

## How to think beyond sovereignty: on Sieyes and constituent power\*

### Abstract

Historians and political theorists have long been interested in how the principle of people's power was conceptualised during the French Revolution. Traditionally, two diverging accounts emerge, one of national and the other of popular sovereignty, the former associated with moderate monarchist deputies, including the Abbé Sieyes, and the latter with the Jacobins. This paper argues against this binary interpretation of the political thought of the French Revolution, in favour of a third account of people's power, Sieyes' idea of *pouvoir constituant*. Traditionally, constituent power has been viewed as a variation of sovereignty, but I show it to be an independent conceptualisation of people's power. Sieyes' political theory led him to criticise and refuse contemporary theories of sovereignty in favour of what he understood as a fully modern account of people's power. Based on extensive research in the archives, I show how Sieyes opposed the deployment of sovereignty by the revolutionary Assemblies and recommended replacing it with the idea of constituent power.

### Keywords

Sieyes, constituent power, popular sovereignty, national sovereignty, French revolution

Summoned to Versailles for the meeting of the Estates General, on 17 June 1789, the Assembly of the Third Estate passed a motion declaring itself a National Assembly.<sup>1</sup> Following the wording put forward by the Abbé Sieyes, the deputies declared that 'the only suitable denomination for the Assembly is that of National Assembly, both because its members are the only legitimately and publicly verified representatives, and because they have been directly sent by almost the totality of the nation' (Madival, J., Laurent, 1862).<sup>2</sup> In affirming this, the representatives of the Third Estate theorised, declared and enacted a radically new paradigm of political organisation. They claimed that political authority lay not in the hands of the monarch, who consulted the Estates as a merely deliberative body, but in the will of the people. Comprising equal, free individuals, the people ultimately held political power, the exercise of which no longer consisted in negotiations between the three orders of society but enshrined the expression of the popular will. This transfer of political

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authority from the monarch to the people was initially welcomed by almost all the deputies of the third Estate as self-evident and necessary. However, once the power of the Assembly had been stabilised and it started working on the first draft of the Constitution, references to the idea of popular power became gradually more problematic (Hont, 2004). No consensus could be built around any definition of the newly established popular authority, nor around the institutional mechanisms through which it was to be expressed and implemented. In late August and early September 1789, the Assembly debated the questions of the imperative mandate and the royal veto. On both occasions, the issues at stake were far more than the simple discussion of the proposed measures, giving rise to one of the most problematic, enduring and relevant debates in modern politics. They sought directly to articulate the principle of popular power with the authority of the state.

These debates, addressing the problem of the people's political identity, the concrete implications of their political authority, their role and position in relation to representatives, are studied by scholars interested in both political theory and intellectual history. Following a traditional and authoritative reading of the revolutionary archives, most authors identify two conceptualisations of the principle of people's power which, relying on the notion of sovereignty, attributed it either to the nation or to the people.<sup>3</sup> For example in the debate on the imperative mandate, the former position is usually associated with a large number of deputies strongly opposing the practice in the name of the indivisible character of *national* sovereignty. Arguing that sovereignty, instead of being attributed to an ensemble of uncoordinated individuals able to control the representatives, was to be associated with the nation qua superior collective body, moderate deputies sought to keep the country compact and united under the national will as freely interpreted by Assembly members. The alternative understanding of sovereignty is often associated with the most radical deputies who argued that the attribution of sovereignty to the nation (and thus to the Assembly) prevented the people from actually exercising their political power. Consequently, they defended the imperative mandate as an instrument privileging the people's will over that of the representatives and relied on the notion of *popular* sovereignty to implement the fundamentally inalienable character of people's political authority.<sup>4</sup> Whilst this second position was predominantly voiced by exponents of what was later called the Jacobin club, the first stance was supported by various groups of monarchist deputies who shared the desire to affirm the principle of people's power but sought to limit the forms and means by which it was to be exercised.<sup>5</sup>

I do not wish to deny the fundamental role played by these political and conceptual poles throughout the revolution. However, in this paper I argue that the interplay between the different conceptualisations of people's power and its implementation was more complex than has traditionally been portrayed. I argue that a third account of people's power existed, based on the rejection of the very notion of sovereignty. This was Emmanuel Sieyès' idea of constituent power.

## I

Born in 1748 in the south of France, Sieyès began reflecting on the peoples' relationship with the state long before the revolution got under way. Nonetheless, he gained notoriety only in 1788-1789, due to

a series of pamphlets, including the most famous of all, *What is the third estate?*, in which he claimed that political authority, far from belonging to the monarch, lay with the productive portion of society, the Third Estate. Once elected to the ranks of the Third Estate in 1789, he urged the transformation of the Estates General into the National Constituent Assembly. Soon after his re-election to the National Convention, he was forced to flee Paris to avoid execution.<sup>6</sup> Recalled after the Terror, he drafted the constitution of year III and was appointed to the *Directoire* where he helped to organise the *coup d'état* of 18 *Brumaire*. He lived the last years of his life in Brussels before eventually returning to Paris just before his death, in 1836.<sup>7</sup>

One of the most active figures in the revolutionary decade, Sieyes has long been an object of study. His political theory significantly influenced the birth and early developments of French constitutional thought and, after temporary eclipse in the nineteenth century, attracted the attention of legal and intellectual historians.<sup>8</sup> Due to the moderate and anti-Jacobin character of his writings, Sieyes is considered as one of the most sophisticated theorists of the sovereignty of the nation. Hence, his understanding of the principle of people's power is associated with the idea of national sovereignty. The effect of the association is to downplay the role of constituent power in Sieyes' political theory. Far from being an independent way of conceiving of people's authority, it is reduced to a specific instrument for the implementation of national sovereignty in constitutional states. In his *Contribution à la théorie générale de l'Etat*, the French jurist Carré de Malberg, viewed Sieyes' political theory as key in the struggle of the moderate deputies to affirm the national interpretation of sovereignty during the course of the revolution (Malberg, 1912). According to him, by introducing the notion of constituent power, Sieyes adapted the exercise of sovereignty to the structure of the constitutional state.

Slightly differently, for the two hundredth anniversary of the Revolution, historians discussed Sieyes' idea of constituent power in connection with Rousseau. Building on an interpretation first put forward by Paul Bastid, they claimed that Sieyes used the notion of constituent power to rationalise and moderate Rousseau's account of sovereignty. The result was to avoid direct democracy while establishing a unitary sovereign body having a unified political will (Baker, 1989, 1990; Bastid, 1920). Similarly, Baker and Backzo saw Sieyes' idea of constituent power as an attempt to solve the problem of Rousseau's proclamation of men's equality, i.e. how the concrete exercise of power should be structured in a politically equal society. The solution was provided by the way Sieyes replaced Rousseau's abstract notions of *volonté générale* and legislator with the much more concrete ideas of *pouvoir constituant* and the Constituent Assembly (Backzo, 1989).<sup>9</sup>

Rejecting these Rousseau-based and Rousseau-biased interpretations of Sieyes' thinking, Fauré, Pasquino and Hont affirmed the autonomous and original character of his account of people's power. However, this has been associated, once more, with the idea of national sovereignty (Fauré, 2008; Hont, 2004).<sup>10</sup> The originality of Sieyes' thinking, they claim, lies in the fact that he created a limited model of sovereignty by attributing it to the nation alone, comprising the productive part of society, and hence comprising the entirety of the body politic, 'one and indivisible'. Consequently, political power was not to be exercised by individual citizens comprising the nation, but by a unified central body able to represent the national will. This representative body, scholars have argued, was then successfully absorbed into the workings of the constitutional state through Sieyes' reliance on the idea of constituent power.<sup>11</sup> This was meant to give substance to the principle of national sovereignty by making its exercise concrete through the process of writing the Constitution. After the constituent

enterprise, the sovereign '*pouvoir constituant*' would retreat and make room for the ordinary exercise of power through the legal and political system which, having no sovereign will of its own, was necessarily constrained in both scope and nature by the limits established by the constitution. In Pasquino's view, this inaugurated a rigid constitutional system and highlights the liberal concerns behind Sieyes' political project.<sup>12</sup>

As numerous and diverse as these interpretations may be, they all consider Sieyes a theorist of national sovereignty and associate his political positions with those upheld by the moderate group in the Assembly, to the extent of considering him one of its most eminent spokespersons.<sup>13</sup> By focusing their attention on Sieyes' understanding of the nation, legal scholars and historians of political thought have addressed the notion of constituent power merely as an instrument for implementing the nation's sovereignty. However, a detailed analysis of both the revolutionary archives and Sieyes' manuscripts casts doubt on the historical and theoretical pertinence of this traditional interpretation. The discussions of the constituents show that Sieyes shared the position of moderate deputies less often than is usually thought. Not only did he oppose their stance when debating fundamental issues such as the royal veto and the bicameral system, but he also frequently questioned their understanding of sovereignty and criticised their political project as dangerously short-sighted. Sieyes' manuscripts clearly show that he never relied on the notion of sovereignty to describe the principle of people's power. In the whole of his published and unpublished writings, he mentioned the term sovereignty only twenty times, and always critically and with reference to other deputies' theories of political authority. From his very first political writings and in all of his public speeches, Sieyes referred to the political authority of the people through one expression alone: the idea of constituent power. Scholars have ignored or minimised these elements as marginal inconsistencies, but I propose taking them seriously since they lead to a different interpretation of Sieyes' understanding of people's power.<sup>14</sup> Far from depicting him as the theorist of national sovereignty, in this paper I will argue that Sieyes' political theory is informed by an utter, conscious refusal to conceptualise the principle of people's power in terms of sovereignty, turning to the alternative of constituent power. This is to be understood as Sieyes' fully-fledged, independent conceptualisation of the people's newly acquired political authority. It is an account of people's power according to which the supreme political authority, the nation's constituent power, entails exclusively the power to authorise the creation of the political order through the writing of a Constitution. Once the constituted order is created, the people's constituent power is present only indirectly, as expressed and enforced through the rules established in the constitution.

## II.

As Guilhaumou explains, throughout his life Sieyes showed a keen interest in the role of language and its social and political relevance (1989, 1998, 2002). Evidence of this is provided by a fragment in his manuscripts, where he complained about the use of everyday language in addressing political issues, as follows: '[e]ach science has its own language [...] If you think you have identified one in the array

of ordinary linguistic forms, you are wrong. You are hitting the water, moving and shaking, without any clear and steady ideas, chaotically [...] How many mistakes, how many eternal ambiguities we could have avoided, if the common people who take themselves for philosophers had had the opportunity to address these ideas in the proper language' (Sieyes, 1999: 454). This shows that Sieyes was a strong believer in politics as a form of scientific knowledge, deserving its own specific language. The fact that he insisted on avoiding the term sovereignty and called the political authority of the people '*pouvoir constituant*' should not pass unnoticed. As Sieyes modestly argued to the Assembly, 'a sound and useful idea was invented in 1789; the separation of the constituent power from constituted powers. It will go down in history as a discovery that advances science, for which the French can be thanked' (1989d: 11). This not only highlights how Sieyes' idea of constituent power differed from other accounts of people's power, and was, for him, a scientific concept, but also shows the fundamental role he assigned to it in the development of his broader political theory. The following sections analyse this development in Sieyes' manuscripts and conceptual writings and then go on to discuss the occasions on which he used the concept to oppose conceptualisations of people's power in terms of sovereignty, both in its national and popular versions.

Despite the fact that Sieyes neither wrote nor published a complete theory of politics, taken together his reflections were unmistakably systematic and coherent over the years.<sup>15</sup> His understanding of human liberty changed very little, informing his revolutionary claims for the Third Estate and establishing the grounds for his refusal to conceptualise people's power in terms of sovereignty, in favour of the idea of constituent power. According to Sieyes, the protection and expansion of individual freedom was the ultimate aim of every social and political arrangement.<sup>16</sup> Specifically, liberty was understood only in terms of individual freedom, comprising two different, but complementary, aspects. First, Sieyes saw it as independence, the capacity to act according to one's will without subjection to any form of domination. This means that 'a free man is he who obeys only his own will. In order to be binding, his commitments must have been free, must have been the consequence of his own decisions' (Sieyes, 1999: 473). This definition of liberty, stressing the lack of domination by anyone but oneself, means that citizens are bound to the legal and political system only as long as they have freely agreed to commit and submit to its rules. In order to be legitimate, the law requires authorisation; in other words, it must be 'the manifest will of he who has to obey the law' (Sieyes, 1989c: 35), of each individual citizen. In relation to this basic principle, Sieyes argued before the National Assembly, that since all citizens 'like all of you are bound to obey the law, they must also, like you, participate in its formation. This contribution must be equal' (1989a: 13–14). This is a concise, clear expression of one of the basic principles of modern politics and the cornerstone of people's relationship with the authority of the state. The state and its laws are legitimised only through the explicit authorisation of citizens.

Second, Sieyes realised that liberty merely as independence does not itself guarantee the fulfilment of personal will. As he put it, the desire to eat cannot be satisfied without means, for instance, the help of a stick to shake an apple hanging from a tree (Sieyes, 2007: 400). Consequently, Sieyes argued that liberty has a second, more pregnant, meaning, which is to empower men to overcome the obstacles they face in order to obtain what they have independently set as their goals: 'man needs to be free not to be fruitlessly free, but to exercise or employ his power and to progressively increase it' (1989b: 35). Considering that 'power' in this context indicates the individual capacity to act according to personal goals, it follows that liberty is only guaranteed when individuals have the time and resources necessary

to pursue their aims. This can be achieved through the social differentiation of labour. In a society as large as France, labour was divided and innumerable actions were delegated to specialists acting on behalf of the persons benefitting from their implementation and, in so doing, representing them. Representation frees individuals from having to deal with the necessities of life on their own, increasing their ability to pursue their goals and exercise their freedom. In Sieyes' terms 'it is clear that being represented in as many things as possible is a way to increase your liberty' (1989a: 6). Since representation is not 'alienation but, on the contrary, is always free, can be withdrawn and is limited in both time and matter' (Sieyes, 1989g: 21), it follows that it is preferable, for the individual, to 'make others do' (Sieyes, 1999: 460), to delegate power, including political power, to representatives.<sup>17</sup> Accordingly, as Hont points out, Sieyes 'saw representation as a fundamental fact of modern society, as something indelibly inscribed in the division of labour and commercial sociability, and [he saw] political representation as a permanent necessity in any large and populous country in which it was virtually impossible to unite the voice of the people directly' (Hont, 2004: 198). Consequently, Sieyes established the second fundamental principle of the relationship between the people and the authority of the state: although citizens are the ultimate holders of the political power, they exercise it only indirectly, through temporarily elected representatives.

However, when the time came to articulate this dual conception of liberty with the principle of people's political authority, Sieyes struggled to find a way to remain consistent with his two-fold understanding of freedom. All conceptualisations of people's power at the time relied on the notion of sovereignty, which, for Sieyes, brought to the fore a conceptual as well as an organisational problem. Since sovereignty was originally used to describe the monarch's absolute power, it implicitly entailed an absolute and unlimited understanding of political authority. As Sieyes proclaimed in one of his speeches, this conceptualisation of people's power, 'resembles one of the exaggerated ideas that have been used to adorn what they call sovereignty' and went on to specify that 'this word [sovereignty] now sounds so colossal to our imagination because the French spirit, still filled with royal superstitions, has equipped it with the heritage of the pompous attributes and absolute powers which used to shine on usurped sovereignties. We have even seen the public spirit, in its immense generosity, getting nervous about not having received more; we said, with patriotic pride, that if the sovereignty of the great kings was so powerful and terrible, the sovereignty of a great people should be even more so' (1989d: 7). Consequently, in Sieyes' view, the revolutionary choice to conceptualise the newly affirmed popular authority in terms of sovereignty necessarily undermined his own understanding of liberty as authorisation and delegation of the exercise of power. When attributed to the people, the absolute element entailed in the idea of sovereignty would have given rise to the confused and dangerous practice of popular despotism as well as to people's constant, uncontrolled and unlimited exercise of power. Alternatively, if attributed to representatives, sovereignty would somehow justify the delegates' abusive expropriation of people's authority and would induce them to fail in their commitment towards the citizens' authorising will.

Hence, Sieyes attempted to avoid these institutional and conceptual problems by putting forward an alternative account of the people's political authority, what he called *pouvoir constituant*. In particular, Sieyes used the idea of constituent power to provide a conceptual instrument able to translate the principles discussed above into a consistent model of political organisation without reliance on the idea of sovereignty. By using the notion of constituent power, Sieyes conceptualised people's power as the original authority to constitute the state.<sup>18</sup> It entailed the citizens' ability to freely decide the

form of government they wished to establish for themselves, the fundamental law. In Sieyes' words, 'constituent power can do everything [...] The nation that thus exercises the largest, the most important of its powers, must be, in the exercise of this function, free from all constraints and forms, other than those it freely chooses to adopt' (1989e: 35). Hence, the idea of constituent power entails first and foremost the popular institution of the political order and is consistent with Sieyes' first definition of liberty as independence.

However, in line with Sieyes' second understanding of liberty the people as holders of constituent power, do not create the constitution themselves but elect extraordinary representatives to do so, and then ratify the Constitution, authorising its entrance into force. Hence, the exercise of constituent power does not coincide with the writing of the constitution, which is delegated to representatives, but with its authorisation and approval by the nation. As Pasquino (2008) has shown, this may occur *ex ante* or *ex post*, but is in no way to be confused with either the writing process or the election of the extraordinary representatives of the Constituent Assembly. Although the writing of the Constitution is carried out by representatives of the nation's constituent power, representative activity is not itself the core of the constituent power which lies with the people's authorisation of the result of that activity: the constitutional text. Similarly, the nation's constituent power should not be confused with the citizen's authority to elect the extraordinary representatives at the Constituent Assembly. As Sieyes explained, the power to choose representatives – whether ordinary or extraordinary – is a *pouvoir commettant*, not a *pouvoir constituant*. The former corresponds to the power of the nation to elect its representatives and commit them to a specific task, whilst the latter indicates the nation's power to authorise the creation of the political order, as proposed by the elected representatives. Consequently, the core of Sieyes' idea of *pouvoir constituant* rests on the power of the people to authorise, freely choose and accept, the creation of the political order and the laws by which it was to be ruled.

Given that constituent power is understood by Sieyes as an authorising power, it is clear that supreme political authority is only exercised in extraordinary founding moments. Once the people have authorised the constitution, a constituted order is created as the logical and necessary counter-part of the nation's constituent power. It works according to the constituent power's will - as outlined in the constitution - but is not its direct expression. In line with Sieyes' account of liberty as empowerment, people have neither the time nor the necessary knowledge and skills to get involved in politics on a daily basis. After authorising the general norms of the political system, they retreat into the private sphere and confer the ordinary working of politics onto ordinarily elected representatives who, unlike extraordinary representatives, are not required to submit the result of their work to the nation's authorising power because they act within a legal and political framework that has already been authorised and constituted. Hence, they have limited delegated powers, acting only within the constitutional boundaries. The constitution, being hierarchically superior to ordinary laws, distinguishes between constituent and constituted politics and subjects ordinary representatives 'to laws, to rules and to forms that they are not authorised to change' (Sieyes, 1989e: 35). Consequently, the constituted order derives its authority from the constituent power of the nation, but can only exercise it within pre-established limits.

The idea of constituent power, in its dichotomous relation with the constituted order, allowed Sieyes to integrate his own understanding of freedom with the principle of people's power. While freedom (from unauthorised powers) finds its inalienable expression in the nation's constituent power, its exercise is delegated to the constituted order, leaving room for the implementation of people's free

initiative without the impediment of having to deal with everyday politics (freedom as empowerment). Moreover, the hierarchical distinction between the constituent power and the constituted order prevents confusion between the two levels of political authority: the people, who hold the original constituent power, exercise it only indirectly while the delegates, who hold a derived constituted power, exercise it only within limits. The outcome of this theoretical construction is a constitutional representative government that derives its legitimacy from the people's initial authorisation and is ultimately subject to the limits the constituent authority established for its representatives when authorising the constitution. Relying on the idea of constituent power Sieyes theorised a form of popular power that not only avoided the dangers of despotism and direct popular rule enshrined in the idea of sovereignty, but also sanctioned the principle of people's political authority while remaining consistent with his dual conception of freedom.

### III.

Despite the fact that Sieyes developed his political theory with reference exclusively to the idea of constituent power, the stand-alone character of this conceptual category has often been overlooked; scholars have unanimously addressed it as a variation of the idea of national sovereignty. As suggested above, this is mistaken, theoretically and as a historical record. Sieyes introduced a completely autonomous political idea and used it to propose an alternative to both the radical project underpinned by the notion of popular sovereignty and the moderate model of checks and balances built on the idea of national sovereignty. This can be seen in the stands he took in two key moments in the revolution.

At the end of August and beginning of September 1789, the Assembly moved away from a discussion of the imperative mandate to focus on a new organisational debate. Having won the battle against the mandate, moderate deputies needed to further press their vision of sovereignty. The elimination of the imperative mandate was the perfect opportunity to claim that legislative power, belonging to the nation as a whole, could only be exercised by the representative Assembly. Identifying the only legitimate locus of sovereignty in the Assembly, delegates avoided the dangers of direct popular participation but, at the same time, engendered new reasons for anxiety. Specifically, unifying all sovereign functions in a single political body, the Assembly, might have led to excessive, even unlimited power. Moderate deputies therefore began to fear the colonisation of the Assembly by representatives or by the tumultuous multitude. One of the most authoritative members of the moderate group, Mounier, explained: 'to entrust an Assembly with legislation may favour the creation of an aristocracy of representatives, as it provides them with the union of all powers, or it may favour the institution of a democratic tyranny, by exalting the ideas of the multitude; lastly, this form of government may even favour the despotism of a single man. Eventually, it will always be dangerous to the liberty of the nation' (Madival, J., Laurent, 1862: VIII, 417).<sup>19</sup> Consequently, moderate deputies put forward a complex system of power balances to oppose the excessive political authority they attributed to the Assembly through the idea of national sovereignty. The discussion took place between 31 August and 14 September 1789. Following the project presented by the Constitutional Committee on 31 August, Lally-Tollendal argued in favour of the 'the necessity to weigh up power, the necessity to divide the legislative [...] not in two, but in three parts' because '[a] single power will necessarily end up annihilating all powers. Two will fight until one has destroyed the other. But three



will keep themselves in perfect balance' (Madival, J., Laurent, 1862: VIII, 515). This balance of powers, the moderates argued, would be guaranteed by two institutional mechanisms: on the one hand, the creation of a second chamber and, on the other, the attribution of an absolute veto to the king. The first measure would secure lengthier time for reflection before passing laws, and the royal veto would protect legislative power from its own degeneration and from the risk of hijacking by the people. The two measures together would limit legislative power by submitting its potentially unlimited sovereignty to a series of vetoes, whereby, in Tollendal's words 'the two chambers must have the power to reject or veto each other, and [...] the king must have the right to veto both' (Madival, J., Laurent, 1862: VIII, 522).

This system of balance was viewed favourably by the Assembly, but was opposed most intransigently by Sieyès, who delivered a lengthy and nuanced critique of its main assumptions<sup>20</sup>. First, he contested the idea of assigning a legislative veto to the monarch on the ground that the royal sanction gave unequal power to the will of a single citizen, contradicting the principle of equality. **Questioning whether the vote of an individual citizen, albeit the monarch's, could be allowed to weigh more than that of any other citizen, he maintained that 'the king, considered as the first citizen, [...] has the right to vote [...] but nowhere can his vote be worth two votes'** (Madival, J., Laurent, 1862: VIII, 593). Sieyès also opposed the king's veto on the ground that it would constitute an utterly arbitrary power. In his words, 'the king will force deputies to support, and parties to uphold, all the laws he would like to see passed. If they pass, all will be done at his pleasure. If they are rejected, he will reject all contrary decisions. This should suffice to see that such a power would be enormous, and that he who exercises it would be the master of almost everything' (Madival, J., Laurent, 1862: VIII, 593). The recognition of the royal sanction would therefore be a means to attribute to an unelected citizen the power to block the representative Assembly, bypassing the authority of the nation. It was, in Sieyès' terms, a '*lettre de cachet* sent against the will of the nation' (Madival, J., Laurent, 1862: VIII, 593). Secondly, Sieyès opposed the bicameral system, in the strongest rhetorical terms: 'Remember, Sirs, your decision of the 17 June [...] when you declared the National Assembly to be *one and indivisible*. What constitutes the unity and indivisibility of an Assembly is the *unity of decision*' (Madival, J., Laurent, 1862: VIII, 597).<sup>21</sup> Foreshadowing an argument he was to explain in greater detail a few months later, Sieyès criticised the bicameral system on the grounds of fundamental instability. He argued that the best way to secure properly pondered decisions was not the creation of a second chamber but the establishing of two or three sub-assemblies separately discussing the same issues and eventually voting together. The bicameral system was to be avoided because it would result either in legislative paralysis, a *contre-action*, or in an *action unique*, a single person imposing his will on both chambers. Elucidating the point some years later, Sieyès compared two legislative chambers to 'two horses harnessed to the same carriage, which we would like to go in opposite directions, and so remain where they are, regardless of promptings to the yoke and the stamping of hooves, unless a royal coach is mounted at the front to give them direction; but we do not want a royal coach' (Sieyès, 1989d: 9). Moreover, Sieyès argued that the institution of a second chamber ran counter to the revolutionary principle of people's liberty to participate on a level footing in the creation of the law. As already stated in 'What is the third estate?', England proved that all bicameral systems relied on the division of society into orders, which in turn implied that the people did not express their will as part of a single body of equal citizens but as members of a specific order or Estate.<sup>22</sup> In Sieyès' words, 'how can you desire to institute in France the same political edifice that they have in England? [...] we cannot but

see the latter as a monument of gothic superstition' (1989f: 115).

Consequently, in a nutshell, Sieyes' critique of the moderate project was this: moderate deputies, with their confused notion of national sovereignty, wanted to prevent despotism with a system of checks and balances that not only contradicted the principle of equality and perpetrated the division of society into orders, but also subordinated people's political power to a series of reciprocal vetoes. According to Sieyes, this could be avoided by abandoning the concept of national sovereignty in favour of the idea of constituent power. Sieyes believed the notion of sovereignty misleading and fundamentally wrong: 'And lastly, let's dare to say it: what is sovereignty? [...] sovereignty understood as a supreme power which dominates/embraces everything does not exist. It cannot be found in the united mass of all public officers, and if the constitution separates the public powers, if each of them is limited to its special mission and cannot abandon it without usurpation and crime, where can this gigantic idea of sovereignty be placed?' (Sieyes, 1998: 198). Sovereignty regarded the nation's political authority as the undivided power of the Assembly and, in so doing, created an excessive concentration of power, which to the moderate deputies' mind, was to be counterbalanced with a series of vetoes.<sup>23</sup> In contrast, the idea of constituent power affirms the nation's original authority over the constituted order and subordinates legislative and executive functions to the constituent authority of the nation as expressed in the constitution. Amendable only by the constituent power, the limitation of the constituted order and, within it, of the National Assembly was guaranteed. In year III, Sieyes claimed that the mechanism could be strengthened by introducing a constitutional jury, an indirectly elected body independent of both the legislative and the executive, with the function of checking the consistency of the acts of the Assembly in relation to the people's constituent will as expressed in the constitution.<sup>24</sup> As Sieyes maintained before the Assembly, the 'gigantic idea of sovereignty', and with it the system of mutual vetoes, should find no place in France, because, unlike the English system which 'has not yet distinguished the constituent from legislative power [...], it will have as its fundamental constitutional principle the provision according to which the ordinary legislature will exercise neither constituent nor executive power' (Madival, J., Laurent, 1862: VIII, 95). Positing the distinction between the constituent power and the constituted legislative order at the heart of his political system, Sieyes proposed an alternative to the idea of national sovereignty compatible with people's equal and unitary representation in the legislative Assembly.

To understand Sieyes' opposition to the idea of sovereignty, account must be taken of his enduring scepticism toward the radical project underpinned by the notion of popular sovereignty. Since it produced the Terror, it represented for Sieyes the concrete and final proof that his linguistic, conceptual and institutional refusal of the idea of sovereignty was fully justified. However, a direct debate similar to the stand-off between Sieyes and moderate deputies did not take place; Sieyes was forced to escape from Paris during the years of precisely the Jacobin Terror. The terms of debate can be partially reconstructed. Far from fearing popular pressures on the legislative Assembly, the Jacobins were concerned by the representatives' possible usurpation of people's inalienable sovereignty. Arguing that 'sovereignty resides in the people, in all the individuals comprising the people' (Robespierre, 2009: 131), Robespierre claimed that all state institutions should depend on the peoples' unstinting exercise of political will. How this principle was implemented over time varied and was even self-contradictory, according to the changing political circumstances.

However, the main pillars of the Jacobin vision of politics were erected over three phases. Firstly, during the years of the constituent and legislative assemblies, the Jacobins maintained that the

people's political power could not be delegated, not even to representatives. Robespierre believed that delegation would lead to the sacrifice of liberty. In his words 'Jean-Jacques Rousseau has said that legislative power constitutes the essence of sovereignty [...] and that when a nation delegates its power to its representatives, it ceases to be free, ceases to exist' (2009: 612). So the Jacobins rejected all forms of delegating legislative power but implicitly admitted the need to devolve some basic functions to a central assembly. In order to secure the people's capacity to supervise the actions of the assembly, they defended the imperative mandate as a principle of natural right, upheld the ability of the king to suspend its activities and appeal to the nation, and argued in favour of the permanence of local districts as a means for exercising sovereignty directly. But during the first months of the Convention the Jacobin project changed. People's sovereignty was no longer to be considered the sum of individual wills but was to be found in some sort of pre-existing truth, transcending the will of the individual and simultaneously expressing the reality of the people's sovereignty. Undermining the legitimacy of the assembly, this entailed the gradual displacement of political authority into the hands of those who claimed to interpret the general will, i.e. the Jacobin club. Lastly, fully inside the Terror, the Jacobins argued that neither the permanence of districts nor the implementation of the general will by the Assembly were sufficient mechanisms to guarantee the inalienability of the sovereignty of the people. The only way to secure people's political power was to eliminate the distance separating their will from the Assembly. This was to be realised by establishing total identity between those in power and the people based on their common adherence to the general will. Once this was achieved, once the government's unity embraced what Saint Just called the unity 'of all the citizens' interests and relations' (Madival, J., Laurent, 1862: LXIII; 200), the people would be the true repositories of power.

Despite Sieyes' silence during the Terror, he strongly opposed the Jacobin political project both before their seizure of power, and after their control of the Assembly had come to an end. Specifically, Sieyes was quick to realise the dangers of the Jacobins' initial rejection of representation and set about criticising their main assumptions, disputing their conception of liberty and arguing that 'they understand political freedom as a continuous exercise of their political rights, as an uninterrupted participation in public affairs. It is not so. Liberty always consists in achieving the largest result at the lowest cost, by making others act, so as to encounter fewer troubles and more enjoyment' (1999: 460). This could only be achieved through representation, and consequently he criticised all three mechanisms the Jacobins had proposed to guarantee people's direct participation in the law-making process. In 1789, Sieyes opposed the imperative mandate maintaining that the National Assembly should comprise free and independent representatives able to discuss and deliberate. A few weeks later, he refused the king's power to submit the law to popular scrutiny warning that, 'the vast majority of our fellow citizens has neither enough education, nor enough time, to be willing to directly engage with the laws that shall govern France' (1989h: 68). And lastly, he heavily criticised the Jacobin defence of the permanence of local districts on the grounds that France was not a 'democratic' federal state but a single unified nation.

After the fall of Robespierre, he maintained that the very idea of general will was inherently wrong. Pointing to the negative influence of Rousseau on the Jacobins, he accused them of understanding the general interest as an overarching universal truth encompassing all aspects of an individual's life. Contesting the very idea that a common will could ever exist beyond the partial piecing together of individual preferences, Sieyes claimed that the Jacobins confused the true aim of the political order, the protection of individual freedom, with the affirmation of an arbitrary and irrational conception of

the common good. As he wrote in his manuscripts '[t]he aim of the political order is individual liberty, private 'wealth'. Those who conceive it as an abstract thing, as public happiness belonging to no-one, are wrong [...] the common 'wealth' is for them an abstract being, a superstition, an idol to which they offer sacrificial victims' (1999: 471). Once more affirming the primacy of the individual over the people, he rejected the idea of a general will as an extremely dangerous and potentially despotic mystification of peoples' political authority.

Lastly, Sieyes criticised the Jacobin idea that people's inalienable sovereignty could only be secured by guaranteeing a complete identification of the people with the governing body. Rhetorically wondering whether, 'in order to avoid the inconvenience of having partial wills at different political levels it is preferable to reunite them all in a single abyss, to create a *volonté totale*' (Sieyes, 1999: 398), he defended the need to abandon the idea of popular sovereignty and, instead, to distinguish between the authorising power of individuals and the limited power of those in office. Repeating an argument he had already outlined several times, Sieyes claimed that the concentration of powers in the hands of a small group of people claiming to embody the popular sovereignty entailed the establishment of an unlimited power, which is 'a monster in politics, and a great mistake for the French people' (1999: 471). It would have involved the '*monacalisation*' of society, the transformation of the public sphere into an all-encompassing power subjugating the liberty of the individual. In Sieyes' terms, organising the state according to the idea of popular sovereignty amounted to the institution of a 're-totale' a 'social construction [...] which, far from being a free association, is anything but the merging of parts subjected to a large, single, general association' (1999: 470). The consequence of such a political mistake was the 'complete sacrifice of the individual to the common 'wealth', the sacrifice of the sensible being to its abstraction' (Sieyes, 1999: 470). Pointing to the absurd consequences of the Jacobin political project, Sieyes argued in 1795 that the elevation of popular sovereignty to a fundamental political principle led to the collapse of the private sphere into the public domain, from which the despotic regime called Terror naturally followed. Sieyes argued that it could have been avoided by replacing the notion of sovereignty with the idea of constituent power. As he wrote in 1795, in a political system inspired by the idea of popular sovereignty 'passions are too present [...] votes are not confined to a small sphere, through a limited task, the constituent power is confused with the constituted power' (1998: 185). Consequently, if the Jacobins feared the delegates' improper exercise of people's original power, the solution did not consist in democratic districts, in the general will or in the unity of the people and the state, but in the hierarchical distinction between the constituent power and constituted order. The latter would not only assure the representatives' limited power, but guarantee the respect of people's original will while monitoring the security in the private sphere.

As shown above, the intellectual and political differences between Sieyes and the moderate and radical members of the Assembly highlight Sieyes' intransigent rejection of the conceptual premises and institutional consequences of both accounts of sovereignty. For Sieyes, what made these theories of politics unacceptable was their reliance upon an ambiguous definition of the relation of the people with the authority of the state. While the moderate model of national sovereignty subordinated people's original power to a series of vetoes reflecting the division of society into Estates, the radical project of popular sovereignty utterly merged and submerged the authority of the people with the powers of the state. Sieyes repeatedly argued that this theoretical confusion was due largely to his opponents' reliance upon the idea of sovereignty as a way of conceptualising the newly affirmed

popular authority. Sovereignty, be it national or popular, failed to allow any distinctions between people's authorising power and its actual exercise or, in other words, it failed to recognise that 'the most important division of powers is between constituent power and constituted powers. Hence, the inability to distinguish between the two hierarchical levels of political power signals the main, unbridgeable, gap between all conceptualisations of people's power in terms of sovereignty and Sieyes' idea of constituent power.

#### IV.

The archives of the French Revolution have fascinated generations of historians, political theorists and legal scholars alike due to the many insights on political debates they contain. The discussions in late 1789 and early 1790 have received special attention, touching on a cluster of theoretical and institutional problems which are fundamental to the understanding of modern politics. In an attempt to formulate a new political structure for France, the constituents not only discussed the content and extent of people's power, but also questioned who, precisely, had this power, the nation, the sum of France's citizens or an abstract political form. They set out different accounts of the identity of the people and an equal number of institutional mechanisms. Debates on the imperative mandate, the royal veto, the bicameral system and district democracy were not dry technical matters. Rather, they were forums in which people's relationship to the state and its institutions were reconceived. Interestingly, historians of the Revolution studied these early debates but systematically misinterpreted Sieyes' contribution. He has traditionally been described as a key figure in the moderate group in the Assembly and his reflections on people's power have been associated with the moderate idea of national sovereignty. But the independent character of his idea of constituent power has been repeatedly downplayed if not overlooked. In so doing, historians have somehow missed the opportunity to discuss the implications of his conceptualisation of people's power in relation to the development of the modern constitutional state. And, although some scholars have thoroughly analysed Sieyes' liberal constitutionalism, the specific consequences of his refusal of sovereignty in favour of constituent power have not been assessed. Ironically, a similar task has recently been taken up by a group of political theorists fascinated by Carl Schmitt's rather unaccountable interpretation of Sieyes' political thought, turning to the idea of constituent power in order to move beyond the strictures of the constitutional state and to put forward an anti-liberal, radically democratic understanding of people's power.<sup>25</sup> As interesting as it might seem, this represents a rather distorted and historically erroneous view of Sieyes' thought and has arguably done no service to the understanding of his conceptualisation of people's power in terms of *pouvoir constituant*. Consequently, highlighting the theoretical and institutional autonomy of his ideas adds a layer of complexity to our current interpretations of the political thought of the French revolution and to contemporary political thinking revealing a conceptualisation of people's power that has been overlooked. Refusing the very notion of sovereignty, Sieyes' idea of constituent power presents us with an original and alternative account of people's relationship to the state.

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1 The motion was passed with a majority of 491 votes to 90.

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- 2 Unless otherwise indicated, all translations from French into English are mine.
- 3 See Furet, F. (1978), Hont I. (2004), Pasquino P. (1998) and Jaume, L (1989).
- 4 A detailed explanation of the extent to which the ideas of national and popular sovereignty entailed a respectively indivisible and inalienable understanding of sovereignty can be found in Jaume, L. (1989).
- 5 Early supporters of the idea of popular sovereignty were Jean-Baptiste Salle, physician from the Lorraine region, Jérôme Pétion de Villeneuve, lawyer elected by the third estate of Chartres who almost seduced the king's sister during the return trip from Varennes and, famously, Robespierre. Active figures in the moderate faction were Trophime-Gérard de Lally-Tollendal, a lawyer elected by the nobility at the Estates General, Jean-Jacques Mounier, who was elected by the Third Estate of Dauphiné and Malouet, a diplomat in Santo Domingo elected deputy to the Estates General by the constituency of Riom.
- 6 Although there is no clear evidence of whether and where Sieyes found refuge during the Terror, it is thought that he escaped to the south of France, where some of his relatives lived. No record has been found of him living in Paris during the last period of Jacobin rule, and most of his early manuscripts were hidden for decades in his native region, where he himself might have taken them, escaping the Terror. In his autobiographical 'Notice sur la vie de Sieyes', no mention is made of where he lived during the Terror, but on pages 50 and 51 Sieyes provides a detailed description of how he felt threatened by the members of the Montagne, and how he was considered by both deputies and public opinion as a dangerous counter-revolutionary. He also clearly says that he contributed to the best of his ability to the work of Assembly until 1793 but, after his exclusion from the *Comité d'instruction publique*, he disappeared from public view.
- 7 For a detailed reconstruction of Sieyes' life see Bastid, P (1939) and Sieyes, E., *Notice sur la vie*, in Dorigny M. (ed.) (1989).
- 8 Sieyes had a strong influence on French legal and political thought in the early decades of the nineteenth century. He played an important role in the development of Constant's political reflections. See Constant, B. (1997). as well as King, N. and Hofmann, E. (ed.) (1988: 89–110).
- 9 Recently, the French scholar Erwan Sommerer revised an interpretation, initially proposed by Baker, according to which the main limit Sieyes imposed upon the exercise of sovereignty was the myth of a preceding social contract. In the teeth of much of the recent literature on the topic, Sommerer argues that the bases of Sieyes' political system lie in the moral convergence created by a pre-political social agreement. This, being then translated into a constitution by the constituent power, would not only establish the limits of power, but also determine moral rules, most importantly the respect of the private sphere, regulating the exercise of sovereignty. See Sommerer, E. (2011a, 2011b).
- 10 For similar interpretations see also, Forsyth, M. (1987, 1981) and Sonenscher, M. (2003). For an early evaluation of Sieyes' autonomous and anti-Rousseauist thinking see Sainte Beuve, C.A. (1851-1857). Fauré and Quiviger stress the importance of Spinoza in understanding Sieyes' idea of sovereignty and constituent power. Fauré, C. (1999) and Quiviger, P. (2008: 227-240).
- 11 For a complementary discussion of the way in which Sieyes' idea of national sovereignty structured the constitutional state see Troper, M. (2008:25-42).
- 12 For a further analysis of Sieyes' liberal preoccupations see Goldoni (2009, 2012). For an investigation of Sieyes' use of constituent power as a response to the public debt crisis, see Sonenscher (2003, 2008, 2009).
- 13 Hont, for instance, has argued that Sieyes' view of sovereignty was the most complete and consistent theory of how the moderate faction understood people's power. He entitled a paragraph of his text 'Two models of French popular sovereignty: the nation of Sieyes and the people of the Jacobins' (2004:192). Similarly, Lucien Jaume discusses the Jacobin conceptualisation of people's power as opposed to the moderates' understanding of sovereignty. When presenting details of the latter, he focuses on Sieyes' political thought, representing, in his opinion, the most sophisticated account of national sovereignty. Jaume, L (1989, 2008).
- 14 Sonenscher discusses Sieyes' choice to never use the word 'sovereignty' in the following terms: 'although Sieyes never used the word, it amounted to a straightforward assertion of sovereignty. The term he used instead was 'constituting power''. As this quote highlights, Sonenscher recognises Sieyes' decision avoid using the term sovereignty in favour of constituent power, but decides not to take it into account. Sonenscher, M. (2003: XXIV).
- 15 This also applies to Sieyes' attitude to Napoleon. Although he certainly changed his political positions and adapted them to what he saw as the most urgent needs of the time, his manuscripts show that he remained faithful to his dual account of liberty and to the theoretical apparatus he developed during the revolutionary years. Counselling Napoleon, he changed language and to some extent hid his intentions, but it can be argued that within the limits of the political possibilities he was still seeking to implement his constitutional plans in line with his earlier theoretical positions. Proof is Boulay de la Meurthe's description of a particularly tense meeting

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between Napoleon and Sieyes. Addressing Napoleon, he said: 'You [Napoleon] and Sieyes are like the executive and the legislative power, which cannot live but with difficulty together' (1836, 51). Justifying this view, Boulay explained that Napoleon could not tolerate Sieyes' constitutional project which, in his opinion, was 'aristocratic and violated the liberty and the sovereignty of the people' (1834, 49-50). While Napoleon tried to concentrate power in his hands by invoking the people's sovereignty, Sieyes sought to limit his power, introducing the constitutional jury and the great elector to check compliance with the constitution. Although not discussed in these terms with Napoleon, it amounted to an attempt to counter the Emperor's idea of absolute popular sovereignty - which he was to incarnate - with institutions derived from the idea of constituent power.

16 'We eventually always go back to the idea of individual liberty, for the fulfilment of which everything is done', Sieyes, E. (1999: 467).

17 In Sieyes' words 'to have things done by others is to have them done as you wish, is to have them done better, is to stop doing them whenever you want [...] to make others act is to commit to action, it is to choose the most experts', Sieyes, E. (1999: 460).

18 In Sieyes' view, the nation existed before and could not be created by the exercise of constituent power. However, the state, intended as all institutions together organising the nation's political life, did not exist before the nation's constituent power; the state was created through its exercise.

19 In the language of the time, the exercise of legislative power corresponded to the full exercise of sovereignty.

20 Most radical deputies accepted the basic principles outlined by the moderates and tried to adapt them by proposing mechanisms of popular participation such as assigning a temporary instead of absolute veto to the king. See Petion's intervention to the Assembly on September, 5, 1789 Madival, J., Laurent E (ed.) (1862: VIII).

21 Sieyes is renowned for having been a shy and uncharismatic orator. See Lahmer, M. (2008: 43-82) and Avocat, E. (2008: 159-176).

22 As Guennifey explains, not all moderate deputies wanted a second chamber representing the clergy and noblemen. Despite Brierre and Malouet's support for the latter, leaders such as Mounier and Lally-Tollendal seemed to reject the idea. However, for Sieyes the division of the political order meant the division of the social order, meaning division into Estates. See Guennifey, P. (1994).

23 In Sieyes' words, the moderate project confuses 'the constituent and the petitionary wills as well as the execution of the legislative will'. From this confusion it follows that being 'terrified by the immensity of the power they just accorded to the representatives, what do they do? Instead of separating all these tasks and leaving between them only the smallest connection necessary to make them cooperate to the same end, they leave them united; but they imagine giving a second representative body the same amount of power; better still, they give to the two chambers the right to veto each other. They are then proud of having avoided the problem of the 'action unique', which would be the purest of despotisms. This is the system of balance of powers'. Sieyes, E., 'Opinion de Sieyes sur plusieurs articles des titres IV e V du projet de constitution', 2 thermidor an III, (1989:8).

24 For a detailed description of the status and functions of the constitutional jury see Sieyes, E., 'Opinion de Sieyes sur les attributions et l'organisation du jury constitutionnaire proposé le 2 Thermidor. Prononcé à la Convention Nationale, 18 Thermidor an III', (1989: III). See also, Pasquino, P. (1998), Fioravanti, M (2007), Jaume, L. (2002).

25 Schmitt has famously collapsed Sieyes' constituent power with the idea of democratic popular sovereignty in order to channel the democratic principle of people's power toward a dictatorial acclamatory regime. See Schmitt, C. (1988: 16-17). Contemporary political theorists interested in Sieyes' idea of constituent power include, among others, Andreas Kalyvas (2005, 2009) and Mark Wenman (2013).

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