

Sovereignty, Civic Participation, and Constitutional Law: The People versus the Nation in Belgium

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Chapter 4

Abbé Sieyès: The immanent and transcendent nation

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4 Abbé Sieyès

The immanent and transcendent nation

Olga Bashkina

Introduction

Formally ratified in February 1831, the Belgian Constitution established parliamentary monarchy with bicameral representation. The drafters of the Constitution sought to connect its legitimacy not to traditional or religious foundations but to society itself, which was expressed in the formulation of article 33 (originally article 25): “All powers emanate from the Nation. They are exercised in the manner established by the Constitution”. The Constitution’s until recently uncontested interpretation postulates that the meaning of sovereignty engrained in the Constitution by definition excludes all forms of direct democracy in favour of a representative government. This interpretation operates with a strict separation of the principles of direct democracy and representation that is expressed in two contrasting conceptions of sovereignty – popular and national sovereignty, respectively.

It seems that the predominantly accepted national sovereignty paradigm prevents democratic innovation and development in Belgium. It has been suggested that it is necessary to part with this dated conception of national sovereignty (Geenens and Sottiaux, 2015). One way to approach the issue of sovereignty in Belgium is to do it via conceptual analysis and the history of concepts. Which ideas influenced the meaning that is attributed to sovereignty in Belgium today? Several influences are usually named, but the two most common reference points for the origins of the national sovereignty paradigm are Abbé Sieyès, a political theorist from the time of the French Revolution, and French constitutional scholar Raymond Carré de Malberg.

Should the national sovereignty paradigm be abandoned in Belgium? To answer this question, I suggest looking at how one of the major influences of this conception – Abbé Sieyès – treated the issue of sovereignty. How did he understand the idea of national self-government through representation? Did he use the concept of sovereignty? Which conceptual problems did he encounter in theorising the idea of the free nation? Addressing these questions can shed new light on how to understand the idea of national sovereignty in Belgium. In what follows, I argue that Sieyès developed not one but *two theoretical paradigms*

through which to understand the free nation.¹ Although he did not favour the concept of sovereignty as such, he developed influential insights that were later connected with the modern understanding of sovereignty. My interpretation suggests that Sieyès offered two major ideas that are both imprinted in the concept of sovereignty today. Yet, in the evolution of Sieyès' thought, these two ideas are conflicting and do not find a productive synthesis. Extrapolating the observations from the analysis of Sieyès' theory onto the Belgian context, at the end of this chapter, I conclude that in order to promote democratic development in Belgium, one does not need to reject the concept of national sovereignty. Instead, a more productive approach is the combination of popular and national sovereignty in one system.

Two conflicting paradigms

Perhaps the reference to Sieyès as the original theorist of national sovereignty is best traced to the work of the influential French constitutional scholar Raymond Carré de Malberg (1861–1935) (see Chapter 10). Carré de Malberg claimed that Sieyès “defined representative government, at the beginning of the new era of public law, with an accuracy and precision that has not been exceeded since then” (Carré de Malberg, 2003, II, p. 257). It is in Sieyès' ideas on national representation, which he opposed to direct democracy, that Carré de Malberg saw the origins of the national sovereignty paradigm. In contrast to Carré de Malberg's reading of Sieyès, today Sieyès is a prominent reference in radical democratic conceptions of popular sovereignty as constituent power (e.g. Kalyvas, 2005). According to this approach, Sieyès is part of a tradition of revolutionary democratic understanding of popular power coming from below. Which one is the real Sieyès then?

Historically, Sieyès' reception has been highly diverse. Sieyès significantly contributed to the continuous debate on new political forms during the revolutionary decade. Moreover, the author of the infamous pamphlet *Qu'est-ce que le tiers-état?* influenced subsequent thinking about democracy and democratic founding for two centuries onwards. His legacy carried over into classical nineteenth-century French liberalism, the constitutional controversies of the twentieth century, and twenty-first-century debates over democracy. Having lived till 1836, Sieyès was a direct witness to all major events of the revolutionary years in France: the Tennis Court Oath in 1789, the execution of the king in 1793, the establishment of the Directory in year III, and the coup of 18 Brumaire (see Laquière, 2008). Forgotten during some periods, Sieyès' ideas have undergone several revivals, each of which has accentuated different aspects of his thought in light of the pressing debates of the time. In the nineteenth and twentieth centuries, debates that engaged with Sieyès included those over individual rights and the limitation of power (the Coppet Group: Madame de Staël and Benjamin

1 I am assuming conceptual interconnectedness between ‘freedom’ and ‘sovereignty’.

Constant), national sovereignty (Adhémar Esmein, Léon Duguit, and Raymond Carré de Malberg), and constituent power (Carl Schmitt) (Laquière, 2008). The scope of contemporary readings of Sieyès that are informed by the revived interest in democratic founding and constituent power is remarkable. From revolutionary thinker to theorist of constitutional limits, Sieyès exists in contemporary thinking in a variety of manifestations.

Not only is this diversity of interpretations indicative of the richness of Sieyès' thought, but it also gestures to a paradox at the heart of his theory of representation: While regarded as one of the first theorists of modern representation, some of his ideas appear to be anti-representational. Acclaiming the new revolutionary potential of the French nation, he says that "if a nation had to wait for a positive mode of being in order to become a nation, it would simply never have had an existence" (Sieyès, 2003, p. 136). Statements like this contribute to a line of thought that suggests that representation does not create the nation, which already exists, but only the national government. Yet, in other passages of *Qu'est-ce que le tiers-état?*, he asserts that the nation is "a body of associates living under a common law, represented by the same legislature" and that "a nation is made one by virtue of a common system of law and a common representation" (ibid., pp. 97–99). This would seem to suggest that he believes that the nation cannot speak other than through its representatives. These different inflections within his thinking have, in turn, found their home in different interpretations. On the one hand, because of Sieyès' extensive analysis of representation and the way in which he posits it at the centre of his politics, many assert that he follows the Hobbesian tradition in his argument about the nation (Forsyth, 1981; 1987; Hont, 1994). On the other hand, some fundamental claims made by Sieyès are ultimately anti-Hobbesian (Clavreul, 1982; Jaume, 1986; Laquière, 2008). Consider, for example, the claim that "the nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself" or

a nation is independent of all forms and, however it may will, it is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and supreme master of all positive law.

(Sieyès, 2003, p. 138)

These claims, together with a powerful statement equating the Third Estate with the entire nation, cast Sieyès' theory of representation in a paradoxical light. They raise the question of whether Sieyès conceives of representation as the fundamental way of understanding political relations or whether the nation as a political agent can also be conceived and express itself in a pre-representational, direct way. The central problem is, in short, whether the nation is formed by the representative will from above or is expressing itself directly from below.

My interpretative approach departs from this more common debate on Sieyès' idea of representation. While, within this debate, the problem pertains to *how* the nation expresses itself (via representatives or directly), I am concerned with *what* is being expressed. While I too believe that the concept of representation is

central for Sieyès, I choose to shift the focus of my enquiry away from the either/or of representation versus the direct will of the people and frame my interpretation in terms of immanence and transcendence. My reading in the present chapter offers a division of Sieyès' ideas into these two paradigms. Representation remains important for both paradigms since, for Sieyès, the idea of representation is fundamental. That is to say, what changes in his thought is not *how* he conceives the national will being expressed – either directly or by means of representation. Rather, what changes is *what* he thinks is being represented (and by whom) – immanent relations that already exist in a society or transcendent norms that should shape an ideal nation. In this chapter, I do not want to construct a system out of these paradigms. Rather, I want to think of them as two archetypes of thought that are both present in how we think about democracy today.

One final remark is due about the concept of sovereignty itself. I read Sieyès with regard to the tradition of national sovereignty that is central to the Belgian case analysed in this book. However, it is necessary to note that Sieyès himself was critical of the concept of sovereignty and almost never used it in his own work (see Rubinelli, 2016). He associated the term 'sovereignty' with the tradition of absolutist rule that he was trying to debunk with his work. In his mind, 'sovereignty' meant an absolute undivided highest power that was in conflict with the new liberal ideas of national representation that he proclaimed. Sieyès' conceptions of representation and constituent power were directed against the personal power of the monarch. For Sieyès, ascribing sovereignty to any group of people would mean advocating for a form of tyranny. Later in the nineteenth century, 'sovereignty' came to also mean an attribute of an abstract rather than a concrete agent – a nation rather than a monarch. This is not yet the case for Sieyès. Yet, even if he is critical of a particular meaning of the term 'sovereignty', Sieyès remains a recurring reference in discussions of sovereignty. Ideas that he framed in different concepts, e.g. constituent power, have enriched the meaning of various conceptions of sovereignty and continue to do so today.

Revolutionary immanence: Constituent power of the oppressed

Born in 1748, Abbé Sieyès pursued a religious career until 1788, when Louis XVI called for the convocation of the Estates-General in Paris. After publishing his renowned pamphlet *Qu'est-ce que le tiers-état?*, Sieyès was elected a representative of the Third Estate to the Estates-General, which was soon to become the National Constituent Assembly. Sieyès' pamphlet not only changed the course of debates at the time but also inspired the eventual revolutionary turn of events. Moreover, modern political categories continue to bear the mark of his innovative contribution (Guilhaumou, 2002). Yet, before developing his famous insights in *Qu'est-ce que le tiers-état?*, Sieyès had already experimented with big ideas in his pre-revolutionary studies in metaphysics and political economy. During his education at the Sorbonne, he was influenced by, among others, Gottfried Wilhelm Leibniz, Étienne Bonnot de Condillac, Adam Smith, and the school of the physiocrats. In my reading of Sieyès, I trace two lines of arguments from

his pre-revolutionary writings – metaphysical (what Guilhaumou calls Sieyès’ “*métaphysique du moi*” [Guilhaumou, 1999, pp. 513–535]) and economic – that influence Sieyès’ thought in *Qu’est-ce que le tiers-état?*, especially the idea of constituent power. It is these ideas that I frame as the immanent paradigm.

Living force of society

Guilhaumou (1997) has pointed to the particular influence of Leibniz’ monadology and his principle of individuation on Sieyès’ *Le cahier métaphysique* (1773–1776). It is Leibniz’s philosophy of physics and his conception of *vis viva*, or living force, that appears in Sieyès’ thought as *force vive*. Leibniz, in the famous controversy with Sir Isaac Newton, rejected Newton’s first law of motion, according to which an object will obey the law of inertia, i.e. an object in motion stays in motion and an object at rest stays at rest unless it is acted upon by another force. In Newton’s mechanistic system, the understanding of motion is predicated upon a causal understanding of movement, i.e. movement is conceived as only caused by another force.² In *Specimen Dynamicum*, Leibniz (1695/1989) develops a concept of *vis viva*, or living force, the earlier formulation of what we know now as the principle of the conservation of energy, according to which the energy of a system is not created or destroyed but is transformed within a system. Simply put, contrary to Newton, movement within a system does not presuppose an external cause; a system contains the constant principle of movement within itself. No outside transcendent source of motion and energy needs to be posited in order to account for the principle of movement of things – the cause of the movement is immanent in the moving thing.

In Sieyès’ thought, this idea of living force reappears as *force vive* and is used in analysing the dynamics of a society. In *Letters to the Economists*, Sieyès writes that a society has an immanent force of its own:

Society, independently of the power of nature which produces goods, must have a living force coproductive of wealth, and it is necessary that the elements of that force, united by society, produce more than they would if they remained isolated. The sum of the labors of all citizens forms the living force. If there is a citizen who refuses his portion of activity, he renounces his rights; no man may enjoy the labor of others without exchange. General labor is therefore the foundation of society, and the social order is nothing but the best possible order of labor.

(Sieyès, 1985, p. 32)

Sieyès’ theory of society rests on the analogy between a physical conception of living force and the economic theory of labour. Sieyès (2003, p. 95) argued

² In *An Essay Concerning Human Understanding*, Locke articulated it as “bodies operate by impulse and nothing else” (*Essay*, II.viii.11).

extensively against the economic theory of the physiocrats who claimed that economic value is derived exclusively from agricultural labour. Instead, Sieyès considered that value derives from labour in general, which encompassed not only agricultural labour but also the labour of industrial and service workers as well as that labour used in social reproduction. This idea of general labour as a living force resembles Marx's later conception of living labour (*lebendige Arbeit*).³ Similarly to Marx, living labour for Sieyès produces not only value but also social connections and sociability. In other words, this immanent force organises social relations before and prior to any external intervention.

This account of immanent social force can also be found in Sieyès' *Qu'est-ce que le tiers-état?*, where, in attempting to give a definition to the nation, he famously excludes the privileged classes from the definition of the nation for "a class like that is surely foreign to a nation because of its idleness" (*ibid.*, p. 97). Sieyès' pamphlet is revolutionary because it exposes how there is a conflict between existing social relations and the political system of the *Ancien Régime*. This idea allowed Sieyès to formulate the revolutionary definition of the Third Estate as an entity that becomes a political subject because it performs "the activities that support society" (*ibid.*, p. 95) but lacks political rights. For Sieyès, the Third Estate constitutes the living force of the social body because it performs the labour required for its subsistence, but the dominant system of social organisation does not recognise the Third Estate as equal and oppresses it. Sieyès' argumentation in this pamphlet is operating within what I call the 'immanent paradigm' as it is built on highlighting the conflict between the existing immanent dynamic of relations in a society and a system of domination that ignores this built-in vitality.

Constituent power

Within this immanent paradigm, the emerging political subject can be conceived on the basis of existent social relations that are not reflected in the current political system. In the pamphlets of 1788 and 1789, the theme of the contradiction between social reality and political inequality is apparent. This is expressed in Sieyès' view that constituting a new people (*un peuple neuf*) requires first getting rid of all the privileges separating people. He explores this point in his piece *Essai sur les privilèges*, printed in 1788 and reprinted in 1789:

It is the essence, the characteristic, of privilege to place the possessor of it beyond the boundaries of common right. [...] [People] seem ignorant that their property, thus increased, with all the additions which a new spirit of

3 "Labor not as an object, but as activity; not as itself value, but as the living source of value" (Marx, 1857/1993, p. 296); "Capital is dead labor, that, vampire-like, only lives by sucking living labor, and lives the more, the more labor it sucks. The time during which the laborer works, is the time during which the capitalist consumes the labor-power he has purchased of him" (Marx, 1867/1981, p. 342).

industry has been able to accumulate in a social state, is in reality their own, and could never be considered as the gift of an extrinsic power. [...] The grant of any exclusive privilege to any person with respect to that which belongs to all would be to wrong the whole community for the sake of an individual; which is an idea at once the most unjust and the most absurd.

(Ibid., pp. 70–71)

This point shows that privileges exist above the law (common or positive) because they operate as if no law can regulate them. While privileges can be instituted in the law itself, e.g. by legally establishing the division of society into social orders, privileges can also function tacitly as “the deplorable effect of long servitude on the human mind” (ibid., p. 70).

Having noted that the Third Estate constitutes the entire nation based on the living force of labour and that the unjust system of existing privileges oppresses the Third Estate, Sieyès can introduce his famous idea of *pouvoir constituant*:

The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. [...] The first in order of precedence will be the constitutional laws. These laws are said to be fundamental, not in the sense that they can be independent of the national will, but because bodies that can exist and can act only by way of these laws cannot touch them. In each of its parts a constitution is not the work of a constituted power but a constituent power.

(Ibid., p. 136)

Even though Sieyès does not spend much time defining the concept of constituent power, the concept has become influential in democratic and constitutional theory. While there is much debate around the meaning of the concept, ‘constituent power’ generally expresses the intuition that the people themselves should be the authors of the basic rules by which they are governed. Sieyès clearly makes this argument when he asserts that the unprivileged Third Estate can speak for the entire nation as the unjust laws imposed from above have been oppressing them for too long. In other words, in Sieyès’ immanent paradigm, the exercise of constituent power by extraordinary representatives frames and expresses the grievances of an oppressed group and aims to change the dominant social and political order. Having made this argument for what I call revolutionary immanence, Sieyès confronts the question of how to combine in thought and in practice the assertion of the revolutionary potential of the people and the organisation of the new political system.

Antonio Negri, the well-known Marxist theorist of constituent power, acknowledges Sieyès for being the first to introduce labour as an exclusive theme in the discussion of constituent power (Negri, 2009, p. 212). For Negri, Sieyès’ economic definition of society shapes the content of his other concepts, e.g. constituent power and representation. According to Negri, Sieyès represents society as “a laborious, unified and compact whole, standing on the social work

organized by the bourgeoisie, and whose development is obstructed by the contradiction between labor and public functions, on the whole usurped by the aristocracy” (ibid.). Yet, Negri is critical of Sieyès for he believes that Sieyès’ concept of labour and hence his conception of constituent power is inherently conservative. For Negri himself, constituent power is a concept that reflects class struggle and, thus, the transformation of social relations. For Sieyès, a new political order should conserve already existing labour relations rather than change them. Hence, Negri concludes, Sieyès’ representative notion of constituent power prevents and suppresses actual revolutionary socio-economic change (ibid., p. 214).

Yet, Sieyès’ immanent paradigm does justify revolutionary transformative action insofar as it allows for the transformation of the old oppressive system into a regime animated by a new conception of the people. The difference between Negri’s and Sieyès’ understandings of transformation lies in the fact that Sieyès does not advocate for direct action. Like Negri, Sieyès sees the foundation of transformative action as existing immanently in society; unlike Negri, he understands this action as representative in nature:

Citizens who appoint representatives renounce and must renounce making laws themselves; they do not have a particular will to impose. If they dictated their wills, France would not be a representative state anymore, it would be a democratic state. The people, I repeat it, in a country that is not a democracy (and France cannot be a democracy), the people cannot speak, cannot act other than through their representatives.

(*Archives parlementaires de 1787 à 1860*, pp. 594–595)

Nadia Urbinati has framed Sieyès as a theorist of the nation of electors; unlike Girondists such as Marquis de Condorcet, he did not conceive of elements necessary for a participatory democracy (Urbinati, 2006). It was Sieyès’ anti-federalist position and praise of representation that made Carré de Malberg frame him as the first theorist of national sovereignty. While Sieyès does advocate for representation over direct action, his deeper concern is the exact nature of this representation: what should be represented and by whom? Once he uncovers the idea of the revolutionary principle immanent in society, he starts questioning who can embody and exercise this principle to transform society. It is in respect to this questioning that one can single out a transition period in Sieyès’ thought in which he shifts from the immanent to the transcendent paradigm.

Transcendent nation: The project of a constitutional jury

Transition

The idea that Sieyès did not exclusively reject all forms of direct participation has been put forward by Olivier Beaud and Andrew Arato, who emphasise Sieyès’ discussion of the preliminary constitution. Beaud posits that Sieyès’ idea of constituent power is twofold: it consists of destructive (*déconstituant*) and constructive

(*constituant*) moments (Beaud, 1994). The first moment consists of completely unbound negative will, while the second moment relies on democratically established procedures and rules. This distinction is important in order to see the connection between the allegedly radical and representative dimensions of Sieyès' constituent power. While radical constituent power pertains to negating privileges and oppressive relations, constructive constituent power establishes rules as to how to, among other things, change established rules democratically. Arato underlines how the originality of this idea lies in Sieyès emphasis on how democratic constituent power can be conceptualised between revolution and reform (Arato, 2017). In *Préliminaire de la Constitution française* (1789a), Sieyès talks about the process of drafting the first Constitution:

The constitution which will be given to France, and which the necessity of circumstances must make provisionally obligatory for all, will be definitive, only after new deputies, regularly delegated to exercise solely constituent power, have it revised, reformed if necessary, and will have given it a national consent which the rigor of the principles demands.

(Sieyès, 1789a, pp. 17–18)

Clearly, for Sieyès, a free people comes into being over time and through a process rather than in a single moment of original creation. He proposes several stages of constitution drafting and maintains that it is important to involve citizens in the process. Arato and Beaud, who identify the importance of this idea for Sieyès' thought, focus only on the drafting of the actual document of the constitution and the possibilities of increasing participation in it. Yet, this idea of constitution as a process has larger implications for Sieyès. In the foreword to the same publication, Sieyès inquires about what it means to give a constitution to a new people (*un peuple neuf*) (ibid., p. 16). For the principles proclaimed in the Declaration of Rights and in the Constitution to function, a society needs to be ready and aware of those principles. But those people whom these documents declare to possess civil and political rights have been subjected to “centuries of misfortune” (ibid.). That is why, Sieyès diagnoses, ideas like constituent power emanating from the nation, the abolition of privileges, equality, etc., first assert themselves as “transcendental metaphysics” (ibid., p. 6). When he states that society needs to mature in order to realise those ideas “not as a set of laws, but as a set of principles” (ibid., p. 3), Sieyès is implying that fundamental laws should not only be enforced upon the people but also be internalised and consciously accepted as their own laws.

In this regard, the idea of a preliminary constitution takes up a broader significance in Sieyès' thought. A constitution conceived in this way envisions the emergence of a free people over time, and it would rely on a system of representative institutions that serve a unifying and an enlightening function but do not replace the active citizenry. Sieyès adheres to the idea of progress as the approximation to the ideal of complete collective freedom. A new people comes about in the process of the gradual maturation of reason which is set off but not limited to the

drafting of the constitutional document. In a different text from the same year (*Quelques idées de Constitution, applicables à la ville de Paris*), Sieyès advances that the category of active citizens, which he initially distinguished from passive citizens, will expand with time.⁴ With the help of national education and the formation of new interests, people will be able to see past their individual concerns and acquire a shared concern for social issues (Sieyès, 1789b, p. 21). Thus, for Sieyès, constitutional principles should eventually become reflected in social reality. The idea of a preliminary constitution then speaks both to the possibility of redrafting the fundamental law of the community and to the eventual actualisation of the ideals of equality and liberty in practice. As to what such a constitution might look like – what combination of citizen participation and representative institutions it would involve – Sieyès does not give a clear answer. Nonetheless, he furnishes political theory with an original and lasting picture of constituent power that does not sever its representative and radical dimensions. For Sieyès, the changes propelled by the Revolution do not stop but evolve and influence society over time. This, in turn, means that institutions are not static but should be able to change as ideas do.

The project of a constitutional jury

The Sieyès of *Qu'est-ce que le tiers-état?*, a mouthpiece of the Revolution, theorised constituent power as the power of a nation to create for itself whatever laws it pleases. In the early years of debates around constitutional proposals, Sieyès developed the position that since the nation establishes its freedom over time, recurring constitutional amendments are required. Finally, after the end of the Reign of Terror, in the years of the Thermidorian Reaction (1794–1795), Sieyès was preoccupied with problems arising in a very different political context, and in his thought, the radical democratic potential of constituent power is replaced by the need to prevent the creativity of constituent power. In speeches made during these years, Sieyès explores how the stability of a constitutional order can be preserved. During Thermidor, Sieyès seeks to put an end to revolutionary experimentation and secure its results: equality, citizen rights, and liberties. If the Revolution itself cannot sustain what it has fought for, what can? Having proclaimed the equality and liberty of citizens, the Revolution resulted in the despotic reign of the few. With this in mind, Sieyès was preoccupied not with the task of democratic founding *qua* inventing new possibilities but with preserving what had already been established. For the purpose of demonstrating how a constitutional order can preserve citizen rights, Sieyès comes up with the project of a constitutional jury. This project is believed to be the first analogue of the contemporary constitutional court.

Seeking to protect the Constitution and secure its basic principles, Sieyès imagines a power that would exist above and be independent of the political process.

4 For more on the distinction between active and passive citizens, see Sewell (1994, ch. 5).

This neutral power would watch over the legislative process and, if necessary, regulate it to keep it aligned with the principles of citizen rights and equality. This project of a constitutional jury is connected with an earlier debate that Sieyès had with the drafters of the Constitution of 1791 (Jacques Guillaume Thouret and Antoine Barnave) over the question of the royal veto (Pasquino, 1998, pp. 11–13). Sieyès did not support the right of a monarch to veto laws drafted by the National Assembly, arguing that the king is not an elected representative of the nation and thus cannot intervene in the legislative process. In 1795, Sieyès theorises an alternative power to serve this neutral function. A constitutional jury, *un dépositaire conservateur de l'acte constitutionnel*, judges on the constitutionality of proposed laws and drafts *cahier de propositions* once every decade as a way of improving the Constitution (ibid., p. 195). He envisions three functions to be exercised by the jury:

- 1) that it faithfully watches over the safeguard of the constitutional ‘deposit’;
- 2) that, sheltered from the pernicious passions, it takes into consideration all proposals that may serve to ameliorate the Constitution;
- 3) that, ultimately, it offers to civil liberties the possibility to appeal to natural equity on those serious occasions when the guardianship of the law will have forgotten its fair guarantees.

(Goldoni, 2012, p. 6)

While I will not discuss all the organisational details and implications of such a constitutional jury, it is important to emphasise how this idea is aligned with Sieyès’ conception of representation. As Marco Goldoni explains, the conception of representation that underlies Sieyès’ idea of the jury is based on the idea of cooperation, rather than conflict. Sieyès thought of public powers as forming a unity of will and not a balance of powers representing different social interests. In this sense, the jury was to fulfil the function of an apolitical elite which guarantees that no political conflict gets in the way of national unity. A constitutional jury institutionalises democratic founding and “is presented as the building block of a system that keeps citizens’ active participation to a vital minimum” (i.e. away from constitutional matters and only voting for ordinary representatives) (ibid., p. 22).

Moreover, this conception of the constitutional jury as taming social and political conflicts is paired with a conception of the nation that transcends the present generation and represents ‘human nature’. Bronislaw Baczko has emphasised that Sieyès changes his take on the nation from 1789 to Year III from a concrete association of 25 million men to an abstract entity extending over successive generations (Baczko, 1988, pp. 98–125). In the speech where he presents his project of the constitutional jury, Sieyès discusses whether it is advisable to permit a constitutional reform. He defends the belief that amelioration instead of total renovation is best. It is at this point that he suggests that the idea of the nation expresses human nature rather than any particular temporal identity:

Without wishing to dispute with future generations the right to do anything in this respect that suits them, it is permissible, and it is still a duty to remark that the true relations of a political constitution are with the nation that remains, rather than with such passing generation; with the needs of human nature, common to all rather than individual differences.

(Bastid, 1939, p. 35)

What is this nation that remains? Marcel Gauchet theorises this as the two bodies of the people: the actual people and trans-temporal or constituent people (Gauchet, 1995, p. 42). The appearance of the transgenerational nation and the constitutional jury in the same text is not accidental. Sieyès here conceptualises positive achievements of the Revolution and speculates how the values of citizen rights and liberties can be practiced. Once identified, rights expressed in the Declaration of the Rights of Man and of the Citizen need to be safeguarded and perfected by the knowledge and experience of the centuries (*‘les lumières et l’expérience des siècles’*). If these rights pertain to human nature itself, then their bearer can be conceived as an atemporal subject that transcends conflicts and differences.

Thus, over the course of the Revolution, Sieyès substantially changed his views on the principle that constitutes a free people. In the initial stages of the Revolution, characterised by the conflict between the immanent organisation of social relations and the *status quo* political system, he attributed revolutionary potential to the Third Estate. For it was the Third Estate that manifested itself as the critical subject in the act of the negation of the old social, political, and legal order. Thus, in Sieyès’ earlier texts, a free people is constituted by the principle of radical conflict. In contrast, the conception of the nation that operates in Sieyès’ later texts is predicated upon the assumed universality of human nature (as shared by the citizens of the nation-state and, most importantly, as interpreted by the jury). It posits that basic rights and liberties need to be protected from political conflict; the idea being that the people’s freedom is ensured when constitutional change is restricted to a special constitutional organ.

This later position of Sieyès prefigures what today is framed as legal constitutionalism. According to legal constitutionalism, the proclamation and protection of individual rights and constitutional limits to power are definitive hallmarks of democracy. Constitutions are considered primarily to be legal documents that enshrine fundamental rights. The protection and interpretation of these fundamental rights are assigned to a counter-majoritarian institution, often a supreme or constitutional court (Bellamy, 2007). The argument for judicial review is usually motivated by counter-majoritarian reasons: majorities can pass oppressive legislation and turn into tyrannies. Additionally, there is an assumption that the law-making process needs to rely on the pre-established definition of rights to obtain guiding values. Rights themselves in this model are understood in a legal and not a political way and allow for little democratic contestation over their content and applicability. The role of interpreting the Constitution and the rights is assigned to judges who are thought of as standing above the political

process. In this framework, constituent power is an elusive concept; it never fully emerges to challenge the constituted order and oftentimes “the question of constituent power simply does not arise” (Dyzenhaus, 2007, pp. 129–130). Pasquale Pasquino frames Sieyès’ theory as the foundation of this framework. He praises Sieyès as the father of modern constitutionalism who explicated major concepts essential for modern democracies (Pasquino, 1998). Sieyès’ influence is most noticeable, for Pasquino, in how his theory of the constitutional jury later became central for many constitutional regimes. Developed later in Sieyès’ career, this theory frames the constitutional jury not only as the guarantor of the rights of human nature but also as the body that will defend them from the perils of politics (Pasquino, 2007).⁵

Conclusion

The shifts in Sieyès’ thought are natural difficulties that arise when we theorise how democratic society and politics can exist. The two paradigms that I single out in Sieyès’ thinking express equally important ideas for the democratic tradition. On the one hand, modern democracy, marked by the experience of the American and the French revolutions, contains elements critical towards the *status quo*. The interpretation of democracy that is attuned to this critical and oppositional dimension is, so to speak, an *immanent* one, that is, it understands

5 Following this reading, Pasquino insists that there is no other way to understand constituent power in Sieyès’ work except as the power to authorise (so not the power to author the constitution). In this reading, the constituent power that is exercised by representatives does not presuppose that the people are actual authors of the constitution. The only way that constituent power can be understood in Sieyès’ theory, Pasquino claims, is in the same way as the contemporary meaning of the constitution is, i.e. “a text establishing fundamental rights, their guarantee, and the basic rules for governing a given country” (Pasquino, 2016, p. 230). Authorisation can either mean electing a representative assembly (*ex ante*) or popular ratification (*ex post*). Sieyès did not theorise popular ratification, but authorisation in his theory should be understood as the election of extraordinary representatives. Pasquino uses Sieyès to justify the indispensable role of constitutional courts in contemporary democracies. He also combines it with the ‘thin’ conception of popular ratification (*ex ante*). In *The Sleeping Sovereign*, Tuck attempted to disassociate Sieyès with the paradigm of popular ratification. The point of Tuck’s book is to demonstrate that there is an intellectual tradition of modern democracy that is based on the distinction of sovereignty and government. This tradition for Tuck runs as a motif through the works of Jean Bodin, Thomas Hobbes, Jean-Jacques Rousseau, and the thought of the American Revolution. It pertains to the plebiscitary model of popular sovereignty and should be considered, according to Tuck, the normative model for modern democracy. The distinction of sovereignty and government, expressed by Hobbes but fully developed by Rousseau, refers to the separation of the act of foundation and regular government. While government cannot but be representative, sovereignty manifested in the act of founding should always be direct. Tuck explains that direct democratic sovereignty does not author the constitution but authorises it. This means that the people in an ideal democracy, for Tuck, do not participate in drafting the constitution, but authorise its enforcement. Since Sieyès did not assign value to referendums, he, for Tuck, falls out of this tradition of modern democracy (Tuck, 2016).

democracy through the people themselves and their immanent struggles for liberation from oppression. Sieyès was an astute observer of this dynamic: through the perspective of labour relations, he saw how the struggle of the Third Estate to become a free people contradicted the existing political system. In contemporary experience, the idea of the people's struggle against oppression is expressed in a variety of critical narratives and social movements – for gender equality, anti-racism, LGBTQ+, etc. On the other hand, there is an idea of the unifying norm of what should constitute a free people. Ideas like 'nation', 'equality', or 'sovereignty' are also guiding ideas which, when being interpreted, give norms as to how a democratic society should be organised. The risk, though, of emphasising these guiding ideas too much is that of delegating their interpretation exclusively to a small group, like Sieyès did with his project of the constitutional jury, which adopts the role of an oracle of the transcendent nation, instead of speaking to and with the people with which it was contemporary.

A reader of Sieyès, Carré de Malberg (see Chapter 10), whose ideas on national sovereignty primarily influenced Belgian discourse, thought of the nation in that transcendent way. He thought, like the late Sieyès, that sovereignty is an attribute of an abstract entity rather than of concrete people with their current grievances and needs. The French Constitution of the Fifth Republic allegedly solved the conflict between the popular and national sovereignty model with the following formulation: "national sovereignty belongs to the people who exercises it through its representatives and through referendums. No section of the people and no individual may purport to exercise it" (Ziller, 2003, p. 267). In contrast, in Belgium today, the debate on the question of popular versus national sovereignty is very much a live one, which is centred on the opposition of direct and representative mechanisms for expressing the national will. In other words, it is centred on *how* the national will is expressed. In my discussion of Sieyès thought in terms of immanent and transcendent paradigms, I pointed out that it is not only *how* the national will is expressed that matters but also *what* is being expressed. Sieyès was never an advocate of direct democracy, always insisting that representation is a modern way of organising politics. However, he pursued two different intuitions as to what (and by which representatives) is being represented as the national will. The early Sieyès highlighted immanent relations within a society that legitimise and inform the act of extraordinary representation and the creation of a new political order that corresponds to these relations. The later Sieyès shifted to the idea of a transcendent nation – its principles need to be discovered and protected by a constitutional jury.

We can think of popular and national sovereignty not only in terms of mechanisms of will expression but also in terms of these immanent and transcendent dimensions. This offers new perspectives on intractable and long-standing political problems. When we talk about Belgium, should we abandon the criticised national sovereignty model? It seems to me that it still holds valuable ideas within itself, i.e. ideas of a society united on the basis of liberal principles, constitutional guarantees, and the separation of powers instead of ethnic ties. Yet, as the early Sieyès reminds us, there is an immanent element in the people that

takes the form of critical opposition towards the dominant regime. If the gap between the immanent and the transcendent elements of the people grows too large, the system collapses. This suggests that a combination of the immanent and the transcendent is necessary, especially in cases where more direct participation (i.e. more popular sovereignty) can be a way to conceive of institutionalising the immanent element of the people. Although sketching an institutional model suitable for Belgium is beyond the scope of this chapter, Sieyès' complex negotiation of democracy and representation does suggest ways of moving beyond a dichotomised understanding of popular and national sovereignty.

Bibliography

- Arato, A. (2017) *The Adventures of the Constituent Power. Beyond Revolutions?* Cambridge: Cambridge University Press.
- Baczko, B. (1988) 'The Social Contract of the French: Sieyès and Rousseau', *The Journal of Modern History*, 60, suppl., pp. 98–125. DOI: 10.1086/243376.
- Bastid P. (ed.) (1939) *Les discours de Sieyès en l'an III*. Paris: Hachette.
- Bellamy, R. (2007) *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press. DOI: 10.1017/cbo9780511490187.
- Beaud, O. (1994) *La puissance de l'État*. Paris: Presses universitaires de France.
- Carré de Malberg, R. (2003) *Contribution à la théorie générale de l'Etat*. Paris: Dalloz.
- Clavreul, C. (1982) *L'influence de la théorie d'Emmanuel Sieyès sur les origines de la représentation en droit public. Sous la dir. de Michel Troper*. Unpublished PhD thesis. Paris: Université de Paris I Panthéon-Sorbonne.
- Dyzenhaus, D. (2007) 'The Politics of the Question of Constituent Power', in Walker, N. and Loughlin, M. (eds.) *Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, pp. 129–146. DOI: 10.1093/acprof:oso/9780199552207.003.0008.
- Forsyth, M. (1981) 'Thomas Hobbes and the Constituent Power of the People', *Political Studies*, 29(2), pp. 191–203. DOI: 10.1111/j.1467-9248.1981.tb00487.x.
- Forsyth, M. (1987) *Reason and Revolution: The Political Thought of the Abbe Sieyès*. New York: Leicester University Press.
- Gauchet, M. (1995) *La révolution des pouvoirs*. Paris: Gallimard.
- Geenens, R. and Sottiaux, S. (2015) 'Sovereignty and Direct Democracy: Lessons from Constant and the Belgian Constitution', *European Constitutional Law Review*, 11(2), pp. 293–320. DOI: 10.1017/s1574019615000188.
- Goldoni, M. (2012) 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power', *Oxford Journal of Legal Studies*, 32(2), pp. 211–234. DOI: 10.1093/ojls/gqr034.
- Guilhaumou, J. (1997) 'Nation, individu et société chez Sieyès', *Genèses, Représentations nationales et pouvoirs d'Etat*, (26), pp. 4–24. DOI: 10.3406/genes.1997.1430.
- Guilhaumou, J. (1999) 'Sieyès et la métaphysique allemande', *Annales Historiques de La Révolution Française*, 317(1), pp. 513–535. DOI: 10.3406/ahrf.1999.2264.

- Guilhaumou, J. (2002) *Sieyès et l'ordre de la langue: l'invention de la politique moderne*, Collection Philosophie, Epistémologie. Paris: Kimé.
- Hont, I. (1994) 'The Permanent Crisis of a Divided Mankind: "Contemporary Crisis of the Nation State" in Historical Perspective', *Political Studies*, 42(1), pp. 166–231. DOI: 10.1111/j.1467-9248.1994.tb00011.x.
- Jaume, L. (1986) *Hobbes et l'état représentatif moderne*. Paris: PUF.
- Kalyvas, A. (2005) 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations*, 12(2), pp. 223–244. DOI: 10.1111/j.1351-0487.2005.00413.x.
- Laquière, A. (2008) 'La réception de Sieyès par la doctrine publiciste française du XIXème et du XXème siècles', in Quiviger, P.-Y., Denis, V., and Salem, J. (eds.) *Figures de Sieyès*. Paris: Publications de la Sorbonne, pp. 83–121. DOI: 10.4000/books.pSORbonne.20034.
- Leibniz, G.W. (1695) *A Specimen of Dynamics (Specimen Dynamicum)*. Translated in: Ariew, R., Garber, D. (eds.) (1989) *G.W. Leibniz Philosophical Essays*. Indianapolis: Hackett, pp. 117–138.
- Locke, J. (1690) *An Essay Concerning Human Understanding*. Reprinted in: Woolhouse, R. (ed.) (1997) *An Essay Concerning Human Understanding*. London, New York: Penguin Books.
- Marx, K. (1857) *Grundrisse der Kritik der politischen Ökonomie*. Translated in: Nicolaus, M. (ed.) (1993) *Grundrisse: Foundations of the Critique of Political Economy*. London, New York: Penguin Classics.
- Marx, K. (1867) *Das Kapital*. Translated in: Fowkes, B. (ed.) (1981) *Capital: A Critique of Political Economy*. London, New York: Penguin Books in association with New Left Review.
- Negri, A. (2009) *Insurgencies: Constituent Power and the Modern State*. Minneapolis: University of Minnesota Press.
- Pasquino, P. (1998) *Sieyès et l'invention de la Constitution en France*. Paris: Odile Jacob.
- Pasquino, P. (2007) 'Constitution et pouvoir constituant: Le double corps du peuple', in Salem J., Denis V., and Quiviger P.-Y. (eds.) *Figures de Sieyès*. Paris: Presses Universitaires de la Sorbonne, pp. 13–23. DOI: 10.4000/books.pSORbonne.20025.
- Pasquino P. (2016) 'Constituent Power and Authorization. Anatomy and Failure of a Constitution-Making Process', in Ingimundarson V., Urfalino P., and Erlingsdóttir I. (eds.) *Iceland's Financial Crisis: The Politics of Blame, Protest, and Reconstruction*. London: Routledge, pp. 230–239.
- Rubinelli, L. (2016) 'How to Think Beyond Sovereignty: On Sieyès and Constituent Power', *European Journal of Political Theory*, 18(1), pp. 47–67. DOI: 10.1177/1474885116642170.
- Archives parlementaires de 1787 à 1860* (Vol. VIII). Paris: Librairie administrative de Paul Dupont.
- Sewell, W.H. Jr. (1994) *A Rhetoric of Bourgeois Revolution. The Abbe Sieyès and What Is the Third Estate?* Durham: Duke University Press. DOI: 10.2307/j.ctv11sn152.
- Sieyès, E.J. (1789a) *Préliminaire de la Constitution française*. Paris: Baudouin.
- Sieyès, E.J. (1789b) *Quelques idées de Constitution applicables à la ville de Paris*. Paris: Baudouin.
- Sieyès, E.J. (1985) *Ecrits politiques*. Edited by Zapperi, R. Paris: Editions des archives contemporaines.

- Sieyès, E.J. (2003) *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791*. Edited by Michael Sonenscher. Indianapolis: Hackett Publishing Company.
- Tuck, R. (2016) *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge: Cambridge University Press. DOI: 10.1017/CBO9781316417782.
- Urbinati, N. (2006) *Representative Democracy. Principles and Genealogy*. Chicago: Chicago University Press. DOI: 10.7208/chicago/9780226842806.001.0001.
- Ziller, J. (2003) 'Sovereignty in France: Getting Rid of the Mal de Bodin', in Walker, N. (ed.) *Sovereignty in Transition*. Oxford: Hart Publishing, pp. 261–268. DOI: 10.5040/9781472562883.ch-011.



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