

**THE ORIGIN OF THE CONSTITUENT POWER THEORY: READING
SIEYÈS' WORKS AND ITS INTERPRETATIONS BY THE CONTINENTAL
PUBLIC LAW¹**

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ABSTRACT

This study reconstructs the thought of Emmanuel-Joseph Sieyès on the constituent assembly, within the context of the bourgeois revolution in France during the 18th century. The central objective is to identify the historical origin of the theory behind the constituent assembly, establishing the original concepts in order to enable critical analysis of the readings that were produced by the continental publicist doctrine in the 19th and 20th centuries. Sieyès is recognized as an important thinker in the area of political philosophy, who made a critical contribution to the modern definition of constitution, as well as to its democratic path of construction based on constitutional processes. This work is part of a broad project of research and re-discussion of the classic theory of the constituent assembly, in order to evaluate whether the traditional theory can explain the contemporary constitutional realities and the social and political demands experienced at the time of change in the constitutional order.

KEYWORDS: Constituent power. Sieyès. Constitutional theory.

**AS ORIGENS DA TEORIA DO PODER CONSTITUINTE: um resgate da obra
de Siéyes e suas múltiplas releituras pela doutrina publicista continental**

¹ Translated by Helena Marino. This article was authorized for publication by the authors in 24/06/ 2014. Version in Portuguese received in 29/10/2013, accepted in 05/06/2014

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RESUMO

O trabalho se propõe a reconstruir o pensamento de Emmanuel-Joseph Sieyès acerca do poder constituinte, no contexto da revolução burguesa vivida na França no século XVIII. O objetivo central é identificar a origem histórica da teoria do poder constituinte, fixando os conceitos originais a fim de que se possa analisar criticamente as releituras que foram produzidas pela doutrina publicista continental nos séculos XIX e XX. Reconhece-se a figura de Sieyès como um importante pensador da filosofia política cuja contribuição foi determinante para a concepção moderna de constituição, bem como do seu processo democrático de construção a partir dos processo constituintes. O trabalho se insere num projeto amplo de pesquisa e rediscussão da teoria clássica do poder constituinte, a fim de que se possa avaliar até que o ponto a teoria tradicional pode dar conta das realidades constitucionais contemporâneas e das demandas sociais e políticas vividas na ocasião da mudança da ordem constitucional.

PALAVRAS-CHAVE: Poder constituinte. Sieyès. Teoria da Constituição.

INTRODUCTION

The constitutional law history in the 20th century is a history of transformation. According to the research made by Nolte and Schilling-Vacaflor, from the approximately 200 constitutions in the world today, more than a half were created or recreated in the last quarter of the 20th century (NOLTE; SCHILLING-VACAFLOR, 2012). The experience of summoning and guiding constitutional processes has been constant in European democracies and societies during a redemocratization path, as in some Latin-Americans governments, like Brazil.

The need for a theoretical structure able to guide the constituent praxis awakened the concern for the systematization of a broad constituent assembly theory that could explain what the creation of a new constitution represents, its consequences and importance. Also, a guide to action is necessary to organize the discussions about the

elaboration of a constitution. That is why a constituent power theory is an urgent theoretical and practical demand.

Emmanuel-Joseph Sieyès is almost universally recognized by the constitutionalist doctrine as the precursor to the theories about this theme in the European constitutional law history. Bonavides says Sieyès has the credit *for helping the development of science with the “discovery” of this concept, extracted from his monography on the third state* (BONAVIDES, 2013:148).

Mannoni believes that is decisive to give Sieyès the merit for his contribution to the conceptual history of the European public law because *Sieyès’ work, based on coherent premises, embodies all the tensions of his time*, and clarifies doubts regarding the goals, values and contradictions of the revolution (BONAVIDES, 2013:148). According to the Italian author, there has not been any theory as connected to the experience of the revolution in its most creative and tragic moments as Sieyès’.

Considering Sieyès’ influence on the publicist doctrine, it is possible to identify in his work the philosophical origin of the interpretations regarding the constituent power, which can be found in the publicists manuals from the continental legal systems since the 19th century, specially the French, German and Italian ones, that strongly resemble the illuminist French tradition and the bourgeois rule of law model.

This article seeks to claw back Sieyès’ rationale, which supports a constituent assembly composed by the French nation, putting it into a historical background and analyzing its consequences for the emergence of a constituent power theory in the 19th century, with its own vocabulary, characteristics and issues. It is, therefore, an effort to “reconstruct” his political theses and to investigate the reaction to his work by continental publicists.

Divided into three parts, this article starts with a brief analysis of the historical moment when Sieyès wrote and published his political work and the influences of political and personal facts on his theories. Therefore, it tries to understand the author in his time, which is a necessary methodological care to avoid anachronism. Next, it

interprets his most important work on the constituent process, *What is the third state?*, a revolutionary pamphlet that helped to spread the bourgeois constituent thought. It is interesting to notice the connection between this pamphlet and other of his works, especially those about political economy that were published before. The third part of this article analyses, from Paul Bastid's (BASTID, 1939) monography and Alain Laquière's (LAQUIÈRE, 2005) bibliographic research, how the continental publicist doctrine greeted Sieyès' ideas.

1 THE REVOLUTION AND THE FRENCH CONSTITUTIONALIST THOUGHT IN THE 18TH CENTURY

1.1 The "reconstruction" methodology of a political thought and the danger of anachronism

The proposal to reconstruct Sieyès' work as a path to systematize the constituent power theory has methodological risks because of the huge time difference between the publication of *What is the third state?*, in 1789, and its rereading today. This pamphlet was written in a revolutionary process that represented a big change in the arrangement of the power in Europe, and needs to be understood according to this historical context, considering not only the vocabulary used, but also the intention implied in the text, its purposes and immediate consequences.

The creation of a method leading to a strict conceptual historiography was object of two schools of thought: the Conceptual History School, from Germany, with Reinhart Koselleck as its main author, and the School of Cambridge, with Quentin Skinner, one of the most important researchers from this school. While the Conceptual History School focuses mainly on the construction process and the many redefinitions of political concepts individually (for example, the State and the constituent power) – this school

aims the comprehension of the term and the ideas that surround it³ -, the School of Cambridge exams the various meanings those terms and political ideas can have in a text, looking at how the author uses them. In the latter case, the school gives a pragmatic view on the uses of language: the important is to understand the meaning the author wanted to give to the term in his text; therefore, the term (and its concepts) should not be analyzed apart from the whole text.

The attempt to create a methodology of the political thought's history tries to avoid a common mistake: *to see under the perspectives of the present the work of authors from the past, conceiving interpretations that do not match what the author really wanted to say through his work* (JASMIN; FERES JÚNIOR, 2006:15). Consequently, it is important to comprehend that it is not possible to enforce *issues and expressions that are attached to the present to authors from the past* (JASMIN; FERES JÚNIOR, 2006:15).

The proposals of Quentin Skinner and John Pocock, from Cambridge School and influenced by the philosophy of language e by the speech act theory, can be useful to understand Sieyès' influence on the conception of the constituent power theory, because they focus on his work seen through the eyes of his time and on its connections with his posterior works about the constituent power. When trying to "reconstruct" the French philosopher's ideas, it is crucial to evaluate methodologically the validity of the interpretation according to which *the interpretation should express what the author would accept as a right description of what he really meant to say or do* (JASMIN; FERES JÚNIOR, 2006:15).

To face the author in his time is a way to analyze his work and has the purpose of *learning to read and comprehend the various idioms of political speech in the means they could be found in the culture and time the researcher studies* (POCOCK, 2003:29).

³ The base of the intention proposed by the Conceptual History School is the differences between term and concept. One of its goals is to understand the continuity and discontinuity of the political vocabulary, watching the many ways terms and concepts from this vocabulary are used. Cf. RICHTER, Melvin. **The history of political and social concepts: a critical introduction**. Oxford: Oxford University Press, 1995, pg. 9.

Some regards must be taken to orientate the analysis of Sieyès' work. First of all, it is necessary to know that with "*What is the third state?*", he has not intentionally tried to create a theory of the constituent power, with the scientific accuracy that is required for a theoretical thesis. His pamphlet seems to have been used more as a revolutionary encouragement rather than a scientific work. Due to that, as a second regard, it is important to distinguish the text and the author's intention from its future acceptance. When presenting a common critique of Skinner's proposal, Pocock explains: *the words used by a writer are not his, because the language he utilizes to show his intentions can be taken from him and used by others to justify different ideas* (POCOCK, 2003:29).

Following Pocock's logic, it is viable to defend the existence of "two" Sieyès: the one from his original work in the 18th century, who wrote focusing on the sequence of political facts during the revolution; and the Sieyès inferred from the rereading of his work, who is recognized as the "father" of the constituent power theory. This image attributed to the author's theory is a *constructo*, although it is possible to see connection between the French thinker's work and his interpreter's.

In the next topic it will be presented the politician and philosopher, Emmanuel-Joseph Sieyès, before starting to analyze his work. The purpose of this short biographic presentation is to fully understand, considering the social context, the meaning the author wanted to show in his text when it was published. Therefore, before analyzing the language applied, we need to comprehend who applied the language: two perspectives that can lead to different understandings, and yet complementary ones.

1.2 Emmanuel-Joseph Sieyès: The Politician and The Thinker

Emmanuel Joseph-Sieyès was born in 1748 in a catholic family and received an education strongly influenced by illuminists' ideas, especially when he first heard of John Locke's political philosophy and the work of the encyclopedists Diderot and D'Alembert. According to Mannoni, Sieyès' doctrine, by embodying the tensions of his time, was one

of the main supports that helped to form the constitutional institutions of the revolutionary French nation in its most creative period (MANNONI, 2000:27).

Unlike Rousseau, who advocates for the idea of a radical popular sovereignty against representative systems, Sieyès suggests a new model that considers the personal and institutional limits existents in his time. Pasquino analyzed the abbot's manuscripts and identified the influence of Sieyès' work about political economy developed between 1770 and 1785 on his view of what is State and society. Sieyès' studies, as Pasquino says, are not only abstract concepts but also decisions on the *appropriate form of government* (PASQUINO, 1987:221) for the modern trading society, which would require a representative model.

Sieyès does not consider appropriate to look at ancient societies to find inspiration because of the lack of similarity, so he proposes to analyze the particularities of the modern society that has been through a process of intensification of the trading activity and division of labor – considering this as the principle of the *société commerçante*. The widespread of work, the growth of the manufacturer and the complexity and diversity of post jobs were understood by Sieyès as the main factor for the bourgeois society's development and, hence, the representative model would be the best for this dynamics of social organization (PASQUINO, 1987:221).

Sieyès' political thinking, far from defending a totally unlimited power for the people, proposes to contain the State, idea that can be easily inferred from his work on the *jury constitutionnaire*. According to him, it is *a restriction to the imminent threat of the legislative assembly's outrageous power* (PASQUINO, 1998:13). He feared an unlimited sovereignty, given even to the nation, and this explains his project to create an autonomous state agency that could preserve the constitution's supremacy.

Pasquino believes Sieyès deserved a great credit for his original idea of a control of constitutionality made by a specialized agency and based on a hierarchy view of the legal system and the belief in the super-legality (*superlégalité*) of the constitution (PASQUINO, 1998:12). The influence of this control system of the constitution's sovereignty on Europeans constitutional states was evident in the 20th century.

This particular constitutional model, which was reanalyzed by Hans Kelsen, was embraced by European constitutions only many years later, after the Second World War (and here I am referring only to parliamentary systems, such as the German and the Italian ones, two countries that, like France in the year III, had just put an end to a “despotic” government) (PASQUINO, 1998:13).

The control of constitutionality is consistent with the political organization of the bourgeois state: a way to control the state’s arbitrariness is an important tool to consolidate the legal supremacy of the constitution over the ruling power, which becomes limited.

Sieyès, besides a political thinker, can also be considered one of the main characters of the French revolutionary movement. In 1789, the Estates-General’s Assembly was summoned, agency to deliberate, from the French absolutist state in the Old Regime and composed by the social states, and it was crucial for the definite subversion of the French monarchy.

An interesting aspect of how the decisions in the Estates-General were voted – emphasized by Sieyès in *What is the third state?* - is the weight of the votes in each of the represented states (nobility, high clergy and third state): although the third state had most of the voters, representing the bourgeois class, it did not have a major political force, because the nobility and the high clergy had differenced votes – in the proportion of two to one.

The reaction that unchained the proclamation of the National Constituent Assembly other than the Estates-General can be interpreted as the result of the immense dissatisfaction of the bourgeois class before the difficulty the monarchy had to embrace an equal distribution of political rights between the different social classes. Due to that, Sieyès defends the legitimacy of a voting system calculated *per head*, instead of a vote by social class, fundamental to the representative model incorporated in the first republican constitution.

Sieyès was one of the principal thinkers behind the convocation of the National Constituent Assembly. The popular speech in the *Jeu de Paume* salon, in the Versailles castle, was written by Sieyès and claimed the commitment, accepted by the members of the assembly, to stay united to fight against those who wanted back the monarchy, until the creation of a new constitution that would be responsible for upholding the order and the nation's sovereignty. This "first" revolutionary assembly lasted two years, until the proclamation of the 1791 Constitution, according to Furet and Ozouf (FURET; OZOUF, 2007:45).

Sieyès' work, far from being a philosophic thought unrelated to the events of his time, was explicitly a decisive ideological tool for the revolutionary process. The author was committed to the revolution, so it seems obvious a political objective behind his studies to expand the ideology that considered itself as a rescuer from old political organization. The pamphleteer content of "*What is the third state?*" makes clear its political utilization as a way to warn the bourgeois class in order to gain intellectual help for the revolution.

2. SIEYÈS' WORK AND ITS THEORETICAL AND POLITICAL IMPACT: THE BIRTH OF THE BOURGEOIS RULE OF LAW'S CONSTITUENT POWER THEORY

Sieyès recognized the issues to establish a direct democracy in the European social context in the 18th century because of many reasons: the lack of political knowledge of the people, the necessity to dedicate time to production work, the absence of interest in public affairs. Consequently, it is vital for the post-revolutionary constitutional order to create an assembly formed by professional political representatives. *Sieyès did not share with the radical republicans the idea that a representative form of government is a necessary evil. He believes that the government is an important tool if well organized* (MANNONI, 2000:50).

Admitting that the revolution must have the establishment of a new state order as a consequence, with institutions and participation rules coherent with the bourgeois' aspirations, Sieyès conceives his constituent power concept as the expression of the nation's sovereignty.

According to him, the constituent power is the energy capable of creating a new legal order, by breaking with the last one, whose consequence is the elaboration of a constitution. Thus, the constituent power is a revolutionary power because its practice is connected to the change of footing of the legal system's validity. Carré de Malberg says Sieyès is the great theorist of the people's constituent sovereignty because he believed this sovereignty reveals itself as a constituent power:

Sieyès – who was in harmony with the revolutionary men's logical systematization spirit and had a clear vision of the problems and political needs of his time, uniting it with practical solutions - put, in an undeniable way, the constituent power in people's hands, and, at the same time, admitted, even in constituent matter, a representative government, to which he offered space in his political reorganization plan (MALBERG. 2000: 1.1665).

The french thinker considered that “*people's sovereignty*” is merged with “*national sovereignty*”. He introduced a notion of the representative system as constitutive of the practice of the sovereignty, through mandates. The author proposes a form of national representation *where the elects would be independent from their electors and only would receive their power through the Constitution* (GOYARD-FABRE, 2002: 184). Therefore, the right to vote only applies to the choice of representatives, who, when elected, have their own will, separated from the will of those they represent. In this progress, the people's sovereignty becomes the national one.

An indirect government, in which there is a distance between who rules and who is governed, to Sieyès, is an improvement on ancient societies, where people were convoked to directly participate in the discussion of public issues – situation that, according to him, it was possible only because of slaves, who were responsible for the production of wealth (PASQUINO, 1987:225). In a trading society, where there is a

population growth and labor division, a representative government enables people to dedicate their time to individual activities, without having to participate in important public decisions all the time.

The representative gives time so people can work, noticing that a professional class of legislative representatives is a result of the growth of society and its social complexity. Sieyès' studies on how economical aspects influence the social dynamics were, therefore, important for the elaboration of his constituent power theory, in which it is possible to infer the essentiality of the representatives on the affirmation of the nation's wishes. In the abbot's words, *individual work and public activities* motivate the prosperity of a nation (SIEYÈS, 1789:5).

According to Pasquino, who shares Manonni's view, Sieyès' work did not have a decisive impact in France immediately, especially comparing to the ideological influence on the revolution of Montesquieu and Rousseau's work (PASQUINO, 1998:9). Despite that, the European constitutionalist doctrine recognizes Sieyès' work as a landmark in studies on the constituent power.

Horta says that *in the end of the 18th century, when the classical doctrine of this power was conceived, Sieyès was already listing the characteristics of the new Constitution's creator* (HORTA, 2010:3). Although his vision on society and power can be interpreted from his set of manuscripts, with "*What is the third state?*" Sieyès not only presents but also invites his revolutionary companions to participate in the constituent power.

"*Ou'est-ce que le tiers état?*", published in January 1789 in France, tries to answer the questions raised by the author in the first chapter: *What is the third state?; what it has been until now in the political context?; what it aims for?*. In its first part, Sieyès shows the main roles and economical activities in the society and comments that the productive strength is concentrated in the bourgeois activity – the activity of the third state. Therefore, the bourgeois class – identified as *nation* - should have the legitimate power because *the third state represents everything that belongs to the nation; what is not from*

the third state, cannot be considered part of the nation. What is the third state? It is everything (SIEYÈS, 1789:14).

Following this logic, the liberty of the people is the guarantee of rights, not privileges, traditionally associated with the nobility (SIEYÈS, 1789:18). According to the French author:

Keeping to this rationale, the third state is the citizens who belong to the ordinary order. The ones privileged by the law, in any way, are the exception; consequently, do not belong to the third state (SIEYÈS, 1789:18).

It is possible to notice a clear effort to establish a political change by depriving the monarchy and consolidating a republic. At that time, the abbot recognized that the third state *did not truly have public representatives, which is why its political rights were almost inexistent* (SIEYÈS, 1789:27), ineffective.

The people *want to be something*, want to be represented in the institutionalized power (SIEYÈS, 1789:28). Sieyès presents, this way, an undeveloped idea of the majority representation criterion when recognizing the injustice of attributing equal values for the votes of the nobility, the clergy and the people classes. He understands that it is fundamental to admit the votes to value not by class, but by number of voters (*par têtes et non par orders*) (SIEYÈS, 1789:29).

The third state wants its representatives to be from the same class; to have the same number of representatives as the other classes; that the votes are counted by head. To achieve these goals, Sieyès proposes the creation of a constitution, since every nation must be free and this freedom must be secured by assuring the right to elect representatives. The abbot recommended, therefore, a government by procuration, constructed through the *representative common will* concept (SIEYÈS, 1789:108).

For a representative government to be formed, it is crucial to create a new constitution in accordance with the abbot's principles and wishes. According to him, *it is impossible to create something targeted to a purpose without organizing it, giving a structure and rules to reach those purposes. That is what we call Constitution* (SIEYÈS,

1789:109). He gives a concept for constitution, saying that its elaboration is attached to the achievement of certain goals, especially the government's duty to follow the nation's will.

In Sieyès' rationale, a constitution must turn into law legal security rules as *it is possible to find many political cautions there, essential to a government, without which the exercise of power becomes illegal* (SIEYÈS, 1789:109). His work shows a bourgeois fear related to the state that has been, in history, responsible for the deprivation of economical freedom, necessary to the *société commerçante*.

Furthermore, he clarifies that the nation is existent before the creation of the government and is what gives its legitimacy: the nation is the *origin of everything* (SIEYÈS, 1789:111). Therefore, the government must esteem the nation's will, expressed through the elected representative's power, not connected with the elector's individual wishes. The mandate represents the politician's *originary irresponsibility*, who does not consult the will of those who have given him the power.

The elector's desire in the bailiwick is an individual wish in relation to the nation's wish, as emphasized by Sieyès, which is why a deputy, representing the nation's will, cannot be limited by this individual desire (FURET; OZOUF, 2007:196).

The French author considers the division of labor and the specialization of functions a proof of the society's development; consequently, it would be natural for the representative - who professionally governs - to be more capable of analyzing and managing the state's issues. That is why the representative, when elected, cannot be bound by the elector's individual wishes.

The representative is responsible to express the nation's will, which is *always legal* because it is *the law itself* (SIEYÈS, 1789:111) and the constitution is a set of procedures and bounds that allows people to manifest their will to the constituted powers.

Sieyès distinguishes the concept of constituted power – bound, restricted by the political prudence made by the constitution – from the constituent power – primitive, represents the laws made according to the nation’s will. The constitution is, for Sieyès, the work of the constituent power, directed to the government organization. It is a former power.

The abbot believes that the reorganization of the state, following the model proposed by the third state through the exercise of the constituent power, will create a constitution for a government based on freedom. The third state wanted *to be anything*, basically to put an end to the oppression and limitation that blocked the exercise of its economical activities and its legal and political participation.

Furet, Ozouf *et ali* suggests that Sieyès was responsible for the creation of a positive concept of constitution, apart from the previous concept, that was strictly historical:

Sieyès countered the traditional meaning of constitution, understood as a social and political order intrinsic to the nature of things, and proposed the idea of a government’s institute. When confronting the arguments of those who defended the traditional use of the term, Sieyès explained that the existence of a nation is the core of the political condition, previous and simultaneous to the constitutional model (FURET; OZOUF, 2007:185).

Considering the nation’s will as the ultimate will and always legal, it is not logical to make it impossible to change the constitution by alleging a violation of the natural order. Sieyès and the Illuminist’s traditional philosophers, especially Rousseau, fought the argument of an established power beyond the convention. The contractualism and Sieyès’ constituent power theory were efforts in order to deconstruct the rationale that associated privileges to an immutable order, created by nature, impossible for the men to change it. According to Furet, Ozouf *et ali*, *it would not be possible to believe anymore*

that the nation was stuck in an unchangeable social and political order, justified by a primitive constitution (FURET; OZOUF, 2007:185).

The constitution's role, within the French revolutionary process – deeply connected to the Iluminism's philosophy – was to create a new organization of the power, influenced by the social changes of that time.

In the next item, how Sieyès' work was received by the publicist doctrine in the 19th and 20th century will be analyzed. It tries to understand the impact of his ideas for the development of a bourgeois constituent power theory.

3 THE IMPACT OF SIEYÈS' IDEAS AND THE REVOLUTIONARY LEGACY: ANALYZING THE CONTINENTAL PUBLICIST DOCTRINE'S VIEW ON THE CONSTITUENT POWER

The European constitutional thought in the 19th century was, according to Saldanha, strongly influenced by the rationalist-lay-bourgeois insignia and resulted from the creation of the modern rule of law (SALDANHA, 2000:20). It also was a French constitutional-revolutionary experience that had the biggest influence of all (SALDANHA, 2000:68). Saldanha:

It was partly because France was coming from its heyday, the revolution (Spengler even claimed that the French culture was the occidental culture of that century). Partly because France is located in the core of Europe – not in an island, neither on the other side of the ocean – a good place to be seen by the other countries and to influence other cultures. And partly because the ideology of the French revolution, which was also a constitutionalizing revolution, spread throughout the world and was considered an example of transformation (SALDANHA, 2000:68).

The spread that Saldanha mentions must be understood within the European continent, and means an ideological influence, helping the emergence of similar political

movements in countries that have a European legal and cultural tradition, like Brazil. The modern Cultural Revolution in Europe cannot be comprehended as a global revolution, despite what Saldanha's term "spread throughout the world" may suggest.

The French publicists' systematization work, since the revolution, was important to sow the constitutionalist ideology, which is why the classical theory is a theoretical resource to analyze the constituent power in this article. The concepts, the definitions, the classifications regarding the constituent power and the theories made about its exercise follow the liberal model explained by Sieyès, considered the first one to elaborate a constituent power theory.

Laquière arguments that only looking at public law professors from the third republic it will be possible to rescue Sieyès' contribution to constitutional studies (LAQUIÈRE, 2005:230). This is similar to Pasquino's conclusion (PASQUINO, 1998:9) that recognizes the inexistence of a deep influence of Sieyès' work at a first moment because of Rousseau and Montesquieu's fame at that period.

In the attempt to "reconstruct" Sieyès' thought by rereading his work, it is possible to focus the analyzes on French publicists who studied mainly the constituent power, between the 19th and the 20th century, such as Paul Bastid, Adhémar Esmein, Georges Burdeau and Carré de Malberg.

Paul Bastid have a major importance when considering Sieyès as the "father of the French public law" in his monography at 1939, "*Sieyès et sa pensée*". In this work, he tries to "reestablish the continuity" of Sieyès' thought and put an end to historic injustices that surrounded Sieyès based on mistaken interpretations (BASTID, 1939:8).

Bastid clarifies, emphasizing the idea that it was not Sieyès' intention to create a constitutional theory or a constituent power theory, that the abbot's work was fragmented and not systemized, which is why, despite its high quality, it did not leave any philosophic work in the traditional models. The hypothesis of the political use of Sieyès' studies – not only a theoretical use – is sustained by what Bastid brings in his work: that, only in 1789, "*What is the third state?*" had four editions, although only the last one was Sieyès'

authorship – therefore, this pamphlet, for months, was used for political awareness and not exactly as a philosophic contemplation (BASTID, 1939:317).

Esmein saw Sieyès as a mentor of the representative model in occidental republics and accepted that embracing this model did not violate the principle of the nation's sovereignty. The biggest critique he had upon Sieyès' proposal was the denial of the representation of particular interests of the social classes. He claimed that the political representation proposed by Sieyès was based on the idea that each representative would act on behalf of the society, not isolated groups, which is the reason the abbot tried to prohibit corporations and association of interests – similar to, for example, political parties today (ESMEIN, 1921:314).

Considering Sieyès' representative model, Esmein explains that the power given to the elected representatives did not come from only the place where he was elected, but from the whole nation, so any "division of the people" would not be accepted (ESMEIN, 1921:314). From this logic comes the assumption of the representative's lack of responsibility regarding his elector's will: because the representative expresses the people's will, not the interests of specific social classes, his will may not be the same as the one from those who elected him. For Sieyès, hence, it does not make sense the existence of a "mandate" because it represents a limitation for the parliamentarian's power to decide (ESMEIN, 1921:318).

Esmein criticizes Sieyès' opinion on the relationship between the elector and his representative because he did not agree to limit the participation of particular interests on the legislative power, prohibiting a political presence of corporations and associations. For Esmein, French interpreter and constitutionalist, this would sacrifice one of the most important individual rights: freedom, embodying freedom of thought, of speech and political association (ESMEIN, 1921:314).

The publicist George Burdeau is also recognized as an important author on the constituent power because of his systemized work in *Traité de Science Politique* (BURDEAU, 1966). Giving the conceptual distinction between raw power and legal power, considered a competence, Burdeau observed the hybrid essence of the constituent

power. Its energy avoids any complete integration in a hierarchical system of rules and competences (BURDEAU, 1966:171), but, at the same time, the constituent power defines itself as a former power, creator of the legal system⁴.

The publicist Carré de Malberg put his studies on the constituent power into his organicist theory (MALBERG, 2000:1.161). He defines the institute as an *individual or a group of individuals whose wishes become the wishes of the state*, and comes from the constitution. The constitution is known as way for the nation to exercise its power, because the positive law has the prerogative of “communicate” the power to public bodies (MALBERG, 2000:1.161).

Despite the critiques on Sieyès’ conceptions about the constituent power, other French authors consider the abbot a mentor of an unconditional and unlimited revolutionary power, responsible to create a new constitutional order. The power to recreate, based on the idea of the sovereignty of the nation, was crucial for the bourgeois rule of law to succeed.

The direct link between the constituent power theory and the success of the liberal state – that later was renovated to adapt to the new social context – is defended by the political concept that the constitution is a document that founds the state, where important values of the nation are expressed.

The modern meaning of constitution – formal, rigid and that ensures rights – comes from a conception of power objectified through a process to create laws, whose result is the elaboration of a constitution. The constituent power has the duty to transform the people’s energy to change into acts necessary to form a state that follows the principle of legality and the rights and guarantees reassured by the legit sovereign.

CONCLUSION

⁴ Burdeau’s debate on the constituent power’s essence – trying to answer if the constituent power can be defined as a legal power – will be discussed in the next topic, comparing the doctrine’s view on this matter.

To comprehend the social and political dynamics during the creation of a constitution can be important for the study of constitutional law in some theoretical points: the effectiveness and the legitimacy of the law, besides being a way to analyze how the society sees itself as a political entity. The constituent process is a moment of tension, of rupture of the previous law, in which the society's reconstruction of the State, by creating new values and institutions, is in its most explicit expression.

A more meticulous study on the constituent power can be interpreted in a global effort to understand the constitutions, not only its legal aspects, but also all the idea behind the elaboration of this legal text.

In this article we tried to analyze, based on an historical perspective, Sieyès' contribution to the conception of a constituent power theory, to legitimate the bourgeois rule of law, and the impact of his work on French publicists in the 19th and 20th centuries.

Although it was not the abbot's intention to create a philosophical analyzes of the constituent power, "*What is the third state?*" was really important to guide the studies on the continental public law: thinking about the power that writes the constitutions, its limits, its functions, its procedures.

Some questions can influence the continuity of the study, set in a wide work to comprehend the constituent power as the base of a constitutional theory: how the constituent power theory, based on classical and liberal theses, could be reviewed upon the advent of the changes stimulated by the philosophic development in the 20th century?

The historical context of the constituent power's origin is the first step for this task that tries to critically rescue the review of works on the constituent power and rethink it according to the current constitutional challenges.

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