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Representative Legislatures, Grammars of Political Representation and the Generality of Statutes

DIMITRIS TSARAPATSANIS[1]

Abstract. The article explores the claim that representative legislatures should create general legal norms. After distinguishing the requirement that statutes be general from the broader rule-of-law idea that law be general, I concentrate on the French constitutional tradition to argue that the plausibility of the claim turns on the elucidation of a set of social norms and understandings about the proper role of representative legislatures mediating between abstract ideals of the common good and local practices. I call these norms *grammars*. The article then briefly compares the French 'Sieyèsian' grammar of political representation with the US 'Madisonian' one regarding the issue of generality of statutes and concludes with a plea for deeper comparative investigation into different such grammars.

Let us begin with the idea that separation of powers involves "articulated governance", i.e. multi-stage governmental action in which different kinds of institutions make distinctive kinds of contributions to the overall project of governing (Waldron 2016, 62-65). How should we understand the contribution made by representative legislatures? A prevalent response, echoed by Waldron (Waldron 2016, 65-66), suggests that legislatures' directives should not address particular situations or persons; rather, they should formulate publicly ascertainable norms at an appropriate level of generality. My main aim in this article is to build on Waldron's claim by elucidating some of the normative and historical conditions of plausibility of such a response. My argument comprises four steps. First, I distinguish the specific institutional issue of the generality of *laws* or statutes *qua* products of representative legislatures from the wider and well-documented theme of the generality of the *law*, introducing a roughly rousseauian ideal that laws should be general because they are aimed at a common good that transcends particularistic interests. I contend that Rousseau's own formulation of the ideal is of

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limited help for at least two reasons. First, Rousseau famously repudiated representation. More importantly, the rousseauian ideal is underdetermined in the sense that it does not imply either conceptually or normatively that legislatures should always create general norms. This indicates that the link, if any, between generality of laws and representative legislatures under a rousseauian construal of the common good, is contingent. Accordingly, in order to further probe the nature of that link, it could be useful to look at how it was tackled by historically specific constitutional traditions. In the second section of the article I thus suggest that the modern French constitutional tradition is significant in this respect, because it has insisted since 1789 on a robust requirement that norms formulated by representatives be general. Representatives are to abstract from particular considerations and "will for the nation", as Barnave famously put it (Brunet 2004, 113). In the third section, I reconstruct this tradition to suggest that detachment from particularity on the part of representatives is not a judicially enforceable norm but an open-ended and flexible presumption resulting from the interplay of the abstract rousseauian ideal with a set of historically specific understandings, expectations and argumentative constraints about the representatives' role. Following Boltanski and Thévenot (2006) and Lemieux (Lemieux 2009), I use the concept of grammar to designate the product of this interplay. Grammars can be understood as the historically concrete and evolving intermediate normative requirements that connect, in more or less flexible ways, relatively underdetermined abstract ideals with local institutional practices. There can thus be many such grammars as I show in the last section of the article, where I briefly compare the 'Sieyèsian' with the quite different 'Madisonian' grammar of political representation akin to the US constitutional tradition. Importantly, the latter downplays, albeit without totally negating, the importance of the generality of statutes. I conclude by pleading in favour of a deeper empirical and normative exploration of different grammars of political representation. Such an endeavour may provide useful insights regarding the elucidation of the distinctive contribution of representative legislatures to the overall project of governing and, thus, supplement more abstract versions of the theory of the separation of powers along lines like those suggested by Waldron.

1. The Generality of Statutes as a Distinctive Concern

To fix ideas further, we might yet again take as our starting point Waldron's observation to the effect that representative lawmaking is a normatively distinctive activity involving the publicly debated creation of legal norms characterized by a double kind of abstraction (Waldron 2016, 136-141). Waldron makes two separate points about representative lawmaking. First, with regard to content, the directives created have to be general in the rule-of law sense of not targeting particular persons (as, for example, do bills of attainder). Waldron calls this content abstraction. Second, with regard to the way they were adopted, directives have to be the result of a process of representation of societal interests and opinions that abstracts from the particular identities of constituents to consider them only under certain universalizable aspects. Waldron dubs this agent abstraction. He goes on to argue that the two are connected in the sense that agent abstraction involved in political representation is associated with content abstraction (Waldron 2016, 137-138). Waldron thus holds that the distinctive contribution of representative legislatures to the collective project of articulated governance involves passing laws that are general.

By way of further illuminating the link, if any, between representative lawmaking and generality of statutes, we must begin by locating it more specifically. First, the link is formulated at a certain level of abstraction from particular legal systems. Thus, its validity does not depend on whether particular systems contain directives requiring that laws passed by legislatures be general. In fact, many constitutional and supreme courts around the world appear to accept that legislatures have the power to create statutes aiming at regulating the conduct of particular individuals (Note 1966). Thus, Waldron's point should not be charitably construed as an empirical generalization about the content of specific legal systems. Rather, it seems to be normative and to do with a kind of ideal to which typical representative legislatures should aspire.

Second, the requirement that representative legislatures create general and abstract norms does not reduce to, even if is related to, the rule-of-law value of formal equality before the law. Generality as a rule-of-law value does not only apply to the creation of directives by legislatures, representative or otherwise. Rather, it is frequently considered as a cardinal virtue that should be exemplified by the legal system as a whole.

Indeed, arguments to the effect that the law as a whole either is or should be general have a well-established pedigree in legal theory. Under a conceptual approach, most notably discussed by H.L.A. Hart and usefully illuminated by Timothy Endicott (Endicott 2013), a legal system must necessarily display at least some degree of generality in order for it to be able to count as a genuine instance of law. In a similar vein, it is possible to argue, as both H.L.A. Hart and Lon Fuller famously did, that generality is a good entailed by the very idea of governing the conduct of purposeful agents through publicly enacted legal rules (Fuller 1969; Hart 1994, chapter 8). The approaches of Hart and Fuller thus tie generality to the very concept of law. Crucially, though, their claim is not that, as a matter of conceptual necessity, *all* law must be general, but rather that *at least some* law must be general for there to be a legal system governing the conduct of purposeful agents via publicly enacted rules (Endicott 2013). Both Hart and Fuller thus allow for the possibility that a legal system may also contain particularized commands. Moreover, they seem to take no stand on the more specific question of whether legislatures as distinctive institutions should govern by means of general norms.

Beyond considerations to do with the concept of law, the requirement that the law as a whole be general is also understood in more substantive normative terms. On this version, the generality of the law stems from a distinctive political value of fairness or formal equality before the law. The epitome of this rule-of-law value is the idea that legal officials ought to treat like cases alike, submitting their judgment to generally applicable standards (Hart 1994, 157-167). As Carl Schmitt summarized the idea (Schmitt 2008, 191):

> The offices authorized for legislating should be directly prevented from establishing, in place of the rule of a norm, their own rule enabling them to no longer distinguish any given individual commands, measures and orders from "statutes"

Two points should be highlighted here. First, as Schmitt remarks, fairness is not exemplified by every legal system, since it is not necessary that all legal systems be fair, but only by those whose fundamental constitutional structures reflect the ideals of

"bourgeois freedom and all the individual, organizational marks of the *Rechtstaat*" (Schmitt 2008, 181). Second, the generality of the law as a whole does not exhaust the requirements stemming from the value of fairness, since general rules may only prevent certain kinds of unfairness. Because generality is merely a formal requirement, it does not preclude the possibility that general rules may be unfair in ways that relate to their substantive content. Still, generality is widely considered to an important normative desideratum that a legal system ought to satisfy in order for it to be fair.

Waldron makes clear that rule-of-law values such as equality and fairness are indeed implicated in his story about representative lawmaking (Waldron 2016, 136). However, he argues that the requirement that the directives created by representative legislatures be general does not simply reduce to such values. It should be also apprehended in the context of a wider conception of separation of powers, as a specific concern about representative legislatures and their function. Indeed, this was precisely the tack famously taken by Rousseau, who, as Waldron explains, argued in favour of a connection between sovereignty, legislation and generality (Waldron 2016, 136-137). On the rousseauian reading, the requirement of generality of statutes could be roughly framed in the following way. Insofar as legislatures purport to represent the whole body politic and not just specific parts of it, their decisions should aim at promoting the common good. Accordingly, generality is the proper form of lawmaking. Singling out particular individuals is a strong indication, if not conclusive proof, of contamination of lawmaking by inappropriate particularistic considerations. Rousseau famously voiced this worry in particularly robust terms, speaking of "corruption of the Lawgiver" whenever the generality requirement is flouted (Rousseau 1997, 3.4):

> It is not good that he who makes the laws execute them, nor that the body of the people turn its attention away from general considerations, to devote it to particular objects. Nothing is more dangerous than the influence of private interests on public affairs, and abuse of the Laws by Government is a lesser evil than the corruption of the Lawgiver, which is the inevitable consequence of particular considerations

According to Rousseau, then, targeting particular individuals amounts to turning attention away from general considerations by considering the specifics of a case. But the "body of the people" acting in its legislative capacity ought to devote its attention solely to general considerations and not to particular interests. Thus, there is some kind of link between legislation as a distinctive activity aiming at promoting the common good and generality of the product of such an activity.

Still, Rousseau's own defence of the ideal falls short of providing a firm normative or conceptual link between representative lawmaking and generality (Rousseau 1997).[2] To begin with, Rousseau famously argued that the general will cannot be represented. Moreover, the "laws" he had in mind, and to which his generality constraint applies, were not ordinary legislation. Besides, Rousseau's generality constraint is only to do with the procedure of the decision, which should be an expression of the general will, and not with its end product. Thus, it might well be the case that a decision based on general considerations could be a particular object or individual. Concomitantly, a general statute might be the outcome of a decision based on particular considerations. This explains why Rousseau comes closest to embracing a strong requirement that laws be general when discussing executive, as opposed to legislative power (Rousseau 1997, Book 3).

It could of course turn out that there are arguments other than Rousseau's that provide grounds for a link between representative lawmaking and general statutes. Indeed, Waldron provides such an argument when he associates the abstraction from particularities through the depersonalization of interests involved in representation with the generality of statutes targeting classes of individuals as the oytcomes of such abstraction (Waldron 2016, 139). Still, there is a sense in which we can say that Waldron's argument is also inspired by a roughly rousseauian ideal of public, political decision-making for the whole body politic uncontaminated by particularistic or factional considerations. In the remainder of this article I want to build on Waldron's point by suggesting that specific, historically constituted traditions of political representation can be interpreted as mediating between the abstract rousseauian ideal and local practices to

[2] The rest of the paragraph is a response to comments made by an anonymous reviewer, whom I wish to thank.

provide a contingent but still surprisingly robust link between representative lawmaking and generality of statutes. To this end, in the next section I shall explore the purported link by reference to the constitutional tradition that was arguably most influenced by Rousseau's doctrines, namely the French one. Even though French constitutionalism diverged from Rousseau on many key points, it placed his key idea of law as the expression of the general will at centre stage, connecting in the real world of constitutional practice the generality of laws with considerations appropriate to representative lawmaking.

2. Representative Lawmaking and Generality: The French Connection

My claim, then, is that French constitutionalism might provide particularly useful insights when it comes to further exploring the relationship of the generality of laws with representative lawmaking for at least two reasons. First, French constitutional theory has wrestled since its inception with public law doctrines of representation (Brunet 2004). As Hamon and Troper observe (Hamon and Troper 2011, 182-192) at the aftermath of the French Revolution doctrines of representation became the default mode of justification of legislative authority through the idea of popular sovereignty. This idea has since retained its legal and political significance. Thus, when it comes to understanding political representation, the close study of French constitutional thought and practice can secure important payoffs. Second, as already observed, French constitutional thought inherited from the Revolution a robust version of the requirement that laws be general, which was linked to a roughly rousseauian conception of the role of representative legislatures. This conception was famously captured by Article 6 of the Declaration of the Rights of Man and Citizen, which refers to "law" ('*loi*') as "the expression of the general will." Despite the fact that, as we shall see, the requirement of generality is not judicially enforceable, it remains one of the backbones of French constitutionalism. Elisabeth Zoller puts the point this way: "the national character […] of representation means that statutes may only have a general object" (Zoller 2008, 226).

In this section, I shall introduce a number of important ideas to serve as a guide for readers not well versed in the French constitutional tradition: the conception of the people/nation as an abstract entity by reference to which exercises of legislative authority

are justified, the prohibition of imperative mandates and the importance of deliberation in the formulation of laws. Then, in the next section I shall proceed to the crux of my argument by explaining how, taken together, these ideas define the basic parameters of a distinctive grammar of political representation that mediates between a roughly rousseauian ideal of the common good and real-world constitutional practices.

2.1. The abstract people/nation as the ultimate justification of legislative power

Placing emphasis on the importance of the concepts of "people" or "nation"[3] when it comes to characterizing the constitutional impact of the French Revolution is hardly original. A voluminous literature has explored in detail the emergence of those concepts and the role they continue to play in French constitutionalism. My aim is not to add to this literature but, rather, to bring to the surface a number of considerations that are valuable for the purposes of further exploring representative lawmaking. I highlight two points. First, in order to fully appreciate the revolutionary conception of representation, it is crucial to place it in historical context, contrasting it with the older idea of representation of the Estates under the *Ancien Régime*. Second, the revolutionaries introduced an abstract idea of the people/nation. Crucially, the people/nation should not be confused with empirically existing individuals. Abstraction opens up the possibility of adopting a particular point of view on society as a whole (Lemieux 2014), enabling representatives to construe the general will in terms of an interpretive mediation between constitutional values and the interests, preferences or opinions of empirical individuals.

As to the first point, it is crucial to note that, in Pierre Rosanvallon's terms, the revolutionary "political culture of generality" dominating modern France emerged against the backdrop of a "rejection of intermediate bodies and the aspiration to achieve a single, unified society" (Rosanvallon 2007, 4). Constitutional ideas were intimately connected with the political project of setting individuals free from the constraints of the *corps* and *ordres* of the *Ancien Régime*. This involved, as an indispensable first step, the destruction of entrenched privileges and the promotion of the idea of equality of all individuals before the law. It also necessitated the creation of new institutional forms,

[3] Despite Carré de Malberg's influential insistence that the terms "nation" and "people" refer to two different types of entity that entail different conceptions of sovereignty, contemporary scholarship has established that they were used during the Revolution in a roughly interchangeable way (Bacot 1985).

going far beyond the system of particularistic representation of interests akin to the system of the *Ancien Régime*. In that system the Monarch himself was the only sovereign incarnation of the nation's unity. Representatives of the Estates General only gave voice to the particular concerns of their respective orders, being effectively banned from exercising their own judgment when it came to identifying the common good. As Keith Baker aptly observes (Baker 1990, 226):

> [D]eputies [we]re elected, in other words, not to legislate for the nation as a whole, but to speak for the particularistic interests of the communities and corporate bodies that ha[d] chosen them for this purpose.

This brings us to the second and more crucial point. The insistence on the sovereignty of the abstract entity people/nation and the importance of the general will as opposed to particular interests can be traced back to the revolutionary moment of the adoption of a resolution in 17 June 1789, whereby the delegates of the Third Estate decided to name themselves "National Assembly", claiming that they represented the whole nation and not just their class. Early debates in the National Assembly were to a large extent influenced by the priest Emmanuel-Joseph Sieyès, whose thought was significant in justifying and giving shape to the conception of representation that prevailed. Famously, one of those debates opposed Sieyès to Mirabeau. Whereas Mirabeau suggested that the delegates of the Third Estate should opt for the formula "representatives of the French people", arguing that the term "people" should be understood as encompassing the greatest part of the nation but not its totality, the adoption of Sieyès' counter-proposal "enshrined the nation as the ultimate source of sovereignty and political legitimacy." (Keitner 2007, 62).

One of the major issues that Sieyès' constitutional reflection tackled was to do with the political construction of a coherent national whole composed of a multiplicity of free and equal individuals. His ambition was to break with the conception of representation of the *Ancien Régime*, which corresponded to a body politic composed of particularistic communities and corporate bodies of unequal legal status. Sieyès' approach was twofold. First, he designed an administrative redivision of France (Forsyth 1987, 151), based on the idea that the nation is composed of free and equal individuals,

not orders or estates. Second, a nation composed of individuals had to be reunited in common political action by a single institution representing its unity. Sieyès thus pursued the aim of representing the unity of the body politic by a single assembly. Legislative representation of social interests should be designed to track this unity. For Sieyès, political institutions ought to reflect neither the aggregation of the self-interest of individuals, nor the factional interests of parts of the body politic, but the common interest "by which citizens resemble one another" (Zoller 2008, 203). Accordingly, political representation of social interests had to ensure that "individual interests [would] remain isolated" (Sieyès 2003, 154), the nation being above them (Forsyth 1987, 69). Sieyès thus conceptualized the people/nation as an abstract political entity encompassing the totality of citizens under their common public guise and irreducible to particular, empirical individuals. Moreover, far from debunking representation as a mode of political organisation, as Rousseau famously did, he maintained that effective expression of the will of the nation in fact *necessitated* representation (Sieyès 1789):

> In a country which is not a democracy (and France could surely not be one), the people cannot speak, cannot act, except by means of their representatives

Articles 3 and 6 of the Declaration of the Rights of Man and Citizen corroborated this (Brunet 2004). The crucial consideration was that representatives were to be understood as representing the people/nation as a whole and not just their electors or constituents. Moreover, the legislature was the only body through which the sovereign nation could speak the language of common interest, and, hence, of political legitimacy. *Qua* representatives of the sovereign, i.e. of the politically constructed totality of equal individuals composing the people/nation, legislators were expected, as Barnave characteristically put it, to "will for the nation" (Brunet 2004, 113), above private or factional interests and concerns. This was the political value that the rousseauian formulations of Articles 3 and 6 of the 1789 Declaration attempted to express.

The conceptual structure favoured by Sieyès was the birthplace of French constitutionalism and the forms of political argument that are akin to it. That structure inaugurated a well-known dialectic. On the one hand, whilst sovereignty as the ultimate

principle of justification of political power rested with the people/nation, it could only be actualised through the concrete activity of representatives. On the other hand, representatives were justified in wielding political power only inasmuch as they were speaking and acting in the name of the people/nation as an abstract political entity irreducible to its individual members. A significant consequence follows. By insisting on the importance of representation as a means of expressing the will of the sovereign people/nation, Sieyès used the concept of representation in ways that have been skilfully highlighted by Hanna Pitkin (Pitkin 1967). According to Pitkin, representation of abstract entities such as people/nation implies that the people/nation itself is absent and becomes present only through the activity of the institution that represents it. Representation can thus be seen as at least partly constitutive of the nation, understood as a collective entity irreducible to individual citizens or to the non-political multitude they compose.

Importantly, this conceptual structure enables a distinctive form of political argument. Insofar as the absent and abstract entity people/nation is ideal and defined, at least in part, by reference to a set of constitutional values (in the French case the famous trio '*liberté-égalité-fraternité'*), the dialectical process of justification of uses of political power and of critiques to those justifications involves a complex mediation between empirical citizens and their abstract-cum-ideal collective selves. What the people/nation 'wills' is not merely a matter of empirical enquiry, but, rather, a matter of interpretation of actual interests, opinions and preferences in the light of constitutional values and extant political and ideological disagreements. The process of interpretation itself is open-ended; abstraction guarantees that there will never be a final word on what the people/nation 'wills'. Legislative assemblies are thus loci of articulation of merely temporary answers to the question "who represents the nation/people". Abstraction opens up the possibility of contestation of those answers through the articulation of representative counterclaims. More importantly for our purposes, the dynamic of justification and critique of legislative performances on the basis of what the abstract people/nation 'wills' tends to move political discourse away from individual differences, interests and points of view and towards general considerations (Boltanski and Thevenot 2006). In this sense, the dynamic of abstraction akin to political representation can lead to

the adoption of a point of view of generality that links with laws as the end products of legislative activity, as Waldron argues.

2.2. Deliberation and the prohibition of imperative mandates

The importance of abstraction as a dominant form of post-revolutionary political argument is further highlighted by the institutional arrangements that undergird practices of representation. Sieyès insisted that, in order for a process of abstracting away from individual differences to effectively occur, members of the legislature must be in a position to identify the general will through free deliberation. Crucially, elected representatives should be able to make up their own minds on the content of the general will. They must also be open to the possibility of changing their minds through free debate with their peers, something they would be unable to do if they were simple carriers of votes under a system of imperative mandate, as under the *Ancien Régime*. Sieyès thus observed (Forsyth 1987, 134):

> It is therefore essential that opinions should be able to concert, to yield, in a word to modify one another, for without this there is no longer a deliberative assembly, but simply a *rendez-vous of couriers*, ready to depart after having delivered their dispatches

Concomitantly, Sieyès favoured, in contemporary slightly anachronistic parlance, a system that views elected representatives not as delegates, but as trustees of the nation. Their main task consists in abstracting away from particular interests and circumstances in order to identify through free deliberation the general will. No one articulated better the core logic of these foundational constitutional arrangements than the constitutional scholar Raymond Carré de Malberg. Carré de Malberg insisted that the modern relation of political representation under public law is distinctive and should not be confused with the more traditional institution of mandate under private law (Carré de Malberg 1962, 212-213). According to Carré de Malberg, banning imperative mandates has three main implications. First, unlike private law principal/agent structures, the representative, once voted in office and until the next election takes place, is irrevocable. Political

accountability, which is the public law counterpart of private law revocability, functions solely through elections and these only give voters the possibility to vote the representative out of office at the end of term. Second, the representative is typically not individually liable to her constituents for the decisions she freely makes. So, for example, there is no legal remedy for seeking damages owing to the fact that the constituents' interests were set back by the representative's political decisions. Likewise, there is no direct analogue of the agent's acting *ultra vires*, which is typically considered as sufficient ground for depriving her acts of legal validity under private law mandates. Third, the representative in her official capacity may create directives simply by following certain ascertainable procedures, so-called private law "defects of consent" (fraud, mistake and misrepresentation) not applying. Carré de Malberg's detailed legal analysis of post-revolutionary institutional arrangements thus corroborated Sieyès' insight that, insofar as they deliberate from the point of view of the nation, which is not to be confused with empirical, actually existing, individuals, deputies represent the people/nation as a whole and not this or that particular individual citizen or class of citizens (Sieyès 2003, 12). The prohibition of imperative mandates is the main institutional mechanism designed to favour independence from particular and factional interests. It was seen as a necessary, although of course not sufficient, condition for effective deliberation on how best to mediate between the abstract sovereign people/nation and empirically existing citizens.

3. Generality of laws and the Sieyèsian grammar of political representation

The argument up to this point has been that reference to the people/nation to justify legislative authority, prohibition of imperative mandates and free deliberation are conceptual and institutional forms favouring abstraction from particular or factional interests and thus tending to support exercises of legislative power that are general in nature. They ground Elisabeth Zoller's observation to the effect that particularistic "private bills […] are inconceivable in French law" (Zoller 2008, 225). However, here again it is important to underline that the connection between these forms and the generality of laws adopted by representatives is contingent and, in any event, not judicially enforceable. To begin with, there is no guarantee that legislative reasoning will

in fact proceed by abstraction, insofar as deliberation is free owing to the prohibition of imperative mandates. Deliberation may proceed by abstraction or, instead, rely on particularistic considerations. Moreover, even where abstract political reasoning indeed takes place, there is no necessity that its end product shall be general statutes. In fact, it could be the case that the common good abstractly defined could justify the adoption of norms making reference to particular individuals or particular occasions. Last, as Carré de Malberg took pains to emphasise, the requirement that laws be general was not judicially enforceable under the constitutional law of the Third Republic, nor has it been explicitly enshrined in French constitutional texts ever since (Carré de Malberg 1962). In fact, on the basis of his self-professed positivism, Carré de Malberg was a staunch critic of the idea that statutes should be general, which was generally accepted by most of his contemporary constitutional scholars: he thought that if such a requirement was not explicit, as indeed it wasn't, then it could not 'exist' in any legally relevant sense. Under these conditions, how should we interpret the robustness of the requirement of generality of laws in French constitutional practice, on which Zoller nevertheless insists?

There are many ways to approach this question, but in this article I want to tackle it by placing emphasis on the notion of grammar, that I borrow from the work of sociologist Cyril Lemieux, who systematises the approach first adopted by Luc Boltanski and Laurent Thévenot (Boltanski and Thévenot 2006; Lemieux 2009). According to Lemieux, a grammar is "a set of rules to follow in order to be recognised, in a community, as knowing how to act and judge correctly" (Lemieux 2009, 21). Crucial to grammars in Lemieux's sense are socially instituted norms guiding actions and judgments and at the same time enabling their assessment as correct or incorrect. Importantly, grammars are not necessarily explicit (Lemieux 2009, 37) and their existence depends on collective action: individuals alone cannot modify them (Lemieux 2009, 33), since grammars have to be in some sense widely shared in order to exist. By way of discussing grammars, Lemieux introduces the crucial notion of "grammatical error": this is an individual action that cannot receive a "positive description" under some accepted grammar (Lemieux 2009, 27) and is criticised by other actors as a mistake calling for correction, at least when it is not explicitly presented by the individual engaging in the criticised behaviour as a proposal for reform of existing grammars.

Grammars, then, allow making sense of individual performances on the basis of collectively accepted social norms. These norms become the object of explicit formulation, negotiation and reform under conditions of open justification and criticism in the midst of disputes about what to do. Moreover, they are typically used by actors in a flexible way: not all grammatical errors are continuously flagged up, but only accumulations of such errors that reach tipping points and are no longer tolerated by other actors in specific circumstances (Lemieux 2007, 34-36). Last, grammars are not abstract structures that causally predetermine action, but, rather, they are themselves the result of practical engagements of actors in specific contexts and institutional sites. It is thus important to recognize that actors are typically equipped with the requisite capacities to follow grammatical rules, use them in argument or criticize them in both non-reflexive and reflexive ways (Lemieux 2007, 36-38). Grammars are thus the expression of a flexible, open-ended and socially instituted normativity whose specific parameters can be unearthed by means of empirical examination and interpretation of the actions of relevant actors. In this regard, the systematic sociological study of disputes and controversies between actors, specifically public ones, can be particularly useful, since public disputes in historically specific institutional contexts are paradigmatic situations in which actors mobilize justificatory arguments in order to rally others to their cause without open recourse to violence, producing discourses and using organisational and material means to secure some form of social coordination (Boltanski and Thévenot 2006, 215-273). Thus, the analysis of non-violent public disputes allows tracing out general argumentative forms that are used to identify successful performances and distinguish them from grammatical errors (for examples see Lemieux 2007, 117-121).

The notion of grammar allows us to formulate the following hypothesis about the relative robustness of the requirement of generality of laws in the French constitutional tradition, on which Zoller insists. The hypothesis is that, due to a set of socially instituted, flexible and tacit normative considerations akin to a particular grammar of political representation, that we might call ‘Sieyèsian’, relevant actors share and maintain through their interactions a set of presumptions and expectations to the effect that legislatures should primarily create norms that are general in character. Whilst closer attention to the empirically and historically specific ways in which the Sieyèsian grammar is used and

reproduced across time is needed to arrive at definite conclusions, we might still relatively safely assert, along with Zoller (Zoller 2008, 225), that it at least relegates certain kinds of performances, such as the practice of adoption of 'private bills', common in a number of common law systems including the United Kingdom and the United States, to the status of clear grammatical errors. More generally, the category of grammatical error applies to all those legislative performances that cannot be positively interpreted as "expressions of the general will".

We have already identified some of the building blocks of the Sieyèsian grammar of political representation. Thus, deputies performing the task of willing for the people/nation ought to be perceived as abstracting in their deliberation from particular interests and points of view to identify the common interest of the nation as a whole. Moreover, insofar as the deputies' goal is to identify the common good through some form of discussion and to persuade others through the construction of legislative majorities (Manin 1997, 183-192), their activity is aimed at transforming particular interests and perspectives into abstractly identified conceptions of the common good. In particular, and with regard to the dialectic between justification and critique in the context of public controversies, representatives have an interest in showing that they are not trying to promote 'factional interests' and agendas. In order to avoid such a criticism, they typically argue with one another by relying on general considerations. Insofar as the argumentative constraints sustained by the Sieyèsian grammar indeed hold (Heurtin 1999), statutes containing norm-formulations that connect generic acts or states of affairs as normative antecedents with generic normative conclusions, i.e. general rules, are understood as the default outcome of legislative deliberation. This, however, does not entail that they shall always be the only outcome. As we have already observed, grammars are flexible in that they typically allow for a certain degree of tolerance of errors. They are also dynamic in that they change across time: thus, certain initially erroneous performances may acquire the status of the 'new normal' if they are accepted by a sufficient number of other actors. Thus, in order to properly evaluate the hypothetical claim made here about the functions of the Sieyèsian grammar, it would be necessary to analyse particular instances of the argumentative dynamic of justification and critique whenever attempts are made to pass legislation identifying particular

individuals or objects. Given constraints of space, this important task will have to await for another occasion.

Nevertheless, even this brief discussion allows us to grasp why there is a vast consensus among constitutional scholars, expressed in Zoller's book (Zoller 2008, 224-231), to the effect that the normal or default outcome of legislative deliberation is a general statute, and this despite the fact that generality is neither a judicially enforceable duty nor a conceptual or normative necessity. While the Sieyèsian grammar of political representation is historically constructed and constantly acted upon by those relying on it in action and in judgment, and thus in a permanent state of evolution, it continues to constitute a normative background widely, even if often tacitly, shared by relevant actors. In this respect, a particularly useful parallel could perhaps be drawn with traditional conventional rules under the British constitution, which are deemed by relevant actors to be normative, even though they are not, strictly speaking, judicially enforceable or explicitly formulated in statutes (Marshall, 1984).

Now, supposing that, as Zoller appears to think, such a thing as the Sieyèsian grammar of political representation still exists in contemporary France, how might we characterise its relation to the abstract and relatively underdetermined rousseauian ideal of the common good that we introduced in the previous section? There are a number of possible, and not necessarily mutually exclusive, answers to this question. One tack would be to interpret the local practices subsumed under the notion of the Sieyèsian grammar as a rough historical concretisation of the rousseauian ideal. The direction of causality would be from the ideal to the practices. The paradigmatic case is that of 'founding fathers' setting up a basic institutional framework in an attempt to 'implement' the ideal. The underdetermined and abstract rousseauian ideal would thus become more historically specific through the mediation of these practices. A different tack would be to construe the direction of causality in a reverse way: the rousseauian ideal would be the abstract value that actors typically rely upon in their public practices of justification and critique because, in contexts marked by the presence of specific sets of argumentative constraints, this is a successful way of trying to justify to others already existing (and desirable to the actors formulating the justifications) political practices. Which of these two possibilities is at play depends on the empirical specifics and perhaps both are true

descriptions of actions in certain contexts. In any event, though, for the purposes of this article it is not necessary to decide between them. In both cases, a normative link, albeit contingent and relatively open-ended, will have been established between representative lawmaking and generality of statutes. In particular, it will be possible to assert that the Sieyèsian grammar of political representation, which requires that statutes be in principle general in order not to be open to criticism, can be justified by reference to the more abstract rousseauian ideal of the common good as transcending particularistic interests, possibly as a reasonable and workable historical concretization of that ideal in real-world political and historical conditions.

4. Comparing Different Grammars of Political Representation

Thus far, it has been suggested that the Sieyèsian grammar of political representation, akin to French public law, concretizes an abstract rousseauian ideal to concretely connect lawmaking with a rebuttable but relatively robust presumption that statutes be general. The recourse to the notion of grammar has a number of implications. First, insofar as grammars of representation are social norms enmeshed with institutional forms and practices, it is perfectly possible, and indeed probable, that different constitutional cultures may rely on different such grammars. Second, the French insistence on the generality of laws resulting from the Sieyèsian grammar of political representation should be understood as doubly contingent. On the one hand, it results from a complex web of practices of justification and criticism and is not a judicially enforceable requirement. On the other hand, it is at work in a specific constitutional tradition, which is geographically, historically and culturally confined. Third, as we have seen, grammars of representation are social norms that can themselves be justified, if challenged, by recourse to political values further upstream, such as the value of representative democracy within a wider scheme of separation of powers, to which Waldron refers (Waldron 2016), or to the principle of equal concern and respect that the polity must display to all of its citizens. Such normative challenges were indeed articulated in France post-1789 by a variety of social actors. Insofar as they succeeded in whole or in part, they spawned a number of modifications to the Sieyèsian grammar. Nonetheless, as we have seen, these modifications did not lead to a wholesale rejection of the founding institutional

arrangements and argumentative constraints (Rosanvallon 2000). This is an important point, since it shows in concrete ways how grammars are dynamic. Their evolution depends, among other things, on an on-going dialectic of criticisms and responses to those criticisms on the basis of different interpretations of constitutive political values.

One important way of further probing the links, if any, between representative lawmaking and generality of statutes would be by comparing different grammars of political representation and evaluating them with regard to their performance. We have already seen that many common law systems accept the practice of private bills, which would seem to flout strict rousseauian generality and would definitely be regarded as an obvious grammatical error in the French context (Zoller 2008, 225). In this vein, Zoller explicitly distinguishes the French republican model, that we have dubbed Sieyèsian, from the American one to claim that (Zoller 2008, 199):

> [T]he government is not, as in the United States, a mirror for the interests of the society […] In French law, it would be inconceivable that a private interest could hold the State in check, still more that it could capture it.

Thus, according to Zoller, and in contrast to the French model, what we could call the "Madisonian" grammar of political representation akin to the US would appear to celebrate appeals to private interests and to rest on extensive interest-group bargaining (Zoller 2008, 141-166). Very roughly, the Madisonian grammar of political representation would seem to be a historical and institutional instantiation of a non-rousseauian abstract ideal of the common good: to wit, the view that the common good results from the free interplay of particularistic interests (ibid.). Since, on this view, factions cannot be avoided, the objective is to represent them in a way that curtails their ability to become tyrannical majorities. Thus, by contrast to the Sieyèsian grammar of political representation, which, as we have seen, places significant normative constraints on the considerations appropriately taken into account by representatives in deliberation, excluding appeals to flagrantly private or factional interests, the Madisonian one would seem to celebrate such appeals. To put it in Jon Elster's terms, the Madisonian grammar would, roughly, remain closer to the 'market view' of politics, whereby private interests

are transformed into the common good through some kind of 'invisible hand' mechanism, whereas the Sieyèsian grammar would remain closer to the 'forum view' (Elster 1986). This schematic diagnosis, of course, nowhere denies that both grammars may also combine elements of both the 'market' and the 'forum'.

Predictably, the Madisonian grammar of political representation appears to be more relaxed than the Sieyèsian one with respect to the issue of the generality of statutes. We have already alluded to the fact that private bills are formally allowed, as are modes of political argument that more openly avow their relation to particular interests. This, however, does not imply the complete absence of various points of convergence. For example, the main institutional mechanisms of representation of citizens through legislatures, such as election, constitution of a uniform deliberative body and exclusion of imperative mandates, are almost identical across France and the US and, in their main lines, have remained stable across time since their inception in the 18th century (Manin 1997). Moreover, it bears noting that bills targeting particular individuals or situations remain a rarity, even when they are not considered, strictly speaking, as flagrant grammatical errors.

Such a connection to some version, albeit softer, of the requirement of generality of statutes could also be due to other features of the Madisonian grammar, which invite a deeper examination of the structure of political bargaining and argument under conditions of more open avowal of the influence of private interests. Thus, it could be that, given a certain institutional structure of legislatures, the public's expectations, a set of reasonable assumptions about the diversity of perspectives and interests in pluralistic societies, the structure of political parties and the incentives provided to rational representatives, strategic interaction between representatives with a view to forming majorities renders certain justificatory moves mandatory in the instrumental sense, barring recourse to arguments putting forward raw private/factional interests. Under these assumptions about the argumentative constraints at play, representatives wishing to promote their agendas would have to do more than just voice the interests of their constituents: they would also have to be part of a majority and, in order to achieve this goal, they would need, at the very least, to obtain their peers' consent. This would imply that, at least in certain circumstances, they would find themselves under the need to justify their choices against

challenges by backing these up with more principled arguments. And whilst this schematic sketch is hardly rigorous or reflective of the real complexity of the Madisonian grammar, it might still serve as a useful illustration of the need for a deeper normative and empirical investigation into different grammars of political representation.

5. Conclusion

In this article I provided a conceptual framework for developing Waldron's claim that separation of powers considerations to do with the distinctive contribution of representative legislatures to the overall project of governing suggest a link between lawmaking and generality of statutes. To this end, and using the French constitutional tradition as my main example, I argued that generality could be fruitfully investigated by recourse to the idea of a grammar of political representation as a blend of concrete practices and political values typically used to assess legislative performances. If my claim has some plausibility, I submit that much more empirical and normative research is needed on such grammars and on the specific ways in which they function in different constitutional traditions.

University of Sheffield, School of Law
Bartolomé House Winter Street
S3 7ND Sheffield UK
Email: d.tsarapatsanis@sheffield.ac.uk

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