Chapter 3
Three Grounds for Tests of the Justifiability of Legislative Action: Freedom, Representative Democracy, and Rule of Law

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Luc J. Wintgens has construed a trade-off model of the social contract on the basis of which every single legal rule calls for its ongoing justification. According to his account,[1] the justifiability of a legislative action, or an omission to reform existing rules (or, in certain cases, also an omission to regulate a specific domain at all), depends on how the legislative choice in question momentarily satisfies four principles of legisprudence. These principles find their normative basis in individual freedom and are termed the principle of alternativity, the principle of temporality, the principle of necessity of normative density, and the principle of coherence. This trade-off reinterpretation of the social contract thus provides one with the basis for a rational legitimation of the laws.

In what follows, I first (Sect. 3.1) give a reconstructive account of the set of conditions of the justifiability of legislative action that one finds in Wintgens' project. Along the way, I will develop his proposal slightly further.

Subsequently, I will bring to the reader's attention two other regulative ideas that may serve—alternatively or in combination with the trade-off model of the social contract—as grounds for tests of the justifiability of legislative choices.

In Sect. 3.2, we will see that even on the basis of the alternative model of the social contract which is criticised by Wintgens (that is, on its proxy

[1] The most developed are the arguments in Wintgens (2012); but see already Wintgens (2005, 2006).

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model), legislators nowadays ought to motivate their choices. In Sect. 3.3, I will develop Otto Pfersmann's reconstruction of the Rule of Law with the claim that the legislator's duty to motivate its choices is also inherent within this very requirement of a contemporary constitutional state.

In this manner we will obtain three different grounds, or points of reference, for developing a test (or various tests) of the justifiability of legislative choices in the world of global rule of law and constitutional democracy. Of course, this is only a preliminary step in search of more rigorous evaluative standards for instances of legislative action with various degrees of actionhood. But, first things first, let us turn to the Enlightenment ideas of the social contract and their twenty-first century reimagining.

3.1 The Trade-Off Model of the Social Contract

The "original position" in the thought of the figures of the Enlightenment was given to our freedom. Wintgens brashly tries to claim, however, that this freedom disappears in the classic social-contract theories as soon as it (logically) provides the basis for the social construction of the Sovereign or the State. Indeed, while freedom is their starting point, it is not their drive, or *Leitmotiv* as he himself puts it (Wintgens 2012: 138, 202 *et passim*). By entering into the contract under the command of reason, a proxy is given to the Sovereign and, on this basis, every limitation of freedom that the Sovereign imposes in the form of rules is taken to be willed or at least agreed upon (although a priori) by parties to the contract, that is, subjects. But this construction is so obviously far from reality that one might read between the lines: Freedom is a joke! The social contract theorists did not take it seriously in whatever sense it has or had. Wintgens, on the other hand, takes a different stance.[2]

I will provide no detailed presentation of his argument on this occasion. Instead, I shall direct the reader to his highly thought-provoking book (the work is well worth the time, despite the fact that, for my taste, its first part, whilst full of erudition, lacks the arts of *dispositio et eloquentia* which the author uses in the last few chapters). In this section, we will only focus on the normative output of his argument.

Although in no place presented in the following rule-centred fashion, here is an incomplete, but for my purposes sufficient, summary of what

[2] See in particular Wintgens (2012, chap. 4: Freedom in Context).

Wintgens (2012: chap. 8) coins "legisprudential validity". This corresponds to "justifiability" (a hypernym I use in this paper to broaden our perspective regarding the grounds for assessing legislative action).

For a rule to enjoy legisprudential validity—formal validity is, of course, its necessary, but insufficient condition (Wintgens 2012: 305)—a justificatory note of the reasons for it has to meet the following conditions:

(a) state the value, goal or end the (single) rule at hand is connected to;
(b) claim that social interaction, which is in the domain of the rule to be justified, is failing in view of that value, goal or end;
(c) point to what exactly makes social interaction fail;
(d) explain why, in that particular domain, limitation of freedom by means of legislative intervention in the form of a sovereignly imposed legal rule is preferable to (or less harming than) failing social interaction;
(e) show that the chosen content for the rule is necessary to protect the value, achieve the goal, or meet the end of the legislative intervention in question (whereas the alternatives that were less restrictive of individual freedom would be insufficient);
(f) eventually—if the rule is associated with a sanction—show that the chosen sanction is necessary to realise the value, goal, or end of that legislative intervention (whereas the alternatives involving no sanction or a less serious sanction would be insufficient).

An intermediate supplement is in place at this point. As you can read from condition (f), legisprudential validity requires an additional justification for rules that are associated with a sanction.

According to Wintgens (2012: 273), the "rule plus sanction" form of regulation presents a double external limitation of freedom. First, because a determination of freedom in a legal rule excludes action on individual conceptions of freedom (these being, in his terminology, one's internal limitations of freedom). But then—"if the required action is not performed freely"—a second reduction of freedom consists in the fact that a pecuniary sanction or a deprivation of liberty reduces one's means to act on conceptions of freedom in some other domains as well. Here, the author is obviously focusing on rules that impose obligations of conduct (see the above quoted fragment, which is referring to the required *action*); he does not seem to have in mind obligations of result. Comparing the two types of obligations (and of prohibitions, I should add) one will note, however, that the latter are less restricting with regards individual freedom than the former.

Under the assumption that a result may be achieved, in general, through a variety of actions (conducts), it is clear that determining a result, the

achievement of which is either obligatory or prohibited, leaves more choice to individuals than determining in that way a certain conduct. —Doesn't it?— Hence, we shall conclude that the trade-off model requires one justification for rules prescribing results or goals to achieve (condition *d* covers this requirement) and a double justification for rules prescribing determinate actions (in this case, condition *d*, which is noticed by Wintgens, is not the only one that applies; condition *e* applies as well). In any case, as he points out, an additional justification *f* is needed, if the rule is associated with a sanction.

Once these conditions have been satisfied, the legisprudential validity of a rule in question is not, however, "peremptorily" acquired (Wintgens 2012: 303). This means that it is not acquired forever. Legal rules may well lose their legisprudential validity with changing factual circumstances (Wintgens 2012: 301). These circumstances may change either independently of any legal rule, or as a result of the very rule under scrutiny. In the first hypothesis, the legislator ought to rehearse the trajectory of justification from points *a* to *f* as listed above; if not, a constitutional court adopting the legisprudential conception of legal validity might strike down the rule, that is, not as a violation of the constitution, but as a "shortcoming" (Wintgens 2012: 306).

In the second hypothesis, things are more complex. On the one hand, the change of circumstances can be the intended result of a rule under assessment. In other words: the change of circumstances can realise the purpose (value, goal, or end) of that rule. Wintgens (2012: 301) identifies this case, but makes no additional comment to it. This does not mean, however, that the legisprudential validity of the rule is preserved here. Sticking to the trade-off re-interpretation of the social contract, he too will agree (or so I would wager) that it all depends again on how the purpose of the rule was defined. Take this as example: if the goal of an ad hoc tax regulation in a time of crisis is to balance the budget of the state, its realisation makes—on the trade-off understanding—the legisprudential validity of the rule expire. The same consequence may also follow when the change of circumstances is an unintended result of legislative intervention. (I say *may*, for it follows if the change is a sufficiently negative effect of the rule under assessment to counterbalance its positive effects.)

As one can see, from the trade-off re-interpretation of the social contract there stems a duty to revise the justificatory notes of the reasons accompanying legal rules. And there is a further duty to withdraw the rules, or to change them, if accommodating notes of the reasons proves to be unsatisfactory (Wintgens 2012: 303). These duties, however, do not amount to an undesirable principle of change (this would go against stability, against legal

certainty), for there is yet another—a "duty of prospection" or prognosis (Wintgens 2012: 301–302)—which requires that the Sovereign take into consideration the foreseeable future circumstances (including positive and negative effects the rule might produce) in order to be able to argue that the slightest change in circumstances will not have immediate repercussions on the rule to be issued.

All these duties[3]—as well as legisprudential validity, which I deem to become the central concept of Wintgens' project in the future—are concretisations of the four principles of legisprudence mentioned in the introduction to this paper. In order to base these guiding principles of practical reason in legislation, Wintgens (2012) has proposed a fine (trade-off) reinterpretation of the social contract; an interpretation based on the contextualisations of freedom, rationality, and the individual.[4] I now intend to show, in the following two sections, that similar principles emerge as well from other (less novel) normative bases.

3.2 The Proxy Model in a Representative Democracy

Unlike in the trade-off model of the social contract, in the proxy model—which is its older conception—the limitations put on freedom by the Sovereign have absolute priority over one's own, that is, internal limitations of freedom (Wintgens 2012: 254).

This absolute priority of the external limitations of freedom over internal ones is a consequence of the Enlightenment idea of the social contract. With the idea of the social contract, a rational political society replaces the natural political society of larger inequalities and the unpredictable use of violence. Consent to the contract includes—according to the mentioned views—a proxy to the Sovereign, by means of which subjects "consent to abide by any of the sovereign's external limitations of freedom whatever their content may be" (Wintgens 2012: 281). This proxy to the Sovereign is, according to Enlightenment views, a general one. It therefore holds as long as the general purpose for it is assured (Wintgens 2012: 219–229 et passim). This purpose may be personal safety, in the case of Hobbes, or equality, as for Rousseau.

[3]For the exact articulation and terminology of the six duties of the legislator, see Wintgens (2012: 294–304).

[4]See Wintgens (2012, chap. 2: The Individual in Context; chap. 3: Rationality in Context; and chap. 4: Freedom in Context).

The reader will remember that Rousseau called the social contract those "true principles of public law",[5] which concern the establishment of institutions (not the content of the decisions arising from them). This is what we today call "the constitution". Now, it is an empirical question, but one may check and see for oneself that a significant number of constitutions in the world provide for what we know as "representative democracies". This is where I would like to make my first point.

In contrast with the trade-off model, the proxy model *an sich* requires no justification of individual rules (Wintgens 2012: 295); for these are justified by general proxy, as we have said. But when the proxy model of the social contract takes the form of a representative democracy, legislators ought to motivate their choices and they ought to do it in a certain way. How is this the case?

The reason for my claim is simple: In a representative democracy, the people exercise their power through representatives. These are normally elected every 4, 5, or 7 years (depending on the system). In the meantime, they are bound to take concrete, and sometimes highly technical, decisions on what is regulated and precisely how is it regulated. Consider legislation concerning GMOs, for example. In the motivating addenda to our laws, these legislative decisions ought to be connected explicitly, and as comprehensively as possible, to specific, albeit abstract values or interests. Otherwise, the legislative action cannot be reviewed by an electorate that does not have the specific knowledge for which representatives and their assistants are being paid.

Here, I would have to devote more time to show why it is precisely values and interests that the legislator needs to express but I believe that one can grasp the general idea. The background thought behind my rationale is that people, when they go to vote, need to be able to judge for themselves whether legislative choices are reflective or not of their own views, beliefs, opinions that have a highly more general and abstract character than the legislators choice in question. This is why the motivating addenda to our own laws ought to include a values-and-interests-based determination of not only the positive but also the negative effects of the choices that are being made. (Note one somewhat surprising point: this standard is higher than the one usually imposed on judicial motivations.[6])

[5] See the very last page of Jean Jacques Rousseau, *Du Contrat Social* (1762). See also Wintgens (2006: 5).

[6] Compare with Wintgens (2012: 302). See also Wintgens (2006: 18) and Wintgens (2005: 109).

As one may see, even in the proxy model of the social contract, legislators in representative democracies ought to motivate their actions. Whether what they do is justified or not is determined when people go to the election booths. Yet if legislative actions are not motivated in the way presented above, they are—on these grounds—not even justifiable, since people can't review them on the basis of specific values and interests which led them to vote for one candidate rather than for his political rival.

This having been said, we can now move to a second point I would like to make, that is, showing in what way the duty to motivate is inherent to the regulative idea of the Rule of Law.

3.3 The Rule of Law Requirements

If the argument above was simple, this one is a little more complex. I do not want to enter into the problem of "essentially contested concepts", here. Let me only stress that—as far as the concept of Rule of Law is concerned—one of the two ways to minimise or eliminate this problem can be found, in my view, in Otto Pfersmann's (2001) *Prolegomena to a Normativist Theory of the Rule of Law*.[7] Now, Pfersmann does not mention the problem of essentially contested concepts and he does not mention any "principles of legisprudence". So, what I am going to do is the following: I am going to develop what he says about the Rule of Law and I am going to give a slightly different articulation of his content.

This is how it goes.[8] We shall first distinguish the nuclear concept of the Rule of Law. (Pfersmann talks about its formal concept.) Then we shall talk about different dimensions or extensions of this nucleus. (Pfersmann himself talks about various material concepts.) The legislator's obligation to motivate his choices stems from what I call the second extension of the Rule of Law. But there are a few other principles of legisprudence that one can articulate on the basis of this model, so I will start by summarising the whole idea.

The nuclear (or the formal) concept of the Rule of Law demands the establishment of a power-conferring norm by means of which we monopolise the use of violence and translate it into the legally authorised use of force by the sovereign. Without this power-conferring norm, one cannot speak of a legal system or a state.

[7] Another way to minimize the problem is used in Laporta (2007).

[8] See already Kristan (2009).

Now, the second demand of this nuclear concept of the Rule of Law consists in the prospectivity and publicity of the norms emanating from the sovereign. If they are not prospective and public, they cannot guide our behaviour effectively. In other words, they are not law.

The first extension of the Rule of Law serves then to minimize the use of force in the immediate execution of sovereign powers. In order to delay the use of physical force as much as possible, its demand is twofold: (i) it establishes a prohibition of immediate use of force and (ii) it accompanies it with an obligation to bring any conflict before a third party.

This minimizes the execution of force. However, it still leaves the legislative and judicial authorities to decide in an arbitrary fashion.

In order to prevent arbitrariness, every exercise of power is to be substantially conditioned. This is the step we may call the second extension of the Rule of Law. It minimizes the arbitrariness and the margins of appreciation. However, at its extreme, it would eliminate the freedom of not only the authoritative powers, but of individuals as well, for these too are usually authorised to choose from among various possible actions. A liberal interpretation of the Rule of Law evades this problem by distinguishing between the private and the public sphere. We thus get two groups of addressees of legal norms: the individuals and the officials.

As far as individuals are concerned, their possibility of choice should not be limited according to this liberal interpretation—on the contrary, it is to be extended. The officials, on the other hand, should have a minimum possibility of choice.

Such a system would, first, strengthen predictability and legal certainty (which require moreover that the laws should rarely be subject to change). Second, the list of possible choices should be—under this extension of the Rule of Law—as determined as possible.

Since the legislator is empowered to make certain choices on the basis of the constitution, every particular decision of his is to be accompanied with a "notice of reason". Furthermore, because every choice made by authoritative powers is questionable (for arbitrariness), the reasons for one of the various possibilities ought to be published—so that they can actually be reviewed.

This being said, we have derived four different principles for practical reason in legislation from this articulation of the Rule of Law—that is, principles on the basis of which a legislative action is to be justified. These are the principles of prospectivity and publicity, the principle of determination of possible (valid) choices, and the comprehensive motivation requirement. Other principles follow from further "extensions" of the Rule of Law. Their examination in this place would go beyond the purpose of the article—which

is to demonstrate how the legislator's duty to motivate his choices can be derived from various normative bases: this reconstruction of the Rule of Law, the proxy model, and the trade-off model of the social contract are not the only ones.

3.4 Conclusion

The attentive reader will find that there might be some tension between principles from different "grounds". For reasons I will not insist upon here, this result is welcome. After all, we have now obtained three grounds, that is, three points of reference, which permit one to develop balanced test(s) of the justifiability of legislative actions. This is, however, only a preliminary step in a possible search for more rigorous evaluative standards for instances of legislative action with various degrees of actionhood.

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