A COMMENT ON "LEGISPRUDENCE"

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In his essay, *Legitimacy and Legitimation in the Legisprudential Perspective*, Luc Wintgens sets out what it takes to fulfill the promise of modernity.[1] According to Wintgens, essential parts of that promise are compromised when self-governing citizens cannot challenge the authority of laws having an "overwhelming impact" on their freedom; when the political system shackles the will of its subjects instead of providing them with the structure in which to flourish; and when political and social imagination have become atrophied due to a lack of choice among alternative ways to organize society. Wintgens answers this rather dismal predicament with a call to radicalize democracy and set the demos free. Rational legislation is central to his call and its foundations and principles form the object of legisprudence. This is an ambitious project. My aim here is to comment briefly on its assumptions and claims as I understand them.

The leitmotif of legisprudence is the reversal of the legitimation chain in modern democracies between citizens and legislators. In Wintgens's view, self-government requires a restatement of the legislative prerogative – a prerogative that has been described as the power "to create rules without the need for justifying them."[2] Like Habermas, who argues that the only legitimate laws are those whose addressees can see themselves as the laws' rational authors,[3] Wintgens makes justification a condition of legitimacy. Citizens are owed reasons for the laws they must obey. In modern democracies, legal rules that limit the freedom of individuals should be the object of actual – not hypothetical – processes of active legitimation qua justification. These processes of justification are comprehensive since, for Wintgens, it appears that all legal rules limit freedom: "Freedom as a starting point – that is, freedom unlimited – logically includes the absence of any

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[1] Luc Wintgens, *Legitimacy and Legitimation from the Legisprudential Perspective*, *in* LEGISLATION IN CONTEXT: ESSAYS IN LEGISPRUDENCE 3, 4 (Luc J. Wintgens & Philippe Thion eds., 2007).

[2] Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 29 (1969).

[3] *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 454 (William Rehg trans., 1998) ("The addressees of law would not be able to understand themselves as its authors if the legislator were to discover human rights as pregiven moral facts that merely need to be enacted as positive law.").

limitation."[4] This claim is insufficiently supported in his essay. If one believes that political concepts do not have normative DNA, as Ronald Dworkin put it[5] and as Wintgens seems to agree,[6] then it is necessary to identify and defend a standpoint (in history, language, political discourse, etc.) that supports an understanding of freedom as the absence of any limitation.[7] While Wintgens gestures towards such a standpoint at various points in his essay, more needs to be said to allay misgivings that the project of legisprudence rests on "conceptions about freedom" that masquerade as "conceptions of freedom."[8]

This line of criticism mirrors the charge that Wintgens himself levels against his main interlocutors, Hobbes and Rousseau. Wintgens argues that these social contract theorists fail the promise of modernity by reviving pre-modern attempts to portray law as a representation of the natural order, rather than as an artifact of human will.[9] In Wintgens's view, one effect of this social contract theory is to reinforce the "thereness" of a legal system which remains outside of the reach of self-governing citizens whose freedom it constrains.[10] Another effect of this theory is a blurring of the distinction between construction and representation – a distinction which Wintgens sees as central to the project of modernity.[11] The implication for legal legitimacy is that procedural theories of legitimation remain procedural in name only. Once

[4] Wintgens, *supra* note 1, at 23. One implication is that the requirement of justification applies to each and every law, rather than a set of "constitutionals essentials." For the idea of "constitutional essentials," see JOHN RAWLS, POLITICAL LIBERALISM 227-30 (1996). For the argument that in liberal political morality the requirements of justification apply to the system as a whole, rather than to particular instances of lawmaking, see Frank Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM 64, 82-83 (Larry Alexander ed., 1998).

[5] RONALD DWORKIN, JUSTICE IN ROBES 153 (2006).

[6] Wintgens, *supra* note 1, at 10 ("Concepts are not natural; they are intellectual constructions.").

[7] For a discussion of what such an argument might look like, see *Discussion*, *in* THE LEGACY OF ISAIAH BERLIN 121-39 (Mark Lilla, Ronald Dworkin & Robert Silvers eds., 2001).

[8] Wintgens, *supra* note 1, at 3. Another relevant question is what happens with Wintgens's distinction between conceptions about freedom and conceptions of freedom in homogeneous cultural groups whose members share a conception of freedom. I do not explore this issue here, as the "fact of pluralism" can be assumed as a given in pluralist societies. *See* RAWLS, *supra* note 4, at xviii ("Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.").

[9] *See* Wintgens, *supra* note 1, at 10 ("The democratic organisation of political space in the Modern philosophical project purports to be more radical than its classical version. Democracy, that is, is not a natural fact nor does not follow from the nature of the polis.").

[10] *Id.* at 22.

[11] *Id.* at 29.

external normative presuppositions are built into the method of active legitimation, they make the standard of legitimacy relate to a "truth" that transcends that very process of legitimation. This unintended, yet unavoidable, consequence makes process-based theories of legitimation similar to substantive models which the procedural turn was supposed to replace. What are these "external" normative presuppositions? Wintgens sees them as anything other than pure will.[12] For Hobbes, they are the command of God, confirmed by human reason; for Rousseau, they are the "cognitive standards" which history brings to light.[13] Thus, in Wintgens's interpretation, the fact that truth corrupts pure will turns Hobbes's and Rousseau's conceptions of democracy into mere "proxies."[14]

While an exegesis of classical social contract theory goes beyond the aim of this Essay, Wintgens's broader claim about the possibility of rational legislation that operationalizes the political space in radical democracies raises a number of questions. His defense of procedural versus substantive theories of legitimation rests on assumptions about the centrality of pure will as the only principium of democracy. He writes that "a procedural model of legitimation cannot refer to anything but itself or some other procedural model. Self-reference is the type of reference we find in a democratically organized political space."[15] Part of the appeal of this procedural conception stems from its openness to constant revision, and the related promise of justifying coercion solely by reference to the citizens' own conceptions about freedom. Openness deflates strong legalism – which Wintgens labels as "nominalism in a realistic dress"[16] – and replaces the uni-directional legitimation chain with dialectical exchanges among citizens as sovereigns.

The choice of procedure over substance motivates the post-metaphysical turn in political philosophy,[17] and is one of the axes around which contemporary constitutional theory has revolved.[18] At issue is the desirability and the possibility of purely procedural theories of legitimacy. Apart from the inherent difficulty of distinguishing between will and reasoning about will, the utility of a conception of democracy that confines itself to theorizing about the

[12] *Id.* at 12.

[13] *Id.* at 10, 12.

[14] *Id.* at 12-13 ("What then both Hobbes and Rousseau are justifying, is not first of all a radical version of democracy, but a proxy version of it. . . . The very proxy character of their version of democracy stems from its foundation in truth.").

[15] *Id.* at 8.

[16] *Id.* at 7.

[17] *See* Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 118-20 (1995); *see also* RAWLS, *supra* note 4, at 372-434 (replying to Habermas's critique); Frank I. Michelman, *Family Quarrel*, 17 CARDOZO L. REV. 1163, 1163-64 (1996).

[18] For an early classic, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980).

first principles of freedom is questionable. Its central difficulty is how far reflection on pure will qua will can take us. Reliance on pure will may just be, as social theory has discovered since the nineteenth century, a form of surrender to the normatively blind social processes that shape that will.[19] In any event, the point of such a theory, even accepting arguendo Wintgens's premise, is to inform us as to how freedom can operationalize the political sphere. Within that sphere, "structured freedom" is different from "freedom" *tout court*, and Wintgens himself argues that political freedom can – indeed, must – be limited.[20] Does this theory not require, however, the application of reason to will, a reason that co-opts will in its project? It is unclear why the presence of reason de-radicalizes the project of modernity (is modern natural law an oxymoron?) and should be removed from the foundations of the province of legisprudence.[21] In this context, it would have been interesting to read the terms of Wintgens's engagement with Rawls's hypothetical social contract, a constructivist enterprise that – at least at first blush – retains the reflective dimension characteristic of procedural theories of legitimation.[22]

Moving now to Wintgens's prescriptions, they seem surprisingly moderate given the dark tones in which he portrays the predicament of modern democracies. While reversals in the chain of legitimation undermine strong legalism, Wintgens does not make the case for a post-legalist paradigm. Rather, he defends a version of weak legalism.[23] He shares with Roberto Unger the vision of radicalizing democracy, but not Unger's unwavering interest in, and radical prescriptions for, the institutional structure of democracy.[24] Furthermore, and *pace* Jeremy Waldron,[25] Wintgens does not argue that judicial review undermines the dignity of rational legislation. To the

[19] *See generally* GEOFFREY HAWTHORN, ENLIGHTENMENT AND DESPAIR: A HISTORY OF SOCIAL THEORY (1987).

[20] Wintgens, *supra* note 1, at 9.

[21] *See id.* at 12.

[22] *See id.* at 8 ("Just as freedom only makes sense when exercised in freedom, a procedural model of legitimation cannot refer to anything but itself or some other procedural model. Self-reference is the type of reference we find in a democratically organized political space.").

[23] *See generally* LUC J. WINTGENS, DROIT, PRINCIPES ET THEORIES: POUR UN POSITIVISME CRITIQUE (2000) (arguing for weak legalism as part of a critical positivist approach to legal theory).

[24] *See, e.g.*, ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987).

[25] *See, e.g.*, Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 20 (1993) ("[O]ur respect for such democratic rights is called seriously into question when proposals are made to shift decisions about the conception and revision of basic rights from the legislature to the courtroom . . . ."); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) ("[J]udicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society.").

contrary, he lists judicial review, alongside referenda or elections, as a practice that reverses the legitimation chain in modern democracies.[26] With the partial exception of judicial review in the French, and French-influenced legal systems,[27] the list refers to features that are quite familiar to modern democracies. Has the shift from strong to weak legalism not already taken place?

To answer that question, one needs to look closer at how these mechanisms perform in practice before gauging if they can fulfill the promise of modernity. I focus here solely on judicial review, specifically on how courts apply the method of proportionality to demand reasons when reviewing the validity of legislation. Since proportionality is arguably one tool for forcing the legislature in the direction of greater rationality, the question is what, if anything, can legisprudence contribute to this endeavor?

Proportionality, which has been hailed as the "most successful legal transplant[] in the second half of the twentieth century,"[28] is a method that courts use in structuring the inquiry into the validity of legislation under that legal system's constitution.[29] The method has four steps. At step one, often described as the preliminary step, courts inquire into the purpose of the law under review.[30] Following this preliminary inquiry are the three steps of the traditional proportionality analysis. First, courts ask if the law is a suitable means for achieving the stated purpose. Second, they examine whether or not the law is necessary to achieve those purposes, specifically in terms of whether means are available which would be less intrusive upon constitutional rights. The last step is balancing, or proportionality *stricto sensu*. Here, courts specifically assess the proportionality of the measure by balancing the loss that

[26] Wintgens, *supra* note 1, at 38 (arguing that constitutional review can function as the "third mechanism of reversal of the legitimation chain," so long as constitutional judges are elected and their appointments are "confirmed by an act of parliament").

[27] The French exception must now be qualified in light of the latest developments in the French constitutional order. *See* EDOUARD BALLADUR ET AL., COMITÉ DE RÉFLEXION ET DE PROPOSITION SUR LA MODERNISATION ET LE RÉÉQUILIBRAGE DES INSTITUTIONS DE LA VÈME RÉPUBLIQUE (2007), *available at* http://www.comite-constitutionnel.fr/le_rapport/index.php (proposing reforms to the French Constitution).

[28] Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 595 (2004).

[29] Perhaps the most comprehensive limitations clause is section 36 of the 1996 South African Constitution:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose.

S. AFR. CONST. 1996 § 36.

[30] *See* Kumm, *supra* note 28, at 579.

results from the intrusion on a constitutional right with the gain that is achieved by the satisfaction of the goal pursued by the law under review. Legislation that fails any of these steps is invalidated.[31]

Not surprisingly, institutional considerations influence judicial assertiveness. While judges in different legal systems differ in how they apply the proportionality test, they tend to defer to the legislator in the preliminary inquiry regarding the purpose of the law, and in the first step involving the suitability of the legislation under review as the chosen means for accomplishing that purpose.[32] Judicial deference can be explained on structural grounds of separation of powers – the democratically elected branch has the right to set its policy agenda and to choose the means by which to pursue it.[33] This approach has been criticized as overly deferential to the legislature.[34] However, it is impossible to replace structural deference with substantive engagement without a theory that provides the terms of engagement between the courts and the legislature at the early steps of proportionality analysis. Legisprudence can be that theory. Its promise is to

[31] For an example of the application of the proportionality test, see *id.* at 579-81.

[32] *See, e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 388-89 (2007) (explaining that to satisfy step one of the proportionality test, "the German Constitutional Court requires a 'legitimate purpose.' By *legitimate* the Court understands a purpose not prohibited by the Constitution. . . . As a result, hardly any law fails at this preliminary step. . . . The vast majority of laws that failed to pass the proportionality test in Germany do so at the third step.").

[33] *Id.* at 388 (inferring that the German Constitutional Court defers to the legislature in the early steps of the proportionality test because "[w]hat is important enough to become an object of legislation is a political question and has to be determined *via* the democratic process"). While some courts have experimented with a more assertive approach along the lines of heightened scrutiny, these courts eventually returned to their normal standard of deference, thus pushing the focus of the proportionality analysis to the final steps. *See id.* at 388-95 (discussing the difference between the proportionality analysis of the German and Canadian supreme courts – particularly the heightened step one standard of the Canadian Court, which "requires an objective 'of sufficient importance to warrant overriding a constitutionally protected right of freedom,' or a 'pressing and substantial' concern" (quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352 (Can.))).

[34] Justice Barak, former President of the Israeli Supreme Court, has expressed doubts about the wisdom of deferring to the legislature:

> Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object [or *purpose*]. A similar approach exists in German constitutional law. . . . That is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not an expression of a lack of confidence in the legislature; rather, it is the expression of the status of human rights.

Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 371 (2008) (footnotes omitted).

help articulate principles of legislation that will recast how courts and legislators interact.

Alas, the task of formulating such terms of substantive engagement is a daunting one. This is particularly true given the already overcharged relationship between courts and legislators. In his earlier work, Wintgens articulates four principles of legislation: alternativity, normative density, temporality, and coherence.[35] I want to highlight some of the difficulties that await the legisprude at this stage by dwelling briefly on the principle of alternativity.

According to the principle of alternativity, "external limitation[s] of freedom [must] be justified as an alternative for failing social interaction."[36] This principle rests on assumptions about the self-regulation of social practices that are not particularly obvious. Wintgens's earlier claim that "an external limitation of the sovereign [must be justified as] preferable to the absence of an external limitation"[37] is in line with his more recent claim that "[t]he overwhelming volume of external limitations of freedom" are the work of an "overactive sovereign."[38] However, lest one should commit the "scholastic fallacy,"[39] there is a need to justify the conception of human freedom packed into these principles of legislation. This takes us full circle to my earlier point about further justification of the relation between freedom and rational legislation.

It is fitting to end with one last cautionary remark, this time about legal justification itself. Wintgens's case about the importance of legislative justification to self-governing citizens in modern democracies is convincing. Legal reasoning, however, is not danger-free. Specifically, the rhetoric of legal justification might push arguments in a necessitarian direction. In law, descriptive arguments about the current state of the social world carry greater legal weight than prescriptive arguments about what society should look like. When courts – interested in convincing their own audiences – claim to represent reality in their decisions, this more or less guarantees that legislative reason-giving for the purpose of judicial review will appear in a similar format. Having escaped the trap of representation-reproduction outside legal discourse, self-governing citizens might fall into a similar trap that awaits – and is equally well hidden – within legal discourse itself.

There is much more to say about Wintgens's essay and the larger intellectual project. In this brief Essay, I have raised a number of questions regarding his theory's assumptions about the nature of freedom, its reliance on

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[35] Luc J. Wintgens, *Legisprudence as a New Theory of Legislation*, 19 RATIO JURIS 1, 10-24 (2006).

[36] *Id.* at 10.

[37] *Id.* at 11.

[38] Wintgens, *supra* note 1, at 36.

[39] *Id.* at 14 ("The scholastic fallacy consists of leaving aside the presuppositions that are inherent to a theory.").

"pure will" to delineate strictly between procedural and substantive theories of legitimacy, and its role in a possible shift from structural deference to substantive engagement in the relation between the courts and legislators in the first steps of the proportionality analysis. Wintgens's inviting approach to judicial review opens interesting avenues for legisprudence. If jurisprudence traditionally showed little interest in legislation, it would be unfortunate for scholars to turn a blind eye on the work of courts now that legislation begins to receive the attention it deserves. As such, articulating principles of legislation for use within the proportionality framework is an area where legisprudence can make an important contribution.