Should We Value Legislative Integrity?

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'We have two principles of political integrity:' -- Dworkin suggests in *Law's Empire* -- 'a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, as far as possible.'[1] In this essay I will be concerned only with the first of these two principles. My arguments here aim to show that legislative integrity is not an ideal, certainly not an important one.

A. The Meaning of Legislative Integrity.

Before we can proceed to the main arguments, a few clarifications about the meaning of legislative integrity are necessary. Legal theorists have applied the idea of coherence to the law in at least two distinct ways: As part of an explanation of what the law is, and as a value of political morality that the law should strive to adhere to. Dworkin has employed the idea of coherence in both of these ways,[2] but this should not confuse us to think that they are the same thing. In the former sense, coherence performs an explanatory function in a theory about the nature of law. In this sense, coherence constitutes part of the conditions for the legal validity of norms: A norm is legally valid if it forms part of, or is entailed by, the most coherent account of other norms that we take to be part of the law.[3] Now, it is fairly clear that this is not what

[1] Dworkin (1986: 176)
[2] For a detailed account of Dworkin's use of coherence in legal theory, see Marmor (1992: chapter 4).
[3] For a possible distinction between an epistemic and a constitutive version of coherence theories of law, see Raz, (1994).

Dworkin has in mind when he discusses political integrity. The latter is not part of an explanation of what the law is, but a distinct value of political morality.

Coherence can be a value of political morality (either in the legislative or adjudicative contexts) even if coherence does not play a constitutive role in determining what the law is. In other words, you can reject a coherence theory of law (in its explanatory sense), but still maintain that coherence is a valuable objective that the law should strive to instantiate. But what about the other way around? If you do hold a coherence theory of law, does it not follow that political integrity is obviously a value? It is tempting to answer in the negative outright, just relying on the is/ought fallacy: even if coherence forms part of the conditions of legal validity, surely it does not follow that coherence is a good thing or that we should want more of it rather than less. But perhaps this rejoinder is too simple.

At least according to one conception of coherence, there is an intimate connection between coherence as a theoretical constraint and coherence as a value. Suppose we hold that coherence is an essential requirement of intelligibility. Suppose we think that unless an aspect of our world can be presented coherently, we wouldn't be able to understand it, or we wouldn't be able to appreciate it and see its point or value. If this is the kind of notion one has about coherence generally, then it would not be surprising if the conclusion is that law must be seen as coherent as possible, and for the very same reason, that it is a good thing too. There are two problems here, however. First, the 'good' in the conclusion of this argument is an epistemic one, which is not a moral political good. More importantly, this strong conception of coherence is misguided.[4] For one, it is easily refutable by counter-examples. Most

[4] Cf., Raz, (1994: 263-278).

theories we entertain about aspects of the world are not entirely coherent. [5] In fact, it is not even clear that a coherent theory is easier to grasp than an incoherent one. Often our belief in the specific components of a certain theory, even if not mutually coherent, are more intuitively compelling than any coherent alternative.

It may be objected that this just cannot be right, at least in the following sense: whatever coherence is, at the very least it involves the avoidance of contradictions. Not every consistent set of propositions is necessarily coherent, but every inconsistent set is necessarily incoherent. If this is correct, one might conclude that the lack of coherence entails a contradiction, and since it cannot be the case that contradictory propositions are both true, it follows that an incoherent theory must be false. But this is a *non sequitur*. The lack of coherence does not necessarily entail a contradiction, although the opposite is true: an inconsistent set of propositions is, *ipso facto*, incoherent. The reason for this is very simple: coherence must mean something more than just the lack of consistency. When we talk about coherence we have in mind a set of propositions which are somehow mutually supportive, they somehow fit together in the overall scheme of things. I'm not sure that I can explain what this means, precisely, but the point here does not require much more. It only requires the realization that a theory, or a set of propositions, can fail to be coherent even if it does not involve straightforward contradictions. Therefore, it does not follow that an incoherent set of propositions is necessarily false.[6]

Perhaps there are other reasons to believe that there is an intimate connection between a coherence theory of law and the value of coherence in the context of political morality. I am not aware of such an argument, and I do not think that

[5] To mention just one example: even within a single domain of science, such as physics, the most successful theories are not easily reconcilable with each other.

[6] I do not intend to imply that incoherence has no epistemic implications. Even a coherence theory of knowledge, however, is not committed to maintaining that any incoherent theory is, ipso facto, necessarily false.

Dworkin assumes that political integrity is entailed by his coherence theory of law. Thus, I will henceforth assume that we can discuss the value of integrity without taking a stance on the role coherence can play in a theory about the nature of law.

Another clarification is appropriate here. Suppose that we espouse the ideal of legislative integrity: How far can it be carried? Whose obligation would it be to implement it? Should individual legislators actually be guided by it? Would legislators have a reason to vote for a law because it would be required by the principle of legislative integrity? Should it also extend to voters when they consider who to vote for, or when they participate in law making through referenda and initiatives? I'm not sure how far Dworkin would take this principle, but it is quite clear that the main implication of legislative integrity Dworkin had in mind concerns the theory of adjudication. He has certainly maintained that judges should interpret statutory law following the principle of legislative integrity.[7] Judges should assume that laws are enacted with this ideal in mind, as it were, so that even if the legislature fails to achieve it, greater coherence can be imposed on legislation through judicial interpretation. Suffice it to say that none of these implications of the ideal of legislative integrity are logically entailed by it, though each one of them may be supported by other reasons. And vice versa; it should not be assumed that the rejection of legislative integrity as a distinct political ideal necessarily entails that judges need not be guided by a similar principle. The reasons for endorsing a coherence approach in adjudication might be different, independently justified on other grounds.

Still, a crucial question remains unanswered: is there anything more to political integrity than the requirement that laws be made coherent? If I understand

[7] Dworkin, (1986: chapter 7).

Dworkin correctly, then the answer actually is that there is less to political integrity than coherence, not more. Political integrity is the requirement to make the law in a way which is *morally* coherent. The law can probably fail to be coherent in other ways, which have nothing, or perhaps just very little, to do with morality. For instance, the law can be pragmatically incoherent, in that it actually creates incentives for behavior which are, from a certain pragmatic point of view (e.g. economic, environmental policy, etc.,) somehow incoherent. If this is a possibility, then it is possible for the law to be incoherent without violating the principle of political integrity. It may thus violate some other principle or ideal, but not necessarily the one of integrity.

Let us assume, then, that the law is morally incoherent if its various prescriptions and their underlying justifications cannot be subsumed under one coherent moral theory. Or, we could say that in such cases there isn't a conceivable single rational moral agent whose moral point of view could justify the entire set of prescriptions under consideration. I think that this is basically what Dworkin means by the value of integrity in law.

Unfortunately, however, Dworkin's famous example of what constitutes a violation of integrity in legislation, does not actually support the meaning of integrity as he defines it.[8] Dworkin asks us to envisage what he calls a 'checkerboard' type of legislation which would prescribe, for instance, that abortions are legally permitted for women who were born on even days of the month, and forbidden for women who were born on uneven days. The reason we would find such checkerboard laws unacceptable, Dworkin claims, is because they would violate the integrity of the law.[9] No single moral agent, Dworkin claims, could justify such a checkerboard solution as

[8] I have made this point in Marmor (2003: 29-30).
[9] Dworkin, (1986: 178-184).

a coherent compromise of conflicting considerations with respect to the permissibility of abortions. But this is a bad example. We do not need the requirement of integrity, or coherence, in order to explain what is wrong with such checkerboard laws. What is wrong with them is that they are not supported by a good reason. When the law makes a distinction, as it does here on the basis of women's birthdays, it must be a distinction which is somehow supported by reason. If there is no good reason for the different treatment, then the law is a bad one, simply because it is not supported by reason.[10]

One may wonder, however, how would we distinguish such checkerboard laws from many other cases in which the law makes distinctions which seem to be rather arbitrary, but nevertheless are understandable and justified. For instance, the law can stipulate that only people who were born after a certain date are allowed to vote in the forthcoming elections. Surely, the particular date chosen is not supported by any particular reasons, it is just an arbitrary cut-off point. But this is precisely the point: In numerous cases, such as in solving coordination problems and other similar situations, we do have a good reason to use arbitrary cut-off points. In such cases, the cut-off point itself is arbitrary, that is, not supported by any particular reason, but there are good reasons to have it as some sort of an arbitrarily chosen cut-off point.[11] The problem with the abortion example is precisely that it is the kind of situation where there is no good reason to have an arbitrarily chosen cut-off point.

None of this means, however, that legislative integrity is a vacuous concept. Far from it. There are countless ways in which the legislature can enact laws that are morally incoherent. My point simply was that "checkerboard legislation", as Dworkin describes it, is not one of them. Legislation which is not supported by a good reason is

[10] At some point (1986: 180) Dworkin admits that 'this is in the right neighborhood', but then fails to acknowledge that it undermines the force of his example.
[11] See, for example, Lewis (1968). On the definition of arbitrariness, see also Marmor (1996).

wrong just because it is not supported by a good reason. The law is morally incoherent, and thus violates the ideal of integrity, when the various norms or prescriptions it embodies are somehow morally contradictory. But here we have to be very cautious. Surely not every tension or potential conflict between moral principles amounts to an incoherence. Every comprehensive moral doctrine involves countless tensions and conflicts in the application of its principles and ideals. As we all know, the values of equality and freedom may often come into conflict. Liberalism endorses both ideals, but surely that does not render liberalism incoherent.

It may be tempting to think that a moral theory is incoherent only when its principles are contradictory. There is, after all, a pretty clear distinction between a conflict of principles and a contradiction.[12] In a world of limited resources, a stringent protection of the environment may come into conflict with creating new jobs for the poorer segment of society. But surely these two types of concerns are not contradictory. A rational moral person can easily aspire for both. On the other hand, maintaining that the state should guarantee equal rights to homosexuals and heterosexuals, but at the same time deny gays the right to get married, for instance, looks very much like a contradiction. So there is a sense in which moral contradiction is quite distinct from conflict or tension between morally sound principles. It is also quite clear that a contradiction of principles does violate the requirement of coherence. The question remains whether moral principles or ideals can be incoherent even if they do not quite amount to a contradiction. Presumably, the answer is yes. As we have noted earlier, coherence must mean something more than mere logical consistency. So it must be the case that there are moral conceptions or world views

[12] Dworkin makes this point drawing on the distinction between conflict and contradiction of principles in Dworkin (1986: 268-275).

that just cannot be subsumed under one coherent doctrine, even if it is the case that the overall set of propositions one believes in are not logically inconsistent.

Be this as it may, there are two types of moral incoherence that are relevant to the ideal of legislative integrity: One stems from the fragmentation of values within any given comprehensive moral doctrine and the other from the fact of reasonable pluralism (I use these Rawlsian terms advisedly). Let me call them *internal* and *external* incoherence, respectively. Internal incoherence stems from the complexity of the sources of moral thought. With the possible exception of a single minded, monistic utilitarianism,[13] every comprehensive moral doctrine is bound to be incoherent, to some extent. Our moral and ethical concerns do not form a response to a single question; they reflect a myriad of human concerns, some of them private and individual, others public and social. As many moral philosophers have noted, it seems extremely unlikely that we can ever construct a comprehensive moral and ethical world view which would subsume all these divergent concerns under a coherent set of principles.[14]

The idea of external incoherence stems from a different fact about the moral complexity of our world: the fact of reasonable pluralism.[15] In most contemporary societies there is a whole range of comprehensive moral doctrines which are, on the one hand, mutually inconsistent, but on the other hand, also within the bounds of reasonable disagreement. It is important to keep in mind that there is a difference between a plurality of moral doctrines and value pluralism. Not every plurality of

[13] Arguably, however, monistic utilitarianism can only maintain its moral coherence at the expense of a huge simplification of morality. This lack of subtlety is partly what makes a monistic utilitarianism so suspect.

[14] See, for example, Raz (1994), Nagel (1979), Williams (1981); It was probably Isaiah Berlin who most famously insisted on this fragmentation of values as being part of the foundation of liberalism. See his collected essays in Berlin (1978). I think it is fair to say that Rawls has also maintained such a position in *A Theory of Justice*.

[15] Reasonable pluralism is a moral fact, not merely a social one. Rawls (1993).

moral doctrines involves a deep form of conflict, even if the doctrines are mutually exclusive. There are many forms of life and moral world views which are mutually exclusive in the sense that a person cannot possibly entertain, or strive to instantiate, both. But this does not necessarily entail a deep conflict. It may simply reflect a choice between sets of incommensurable values or mixed goods.[16] On the other hand, when we talk about value pluralism, we refer to a deep moral or ethical conflict. There are many comprehensive moral doctrines or forms of life which are morally at odds with each other, in the simple sense that if the one is true, the other must be false, and vice versa.[17]

Pluralism, then, stems from the fact that comprehensive moral doctrines are potentially in deep conflict, entailing straightforward moral contradictions between different doctrines people adhere to and live by. Nevertheless, it has been the benchmark of liberalism for centuries that there is a sense in which value pluralism (and not just plurality) is reasonable. I cannot hope to explain the philosophical underpinning of the idea of reasonable pluralism here. But I will make two assumptions. First, that rational people can have reasonable disagreements about fundamental moral and ethical values.[18] Secondly, I will assume that the idea of reasonable pluralism does not necessarily derive from, nor does it necessarily entail, moral skepticism. I may disagree with your moral views and believe them to be wrong or mistaken, but still acknowledge your right to live by your mistakes. In other words, reasonable pluralism may be as much a view about politics as it is about meta-

[16] By pointing to the fact that in such cases the various options are incommensurable I only mean that no ranking between the options is morally determinable.

[17] Moral doctrines inevitably make certain claims to truth. Even a moral skeptic makes certain claims to truth, at the very least, to the truth of his meta-ethical stance and the practical implications following from it. Thus, it should not be surprising if many of these various claims to truth turn out to be mutually contradictory.

[18] This is certainly not tantamount to saying that *any* fundamental moral principle is subject to reasonable disagreement.

ethics. Even if you are profoundly wrong, the assumption we make here is that the State should not be in the business of correcting your mistakes (up to a point, of course.) So there are at least two possible grounds for acknowledging reasonable pluralism, and they are not mutually exclusive: it may reflect a view about the nature of morality and the limits of moral knowledge, and it may be a political view about the limits on the coercive authority of the state. Either way, the argument about legislative integrity that I will explore now assumes that pluralism of comprehensive moral doctrines is reasonable and, as such, ought to be respected by a liberal state.[19]

B. The Argument from Pluralism.

So now at long last we come to the main issue. There are two ways in which we can explore the value of legislative integrity. First, and this is probably the more important argument, I will try to show that the ideal of legislative integrity is directly at odds with the value of pluralism and the commitment of a liberal state to respect reasonable pluralism. Second, I will explore the main causes of the failure of legislative integrity in democratic legislatures, arguing that there is nothing regrettable about those causes and often there is something to commend them.

Let me admit from the outset, however, that none of these arguments can be conclusive. It is generally very difficult to prove that something is not a value. I can only hope to show that there are important reasons to forgo legislative integrity. I cannot prove that legislative integrity is not valuable when those reasons are not

[19] There is a very difficult question about the scope of this principle: does it apply to societies which are not, as a matter of fact, pluralistic? Is there anything inherently wrong in a political society which happens to be homogenous in terms of people's conception of the good, all, say, adhering to the same moral or religious comprehensive doctrine? At least in his later writings, Rawls certainly thought that the answer is yes; he called it the fact of oppression. See Rawls (1993: 36-37). I do not take a stance on this complex issue here.

present. I do hope to show, however, that we have no reason to maintain that *ideally*, the law should be morally coherent, or as coherent as possible.

The main argument against the ideal of legislative integrity relies on two points: A moral-political ideal, very much inspired by John Rawls, and an observation, which actually rejects part of Rawls' stance on the matter. The moral political ideal, which I can only assume here, is the requirement that in a well ordered society the state should try to refrain, as far as possible, from enacting into laws comprehensive moral doctrines that are potentially contentious and subject to reasonable disagreement between various segments of the population. Note that this is not the ideal of neutrality that Rawls himself advocated, but a much more modest principle. I do not believe that the state can, by and large, remain neutral between conceptions of the good or comprehensive moralities. Partly because this is just not possible, practically speaking, and partly because often it is inherently unclear what neutrality would require, or that there is, indeed, any neutral stance with respect to the relevant conflict. (It is not part of my argument here to deny the plausibility of Rawls' conception of neutrality. I'm just pointing out the fact that I do not intend to rely on it.[20]) Nevertheless, Rawls' insight that there is something very objectionable to an attempt by the state to impose any particular comprehensive morality on its subjects is, I believe, a powerful insight that liberal conceptions of the state have in one way or another always endorsed.[21]

Rawls believed that the stronger principle of neutrality is possible partly because he thought that it is possible to delineate a sphere of public debate and state action -- a sphere of *public reason*, as he called it -- that can remain above the fray.

[20] For a comprehensive and powerful criticism of neutrality, see Raz (1986: chapter 5). See also Marmor (2001: 147-152). For some of his replies, see Rawls (1993: 190-200).
[21] As Rawls himself suggests, and I think rightly so, this is a natural extension of the traditional principle of toleration. (1993: introduction)

As he put it, 'a liberal view removes from the political agenda the most divisive issues' (1993: 157). This means that 'in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrine'. (224) Shortly thereafter, Rawls clarifies what he means by 'constitutional essentials' and it becomes clear that he means quite a lot: 'constitutional essentials' include 'fundamental principles that specify the general structure of government and political process', as well as 'basic rights and liberties'. (1993: 228).[22] Of course a lot depends here on what we would regard as 'basic' and what as not so basic, but this is just one aspect of a deeper problem. Any attempt to draw a sharp line between constitutional essentials, which ought to be free from appeal to comprehensive doctrines, and other matters of law and legislation which need not be, is doomed to fail. Public reason is bound to encompass both, for two main reasons. First, it is often controversial just what is, and what is not, a matter of 'constitutional essentials' and, moreover, such controversies often lie at the core of the relevant public debate.[23] Second, the law, as such, recognizes no inherent limits on its reach. The law cannot recognize such limits mostly because its quintessential function is to regulate and resolve conflicts, and there is no limit on which conflicts actually arise and need a resolution.

A brief illustration of the first point should suffice here. Consider, for example, the current controversy in American politics and jurisprudence about gay marriages. Those who advocate the right of gays and lesbians to marry, do so on the grounds that this is an issue of basic constitutional rights, whereas those who oppose this social change may claim the exact opposite. Opponents may not see the issue as

[22] Another crucial sense in which it is notable that Rawls assumes quite a lot here concerns the fact that for him even Kantian morality or Utilitarianism are 'comprehensive moralities' and therefore should be excluded from the realm of public reason. See Larmore (2003).
[23] Cf., Larmore (2003: 384-390).

one of basic rights but as a matter of tradition that should be left out of the constitutional domain.[24] In other words, many of the legal/political controversies are partly, but crucially, about the very question of what is, and what is not, a matter of 'constitutional essentials'.

The second point is perhaps even clearer, and it is much more important: There is no practical way in which issues can be removed from the legal/political agenda just because they are divisive or deeply controversial. History teaches us that anything can become subject to legislation, and if the political will is there, even the most obscure and crazy ideas may become part of the law. This should not be surprising. The law is essentially comprehensive in its reach because it must claim the authority to regulate any type of behavior in every sphere of life. Since the law must resolve conflicts that actually arise, it cannot abstain from judgment. Even when the law decides not to intervene in a given conflict, it is a decision that reflects judgment, namely, a judgment to refrain from taking a certain legal action or granting a certain remedy. Once again, we must keep in mind that an essential function of the law is to resolve conflicts in society, and there is no inherent limit on the kinds of conflict that may arise and need some sort of legal regulation. I think that in this respect, Dworkin's vision of the law as an all encompassing 'empire' that potentially reaches into every aspect of our lives is much more realistic than Rawls' ideal of a secluded sphere of public reason. Even if we can theoretically delineate such a sphere of public

[24] I am not suggesting that these are the only two positions available. For example, many see the issue as one about state v. federal jurisdiction which is a different type of a constitutional debate.

reason (and I actually doubt that we can), there is just no hope of enclosing the law within that realm.[25]

But then, taken with the previous point about the need to respect reasonable pluralism, this is precisely the reason to refrain from espousing an ideal of legislative integrity. Any attempt to impose strict moral integrity on the law would undermine the essential and, we assumed, reasonable, moral fragmentation of a pluralist society. The more we wish to have moral integrity implemented by the law, the more we would have to expect it to implement a single comprehensive moral view. It is inconceivable that an entirely coherent legal regime could be endorsed by opposing (reasonable) comprehensive moralities. Therefore, integrity basically entails a 'winner takes all' strategy, which is directly at odds with respect for reasonable value pluralism. A certain moral fragmentation of values and incoherence is inescapable if we are to respect pluralism as such. The whole point of respect for value pluralism is that we do not want to have a legal-political system whereby the winner (be it the ruling majority or, for that matter, the view of the supreme court) imposes its comprehensive moral views on the rest of the population. Furthermore, as we have seen, even within a single comprehensive moral doctrine it is far from clear that coherence can be somehow imposed without a considerable loss to the subtlety and complexity of the relevant moral concerns. (But my point here can be made even if we ignore the problem of internal incoherence, so I will not strive to defend this stronger claim.)

[25] A possible interpretation of Rawls' stance on the idea of public reason might avoid this criticism: perhaps Rawls has meant to confine the idea of public reason to the constitutional domain. Perhaps he meant to suggest that only within the domain of constitutional law and constitutional debates, any appeal to comprehensive moralities would be wrong and should be excluded. But if this is the correct interpretation, then it has no bearing on our concerns. Furthermore, it leaves Rawls' stance begging the question about the permissibility of relying on controversial comprehensive moralities in ordinary legislation. Does it make sense to suggest that most of the ordinary business of legislation in Congress, for instance, is not within the realm of public reason?

One interesting way in which Rawls expressed a very similar worry is by emphasizing that a well ordered society governed by principles of justice, 'is neither a community nor… an association.' (1993: 40) A democratic society does not have final ends or aims in the way that communities or associations do. 'A well ordered democratic society is not an association, it is not a community either, if we mean by a community a society governed by shared comprehensive religious, philosophical, or moral doctrine.'(1993: 42) Now this is particularly interesting in light of Dworkin's argument in favor of political integrity which is premised on the duty of loyalty to one's community. Dworkin has argued that such a duty of loyalty entails an obligation to obey the law, and that the latter must be seen as the organized voice of the community, taken as a whole. From this Dworkin strove to derive the need to assume a personification of the law, as if it should be taken to speak with one voice, manifesting the community's collective decision. (1986: 195-214)

It is not my purpose here to offer a detailed critic of this complex argument. That has been done by others cogently enough.[26] My observation here is confined to one aspect of this argument, namely, its underlying assumption that a well ordered democratic society can, and should be, seen as a community, and its laws perceived as the community's collective decision. I think that Rawls was right to argue that such a view of a political society, that is, of a liberal state, is quite straightforwardly at odds with the need to respect reasonable pluralism. A political society cannot speak with one moral voice because its moral voice is essentially fragmented and taken as a whole, profoundly incoherent. An attempt to impose coherence on it can only mean that some comprehensive doctrines will win the day while others will be suppressed. This cannot be a liberal ideal.

[26] In particular, see Raz (1994: 291-298).

Let me summarize the argument. I began with the Rawlsian insight that a well ordered liberal society should respect value pluralism. One clear implication of this ideal is an aspiration to try to avoid, as far as possible, using the state and its legal coercive institutions to implement any particular comprehensive moral or religious doctrine. Contra Rawls, however, I do not think that such an ideal can (or should) be carried as far as to recommend a principle of neutrality. More importantly, I have argued that this principle can not be implemented by designating a sphere of public reason that would enclose legislation within strict neutral boundaries. The law is inevitably comprehensive, and there is no hope of actually preventing the law from regulating aspects of our lives which are clearly, but reasonably, controversial morally, ethically, and otherwise. Therefore, I concluded, it would be wrong to insist on the ideal of legislative integrity. The law should not be expected to speak with one voice because there is no single voice that could possibly encompass the range of reasonable comprehensive moral doctrines held by various segments of the society.

Even if legislative integrity is not a distinct political ideal, however, it may be thought that the actual mechanisms which tend to engender moral incoherence in legislation are morally troubling or regrettable. In the next section I will try to show that the opposite is true. The main circumstances that bring about a failure in legislative integrity actually manifest morally commendable aspects of democratic practices and institutions.

C. The Causes of Legislative Incoherence.

Since we want to focus on legislative, as opposed to judicial, integrity, let us stipulate a class of legal norms, call them *statutory law*, which would comprise all those legal norms that are enacted by legislative institutions, such as Congress, state

legislatures, administrative agencies, and such. Now, if nothing else, at least the sheer number of such legislative institutions and their political diversity make it very unlikely that the entire body of statutory law at any given time would be morally coherent. Legislative integrity takes considerable effort to achieve and, often enough, it clearly fails. One of the ways in which we can examine the value of legislative integrity is by looking at the causes of its failure and ask ourselves whether those causes involve morally disturbing or regrettable aspects of our political institutions. Or, if we prefer to put it in a slightly different way: If legislative integrity is an ideal, what would it take to achieve it?

There are, presumably, many causes for the failure of legislative integrity. For example, the legislature can simply make a mistake. Needless to say, mistakes are always regrettable. Mostly, however, legislative integrity fails for much better reasons. Let me consider, in what follows, three of the main causes for the failure of legislative integrity.

1. Division of legislative power.

First, as we have already mentioned, incoherence of statutory law often results from the great number of legislative institutions and the limited means by which their various legislative actions can be coordinated by a central authority. In fact, this results not just from the number of legislative agencies but also from their divergent social and political roles. For example, an administrative agency entrusted with the protection of the environment, like the EPA, is inherently biased in favor of certain social political goals it is there to advance, and those objectives might be at odds with the social and political goals of a different legislative agency. Similarly, a state legislature is naturally expected to promote the welfare of the state's residents and their local interests, and such aims may be at odds with those of the federal

government or some other state. So there is a division of legislative power here which is both numerical and substantive. A well functioning democracy purposefully creates a complex division of legislative power by entrusting legislation to different institutions, some of them with relatively special and limited authority. There are, of course, very good reasons for creating such divisions of legislative power. First, any of division of legal/political power is a safeguard against tyranny. Secondly, such division of power typically aims to achieve a deliberate diversity of legislative goals by establishing legislative institutions which would be inherently motivated to advance a certain type of political agenda. By the creation of relatively specialized legislative institutions, alongside general ones, we aim to promote a diversity of interests which we think as worthy of special care or concern.

There is no reason to assume that division of legislative power is purposefully designed to undermine the integrity of legislation. But it is certainly the case that the more legislative power is divided between different, and often competing, legislative institutions, the less likely it is that integrity will prevail. However, to the extent that division of legislative power tends to undermine the integrity of legislation, it is not necessarily for a bad reason. The failure of integrity here derives from aspects of our political institutions which are based on sound moral-political principles.

Needless to say, there is a certain level of legislative coordination and coherence which is essential for the efficient functioning of any legal system. Too much incoherence and confusion makes it very difficult for people to follow the law. But this only means that a certain *minimal* level of coherence is necessary for the functioning of a legal system. It does not come close to substantiating *an ideal* of legislative integrity. This is very much like the stability of law: a minimal level of

stability over time is essential for the functioning of law, but again, this does not entail that stability is an ideal, or that ideally, the law should be as stable as possible.

2. Logrolling and compromise.

In the case of division of legislative power, as we have seen, the lack of integrity in legislation is a result of the multiplicity of legislative institutions and their diverse goals. However, even within a single legislative body, especially as politically diverse as a parliament or Congress, there are familiar legislative strategies which tend to undermine the integrity of legislation. Bargaining and compromise which are so often necessary to achieve an act of legislation may certainly result in laws that are morally incoherent. To be sure, not every legislative compromise undermines integrity. Roughly, there are two main types of compromise: either you have to retract some of what you wanted to achieve, or else you get it all, but then you also have to give the other party some of what he wants (which may, or may not, be related to what you get). In both of these cases, the question of whether the resulting compromise is morally coherent, or not, depends on many specific details which we need not explore here. Suffice it to say that compromise and logrolling often result in legislation that falls far short of the ideal of legislative integrity. Does it make the necessity of compromise a regrettable aspect of democratic decision procedures? Surely, that depends on the alternatives, and the relevant alternative is much worse.

Political parties which do not have to compromise have too much power. They have the power to implement their comprehensive moral and political agenda without having to pay sufficient attention to the needs and interests of those who oppose their doctrines or whose interests are at odd with theirs. Once again, there is a delicate balance that needs to be maintained between too much and too little partisan political

power. If the ruling majority is very flimsy and the government needs to compromise on every step it wants to take, governing itself might be seriously compromised. But this truism does not entail that the opposite is a political ideal: it does not follow that a good government is one which does not have to compromise with minority parties. In other words, in a pluralistic society compromise is not a regrettable necessity, but an important virtue of democratic decision procedures.[27]

3. Partisan realignment and the continuity of law.

In a well functioning democracy control of the government periodically changes hands among various political parties. Naturally, every government wants to implement its political and ideological agenda, *inter alia*, by enacting new laws that purport to implement its views or repealing old ones that stand in its way.[28] This is certainly not an anomaly, it is what elections are held for. On the other hand, no government or legislature can start from a clean slate. Previous governments have had their own moral and political agenda enacted into laws which are still in force, and those old laws can be at odds with the moral political views of the new government. These are the circumstances of partisan realignment, and these circumstances are bound to engender legislative changes which are morally incoherent. New laws and policies may coexist rather uneasily with the laws and policies still in force from the previous regimes.[29]

[27] Cf., Waldron (1999).
[28] Of course in the US this is somewhat more complicated due to the separation between control of congress and the presidency. For simplicity's sake, however, I will not dwell on this complexity and speak of 'control of government' according to the parliamentary models in which the government is composed of the ruling majority in the legislature. Nothing in my substantive arguments should be affected by this difference.
[29] See Waldron, (1999: 188-189) and Raz (1994: 280-281).

The failure of legislative integrity here stems from both practical and principled reasons. Even if the new government wanted to wipe the slate clean and change or repeal all those laws and policies which are inconsistent with its new ones, it would normally fail. The vast amount and complexity of legislation make such a task dauntingly difficult to carry out. But it is noteworthy that governments do not even attempt the task, and for principled reasons. Two of those reasons are very important: First, there is a principle of legal stability and continuity. Legislation typically creates an expectation that it will be relatively durable. People normally adjust their behavior and expectations to the legal regime currently in force. Changes of the normative environment often require an adaptation phase, which may be costly or otherwise disruptive. To be sure, none of this means that laws ought not be changed or that any legal change is, *ipso facto,* costly or disruptive. But as we all know, some level of stability over time is essential for the law to achieve its purposes, whatever they are. The law can change, of course, and changes in the law are not infrequent in any modern legal system, but it would be fair to assume that if changes are too frequent, people would find it very difficult follow the law.

Second, and more important in the present context, a general recognition that partisan realignment should not involve an attempt to wipe the previous legislative slate clean also stems from a principle of respect for pluralism. If elections result in partisan realignment, it is because the minority party has become the majority, and vice versa. But the previous majority-turned-minority has not vanished; it is still there, often representing a considerable segment of the population. It is widely acknowledged in well functioning democracies that it would be wrong for the new majority to eradicate all the legislative achievements of the previous majority, even if they were partisan and ideological, because such an attempt would manifest disrespect

for the views and moral convictions of the majority-turned-minority segment of the population. There is a delicate balance that needs to be respected here. On the one hand, an electoral victory resulting in partisan realignment is certainly a mandate for change, but it is not normally conceived of as a license to ignore the moral political convictions of those who lost, and this is as it should be.

To conclude, the circumstances of partisan realignment engender a considerable amount of legislative incoherence. The new government is typically forced to introduce legislative changes amidst a tight network of previous laws and policies that may conflict with the new ones. These circumstances are likely to produce a patchwork of statutory law which cannot possibly reflect the moral and ethical views of a single, morally coherent legislature. But this is not a regrettable aspect of democracy. On the contrary. As we have seen, the resulting legislative incoherence reflects moral political considerations which are supported by principled reasons. Those reasons derive both from the need to maintain a certain level of legal stability, as well as the need to respect value pluralism. Partisan realignment requires a delicate compromise between competing considerations. Not every compromise is regrettable. This is the kind of compromise that manifests respect for the moral complexity of our social and political realities. The best solution to social problems often consists in doing without the best.

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