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Incommensurability of law

If... the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never be wholly eliminated from human life
(Isaiah Berlin, *Four Essays on Liberty*)

Incommensurability reveal what is at stake in many areas of law
(Joshep Raz, *The Morality of freedom*)

Introduction

In this essay I shall explore one fundamental claim and discuss its possible implications in law. The claim is that our values are incommensurable. However, this well-known moral statement is slightly different understanding and in the beginning I would like to make some remarks about my working definition of incommensurability. In terms of implications in law I particularly want to show some important conceptual relations between the thesis about value pluralism and the phenomena of legal pluralism. Three general questions were posed as a means of presenting explorative issue: 1) what is common in different faces of the concept of incommensurability of values; 2) how the thesis about value pluralism could be transferred into legal sphere (particular examples); 3) why the concept of incommensurability of values could be fruitful for better understanding of some basic difficulties pertaining to pluralism of legal orders.

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Incommensurability of values

The notion of incommensurability is relevant for a variety of disciplines such as philosophy of science (e.g. incompatibility and competition between scientific theories, procedures or paradigms), moral philosophy (e.g. irresolvable moral dilemmas), political philosophy (e.g. competition between political visions or, more generally, between ways of life) and so forth. There are also a lot of items (such

as values, goods, reasons, life plans and norms) that are sometimes described as “incommensurable”.¹ Taking under consideration the “incommensurability of values” we are obliged to distinguish this term from the kind of incommensurability associated with other items although it seems to be an open philosophical question how we could reduced one incommensurable (e.g. values) to the another one (e.g. choices or norms). Notwithstanding, this article explores only the notion of incommensurability of values.

What is incommensurability? This core question sends a shiver down our spine because different authors understand this term in slightly different ways. One of the most popular definition claim that some things cannot be put on a common scale. But, in many ways, the numerous authors² make, in this case, a distinction between incommensurability and incomparability. However, the debates about definitions of these terms are plagued by imprecision and confusion. To make the matter less obscure, the term “incomparability” is often related to the absence of a scale or metric rather than as such incommensurability. In other words, there is a lack of the one general ranking of options / goods / values etc. or it is impossible to create such a normative criteria or criteria enabling a choice between them. These criteria for measurement of items could be understood in many different ways, for example: in a consequentialist, utilitarianism, cost-benefit valuation sense. The idea of an absence of a common measure has a very long tradition and is deeply rooted in the Western thought from ancient times. Aristotle was probably the first man who referred to values as “incommensurable” if they lacked a common unit by which they could be measured (he used the adjective *asummetros*, by then the established term for “irrational” or “incommensurable” magnitudes in Euclidean mathematics). Because the idea of incomparability is often close to the term of incommensurability it remains an clear to make a very precise distinction between these notions. Later some thinkers paid special attention to distinguish incomparability from incommensurability. This simple definition of incomparability, as I mentioned above (absence of a scale or metric), however very useful and common, is incomplete, according to Ruth Chang’s *Comparison and the Justification of Choice*. Chang claims that:

Two items are incomparable if no positive value relation hold between them. [...] what it is for a relation to be positive can be given an intuitive gloss: in saying that the positive relation holds

¹ M. Adler, *Law and incommensurability: introduction*, „University of Pennsylvania Law Review” 1998, nr 164(5), p. 1170.

² See: C. Sunstein, *Incommensurability and Valuation in Law*, „Michigan Law Review” 1994, nr 92(4), p. 779–861; R. Chang, *Introduction*. In: *Incommensurability, Incomparability, and practical reason*, Harvard University Press, 1997, p. 1–35.

between two items, one is saying something affirmative about what their relation is. So, for example, the claim that x is “better than” – or “less kind than” or “as cruel as” – y says something affirmative about how x and y relate, while the claim that x is “not better than” – or if kind, not much kinder than” or “neither crueller than nor kinder than” – does not.³

The options can be incomparable in connection with that aforementioned definition based on the absence of a scale, however still bear a positive value relation. As an illustration of such situation, Derek Parfit gives a practical example comparing two poets and a novelist for a literary prize.⁴ Neither the First Poet nor the Novelist is worse than the other and the Second Poet is slightly better than the First Poet. If the First Poet and the Novelist were equally good, it would follow that the Second Poet is better than the Novelist. Instead, the First Poet and the Novelist may be roughly equal. The intuition is that even though three items display the markings of virtue of which the comparisons are made, some comparisons are inherently rough so that even though two alternatives are not worse than one other, they are not equally good.⁵

The whole idea is that the items are comparable not only through one of the three traditional relations like “equally good”, “better than”, “worse than” but also items could be related by a fourth positive value relation beyond the usual trichotomy. So, options could be comparable “on a par” and bear some further positive relation however in a different situation when items are incomparable no justified choice between them can be made.

A brief analysis of the notion of incomparability sheds some lights on the term of incommensurability. The failure of a particular kind of scale or metric or normative criteria stimulate the variety of different approaches to the another, more precise, definition of incommensurability. The economic theory of alternative opportunity and comparative costs, investigated in detail by David Ricardo in his 1817 book entitled *On the Principles of Political Economy and Taxation*, operates on the specific notion of comparability without any relation to some normative criteria or criteria bearing on choice. According to the theory of comparative costs, two items could be comparable in the comparative worth of options. This is in accordance with slightly different claim that some things cannot be mutually compared, as Joshep Raz said in relation to the world of values. To illustrate

³ M. Adler, *Law and incommensurability: introduction*, „University of Pennsylvania Law Review” 1998, nr 164(5), p. 1170.

⁴ Ibidem.

⁵ See on the website: *Stanford Encyclopedia of Philosophy*, <<http://plato.stanford.edu/entries/value-incommensurable/>>.

this concept I present one example. There are two people, both of them are great pork chop lovers and they eat this kind of meat almost every day. If provided with a choice between a pork chop and another dish, say, a fish, they would choose the meat without hesitation. Taking under consideration the comparative theory, there is no doubt that a pork chop is better than fish for both of them because eating this meat creates more happiness for those people than eating food of different kind. However, one of them is Catholic and on Friday she chooses fish or some other alternative to meat (obviously if she is a fair Catholic person). And again, according to the comparative theory the opportunity cost for a Catholic person in terms of different value of goods will be higher when she chooses fish on Friday. Although there are some arguments to be made for the distinction between this theory and a theory based on the idea of comparability, there are many against it, too. Briefly I explore two arguments. Firstly, the idea of the comparative worth of options also, indeed, assumes some kind of relation to the criteria bearing on choice, however those criteria are not normative⁶ and are understood very generally as human well-being.⁷ I think that the above example of the lovers of pork chops shows clearly how general that criteria could be. In this case, it is quite plausible way to transfer many arguments against the theory of comparability to the theory of comparative worth of options. Secondly, the comparative worth of option, assumes moreover one sense of comparability, based on the alternative cost. Even though, we absolutely resign from any kind of normative criteria (even understood as generally as “human well-being”⁸) in relation to the estimation of consequences of our deeds, all in all, the entirety of the personal cost depends upon the factual criteria bearing on choice. We make a longtime predictions and analysis how much could we lose and how much could we win in any particular situations when we should choose one item rather than another. Taking into account the very controversial idea of the comparative worth of options as the proper definition of incommensurability we should be aware that this definition is coincides with the idea of comparability based on the normative criteria or criteria bearing on choice.

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There is also another sense of incommensurability which is often used, explicitly or implicitly, by scholars. According to the first definition of incommensurability based on the notion of incomparability (that some things cannot be put on a common scale) some scholars claim that even if we found some common unit

⁶ As “normative criteria” I understand all kinds of criteria which impose obligatory choice on people.

⁷ In most cases well-being is understanding as maximizing the self-happiness of human being according to the theory of *homo oeconomicus*.

⁸ However, I am not convinced it is really possible in terms of the comparative worth of options.

and therefore we were able to put items on a common scale, still could be for us an incommensurable choice, not yet between items but now between different scales. For example from utilitarian point of view choice A is better than B, but from consequentialist or from perfectionist point of view choice B is better than A. It seems to be plausible, however, this argumentation is more difficult. But, firstly, let me start with a brief linguistic analysis. As articulated above, incomparability or – as we could agree in this moment – this kind of definition of “incommensurability” means elsewhere that there is a lack of the one general ranking of options/ goods/ values etc. or it is impossible to create (or apply) such a normative criteria (or criteria bearing on choice between them). It is important to note that this disjunctive connective since now I would like to pay more attention to the difference between the lack of a general ranking and the normative criteria (or criteria bearing on choice). In the other words I would like to differ the notion of criteria from the notion of ranking. For the purpose of this paper I understand the term of “ranking” exactly as the terms such as scale, procedures, etc.

All of these notions are used to express some kind of a measure scheme where the numbers assigned to items represent their order and also their worth. The normative criteria or criteria bearing on choice, in fact, mean something slightly different. Obviously it is quite trivial that all kind of rankings or scales are constructed according to the variety of criteria but in terms of concrete decision-making situation we sometimes choose between these rankings based the criteria themselves. The above statement could be a little obscure, so I shall present one simple example to shed some lights on this matter. Supposing that there is a defendant in the Supreme Court in New Hampshire who is accused of robbing several people. Without doubt, if defendant confesses, she will be sentenced according to the New Hampshire Criminal Code. Assuming that defendant believes to be innocent, then given a choice, she will want to avoid the penalty. But if plaintiffs prove her guilty, from the normative point of view she will be sentenced, even though from the well-being, utilitarian etc. point of her view it will be better to avoid the penalty. This simple example shows, at least, two things. Firstly, the difference is between scale and normative criteria, since because in some situations the normative criteria (like legal norms) forced us to do A not B, whereas the scales or rankings show us only that A is better for some reason than B, one is free to choose whatever one wants. Secondly – and this is the most important conclusion – the scaling procedure could not be the best procedure by which to choose among items or options. So, we could imagine the situation of incommensurable choice between two different scales and two different normative criteria as well (for example: moral and legal) or maybe even between the normative criteria and some kind of ranking or scale procedures.

Taking into account the above part of my article, we are able to list, at least, three different definitions of incommensurability:

1. Some things cannot be put on a common scale and there is a lack of a general ranking of items or it is impossible to create or apply a normative criteria (or criteria bearing on choice).
2. It is impossible to compare two items according to the theory of alternative costs. It is really worth to underline that both of them based on the term of comparability rather than commensurability. But incommensurability meaning the absence of a scale is not the same as incomparability. There can be a group of comparable options that can be ranked ordinally in the order of their comparative worth, even though no common unit of their worth exists.⁹
3. Finally the third one said the fact that a scaling procedure is not the best procedure by which to choose among items.¹⁰

In the next part of my paper I shall explore why I think that *the third definition* is more plausible and more useful for some important reasons in legal philosophy and the practice of law.

There are a lot of items which could be incommensurable, e.g. options, deeds, goods, reasons (there are a lot of similarities between them), but I will focus upon the incommensurability of values because I think that the other incommensurabilities are more or less dependent on its. The notion of incommensurability of values has a very long and influential tradition which begins, at least, from Sophocles' *Antigone*, where a tragic conflict between Antigone and her uncle Creon over the burial of Polyneices, shows two different and incommensurable sources of law. Sophocles shows us in this very crucial case that there is no reasonable way to reconcile the divine law with the law made by men because "no overarching and agreed upon system of norms exists that can frame and resolve the dispute".¹¹ The modern and scientific description of this phenomenon is described by Isaiah Berlin who depicted in his famous essay, *The Originality of Machiavelli* arguing Niccolo Machiavelli was the first thinker who took notice of the problem of value pluralism. Berlin used this term in his later books as an argument of importance

⁹ M. Adler, *Law and incommensurability: introduction*, „University of Pennsylvania Law Review” 1998, nr 164(5), p. 1170.

¹⁰ Similar division of definitions of incommensurability, however without deeper explanation, could be founded in Matthew Adler comments from the Symposium on “Law and incommensurability” which held at the University of Pennsylvania Law School on February 6 and 7 in 1998. See: M. Adler, *Law and incommensurability: introduction*, „University of Pennsylvania Law Review” 1998, nr 164(5).

¹¹ J. Etxabe, *Tragic Incommensurability and Legal Judgment*, „Canadian Journal of Law and Jurisprudence” 2011, nr 24/1, p. 1.

of liberty and liberal concept of trade-offs, but probably the most influential thing was the introduction of pluralism as a great counterargument against monism, deeply rooted in the Western moral tradition. The thesis about value pluralism claims that in many cases there are no *justified* one-right-answer. As Gray mentioned, “Berlin’s agonistic liberalism – his liberalism of conflict among inherently rivalrous goods – grounds itself on the radical choice we must make among incommensurables, not upon rational choice”.¹² This kind of pluralism must be clearly distinguished not only from monism (understanding as one all-embracing pattern of interpretation so that all ends are ultimately compatible) but also from value relativism. There are numerous articles about this very core issue¹³, considering mostly that both pluralism and relativism are based upon two presumptions, but one of them makes the whole difference. First of them is that pluralism and relativism assume there are a lot of values being equally ultimate and cannot be rationally compared or measured. But the second presumption claims that pluralism assumes that the character of values is objective, not subjective, according to the relativism point of view. “With an understanding of this sort, it will be possible as well to understand some features of practical reason in law, especially in the old area of analogical thinking, but also in new areas involving the theory and practice of the regulatory state”¹⁴ wrote Cass Sunstein in his book *Incommensurability and valuation in law*. His point was clear that value pluralism could be fruitful for legal studies and that thesis about incommensurability of values has a strong implication for different branches of law and legal reasoning in many different ways. In the next chapter I shall explore how that thesis about value pluralism could be transferred into legal sphere according to Sunstein postulate.

Implications for law

According to Isaiah Berlin, incommensurability is not the abstract or only theoretical assumption but is a particular instance of a conflict that arises in concrete, factual world. If he was right the thesis about incommensurability of values has a natural implication for law and realms of choice. There are many implications concerning such different issues like legal certainty or the process of legislation.¹⁵

¹² J. Grey, *Berlin*, Fontana, London 1995, p. 8.

¹³ E.g. see: A. Brogan, *Objective Pluralism in the Theory of Value*, „International Journal of Ethics” 1931, nr 41, p. 287–295.

¹⁴ C. Sunstein, „*Incommensurability and Valuation in Law*”, „Michigan Law Review” 1994, nr 92(4), p. 781.

¹⁵ Some thinkers have argued that there is a structural similarity between a single individual trying to choose in accordance with incommensurable values and the process of incorporating different social

However, for me the most influential one is about the process of interpretation legal reasoning. Some fundamental difficulties connected with legal reasoning shed lights on my thesis about legal pluralism described in the section III.

By legal reasoning I mean process of construction and articulation the legal argument. The importance and utility of this process is obvious for legal scholars and professionals alike (on many levels beginning from legal interpretation). Constructing legal argument is, depending on context, a kind of art of persuasion and clarification. To formalize or evaluate arguments lawyers and legal theorists use many useful logical tools, beginning from simple deduction (like syllogism) to more refined approaches like for example principles of predicate logic or even non-monotonic logic like defeasible logic. If we would like to seriously acknowledge Berlin's claim that values are incommensurable, it will mean that in some legal cases, where we create reasons and construct arguments depending on these values, we are in a very discursive problem, not only practical but above all strongly philosophical problem. There is enormous number of cases where incommensurability between non- reducible values leads to difficulty with justice judgment in a court. For example, we could take into account *Olga Monge v. Beebe Ruber Company* case¹⁶ scrupulously analysed in terms of modeling legal reasoning, by such thinkers like Scott Brewer. In that case the Supreme Court of New Hampshire changed a very long-standing precedent that permitted employers to "fire employees at will" for any reason or no good reason at all. The Monge court changed this well established rule of New Hampshire contract law and the new rule stated that a termination of a contract of employment by the employer at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.¹⁷ Considering *Monge* as a practical legal reasoning we assume the existence of controversy as for which rule – old or new one – should be applied to this case. The old rule states that all employers can run their business as they see fit, but the new one ensures that good employers cannot be fired in malice. The actual state was that Olga Monge was fired in malice. If we are not sure which rule should we applied to Monge case we should try to search for good reasons for and against these claims. This lead us directly to values. According to the old rule employers being able to run their business as they see fit promotes individual liberty. But, considering other side and ac-

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preferences into one particular legislation decision. E.g. see: R. Crasswell, *Incommensurability, Welfare Economics, and the Law*, „Pennsylvania Law Review” 1998, nr 164(5).

¹⁶ *Olga Monge v. Beebe Rubber Company*, No. 6637, Supreme Court of New Hampshire, February 28, 1974.

¹⁷ See: <<http://www.law.harvard.edu/faculty/faculty-workshops/brewer.faculty.workshop.summer2013.pdf>>.

According to the new rule employees not being able to be fired in malice promotes the well-being of the economic system and public good. This example shows, at least, two important things, firstly, trivially, that legal reasoning is strictly involved with moral reasoning, and secondly – if we agreed with Berlin thesis about value pluralism – conflict between incommensurable values could be *naturally* transferred in particular cases into legal reasoning and its interpretation.

As Joseph Raz said “if two options are incommensurate then reason has no judgment to make concerning their relative value” and so that “we are in a sense free to choose which course to follow”.¹⁸ Obviously, there are so many philosophers and legal theorists who could strongly disagree with Raz’s claims because during the history of legal philosophy we have learned a very diversified range of arguments how could we manage with incommensurable reasons from the *legal* point of view. It is noteworthy to underline that these arguments are relevant above all for the practice of law and for the strictly pragmatic process of formal decision making. In fact, law imposes on us the necessity of judgment even, when from the moral point of view, a decision about incommensurable values could not be made. However, according to Raz’s point that we should differ *a priori* from *a posteriori* moments of incommensurability, the final legal judgment between incommensurable values does not mean *that the notion of incommensurability can be wholly neutralized always in principle*. Those observations will be conceptualised in the next section of this article.

Incommensurability and legal pluralism

Value incommensurability also has been considered with respect to legal pluralism.¹⁹ The notion of legal pluralism is understood in many different ways, but I would like to adopt, for purpose of this paper, the sociological or so-called “anthropological” definition of legal pluralism. In general, sociological studies of law are against legal centralism defined by the claim that the only true law is the law made and enforced by the modern state. In contrary to this standpoint sociological thinkers understand law broadly to include not only formal (official) rules enforced by the state but also a great variety of informal and unofficial rules and forms of normativity within social groups and communities.

In many cases we could observe more or less painful clash between different sources of normativity, e.g. in the field of legal and moral reflection between own

¹⁸ J. Raz, *The Morality of Freedom*, Oxford University Press, New York 1986, p. 324, 335.

¹⁹ E.g. see: P. Glenn, *Are legal Traditions Incommensurable?*, „The American Journal of Comparative Law” 2001, nr 49(1), p. 133–145.

rules of consciousness and rules enforced by the state. In fact, there are a lot of cases where the conflict between incommensurable values originate from different sources of normativity. Obviously formal (official) law is trying to incorporate and exclude other sources of human normativity by putting them into so-called consistent and technically organised (by the state) official legal framework. Then, we could count upon these sources according to the clauses of social coexistence or good faith which are respected in many countries. But, if Raz was right that the notion of incommensurability cannot be wholly neutralized in principle, therefore the most important and urgent challenge for legal recognition is to construct and apply very refined arguments for better acknowledgment of this notion in the legal sphere. In fact, as I mentioned above, legal theorists have proposed a variety of arguments, such as:²⁰

- Liberal trades-off and compromises – understanding in many different ways but generally as analogy of market transaction between merchants.
- Dworkinian concept of balancing legal principles – in judicial case principles should have been found and appropriately balanced.
- Interpretation to the best explanation (from x,y,z... etc. point of view comparing with competing arguments).
- Rule-changing reasoning or defeasible reasoning – in case of strong and justified counterarguments we could present a defeasible scheme or change invalid rule.

However, taking into consideration the third definition of incommensurability we still have unsolved problem because our procedure of assessment could not be the best procedure by which to choose among items. So if we would like to transfer different rules and forms of normativity to our general reflection about formal (official) state law we should attempt to develop and apply highly diversified tools rather than a simple procedure of scale or not only trivial logical idea of syllogism, as many judges still doing. We could built the legal framework where different procedures of assessment between values will be possible and therefore, maybe, we will minimize the tragedy of incommensurability.

Closing remarks

In this paper I attempted to define the notion of incommensurability. Difficulties with proper definition show, however, something very important if we would like to transfer this notion to the legal sphere. Concerning legal pluralism two char-

²⁰ This is, obviously, incomplete list of arguments.

acteristic have been shown. *Firstly*, that the diversity of normative sources which based on incommensurability of values cannot be wholly naturalized in principle by the state law. *Secondly*, there is no one optimal procedure to manage with value pluralism so that the legal framework should be open for different techniques of measurement.

Famous and influential lawyer Oliver Wendell Holmes many years ago said that the life of the law has not been logic, it has been experience. Now, in the time of global legal acculturation the next step of our experience should be done.

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