6

Compromise Between Incommensurable Ethical Values

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6.1 Introduction

In this chapter I will concentrate on compromise in ethical conflict and disagreement. I will discuss compromises related to disagreement with respect to public decisions between options that represent conflicting incommensurable human values. The central question will be whether in those cases a *principled* compromise is possible. A 'principled compromise'[1] can be defined as a rational way to achieve a trade-off or balance between conflicting values, for instance, by rational assignment of relative weights. I will argue that in some cases incommensurability will prevent a principled compromise in the defined sense. I will show why phrases used by some philosophers, such as 'making a rational trade-off', 'striking the right balance', 'finding the Aristotelian Mean' or 'splitting

[1] Some philosophers use the phrase 'principled compromise' in another sense. See May (2005: 317–348).

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the difference', are based on misunderstandings about the characteristics of incommensurable values that are usually at stake in the pursuit of a compromise. I will show that incommensurable values lack an equivalence relation and how this prevents a determinate trade-off or balance between them. This is especially important with respect to the pursuit of compromises in ethical conflicts, including conflicts of justice, where we need a rational and ethical justification for the final decision. I will argue that the model of deliberative democracy presents a promising procedure for making the final decision legitimate but that, in the relevant cases, it cannot avoid an ethical deficit.

6.2 Some Common Views on the Nature of a Compromise

A compromise is often regarded as a trade-off or balance between competing values or conflicting interests.[2] According to some philosophers—amongst others Stuart Hampshire (1984: 118–119), Henry Richardson (1997: pp. 235, 238f, 243, 253, 254–266) and Charles Taylor (2001: 118)—it is possible to make a rational trade-off between rival human values and to rationally weigh their relative importance. These philosophers believe that a trade-off between antithetical values concerns the pursuit of an 'Aristotelian' mean or balance. Hampshire argues that '… in politics and government, the decision in a situation of conflict often involves a trade-off … One could properly speak of a trade-off if one were trying to combine a decent degree of one value with a decent degree of the conflicting value. The trade-off would then be an Aristotelian balance…' (1984: 119). And according to Taylor: '… adjudication and balance between two conflicting values are possible if we approach value pluralism in an Aristotelian framework. That is, we can weigh the relative importance of the goods that concern us…' (2001: 118). Also Henry Richardson (1997) proposes an 'Aristotelian' approach of searching for

[2] Where I speak about conflicting interests, principles, virtues or demands, it is assumed that they concern conflicts between the values on which they are based.

reconciliation ('mutual fit') of opposing values.[3] According to Jonathan Baron: 'There are times when we are put in a situation in which any action we take seems to violate a prescriptive moral rule … tradeoffs are always possible. One must simple choose the course that does the least harm, all things considered' (1986: 15).

Michael Stocker points out that 'contemporary ethical theories talk of trade-offs of different and plural values. These involve balancing different goods against each other … a trade-off involves a comparison, showing equality, between different values' (1999: pp. 137–138, 203).[4]

A common view is that an Aristotelian balance or the Doctrine of the Mean cannot be applied to the problem of conflicts of (ethical) values and compromises between them, because Aristotle would not have recognized the rationality of such kind of tensions. It could be said that, if you follow Aristotle's philosophy, conflicts of values are only apparent; a clear view of the relevant issues would show that the seeming tension is caused by extreme positions and not by a real conflict between plural values. Moreover, if a right balance exists, and if it is struck, there is no need for compromise because the relevant action would then be completely virtuous without it sacrificing any real value.

However, in his book *Plural and Conflicting Values* Stocker argues that, contrary to the received view, 'Aristotle explicitly allows for conflicts of values—even in good people' (1999: 51). 'Virtues, too, quite generally involve incommensurable values. For they are concerned with important human situations, in which for systematic reasons we have to choose between incommensurable values' (Ibidem: 151). Interestingly, Stocker tries to apply the Doctrine of the Mean to conflicts between incommensurable values.

In his book *On Compromise and Rotten Compromises* Avishai Margalit discusses the nature of what he calls a *'sanguine* compromise' (2010: 48). A *sanguine* compromise differs from other—so-called *anaemic* compromises—as follows. A sanguine compromise is based on mutual recognition of each party's claim; the parties regard each other's claim as equally legitimate. Therefore, according to Margalit, a sanguine compromise

[3] Michael Stocker (1999) proposes a similar Aristotelian approach.

[4] Stocker, *Plural and Conflicting Values*, pp. 137–138, 203.

should be an agreement '*halfway*'. It requires that the difference is split—that is, divided 'not too far from the middle'. Margalit gives an example of a sanguine compromise borrowed from the Bible (Ibidem, p. 39).[5] Abraham wants to buy a piece of land from Ephron, to bury his wife. Ephron asks 400 pieces of silver. Abraham wants to pay 300 pieces. Both parties respect each other and agree that neither price is unreasonable. In that case, a sanguine compromise is an agreement 'halfway', a fair balance, that is, a price halfway, so 350 pieces of silver.

My aim is to show that the phrases used by the philosophers I quoted are misleading. Phrases such as 'making a rational trade-off', 'striking the right balance', 'finding the Aristotelian Mean', 'splitting the difference', 'finding the middle ground' and 'meeting halfway' are based on misunderstandings about the characteristics of conflicting incommensurable values that are usually at stake in the pursuit of a compromise.

6.3 'Aristotelian' Balance

Can a tension between heterogeneous values be determinately resolved via an 'Aristotelian' balance? Aristotle believed that 'complete virtue' is attainable, at least in principle (i.e. if 'bad luck' does not interfere). An Aristotelian virtue is an equilibrium, a mean between extremes. In the case of a single virtue, the relevant extremes represent 'disvalues', namely a deficit and an excess of value. Vice is either an excess or a deficiency of the relevant value, while virtue hits the right balance. Moral virtue is concerned with actions lying between extreme alternatives. The right balance between these alternatives is determined by practical wisdom (*phronesis*).

Let us assume that courage is constituted by an optimal balance between two extremes: 'cowardice' (a deficit) and 'rashness' (an excess) (vi. 1115b25 ff.). Because rashness and cowardice are disvalues instead of values, the mean is no resolution of a conflict between values. The situation is different if the extremes do not represent vices but virtues, not negative but positive values, which (contingently or inherently) conflict

[5] I somewhat adapted the example.

with each other. Take for instance the value of contemplation versus the value of adventure. We cannot simultaneously be a *Narcissus* who leads a contemplative life and a *Goldmund* who leads an adventurous life.[6] If we want to realize a value optimally, the choice is often 'either-or' rather than 'and-and'. Kierkegaard could not combine his vocation with a marriage to Regine Olsen. Gauguin could completely develop his artistic talent by giving up his promising career in banking and by leaving his family and going to Tahiti. Gauguin had to decide between 'excellent creativity' (one extreme), 'ideal marriage/parenthood' (the other extreme) or a balance between both extremes, excluding an excellent realization of either value. Here it is not immediately clear whether the extremes are worse than a balance between them and if the balance would be better, where it has to be struck.

Aristotle defines his mean as follows: 'In anything continuous and divisible it is possible to take a part which is greater or less than, or equal to, the remainder ... The equal part is a sort of mean between excess and deficiency' (1106a). Aristotle believes in a 'complete virtue' and a life 'lacking in nothing', which consists of hitting the right balance between extremes (Nussbaum 1990: 378). He argues that 'there are many ways of missing the target ... and only one way of hitting it' and he adds the following quotation: '... men are bad in countless ways, but good in only one' (1106b28–35). In other words, there is a 'mean' (relative to the agent) between the extremes that forms a single optimal target.

Some theorists regard the Doctrine of the Mean as epistemologically vacuous: it does not give real guidance. Jonathan Barnes argues in his introduction to Aristotle's *Ethics* as follows: 'The Doctrine of the Mean is incapable of advising because it enshrines an analytic truth.' 'If I am puzzled about how I should act and you advise me to observe the mean, then I know nothing more than I did before; I am not better off, no better informed about the moral possibilities and demands of my situation', as Aristotle himself admits (*Ethics*, 1138b18-32). Any point may turn out to be the mean. 'Act in accordance with the mean' thus becomes 'Act as you should act' (Barnes 2004: xxiv).

[6] See Hermann Hesse's novel *Narcissus and Goldmund* (2002).

David Pears regards the Doctrine of the Mean not merely as epistemologically but even as conceptually senseless. I follow Stocker's illuminating explanation of Pears' view. Pears believes that courage as a mean is incoherent. Courage involves two distinct feelings, 'confidence' and 'fear' and—associated to these feelings—two distinct goals: achievement of victory and avoidance of danger. 'Just as fear and confidence are not species of the same feeling and do not shade into each other, victory and danger are not species of the same thing nor do they shade into each other. Too much of one is not too little of the other, nor does it approach, much less shade into, the other (Stocker 1999: 132).'

Pears concludes that confidence and fear, and victory and danger, do not lie on the same continuum and thus cannot be in a mean. It might seem that we could compare these distinct feelings and ends by seeing which is closer to its own particular mean. But the mean involves incommensurable determinants (Ibidem, 153). How to compare incommensurable feelings on different continua and how to compare distances on different continua? How can we put together the distinct mean of fear and the distinct mean of confidence (Ibidem, 135, 136, 140)?

Stocker, who believes in the coherence of the Aristotelian mean, gives the following answer. If the distinct feelings confidence and fear and their own distinct objects victory and avoidance of danger are understood as being independent of each other, existing on their own, then they cannot make up a mean of feeling (Ibidem, 140). But they are interdependent. The appropriate amount of fear in any particular case is a function of the features of the complex of the danger and victory—not just of features internal to the danger (Ibidem, 141). Something similar applies to confidence. So values should not be balanced on their own but in the context of a concrete situation. 'Given what we are and how we are situated, to give too much weight to one will force us to give too little to the other (Ibidem, 146–147).' In sum, 'courage involves integrating the dangers and the victory, the fear and confidence, into one coherent and settled emotional appreciation of the situation (Ibidem, 144).'

Stocker responds to Pears' suggestion that the different values cannot be measured on a homogeneous scale as follows. Complex unities of feeling do indeed not allow for a continuum with a homogeneous scale composed of more and less of a single good. We need a balance that allows for

many elements each of which can tip the balance in a different direction. This balance is a device for comparing incommensurable values. The mean is achieved when there is not a simple balance but when 'each of the weights is in its proper, mean place. There need be no common units of value which are increased or decreased to reach the mean both in the overall situation and in regard to the particular virtues (Ibidem: 149)'. Stocker's analysis is thorough, profound and, I think, correct. But I do not think that this refutes the core of Pears's objection and resolves our problem: the possibility to find a mean between heterogeneous values. Also Stocker himself recognizes that the problem has not been resolved: '... the point remains the same: if two feelings are incommensurable, how can we make sense of one feeling being more or less of a mean than another ... (Ibidem: 152)?'

Even if the Doctrine of the Mean is assumed to be conceptually coherent, it may appear to be epistemologically vacuous (see above). Premising that an optimal or single right balance does exist (for a particular person and situation) between heterogeneous values, it is not clear how to determine it. Stocker does not think that the charge of epistemological senselessness is correct but admits that he cannot refute it either '... a resolution of these issues can come only after a thoroughgoing study of commensurability (Ibidem)'. I do not know whether the study of (in)commensurability on which this chapter is based is thorough enough, but it supports rather than refutes the charge of epistemological (and even conceptual) incoherence of the Doctrine of the Mean. It does not show that weighing heterogeneous values as such is incoherent, but that the assumption of the existence of a golden mean (a determinate and single right balance) seems incoherent (see below).

Stocker tries to give an indirect counter-argument by showing that if the heterogeneity of the values implies a problem for the Doctrine of the Mean,

> ... lack of homogeneity is a problem for any ethics that allows for different values that need to be amalgamated. Contemporary ethical theories do not talk of a mean of different values. But they do talk of mixes and trade-offs of different and plural values. They involve balancing different goods against each other, different bads against each other, and different goods

> against different bads. The correct balance is hardly to be understood in terms of one continuum. But not having such a continuum is what was said to be so problematic for the Doctrine of the Mean. Thus, if the lack of such homogeneity makes the Doctrine problematic, if not incoherent, it would also do this to those contemporary theories cast in terms of mixes and trade-offs of plural values. For the problems come not from the special sort of weighing and comparing involved in determining a mean, but from weighing and comparing non-homogeneous values and elements (Ibidem: 137–138).

I think Stocker is right, but this shows that the relevant issue forms indeed a problem not only for Aristotle's mean but for all other ethical approaches in which heterogeneous values are weighed and balanced, rather than that it shows that it does not form a problem. According to Stocker we must conclude 'either that there is no problem for Aristotle's ethics or ours, or that, contrary to all appearances, everyday and seemingly plausible and unproblematic forms of judgments are in fact unacceptable (Ibidem: 130)'. However, this either/or conclusion is a False Dilemma. Incommensurability is a necessary but not a sufficient condition of hard choices. If incommensurability does not pose problems in particular situations, it does not follow that it does not pose problems in other situations. For instance, in everyday choices between trivial options, it does not matter if the alternatives are incommensurable; such decisions do not require a rational justification. The fact that incommensurability does not pose problems for trivial choices, does not mean that it does not pose problems for important decisions, such as choosing between different ways of life, different organizations of society, deciding between conflicting interests of rival parties or between clashing moral requirements or in questions of life and death (as in the case of courage as the right or mean feeling towards the danger of being killed).

The incommensurability of two dimensions means the absence of an equivalence relation (a level of equality[7]), which seems to exclude an (even roughly) determinate Aristotelian mean. True, it is possible to make

[7] As Aristotle himself argues, 'without commensurability there would be no equality' (*The Nicomachean Ethics*, 1133b18–20).

a specific hierarchy or ordinal ranking of heterogeneous values, as Aristotle advocates. But, due to incommensurability, the specific ranking largely depends on intuitive weight assignment. Even for one and the same person many different rankings may be compatible with rationality and reasonableness. So, Aristotle's advice seems to lack determinacy and to be incapable of giving substantive guidance. This makes the idea of 'hitting a single optimal target' in many cases incoherent and unworkable. Besides, a single optimal target seems difficult to reconcile with the idea that a person may constitute her own identity in different ways. It is difficult to imagine that there is a (for every person, society or situation) single optimal choice of values and a single optimal balance between these values. Finally, it is not clear why a balance between virtues result in 'complete virtue' in the sense that no irreducible value is lost and that it is 'lacking in nothing'.

'Complete virtue' seems difficult to maintain if the agent or the society has to choose between important but incompatible heterogeneous values. As Robert Merrihew Adams argues, it is not simply the case that less of the same value is lost in making a balance (Adams 1999: 54). On the contrary, something qualitatively different and irreducible is sacrificed. 'Complete virtue' (suggesting virtue without loss) and sacrifice of irreducible value seem difficult to reconcile. Adams: 'The golden mean is not acceptable, in my opinion, as a complete ideal of virtue. There is certainly an excellence ... in the … balanced human life. But the value of such balance is one of the often incompatible values among which we sometimes have to choose. There are also values of extravagance, and some of them are great values, and command a more astonished admiration than the values of the balanced life. What is most admired in saints is often to be found among the values of extravagance (Ibidem: 55).' It is not evident that in the case of two competing positive values a balance is always better than one of the extremes. A balanced life is itself one of the values against which the extreme values must we weighed.

The pursuit of compromises usually concerns tensions between positive values, such as liberty versus equality; national security versus personal privacy; freedom of expression versus social cohesion; economic growth versus protection of the environment; efficiency versus equity in the distribution of welfare or the distribution of scarce health care

resources (e.g. production of a larger total welfare and larger total health benefit versus a fairer distribution of these advantages); or need versus desert in distributive justice. While a balance between negative extremes (e.g. 'shyness' and 'shamelessness') constitutes value and virtue (e.g. 'modesty'), an attempt to combine positive extremes (e.g. maximal equity and maximal efficiency) will often fail and lead to a loss in value and a *compromise* rather than a right balance between mutually supporting values. Neither a single person nor a single society seems capable of completely incorporating all important human values without loss.

In sum, there seem to be at least four problems with the Aristotelian idea of 'complete virtue' and the attempts to achieve reconciliation between rival incommensurable values based on this idea. First, a balance between values often concerns a compromise rather than mutual elevation and does not preserve 'complete virtue' without sacrifice of irreducible value. Second, it is not evident that a compromise between competing values is always better than realizing one of both values optimally. Third, if it would be better to strike a balance than to pursue one of the values optimally, it is not clear how to determine where the balance should be struck in the wide range of different rational possibilities. Fourth, it is implausible that there is a determinately right balance, even for one and the same person or society in one and the same situation. The next section will further substantiate the third and fourth problem.

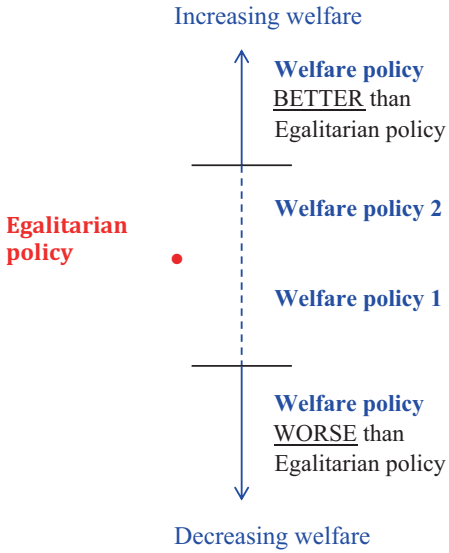
6.4 Incommensurability

In this section, I hope to demonstrate that a mean and a balance between conflicting incommensurable values do not exist. This means that a principled compromise is impossible in the sense of a trade-off or balance based on rational comparisons and rational assignments of relative weights. The result will be persistent reasonable disagreement concerning the right compromise between incommensurable values and any achieved compromise will contain a significant element of *arbitrariness*.

Two values are incommensurable if they have different dimensions that cannot be reduced to one common dimension. An essential characteristic of two incommensurable values is the lack of a point of

equivalence: no amount of one value is equal to (not even roughly equal to) any amount of the other value (Boot 2017: 24). I will give an example to demonstrate this.

Let us compare rival policies with respect to the production and distribution of welfare: an Egalitarian policy versus different Welfare policies.



The Egalitarian policy produces less welfare but is *fairer* than the Welfare policies; it distributes welfare more equally. The different Welfare policies are shown in a vertical chain: the higher in the chain, the larger the welfare of the Welfare policy.

Let us assume that the Welfare policies in the upper part of the chain are overall better than the Egalitarian policy because, although they are less fair, they produce extremely more welfare than the Egalitarian policy. Let us further assume that the Welfare policies in the lower part of the chain are definitely worse than the Egalitarian policy because they produce hardly more welfare than the Egalitarian policy while they are less fair. Between the upper and lower part of the chain there is a zone, indicated by a broken line, in which it is not clear that one policy is definitely better than the rival one. Suppose that in this zone there is a Welfare

policy 1, which produces a particular amount of welfare. Suppose we conclude that Welfare policy 1 is neither definitely better nor definitely worse than the Egalitarian policy. Does the conclusion that neither policy is better than the other mean that Welfare policy 1 and the Egalitarian policy are roughly equally good in the sense that they represent an equivalent amount of total value, or that the larger welfare of Welfare policy 1 has roughly equal weight as the larger fairness of the Egalitarian policy?

This need not be the case. This can be shown by the so-called 'improvement argument'. Take a Welfare policy 2. This policy produces significantly more welfare than Welfare policy 1. Therefore, other things being equal, Welfare policy 2 is definitely and significantly better than Welfare policy 1. Does this make Welfare policy 2 also definitely better than the Egalitarian policy? This need not be the case. Why? The reason for this is that the Egalitarian policy remains significantly better with respect to fairness. It is implausible that a significant (but not extreme) increase of *welfare*—a value that fundamentally differs from the value of *equity* or *fairness*—would make Welfare policy 2 definitely better than the Egalitarian policy. If it is true that Welfare policy 2 is *not* better than the Egalitarian policy, then the Egalitarian policy cannot be said to be equally good as Welfare policy 1: indeed, if they *were* equally good, then an improvement of Welfare policy 1 would make it definitely better than the Egalitarian policy. If this reasoning is sound, the conclusion must be that the Egalitarian policy is not equally good as Welfare policy 1. But, as we concluded above, the Egalitarian policy is also not better or worse than Welfare policy 1.

If so, this is an instance of what I call '3NT' ('triply not true'). It means that it is not true that the Egalitarian policy is better than, *and* not true that it is worse than, *and* not true that it is equally good as the relevant Welfare policy.

In the figure, there is not any level where the Egalitarian policy is equally good as one of the Welfare policies. In other words, there is no amount of fairness that is equivalent to any amount of increased welfare.

The Egalitarian policy and the Welfare policy are not even roughly equally good. Indeed, if Welfare policy 1 were roughly equally good as the Egalitarian policy, Welfare policy 2 would be not only considerably better than Welfare policy 1, but also considerably better than the

Egalitarian policy. But this is not the case. In the relevant range, welfare considerably increases, without making Welfare policy 1 better than the Egalitarian policy. If this is correct, it means that over a *large* range of increasing welfare the relation between the two policies is an instance of 3NT in the sense that the Egalitarian policy is neither better than, nor worse than, nor equally good—not even roughly equally good—as the Welfare policy. We might call this large range the 'range of rational indeterminability'. In this range reason does not unambiguously show which option should be chosen all things considered because an impartial and determinate comparative worth of the relevant options does not exist.

Also common sense supports the idea of the lack of an equivalence relation. As W.D. Ross more than half a century ago argued, 'it is unintelligible how any amount of a particular value could be equal in value to any amount of a different value, if the two values are incommensurable (Ross 1930: 154).' It is important to note that this absence of any equivalence apparently applies to all incommensurable values.

What is the significance of this for our thesis? The absence of any equivalence between incommensurable values is the reason why a rational trade-off is not possible and why a determinate *Aristotelian Mean* and a *Right Balance* between these values do not exist.

Absence of equivalence fundamentally prevents a determinate trade-off or balance. Reason 'under-determines' the choice, that is, reason is silent about the right trade-off or balance between incommensurable values, simply because they do not exist.

Because in the case of 3NT options the range of rational indeterminability is large, reasonable persons will often assign considerably divergent relative weights to the competing policies, and as a result will come to opposite conclusions about which policy should be chosen. Within the wide range of rational indeterminability, reason does not show that the divergent relative weights are unreasonable or irrational. The outcome will be reasonable disagreement concerning the question which policy should be chosen.

All this does not mean that a *compromise* between incommensurable values is impossible. However, it does mean that a possible compromise is not a *principled* compromise in the defined sense. Because reason largely under-determines the final choice, the achieved compromise will

always contain a significant element of *arbitrariness*. Any compromise involves an ethical deficit, in the sense that the final compromise will be incompletely ethically justified. With respect to two 3NT options there is no overall reason for choosing one alternative compromise *rather than* the other. For instance, choosing the Welfare policy instead of the Egalitarian policy cannot be rationally justified because the reasons for this choice do not determinately outweigh the reasons for the non-chosen alternative.[8] This is especially problematic if, as in this case, the compromise entails a moral deficit (if we choose the Welfare policy, we will end up with less fairness than could have been possible. This will be further explained in Sects. 6.6 and 6.7).

This problem does not necessarily exclude principled compromises that are *not* based on a trade-off or a balance. In the following section I will briefly discuss a possible example of such a compromise by discussing John Rawls's well-known Difference Principle and G.A. Cohen's criticism of it.

6.5 The Difference Principle

Rawls developed a theory of justice, which reconciles rival human values and competing principles of justice without the need of making trade-offs or assigning relative weights. Rawls was deeply aware that conflicts between incommensurable values cannot be resolved via a trade-off. That is why he has developed a theory of justice that avoids it. An interesting example is his Difference Principle. The Difference Principle tries to reconcile greater welfare and fairness in the distribution of welfare. It tries to do this without relying on a trade-off between greater welfare and fairness.

According to the Difference Principle, the social and economic inequalities are to be to the greatest benefit of the least-advantaged

[8] Cf. Joseph Raz: 'Where the considerations for and against two alternatives are incommensurate, reason is indeterminate. It provides no better case for one alternative than for the other' (1986: 333–334). And Thomas Nagel: '[When each of two choices] seems right for reasons that appear decisive and sufficient, arbitrariness means the lack of reasons where reasons are needed, since either choice will mean acting against some reasons without being able to claim that they are *outweighed* (1979: 129, emphasis original).'

members of society. The Difference Principle takes into account both greater welfare and fairness. It takes into account greater welfare by allowing inequalities that cause an incentive to produce more welfare for all. It takes into account fairness by only allowing inequalities that are to the greatest benefit of the worst-off.[9]

Let's go back to our example where we are faced with a choice between two hypothetical policies (see Sect. 6.4). How would a resolution of the conflict between fairness and greater welfare look like if the Difference Principle would guide public policy?

In Table 6.1 the numbers indicate incomes. A policy based on the Difference Principle would be in-between the Egalitarian policy and the Welfare policy: it would be less egalitarian than the Egalitarian policy, and more egalitarian than the Welfare policy; and its mean income would be higher than the mean income in the Egalitarian policy, and lower than in the Welfare policy.

Table 6.1 The difference principle and a reconciliation between fairness and greater welfare

Incomes				
Policies	Least-advantaged group	Middle group	Most-advantaged group	Mean income
Egalitarian policy	200	400	600	400
Difference principle	**300**	**700**	**1100**	**700**
Welfare policy	100	800	1500	800

[9] As G.A. Cohen explains: 'For Rawls, some people are, mainly as a matter of genetic and other luck, capable of producing more than others are' (2008: 29). (The prospect of) higher wages would generate an incentive for these people to produce a greater total product than if strict equality would prevail. If inequality generating incentives are necessary to let the talented people produce more and if this greater product would at the same time benefit the less fortunate more than if equality would have prevailed, then they are just. Rawls: '… inequalities of birth and natural endowment are undeserved … Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to … help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle (1971: 100–102).'

In a society based on the Difference Principle the least-advantaged group would do best. Compared to the Egalitarian policy, in a society based on the Difference Principle inequalities are to everyone's advantage. By contrast the Difference Principle would not allow the rich to get richer at the expense of the poor, as would happen if we would implement the Welfare policy. The principle does not allow that increasing differences do not benefit the worst-off. In sum, the Difference Principle would lead to a reconciliation between fairness and greater welfare.

Interestingly, Rawls thinks that the Difference Principle is not a compromise. He believes that it is a principle of justice. Rawls argues that the Difference Principle is simply a requirement of justice, not only because of its concern for the worst-off but also because he thinks that, in the original position and behind the veil of ignorance, all reasonable people will choose the Difference Principle. In other words, there will be *consensus* about this principle.

However, the late Oxford philosopher G.A. Cohen shows in his book *Rescuing Justice and Equality* why the Difference Principle cannot be a principle of justice and why it is not entirely just (Cohen 2008). The Difference Principle allows large undeserved inequalities. Undeserved inequalities are inequalities that are based on morally arbitrary factors.

Table 6.2 shows that the Difference Principle is compatible with large inequalities (again, the numbers indicate incomes). The worst-offs are better off in society Q than in society P with respect to incomes. This means that, if we would have to choose between the two societies, the Difference Principle requires the choice of society Q. However, the extreme differences in income of the citizens of Q seem difficult to reconcile with complete fairness, at least if these differences are due to morally arbitrary factors, that is, to brute bad luck or good luck, instead of desert or merit. In his *A Theory of Justice* Rawls himself states that distribution of welfare should not be influenced by morally arbitrary factors. According

Table 6.2 The difference principle and large inequalities in incomes

Society	Least-advantaged group	Middle group	Most-advantaged group
P	100	150	200
Q	200	2000	10,000

to Cohen the Difference Principle is actually a compromise. It is a compromise between a greater welfare distribution and a fair distribution of welfare.

What does this mean for our discussion about principled compromises between incommensurable values? We had concluded that 'principled compromises' based on rational trade-offs and relative weight assignments are impossible. But we said that this does not necessarily exclude other forms of principled compromises. The Difference Principle may be an example. However, because this principle is compatible with large undeserved inequalities, people may disagree to what extent these differences may be accepted. If we would conclude that large inequalities cannot be accepted, then the need to weigh greater welfare against fairness cannot longer be avoided. But in that case we have again the problem of making trade-offs or assigning relative weights to these incommensurable values, which is impossible. Besides, even if the Difference Principle would be acceptable, it only works for the specific conflict between greater welfare and a fair distribution. The possible conflicts between other human values cannot be resolved by this principle.

6.6 Conflicts of Justice

Justice is a multifaceted concept. The multiple elements of justice are related to plural ethical values, which justice is expected to protect. These values are, for instance, basic liberties, personal privacy, equal opportunities, equal distribution of welfare, legitimate entitlement, concern for the worst-off, need and desert. Some of these values may conflict mutually. Besides, they may clash with other human values, which are not elements of justice (or only indirectly related to justice), such as growth of welfare, efficiency and public security.

Because these values may conflict, claims concerning what ought to be done with respect to justice may conflict as well, in at least two different ways. First, the claims of justice may conflict mutually. Let us call them 'internal conflicts of justice'. Second, the claims of justice may conflict with other human interests. Let us call them 'external conflicts of justice'.

An important issue, suitable for illustrating the problem of conflicts of justice, is the distribution of health care resources. Because health care resources are not unlimited, it is important to use them efficiently in order to maximize total health benefit. With the same budget, total health benefit depends on cost-effectiveness of the treatment. However, patient selection purely based on cost-effectiveness and utility of treatment may be at the expense of equity (fair chance of treatment; concern for the worst-off). By contrast, patient selection purely based on equity may be at the cost of total health benefit. The possible conflict between equity and efficiency suggests that a selection procedure that is simultaneously the most just *and* the most beneficial, does not always exist. If we would conclude that neither the claim of equity nor the claim of efficiency can be ignored, we have to choose a combined approach in which both fairness and outcome are taken into account. If neither claim can be completely fulfilled, then a compromise ought to be struck.

Rawls argues that justice requires 'a proper balance' between competing claims. Justice should be able to order all important conflicting claims and yield determinate and decisive conclusions.[10] Rawls emphasizes the role of assignment of weights as 'an essential part' of a conception of justice (Rawls 1999: 37). Weight assignment is necessary to order the relevant conflicting claims.

However, in several internal and external conflicts of justice, assignment of impartial and determinate weights is prevented by the incommensurability of the relevant values. This entails that in several internal and external conflicts of justice, we cannot determine whether one claim impartially and determinately outweighs the other. ('Impartial' in the sense of independent of a specific personal belief, intuition or preference; 'determinately' in the sense of 'definitely', 'decisively', 'unambiguously', 'not uncertain', 'not arbitrary' and 'determinable').

In our example of a conflict of justice, the required compromise between efficiency and equity in the distribution of limited health care resources is indeterminate, because both efficiency and equity represent incommensurable values. The cause of this indeterminacy is not that the

[10] Rawls: '. . [A] conception of right must impose an ordering on conflicting claims. This requirement springs directly from the role of its principles in adjusting competing demands. . . (1999: 115)'.

claims have roughly equal weights, but because it is neither true that one claim outweighs the other, nor true that they have equal weights or roughly equal weights.[11] In this kind of rationally irresolvable conflicts of justice, the justification of the final decision cannot avoid arbitrariness, because, in those cases, each decision will act against reasons that cannot be said to be outweighed by the reasons in favour of which the decision is taken.

The result is an ethical dilemma in which neither decision seems capable of avoiding an injustice or other 'ethical deficit'. The possible consequence is that, in the relevant cases, there is no right answer. In internal conflicts of justice, this would mean that either decision results in an ethical deficit, because neither decision can be completely justified by the fact that the claim in favour of which the decision is taken outweighs the rival claim. Either decision will wrong at least one of the parties.[12] In external conflicts of justice there is an uncompensated value deficit if a decision is taken in favour of the claim of justice, while there is a moral deficit if a decision is taken in favour of human interests, which differ from justice. The relevant issues are indeterminate in the sense that they lack a right answer which does justice to both sides. If so, then the justification of the final decision cannot avoid being 'partial' in the double sense of 'incomplete' and 'biased'.[13]

Insight in the incomplete justification of the final decision may lead to the recognition that, if there is reasonable disagreement about what ought to be done, the losing party's claim is not less legitimate than the winning party's. This recognition does not remove, but may mitigate, the conflict. It may prevent that the injustice done to the losing party is worsened by ignoring or disregarding her justified and legitimate claim.[14]

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[11] See the argument about the '3NT' value relation, as discussed in Sect. 6.4.

[12] See also footnote 8.

[13] Cf. Sen (1992: 45ff., 134).

[14] Cf. Norman Daniels, who emphasizes the importance of careful deliberation 'that takes seriously the considerations people bring to a dispute'. Such a 'careful deliberation about the various reasons put forward on both sides has in its favour the fact that *even losers will know that their beliefs about what is right were taken seriously by others*' (Daniels's emphasis, 2008: 116).

The above argument shows that justice is not always uncompromising, as Rawls believed.[15] Instead we sometimes need to strike a compromise when we are faced with a conflict of justice. However, one of the main problems of an incommensurable value conflict is that any compromise between the relevant options involves a loss of irreducible value, not outweighed or compensated by the gain in other values. The loss of irreducible value is the direct consequence of incommensurability, precisely because it entails irreducibility of the values involved.

Because reason under-determines the right balance or right compromise, equally rational and well-informed people may assign considerably different weights to the relevant values. Therefore, they will arrive at different, often opposite, conclusions about how the compromise ought to be struck.

6.7 Democratic Deliberation

It could be argued that rational deliberation amongst free and equal persons and the exercise of public reason may lead to convergence of judgments about the right thing to do, or the right compromise, between conflicting values and competing requirements of justice. In *A Theory of Justice* Rawls also emphasizes the unifying power of impartial reason, detached from personal interests, beliefs and conceptions of the good (Rawls 1999: 514).

Indeed, if free and equal citizens will make proper use of impartial or public reason, it is conceivable that it will lead to convergence of judgments. In Rawls's original position, behind the veil of ignorance, people are detached from morally arbitrary judgments because they are ignorant of their personal characteristics, aims, interests and circumstances. If democratic citizens use impartial or public reason, this may promote consensus on basic principles of justice amongst reasonable people. An important condition is that people are free and equal and have the opportunity to deliberate freely and without coercion.

[15] Rawls: 'Being first virtues of human activities, truth and justice are uncompromising' (1999: 4).

One of the aims of Rawls's devices of the 'original position' and 'veil of ignorance' is to make the choice of principles of justice independent of contingent, changing and inconsistent outcomes of social choice amongst disagreeing democratic citizens who have different backgrounds, beliefs and interests. Rawls's theory tries to construct an unambiguous, impartial and stable ordering of principles agreed upon by all reasonable and rational people. The theory tries to order and integrate the plurality of principles in a coherent system, making use of a scheme of lexical priorities and the Difference Principle. It assigns lexical priority to equal basic liberties over equal opportunities and it ranks the latter over the Difference Principle. The Difference Principle, in turn, integrates a greater welfare distribution with concern for the worst-off.

The lexical ranking of one value above another means that the former—however small its amount—is always more important than the latter—however large its amount. Therefore it will always get priority in cases where the two conflict in practice. A lexical ordering would enable us to resolve practical value conflicts. For instance, when need clashes with utility or greater welfare, Rawls's theory shows that a social state in which the neediest citizens get priority is more just than a social state with a more utilitarian or greater welfare distribution that goes at the cost of concern for the worst-off. To give another example, above a minimum level of welfare a society with more extensive basic liberties at the cost of economic growth, is shown to be more just than a society with more economic growth at the cost of one or more basic liberties.

However, not so many of our political values and principles allow for a lexical ordering on which all reasonable democratic citizens will agree, even if they would apply impartial reason. As Gerald Gaus argues, 'Little, if anything, is the object of consensus between reasonable people (1996: 293)', let alone an agreement on a lexical ordering of political values. And according to John Broome, a lexical ordering is very implausible in general: 'it is implausible that any value lexically dominates any other (Broome 2004: 24)'.

Generally acceptable and even universally valid values do usually not lead to consensus on their ranking because the rationally permissible weights assigned to them differ considerably. The widespread belief that, by deliberation, the range of weights assigned to relevant values could be

narrowed down, is, I think, partly based on the assumption that the differences in weight assignment are due to inconclusiveness rather than to indeterminacy, and that knowledge, information and rational deliberation will promote convergence and consensus. I call this the 'convergent reason assumption': the assumption that true insight results in convergence of value judgments. This assumption is not very plausible if the disagreements can more plausibly be explained in terms of indeterminacy than inconclusiveness (Boot 2007: 283).

Empirical studies corroborate the claim that relative weights assigned to incommensurable values considerably differ between equally rational persons (Nord 1993; Daniels and Sabin 1997). All participants to the empirical studies were well-informed, intelligent and acquainted with the relevant issues. The wide range seems the result of reasonable rather than unreasonable disagreement and this makes a significant narrowing-down of the range of 'rationally permissible' weights implausible. Daniels and Sabin argue that the large inter-personal differences in weights which people assign to different moral concerns 'probably depend on how these moral concerns fit within wider conceptions of the good ... If so, there is good reason to think these disagreements will be a persistent feature of the situation (1997)'.

In sum, it is not a lack of knowledge or information (inconclusiveness) that seems to underlie the width of the range of different weights, but rather the plurality of reason itself, the deep moral divisions and the incommensurability of the competing relevant values themselves (indeterminacy).

The unrealistic expectation of the possibility of rational consensus amongst all reasonable people forms also the weak link in Jürgen Habermas's 'discourse ethics' which is assumed to be capable of resolving value conflicts by rational deliberation and moral discourse applying 'valid normative rules'. According to Habermas 'a norm is valid if and only if it can be accepted by all affected as participants in discourse in the light of their values and interests (Finlayson 2005: 81–82).' Because of this condition of agreement of 'all concerned', 'not many candidate norms will survive such a severe test of its validity, and those that do will

be extremely general (ibidem: 87)'.[16] Many values but only few rankings of these values are acceptable for all rational and reasonable people.

How should we deal with the problem of disagreement related to an incommensurable value conflict in practical cases? How should we strike a compromise when it is not to be expected that we reach consensus on the resolution of the relevant value conflict? Which decision procedure should we follow? In other words: if we cannot achieve consensus, how can we still make a compromise?

One may argue that in a democracy we should decide by the majority rule. However, what gives the majority rule its legitimacy as a procedure for resolving moral disputes about public policy? One may answer that the majority rule counts everyone's interests equally in the decision process. However, this procedure often simply aggregates the *preferences* of the voters. Is this a sufficient justification in cases of fundamental moral disagreement?

There is an essential difference between preferences and ethical values. Ideally, we would like to resolve moral disputes through argument and deliberation about reasons that we consider convincing, instead of by counting preferences.

In cases of moral disagreement it is not sufficient to be told that 'a majority of people think otherwise'. Majorities can be morally wrong and may let us do the wrong thing. Therefore, according to Daniels, counting votes fails as an account of the legitimacy of a democratic procedure because it ignores the way reasons play a role in our deliberations about what is right (Daniels 2008).

But there is still another important reason not to accept the majority rule if it is based on merely counting preferences. In the case of incommensurable value conflicts, there are usually winners and losers. As the example of the allocation of scarce medical resources shows, the winners and losers win and lose something very important, namely health, or even life. So the final decision we take has far-reaching consequences for the concerning persons. Every decision will make some people better off and some worse off than they would be as a result of an alternative

[16] Although Habermas initially denied this, he later conceded the point.

decision. That is why we have to take this decision very carefully. In the relevant decision-making, justification of the decision is necessary, because losers expect a reasonable explanation why they do not receive the resources.

According to Daniels the moral controversy that surrounds the creation of winners and losers results in a legitimacy problem. Under what conditions do decision makers have the moral authority to decide on the selection criteria? In order to make the decision legitimate, we must seek terms of fair cooperation that all parties in the dispute can accept as reasonable. In other words, we must seek fair cooperation that rests on justifications acceptable to all (compare the views of Rawls, Scanlon and Habermas). In the deliberation we should only appeal to kinds of reasons that all can recognize as acceptable or relevant.

The majority should not exercise brute power of preference, but should be constrained by having to seek reasons for its view that are justifiable to all who seek mutually justifiable terms of cooperative and democratic decision-making. So the decision procedure requires careful deliberation about the various reasons put forward on both sides, with the goal of seriously considering all relevant reasons. Only then, also losers will know that their beliefs about what is right were taken seriously by others. Both sides of the dispute should recognize the relevance and appropriateness of the kind of reason offered by the other, even if they disagree about the relative weight, interpretation or application of that reason. This procedure is called 'deliberative democratic decision-making'. As Daniels argues, on this view, the minority can at least assure itself that the choice of the majority rests on the kind of reason that appropriately plays a role in the deliberation.

Habermas has identified the following four conditions of an ideal democratic deliberation situation:

1. No party or person who is capable of making a relevant contribution has been excluded;
2. Participants have equal voice;
3. They are internally free to speak their honest opinion without deception or self-deception;
4. There are no sources of coercion built into the process and procedures of discourse.

So ideal democratic deliberation among decision makers is deliberation that is free from distortions of unequal political power, such as power obtained through economic wealth or the support of interest groups. In sum, a deliberative democratic procedure means that, for a democratic decision to be legitimate, it must be preceded by public deliberation, not merely aggregation of preferences.

However, although democratic deliberation is a condition for legitimacy of the final decision, it cannot prevent an ethical deficit. As we have discussed in Sect. 6.6, either decision between 3NT options that represent rival ethical values results in an ethical deficit. The reason is that, in the relevant cases, neither decision can be completely justified: neither claim in favour of which the decision is taken outweighs the rival claim. The consequence is that either decision will wrong at least one of the parties without a complete justification—a justification based on the argument that the final decision is all things considered the right one (which is not the case). The majority rule will not remove this ethical deficit, because it accepts instead of resolves the ethical conflict under consideration. Even if the democratic deliberation would lead to consensus about the compromise to be made (e.g. a compromise between greater welfare and fairness in the distribution of welfare according to Rawls' Difference Principle), this would not remove the ethical deficit (in this case, undeserved inequality).

6.8 Conclusions

We have discussed that incommensurable values lack any point of equivalence. This implies that between these incommensurable values, there cannot be an objective, impartial and determinate traded-off or balance, not even in principle.

Even if we start from generally accepted or even universally valid ethical principles and demands of justice, the exercise of reason, including impartial reason, will not lead to the same compromises between and rankings of these principles and demands of justice. This means that different societies may choose different compromises without necessarily being less rational or less reasonable.

As Isaiah Berlin and John Rawls have emphasized, there is no society without loss of human values, because the full range of competing human values is too extensive to fit in any one social world (Berlin 1991: 13 and 1969: 167 ff.; Rawls 1996: p. 197 n. 32). Optimal realization of some values in some societies may be incompatible with optimal realization of some other values. These other values may be better realized in other compromises between and rankings of values in other societies.

In other words, a complete reconciliation and optimal realization of all conflicting human values in one single society is not possible. This entails that a single global society with a single ranking of human values and one and the same compromise between or ordering of 'values of justice' would be at the expense of a loss of some of these values.

This shows the importance of a diversity of cultures and nations, in which universally valid human values and 'values of justice' may be ranked differently. In this respect, local compromises may be preferred to global compromises—and perhaps even divergent rankings of domestic justice may be preferred to a uniform and single ranking of global justice—provided that fundamental ethical principles and minimal requirements of justice are universally recognized.

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