

The Concept of Dilemma in Legal and Judicial Ethics

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Introduction

The term dilemma is common in daily language. Many conversations start with “I have a dilemma.” typically aimed at obtaining an advice about how to make a difficult decision. Such a statement may also be simply an expression of expectation that the interlocutor will show compassion because of the weight of the decision to be made. Irrespective of whether we call a situation a dilemma because we want advice about the right course of action or to express our emotions related to the necessity of making a choice, it is sure that we do this very often in many various contexts and in respect of many different situations. On one hand, they may be about very trivial (but not easy) choices, such as decisions on the dish we want to have for dinner, or where to go on holiday. On the other, they include serious choices such as the university course to choose, moving to another city or changing job. Interestingly, we rarely use this term in daily life in relation to situations that are truly dramatic, satisfied with stating that someone undergoes a tragedy of simply difficult moments. Perhaps this is because we then deal with exceptional situations and not everyday, ordinary ones.

However, it is worth noting that the opposite is true in philosophical reflection. In ethics, the concept of dilemma is reserved for situations of the toughest moral choices, in which none of the available options seem acceptable. In consequence, we face the wall which blocks decision-making even though we are convinced that one must be made. The difference between daily and philosophical discourse concerning dilemmas was one of the factors which caused significant revival of the latter starting from the 1980s and 90s. The works of such authors as W. Sinnott-Armstrong¹ and D. Statman² certainly raised the issue of whether everyday use of “dilemma” has anything to do with the corresponding philosophical term. Reflection on this issue mostly took the form of dispute about whether dilemmas in philosophical understanding really occur in practice. The answer to that has far-reaching consequences for ethics, for if in daily life we may encounter true moral dilemmas, then we can expect help in solving them from an ethical theory. But if they can be solved, are

¹ Walter Sinnott-Armstrong, *Moral Dilemmas (Philosophical Theory)* (Oxford: Basil Blackwell, 1988).

² Daniel Statman, *Moral Dilemmas* (Amsterdam-Atlanta: Rodopi, 1995).

they true dilemmas? And if no solution is possible, what is the use of ethics that cannot help when its guidance is most needed?

This issue is extremely consequential, and in some way decisive for the identity of ethics as a philosophy of morality. The aim of this book, however, is neither to decide nor formulate another position in the dispute on the concept of dilemma in ethics. The reflections within aim to study the extent to which the category of dilemma is useful in legal and judicial ethics. Naturally, theoretical disputes on dilemma are essential background for achieving this aim, and will be considered in further argument. The fact that this problem has not been tackled in a comprehensive manner by the subject literature seems crucial. However, it is of fundamental importance for further research in legal and judicial ethics and their relation to other branches of jurisprudence, as well as in the ethical education of lawyers. The reason is that dilemmas – understood in any way – which arise in the practice of the legal professions, are usually the point of departure for theoretical reflection in this scope. The specificity of these dilemmas and the fact that they are characteristic uniquely of a given profession are typically an argument for distinguishing its ethics from that of other fields. If there are no dilemmas uniquely characteristic of a given profession, then this weakens the arguments for distinguishing professional ethics, or at least deprives this distinction of importance.

Simultaneously, on the basis of legal and judicial ethics, the concept of dilemma is neither satisfactorily defined nor sufficiently analysed. This results in the fact that, in this discipline, the term is usually understood intuitively as a collective category into which fall many various kinds of situations. It is applied, for example, to situations where a choice subjectively felt as hard is to be made, the conflict of disproportionate values, conflicts of roles and obligations, and also the conflicts of conscience and convictions related to performing a profession or specific professional tasks. Such varied situations have methods for their solution worked out in theory as well as within institutions. Likewise, in the ethical education of judges and lawyers, the concept of dilemma is the starting point for many propositions from the scope of didactics. Notably, going beyond the minimalist educational goal, namely acquainting learners with the content of provisions of law and codes of professional ethics within the “regulatory approach,” requires that they acquire the skill of argumentation and reflexive attitude, namely, adopting a philosophical approach. In terms of methods, this means primarily orientation to activating methods – the learners are presented dilemmas that they have to try to solve.

The problem of the usefulness of the concept of dilemma in legal and judicial ethics and the ethical education of lawyers is presented in this book in three steps. First, an outline of the debate that has been ongoing during recent

decades is presented. It is not a full presentation, but rather a general discussion of the main points of this debate in the respect in which its conclusions may be useful in further reflection. The issue of the structure of moral dilemmas, which distinguishes them from other types of practical problems described in the book, is especially important. Hence, we mention such objective elements of a moral dilemma as alternativeness, symmetry of options, and the existence of moral conflict arising from necessarily resulting in doing harm. As far as subjective elements of a dilemma are concerned, the issues of the difficulty of choice, sense of guilt and “moral residuum” are raised. Then, thanks to discussing all these elements, it will be possible to determine whether various kinds of situations of choice indicated in legal and judicial ethics as moral dilemmas do indeed fulfill the criteria.

Second, the three following chapters discuss the types of dilemmas in legal and judicial ethics. They are divided on the basis of the distinction into three levels of reflection – deontological, axiological, and moral responsibility.³ On each level there are at least a few characteristic choices faced by a lawyer. For instance, on the deontological plane, it is necessary to decide how to understand obligations resulting from lawyers’ professional role and their relation to other categories of obligations, including moral and legal ones, and those resulting from other roles they have, and so on. On the axiological level, the questions are of which understanding of professional values to adopt, and in what relation they stand, for example, to the legal system or social expectations. On the moral level, we may ask for instance the scope of a lawyer’s responsibility – is it prospective or only retrospective, or how the relation between personal responsibility and that of an organization looks.

It is worth mentioning, that similar division of dilemmas is used by Barbara Kudrycka in her work on administrative and public official ethics. She speaks about dilemmas of duties, dilemmas of values and dilemmas of responsibility. However, according to her work there are also other types of dilemmas, i.e. dilemmas of roles, dilemmas resulting in conflict of interests, dilemmas of loyalty and dilemmas resulting in distortion of information. There can be also other, not mentioned types of dilemmas. In this book such situations are not perceived as moral dilemmas at all. They are rather in the group of other practical problems, which does not make them less important. This view just takes into account that they do not have some features of moral dilemmas in strict sense. Nevertheless, it has to be emphasized that the study of administrative and public

³ On three levels of theory in legal and judicial ethics, see: Paweł Skuczyński, *The Status of Legal Ethics* (Frankfurt am Main: Peter Lang, 2013), pp. 119–193.

official ethics by B. Kudrycka is a good example of similar idea to which this book is based on.⁴

Third, the following five chapters, making up the second part of the book, contain a review of dilemmas relative to their branch of law and legal profession. It comprises the following branches: criminal, civil, commercial, family and guardianship law, employment and social security law, as well as constitutional law. Each chapter contains description of thirty *prima facie* dilemmas, which were divided according to legal profession/role, e.g. dilemmas of a judge, prosecutor and counsel. Together, 150 dilemmas, a considerably rich body of material, are presented. Every dilemma is discussed by distinguishing the facts, a description of alternative courses of action with indications of the good and bad aspects of each, a standard solution, namely how a dilemma is typically solved in practice, giving the fundamental arguments and the meta-ethical perspective (placing a given situation into one of the following categories: moral dilemma in proper sense, conflict of conscience, legal dilemma, or the problem of subjection to law, the problem of the application of law, the problem of legal interpretation, conflict of values when they can be balanced by hierarchisation or optimisation, conflict of roles, subjectively hard choice and – last but not least – an epistemic dilemma).

On the basis of these three steps, a thesis on the usefulness of the concept of dilemma in legal and judicial ethics may be formed. Namely, it seems that we do not have moral dilemmas here in the strict above-described sense used in ethics, and that it would contribute nothing important to the debate. This is due mainly to the correlation of meta-ethical discussions concerning the concept of moral dilemma with the fact that lawyers and judges act in a defined institutional context, and play defined professional roles. The latter means bringing a new element to the discussion, albeit a stable one in professional ethics, namely the reasons arising from the performed role and the responsibility related to it. This circumstance changes, in one way or another, the structure of situations which at first glance are dilemmas. In effect, there are two possibilities. The concept of dilemma may be adapted so that it encompasses also these situations, namely by modification or broadening. Another option is to acknowledge that these situations are not dilemmas in the strict sense, and regard them as belonging to other categories of practical problems. The book opts for the latter possibility, for following reasons.

First of all, scepticism as regards the use of the term dilemma in legal and judicial ethics allows us to maintain a meaning that is more general and already

⁴ Barbara Kudrycka, *Dylematy urzędników administracji publicznej (zagadnienia administracyjno-prawne)* (Białystok: Temida 2, 1995), pp. 43 et seq.

rooted in debates. Then, in the professional sphere one can speak of prima facie dilemmas at most, which on closer inspection turn out not to be moral dilemmas in the strict sense. Situations from this sphere may perhaps serve as counter-examples in the general debate on dilemmas, but, due to their special, professional nature, are not a sufficient basis for modification of the concept of dilemma. Without going overboard, it may only be limited. Such a solution also seems rational because it underlines the difference that institutions bring to practical problems. Although one may also defend the position that they generate many moral problems, for example due to the necessity of reconciling various social roles, the analyses conducted in this book seem to justify the opinion that institutions have a different function in moral life – they change the structure of a situation either by providing reasons for one of the modes of conduct, introduce additional possibility in this scope, or transfer responsibility for the choice from the engaged person to the situation. In effect, the situation ceases to be a “no-win.” which cannot be solved. An institution creates a situation and simultaneously introduces its potential for resolution.

This thesis may resemble a legal positivist view, according to which institutionalised rules introduce into practical reasoning a certainty that is missing when referring only to morality. For the former are connected with something that J. Raz called exclusionary reason, which is “a second order reason to refrain from acting for some reason.”⁵ Contrary to the first order reason, the second order reasons, especially their negative version – exclusionary reasons, do not require consideration of their relative weight or confrontation with opposing reasons. In a conflict of first and second order reasons, the latter always prevail. This is so only because of their superiority without regard to any other substantive issue. Because of this, they may introduce certainty to practical reasoning in place of the uncertainty that occurs when a subject has to weigh all available reasons of the first order on their own. This does not mean that the subjects cannot conduct their own practical reasoning without reference to exclusionary reasons. However, if they exist, they should act according to the conclusion determined by them.

This view, together with other theoretical propositions, will be included in further reflection, especially on the deontological dilemmas of lawyers and judges. However, it is worth stressing here, that it is not intended that the thesis on the limited usefulness of the concept of dilemma in legal and judicial ethics should subscribe to or support any general view of this kind. On the basis of the conducted analyses, one may at most conclude that institutions introduce the potential for resolution of moral problems, but not through direct establishment

⁵ Joseph Raz, *Practical Reason and Norms* (Oxford–New York: Oxford University Press, 1990), p. 39.

of exclusionary reasons. It is rather done by putting people acting within institutions before the necessity to define their relation to these institutions, and not on the grounds of authority. Hence, this requires from them decisions about how they will solve particular practical problems encountered in their professional work. The decisions do not necessarily have to be made within conscious practical reasoning, but they are somehow always present in professional contexts of lawyers, and on these rely the content of decisions in specific situations, without which moral dilemmas may appear unsolvable. For that reason, the situations distinguished in the second and third step described above, and hence in the first and second part of the book, may be divided into two groups.

First, there is a whole group of problems that can be described as meta-dilemmas of legal and judicial ethics. They concern such issues as primacy of professional role or private conscience, and whether the values of legal professional roles are determined by axiology of the legal system, by social division of work and market reality, or are perhaps autonomous? Hence, meta-dilemmas concern issues that are fundamental for the way that more specific problems, which may occur in the daily life of a lawyer or judge are solved. Thus, meta-dilemmas do not become less real than the latter, but are only less frequently solved in a reflexive and deliberate manner. However, the choices they require must be made at least implicitly, for they are more indispensable for making decisions in daily life while maintaining at least the minimum level of coherence. Dilemmatic types of situations on the deontological, axiological and moral responsibility levels if legal and judicial ethics eventually turn out to be meta-dilemmas.

Second, there are also situations that at first glance seem moral dilemmas or are believed to be so in daily life. However, they do not meet the criteria of dilemmas on the grounds of meta-ethics. They are different kinds of practical problems. Due to that, in this book the term *prima facie* dilemmas is used in regard to the latter, and moral dilemmas in the strict sense has been applied to the former. As already mentioned, this distinction will be used mainly in the second part of the book, where many examples of situations which usually are seen as *prima facie* dilemmas, but on closer inspection cannot be seen as moral dilemmas in strict sense, are analysed.

Hence, instead of the idea of a moral dilemma, there may be the concept of meta-dilemma and *prima facie* dilemma proposed in legal and judicial ethics. They depend on each other, as some situations seem to be dilemmas but only at first glance, since previously solved meta-dilemmas make them solvable. The latter is relative, then, though it may not be reduced to ethical beliefs alone. For the solutions of meta-dilemmas are decisions on the courses of action made on

a level different to that of *prima facie* dilemmas. They may also be made against the beliefs of a person who acknowledges the superiority of certain reasons over their own opinions. It is notable that distinguishing meta-dilemmas and *prima facie* dilemmas facilitates a better understanding of what may be described as the standard solution of the latter. In practice, they play an essential role and hence are covered in the situations review in the second part of the book. They are very characteristic of professional ethics. Their standard nature is not only about their being traditionally adopted, but that they are regarded as valid. This validity typically relies on an implied solution of professional meta-dilemmas.

However, irrespective of whether such a view on the usefulness of the concept of moral dilemma in professional ethics proves convincing, the material collected in the book may prove useful. Both the review of *prima facie* dilemmas and the typologies of deontological, axiological and moral responsibility meta-dilemmas have been prepared as systematisations. They may be useful both in further research as well as in lawyers' education. They are based on examples from the Polish legal system, and hence refer to Polish legal literature. Therefore, they may be a means by which a foreign reader can become more familiar with the achievements of the Polish legal professions and their ethics. Simultaneously, the belief that the material has a wider European nature is justified, for it is an illustration of problems typical for civil law legal culture, and indeed the roles of lawyers and judges and the institutions presented similarly formed on the whole continent. Moreover, many of the presented situations may have a universal range and concern lawyers representing different legal cultures and systems. We have to start by presenting the debate on the concept of dilemma on the grounds of ethics, and giving examples of situations that seem to be truly universal dilemmas.

Paweł Skuczyński

Part I.
**Moral Dilemmas in Ethical
and Legal-Ethical Perspective**

Chapter 1. Moral Dilemmas as a Matter of Contemporary Ethical Debate

Paweł Skuczyński

1.1. Examples of dilemmas

In literature, there are tens or even hundreds of moral dilemmas, which serve to show not only their essence but also variety. Naturally, there is no possibility to present here all of them or even a fully representative selection. But one must not for this reason avoid starting a discussion on dilemmas in legal and judicial ethics through the use of examples. The existence of a certain canon of situations that are given most attention may prove useful here. They are so common and characteristic that many people have encountered them in their education or popular culture. They are often covered in separate works. However, the issue of belonging to the canon is in some measure based on convention, and for that reason every such list may be questioned. Bearing this in mind, four dilemmas have been chosen, which on one hand seem to belong to the canon, while on the other will show some variety of situations described as dilemmas. They are: the trolley dilemma, a student of Sartre's dilemma, Heinz's dilemma and Sophie's dilemma. Each of them is based on a slightly different scheme and is related to a different, irreconcilable moral conflict. They are also a foundation upon which to formulate more abstract theses on dilemmas. In effect, each of the examples – more precisely, the schemes on which they are based – may be used in analysis of situations on the grounds of legal and judicial ethics. This particularly pertains to deontological dilemmas.

1.1.1. The Trolley Dilemma

In a now classic work on moral dilemmas, written in 1967, Philippa Foot described a situation commonly known as the driver's dilemma or the trolley

dilemma, which has become even a paradigmatic example.¹ It has been mentioned by the author among many other situations, hence its description is quite laconic. She proposes a situation in which the subject:

is the driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed.²

The discussed situation posits rolling stock getting out of the driver's control and gaining speed. The only thing the driver can do is to switch the point and decide which track it will continue on. On one of the two possible paths there is a group of five workmen, and on the other only one. It is certain that all of those on the track taken by the trolley will die in the resulting collision. This dilemma has become the subject of innumerable interpretations aimed at both proving that it is correct for the driver to direct the vehicle onto the track where there is only one person, thus saving five is right, as well as those focused on doubts that such a solution would mean sacrificing an innocent, unexpected person and an unacceptable calculation of the value of human life.³ It has also become a starting point for many variants, such as one in which the trolley could be stopped if a weighty person were to be pushed onto the track,⁴ and the speleologists' dilemma, in which people trapped in a cave can save themselves only by blasting one companion who got stuck in the exit.⁵ A separate place among variants is taken by the plane problem. The author points to the choice of a pilot who knows that their aircraft will crash, but can change the flight path, and so the place of catastrophe, by directing the plane towards a less inhabited area.⁶ Their situation is similar to the choice before the trolley driver. However, it looks different if we imagine the plane has been hijacked for use in a terrorist attack, namely it is being purposely directed to densely populated areas. In that case, is it admissible to shoot down the plane and sacrifice the passengers and crew in order to save many more people, since it may be assumed that all on board will lose their lives in any case? That this is no mere theoretical situation

¹ Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review* 1967, No. 5, included in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Oxford: Clarendon Press, 2002).

² *Ibidem*, p. 2.

³ The trolley dilemma was made popular in particular by Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem," *Monist* 1976, No. 59. Contemporarily see e.g. Frances M. Kamm, *The Trolley Problem Mysteries* (Oxford-New York: Oxford University Press, 2015).

⁴ See e.g. Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), pp. 161 et seq.

⁵ The speleologists' dilemma should not be confused with *The Case of the Speluncean Explorers* presented by Lon L. Fuller originally in *Harvard Law Review* 1949, No. 4.

⁶ Foot, *The Problem of Abortion*, p. 2.

may be testified to by the fact that such use of planes has happened, and that there have been attempts to introduce into law the possibility of preventive shooting down of a plane in such a situation. In Poland, such a law was passed in 2004, with the addition of art. 122a to the Act of 3rd July 2002 – Aviation Law reading as follows:

If required by national security considerations and the air defence command structure, taking into account in particular information provided by air traffic services providers, that the civil aircraft is used for illegal activities, and in particular as a means of terrorist attack from air, this aircraft may be destroyed on the terms set out in the provisions of the Act of October 12, 1990 on the protection of the state border.

This provision was challenged and subject to review by the Constitutional Tribunal, which ruled that it breached constitutional guarantees of a democratic state of law, human dignity and right to life. The Tribunal formulated the problem by asking: “can the lives of passengers of a hijacked plane, most certainly nearing the inevitable end, be held as of lesser value than the lives of other people, especially those threatened by the terrorist attack?” to which it replied:

there is no doubt that human life is not subject to evaluation on account of age, state of health of the individual, expected life span or any other criteria. Each person, including the passengers of a plane flying in the airspace of a given state, has the right to have their life protected by that state. The self-granted authorisation of the state to kill these persons, if only for the protection of the lives of other people, remains in contradiction with the right at issue.⁷

Among innumerable variants and interpretations of the trolley dilemma, it is worth mentioning the following issues. To Foot, this and other examples are primarily to illustrate the working of the doctrine of double effect. As she indicates, double effect refers to “the two effects that an action may produce: the one aimed at, and the one foreseen but in no way desired.” While the doctrine of double effect claims that “it is sometimes permissible to bring about by oblique intention what one may not directly intend.”⁸ This means that doing harm may sometimes be permissible unless such harm is expressly intended by the perpetrator, when it may only occur as a secondary effect – foreseeable but not acceptable. This distinction resembles the distinction of direct intent and recklessness. The doctrine of double effect maintains that, if our action is

⁷ Judgment of Constitutional Tribunal of 30 September 2008, case No. K 44/07.

⁸ Foot, *The Problem of Abortion*, p. 2.

directly oriented to good, and the circumstances indirectly also bring harm, then there are no grounds for negative moral assessment. Blame would only be apportioned if this bad effect were to be caused by direct intent. This explains why we allow the driver to change the track – he wants to save five people, the unintended – but foreseeable – effect of which is the death of one person.

The above distinction may be expressed by separating situations of killing and letting die. According to J.J. Thomson, this allows an understanding of how the driver's actions would differ from other similar courses of action, such as shooting down a hijacked plane. It is similar in the case of a surgeon who faces the dilemma of whether to save several patients by transplanting organs from one person he would have to kill for that purpose.⁹ Despite accepting this distinction and its explicating value, the author does not support the conclusion that the driver's action would be acceptable, or even advisable. This is barred by the rights of the person who would have to be sacrificed to save more people. She uses here Dworkin's metaphor of rights as trumps, which means that reasons following from rights of particular people always prevail over reasons following from calculation. Hence, it can be said that rights trump utilities.¹⁰ Rights are deontologically interpreted here, as providing absolute reasons to protect them. Yet this by no means precludes all calculation. For instance, killing five people certainly is a greater evil than killing one. In the case of the driver's dilemma, it is not only a question of calculation but of a different character of action, which encounters an objection – the right of the person to be sacrificed.

B. Chyrowicz focuses on the problem of the admissibility of calculation, namely that the dilemma makes us face the problem of minimizing the evil. Adopting such a principle would explain our intuition that the driver should direct the tram onto the track with one person and so save more. If he makes such a decision, then he will not automatically become the killer of this one person, since it will happen due to loss of control over the vehicle. Someone will die anyway, and the driver only contributes to alleviating the bad effects. Still, doubt remains about whether, despite not being the perpetrator, the driver can make the decision to sacrifice one person to save others. It should be stressed that the choice is not simply one person or another, but the number of victims is crucial.¹¹ Only by making this assumption can the minimizing of evil be considered, the condition of which is the admissibility of calculation. This can

⁹ Judith Jarvis Thomson, "The Trolley Problem," *The Yale Law Journal* 1985, No. 94, pp. 1395 et seq.

¹⁰ *Ibidem*, p. 1406.

¹¹ Barbara Chyrowicz, *O sytuacjach bez wyjścia w etyce. Dylematy moralne: ich natura, rodzaj i sposoby rozstrzygnięcia* (Kraków: Wydawnictwo Znak, 2008), pp. 36–37.

be juxtaposed with the right of the single person on the track to have their life protected and not to be sacrificed to save other people.

On a more general level, the trolley dilemma may be interpreted as a conflict of consequentialist and deontological reasons. The former, on the most general level, suggest adopting as criterion of moral assessments whether the effects of action maximize good. Hence, it demands a comparison of the alternatives of action and their effects on a universal scale. This means that the comparison must be carried out from the impartial perspective of every rational subject, so must refer only to reasons that are wholly neutral as regards the subject, namely it should not be considered whether it is good for me or people that are important to me.¹² The second view claims that some actions are absolute obligations, irrespective of their effects, on the basis of their internal value or universal nature. This precludes in such situations all calculation and imposes on the subject either the obligation to act or refrain from doing so if the effect would be bad. Relying on one's own responsibility for meeting one's moral obligations, and not on the common good, is the right of every subject, which is referred to as agent-centered prerogative. Reasons following from obligations towards oneself and specific persons with whom we may have any relations should also be considered. Hence, a wholly impartial perspective is not required here.¹³

In brief, it may be said that consequentialism focuses on the promotion of values, while deontology on their protection.¹⁴ This is of special significance for another distinction, important for the trolley dilemma, between positive and negative obligations. In seeking an explanation for why we would admit the change of tracks by the driver, but not allow the plane to be shot down or the surgeon to sacrifice one patient, Foot notices that the first dilemma is propelled by the conflict of two negative obligations, i.e. avoiding doing harm. Whereas in the other cases the conflict is between similar negative and positive obligations, namely protection of life and the provision of help by the state or doctor.¹⁵ According to K. Siaja, the distinction is significant only in the deontological perspective. For a consequentialist it is of no importance, since what matters is the occurrence of effect that has a better balance of values.¹⁶ The primacy of preclusion to do harm over the prescription to provide help would not contradict the calculation that leads to it.

¹² Krzysztof Siaja, *Etyka normatywna. Między konsekwencjonalizmem a deontologią* (Kraków: Universitas, 2015), pp. 69, 75.

¹³ *Ibidem*, pp. 98, 110, 112.

¹⁴ *Ibidem*, p. 77.

¹⁵ Foot, *The Problem of Abortion*, pp. 4–5.

¹⁶ Siaja, *Etyka normatywna*, p. 85.

1.1.2. The Heinz's Dilemma

Another dilemma has a slightly different nature for it is widely used mainly in studies on psychology of moral development and not in philosophical analyses. Still, it is widely known and characteristic. Heinz's dilemma has been primarily used in L. Kohlberg's studies¹⁷ published in 1963, and later in C. Gilligan¹⁸ in 1982. It goes as follows:

In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what the drug cost him to make. He paid \$ 200 for the radium and charged \$ 2000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money, but he could only get together about \$ 1000 which is half of what it cost. He told the druggist that his wife was dying and asked him to sell it cheaper or let him pay later. But the druggist said: "No, I discovered the drug and I'm going to make money from it." So Heinz got desperate and broke into the man's store to steal the drug for his wife. Should the husband have done that?¹⁹

For L. Kohlberg, the situation is about a typical conflict between two values: life and property. By answering a number of questions in an interview, it is possible to define the stage of moral development of a given person. The questions include: Is it husband's duty to steal the drug for his wife if he can get it no other way? Would a good husband do it? Did the chemist have the right to charge that much when there was no law actually setting a limit to the price? Why? If the husband does not feel very close or affectionate to his wife, should he still steal the drug? Why? Suppose it wasn't Heinz's wife who was dying of cancer but it was Heinz's best friend. His friend didn't have any money and there was no one in his family willing to steal the drug. Should Heinz steal the drug for his friend in that case? Why? These show the complexity of the situation and the difficulty resulting from the mentioned conflict of values. Even though the author treated this dilemma as a case primarily in a study on child development from the earliest phases to maturity, due to its structure it may be regarded as universal. Certainly, in this respect, its conclusions became part of a broader discussion, including on ethical grounds.

¹⁷ Lawrence Kohlberg, "The Development of Children's Orientations Toward a Moral Order," *Vita Humana* 1963, No. 6, pp. 11–33, reprinted in *Human Development* 2008, No. 51, pp. 8–20.

¹⁸ Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development* (Cambridge Mass. and London: Harvard University Press, 2003).

¹⁹ Kohlberg, *The Development of Children's Orientations*, p. 12.

The author understood moral development in the categories of enhancing cognitive powers of an individual and passage from the simplest methods of moral reasoning to more complex. Three fundamental levels have been distinguished: pre-conventional, conventional and post-conventional morality. Each stage may further be divided into two phases. On the pre-conventional level: 1) Obedience and punishment orientation, where actions are evaluated in terms of possible punishment, not goodness or badness. Obedience to power is emphasized and the main question is "How can I avoid punishment?" At this level, the most probable answers to Heinz's dilemma may be: "Heinz should not steal the medicine because he will consequently be put in prison which will mean he is a bad person. Or: Heinz should steal the medicine because it is only worth \$200 and not how much the druggist wanted for it; Heinz had even offered to pay for it and was not stealing anything else." 2) Pleasure-seeking orientation, where proper action is determined by one's own needs. Concerns for the needs of others is largely a matter of "you scratch my back and I'll scratch yours," not of loyalty, gratitude, or justice and the main question is "What's in it for me?" Probable answers are: "Heinz should steal the medicine because he will be much happier if he saves his wife, even if he will have to serve a prison sentence. Or: Heinz should not steal the medicine because prison is an awful place, and he would probably languish over a jail cell more than his wife's death."

Conventional level has two phases: 3) Good boy/good girl orientation. Good behavior is that which pleases others in the immediate group or which brings approval; the emphasis is on being "nice." It can be titled also as conforming to social norms orientation. Probable answers to Heinz's dilemma are: "Heinz should steal the medicine because his wife expects it; he wants to be a good husband. Or: Heinz should not steal the drug because stealing is bad and he is not a criminal; he tried to do everything he could without breaking the law, you cannot blame him." 4) Authority orientation. In this stage the emphasis is on upholding law, order, and authority, doing one's duty, and following social rules. It can be described as law and order morality. Probable answers are: "Heinz should not steal the medicine because the law prohibits stealing, making it illegal. Or: Heinz should steal the drug for his wife but also take the prescribed punishment for the crime as well as paying the druggist what he is owed. Criminals cannot just run around without regard for the law; actions have consequences."

Postconventional level has the following phases: 5) social-contract orientation. Support of laws and rules is based on rational analysis and mutual agreement; rules are recognised as open to question but are upheld for the good of the community and in the name of democratic values. It can be called exchanging charter of rights and freedoms orientation. Probable answers are:

“Heinz should steal the medicine because everyone has a right to choose life, regardless of the law. Or: Heinz should not steal the medicine because the scientist has a right to fair compensation. Even if his wife is sick, it does not make his actions right.” 6) Morality of individual principals. Behavior is directed by self-chosen ethical principles that tend to be general, comprehensive, or universal; high value is placed on justice, dignity, and equality of all persons. This stage can be also described as universal ethical principles. Probable answers: “Heinz should steal the medicine, because saving a human life is a more fundamental value than the property rights of another person. Or: Heinz should not steal the medicine, because others may need the medicine just as badly, and their lives are equally significant.”²⁰

Hence, it can be said that moral development progresses to autonomous decision-making based on principles. The more mature we are, the wider range of reason we tend to include and the more willing we are to take responsibility for the choice. However, this does not make the dilemma easier to solve; on the contrary, autonomous thinking allows discernment of more conflicting reasons resulting from conflicting values. Though the basic choice is between life and property, it may also be interpreted in the categories of conflict between an obligation to the wife and an obligation to the chemist. On one hand, we have not only an emotional relation, as predefined by the formulation of the dilemma, but also reliance on someone, dependence and trust. On the other, there is an institution demanding respect, based on precisely defined law and applying sanctions for its breach. Even if we accept that the wife’s reliance on her husband and his sense of obligation to help also result from an institution, namely marriage, it is of a different kind than property. Hence, the conflict is also between two types of institutional requirements. However, this does not provide criteria for solving the discussed situation.

Heinz’s dilemma shows yet another type of conflict. According to C. Gilligan, there are empirical proofs that the levels of moral development presented by Kohlberg correspond to the process of a boy’s rearing and are inadequate as regards the analogous process in women. The masculine part usually believes that stealing is justified because life is of greater value than property. They are also convinced that the court would take this circumstance into account and would not punish the perpetrator. Girls, not questioning this way of thinking, also discern some ambiguity. They indicate that, although Heinz cannot steal the drug, he should not let his wife die. If he steals, then he will probably be sentenced and will not be able to help his wife in sickness. Hence, they propose

²⁰ Particular works of Kohlberg are collected in two volumes: *Essays in Moral Development* (San Francisco: Harper & Row, 1981) and *Essays in Moral Development* (San Francisco: Harper & Row, 1984).

that Heinz talks once again to the chemist and presents him the situation in detail, and surely then they will find a solution.²¹ The different answers also show that there is compassion and obligation to provide help, which take precedence over the law and rights. This pertains to Heinz as well as the chemist, which to some extent makes his decision unrelated to the extent of emotional engagement.²²

According to C. Gilligan, the examples show that the moral development of women is different from that of men, which provides a basis for distinguishing two alternative kinds of ethics. If we adopt Kohlberg's perspective, it means that men attain full moral development because they reason with abstract moral principles, while women remain on the conventional level, trying to find solutions most appropriate for the model of their role – feminised in their case – and so they are directed by care and maintaining relations at all cost. According to the author, this is an argument that Kohlberg's theory should be treated with reserve, and that men and women develop differently. As far as the former are concerned, they head what can be termed ethics of justice, namely thinking about morality in terms of the distinction between rights and duties on the basis of universal criteria of weighing the principles. Women, on the other hand, head the ethics of care, namely seeing morality through the lens of ideals of compassion and sacrifice for another person. It has to be remembered that the thesis concerns sex uniquely in terms of culture, and does not mean biological determinism.

From the point of view of dilemmas, the conclusion is crucial. Although the starting points for the above authors are empirical experiments, they lead to an important analytical distinction, namely that there are many ways of conceptualising a given situation which cannot be reduced only to classifying the available options as falling into such categories as obligation, duty, right, principle, moral ideal, etc. On a more fundamental level, moral dilemmas raise the question of whether such qualifications help us in unsolvable situations, i.e. whether they allow, by means of abstract logic, argumentation or the weighing of principles, in order to make a choice. Perhaps it is more correct to treat dilemmas as situations revealing deep interdependencies between people, and to focus on the nature of a particular relation. Both approaches should be seen as mature, and the resulting theoretical proposals as serious. If they are mutually exclusive in the discussed situations, it means that moral dilemmas are also related to the conflict between ethics of justice and ethics of care.

²¹ Gilligan, *In a Different Voice*, pp. 25–30.

²² *Ibidem*, pp. 54–58.

1.1.3. The Sophie's Dilemma (aka The Sophie's Choice)

Another very popular and much discussed example of a dilemma is the situation described by W. Styron in the novel *Sophie's Choice* first published in 1976. The heroine, Sophie – mother of two, John and Eva, is sent to Auschwitz camp. During selection at entry of those who will be executed immediately and those who will be imprisoned, an SS doctor places the following choice before Sophie:

“You may keep one of your children.”

“Bitte?” said Sophie.

“You may keep one of your children,” he repeated. “The other one will have to go. Which one will you keep?”

“You mean, I have to choose?”

“You’re a Pollack, not a Yid. That gives you a privilege – a choice.”

Her thought processes dwindled, ceased. Then she felt her legs crumple. “I can’t choose! I can’t choose!” She began to scream. Oh, how she recalled her own screams! Tormented angels never screeched so loudly above hell’s pandemonium. “Ich kann nicht wählen!” she screamed.

The doctor was aware of unwanted attention. “Shut up!” he ordered. “Hurry now and choose. Choose, goddamnit, or I’ll send them both over there. Quick!”

She could not believe any of this. She could not believe that she was now kneeling on the hurtful, abrading concrete, drawing her children toward her so smotheringly tight that she felt that their flesh might be engrafted to hers even through layers of clothes. Her disbelief was total, deranged. It was disbelief reflected in the eyes of the gaunt, waxy-skinned young Rottenführer, the doctor’s aide, to whom she inexplicably found herself looking upward in supplication. He appeared stunned, and he returned her gaze with a wide-eyed baffled expression, as if to say: I can’t understand this either.

“Don’t make me choose,” she heard herself plead in a whisper, “I can’t choose.”

“Send them both over there, then,” the doctor said to the aide, “nach links.”

“Mama!” She heard Eva’s thin but soaring cry at the instant that she thrust the child away from her and rose from the concrete with a clumsy stumbling motion. “Take the baby!” she called out. “Take my little girl!”²³

It has to be mentioned that, although this is fiction, similar examples may be found in literature. One of them appears in a lecture on the crisis of humanity,

²³ William Styron, *Sophie's Choice* (New York: Rosetta Books, 2000), pp. 507–508.

delivered in the United States in 1946 by A. Camus. Among several situations from wartime testimony, he recalled:

In Greece, after an underground resistance operation, a German officer prepares the executions of 3 brothers he has taken as hostages. Their old mother throws herself at his feet and he agrees to save one of them. But only at the condition that she designate which one. She chooses the oldest because he has a family, but her choice condemns the 2 others. Just as the German officer intended.²⁴

It is worth mentioning that this example was used by H. Arendt as one of the motifs in her analysis of the relation of totalitarianism to morality. She emphasises that totalitarian terror leads to unprecedented extremes by putting people in such situations which allow the undermining of any choice they make, and hence strip the victims of the opportunity to clear their conscience. Thus, they preclude the last refuge from the system, namely into oneself, into the moral core of a person. By shuttering the latter, entangling in dramatic choices, totalitarianism acts not only with external oppression, but also within an individual, which is its greatest treachery.²⁵

In modern meta-ethical debate, Sophie's choice is usually cited as a classic dilemma. For W. Sinnott-Armstrong, options in the situation are symmetrical, which generates an insolvable moral conflict, for there is no reason to choose one child and sacrifice another. A mother's duties to each of her children are perfectly identical, and there are no grounds to differentiate them. Hence, it is not only an issue that Sophie does not know these reasons; the problem is that they do not exist objectively. If she came up with some extra-moral arguments, it would be a kind of rationalisation that did not rely on truly existing reasons. Neither does, the fact both children will die if Sophie refrains from the choice provide substantiation of the choice, and hence the dilemma is not resolved. The essence of it is that the circumstances force her to sacrifice one of her children. It may be said that by making choice – seemingly necessary – she plays the game and even cooperates with the thug.²⁶

D. Statman doubts whether we may speak here of symmetry of options. He emphasises that, in dramatic circumstances, mothers usually find some

²⁴ Albert Camus, *The Human Crisis*, lecture held on March 28, 1946, p. 4, available at <https://pl.scribd.com/document/341261228/The-Human-Crisis-Albert-Camus-Lecture#> (accessed on 13th August 2018).

²⁵ Hannah Arendt, *The Origins of Totalitarianism* (Cleveland and New York: Meridian Books, 1958), p. 452.

²⁶ Walter Sinnott-Armstrong, "Moral Dilemmas and Incomparability," *American Philosophical Quarterly* 1985, No. 4, pp. 323–324.

reasons to give preference to one child's good.²⁷ He follows the argumentation of R.A. Sorensen, who points out that theoreticians dealing with dilemmas tend to prove that dilemmas as situations of ideal symmetry of options are possible, and not to show how people react to them in reality. Hence, they rely on idealisations. In the discussed situation, Sophie explains her decision that John, as an older boy, stood better chances of survival in the camp. In the author's opinion, this is not only rationalisation, but a true reason that allowed her to make a choice in the dramatic moment.²⁸ Moreover, the situation seems to us paradoxical because, assuming that Sophie's duty is to save each of the children in these circumstances, we conclude that we demand from her simultaneously saving one of the children and not saving it due to the necessity of sacrificing another. This interpretation means that, whichever option she chooses, she will do harm, whereas to the author, there is no conjunction but the alternative between these contradictory demands. As a result, the proper description of Sophie's situation is the statement that it is a boundary one, and we are unable to state whether her choice – whatever it be – may be attributed evil.²⁹

To P. Railton, the situation is more complex, even multi-level. He juxtaposes it with a similar one, that of Ruth, mother of Siamese twins. Doctors inform her that, without an operation, both will die, but they are so deeply joined that such a procedure would allow only one child to be saved. The mother must choose which one will stay alive. Despite several important differences between Ruth and Sophie's choices, the situation's complexity is manifest in both cases. First, they need to decide whether to make the choice at all, or to let the events develop with no interference. This is a crucial moment because it may be argued that, by deciding to make the choice, they decide to accept responsibility for it. Of course, it may also be said that refusing to choose is also a concrete choice in itself. The latter statement may be endorsed with quantitative argument, already recalled in the trolley dilemma – as both children will die should the mother fail to make a choice. By deciding to choose, she may save one of them. Resolution in line with this argument gives rise to another problem, in which the symmetry of options is very clear – both Sophie and Ruth must indicate which child will live and which will die.³⁰

B. Chyrowicz claims that, even if we stated the causal relationship – albeit an indirect one – between Sophie's choice, or lack of choice, and the death of her

²⁷ Statman, *Moral Dilemmas*, p. 11.

²⁸ Roy A. Sorensen, "Moral Dilemmas, Thought Experiments, And Conflict Vagueness," *Philosophical Studies* 1991, No. 63, pp. 292–293.

²⁹ *Ibidem*, pp. 301–303.

³⁰ Peter A. Railton, "The diversity of moral dilemma," in *Moral Dilemmas ad Moral Theory*, ed. H.E. Mason (New York–Oxford: Oxford University Press, 1996), pp. 157–158.

children, or child, this by no means justifies ascribing to her moral responsibility for this choice. It is not her action that causes the death of her child or children, but the action of the blackmailing perpetrator. The author indicates that this is precisely what blackmail is based on – an attempt to ascribe responsibility to the victim for the actions of the perpetrator. It is always a form of violence appealing to the victim's fear of certain consequences. However, it is based on false ascription of responsibility; in effect, the conduct of someone who yielded to blackmail should not be evaluated, since it would mean acceptance of this falsehood. A similar mechanism is used in operations involving hostages.³¹

1.1.4. The Sartre's Student's Dilemma

Also widely known and commented upon is the dilemma described by J.-P. Sartre in *Existentialism is a humanism* of 1946. It is worth citing the original complete description of the dilemma. The author says that a student once addressed him in the following circumstances:

his father had broken off with his mother and, moreover, was inclined to be a "collaborator." His older brother had been lured in the German offensive of 1940, and this young man, with primitive but noble feelings, wanted to avenge him. His mother, living alone with him and deeply hurt by the partial betrayal of his father and the death of her oldest son, found her only comfort in him. At the time, the young man had the choice of going to England to join the Free French Forces-which would mean abandoning his mother – or remaining by her side to help her go on with her life. He realized that his mother lived only for him and that his absence – perhaps his death – would plunge her into utter despair. He also realized that, ultimately, any action he might take on her behalf would provide the concrete benefit of helping her to live, while any action he might take to leave and fight would be of uncertain outcome and could disappear pointlessly like water in sand. For instance, in trying to reach England, he might pass through Spain and be detained there indefinitely in a camp; or after arriving in England he might be assigned to an office to do paperwork. He was therefore confronted by two totally different modes of action: one concrete and immediate, but directed toward only one individual; the other involving an infinitely vaster group – a national corps – yet more ambiguous for that very reason and which could be interrupted before being carried out. And, at the same time, he was vacillating between two kinds of morality: a morality motivated by sympathy and individual

³¹ Chyrowicz, *O sytuacji*, pp. 305–306.

devotion, and another morality with a broader scope, but less likely to be fruitful. He had to choose between the two.³²

To Sartre, the student's situation shows tension between the lack of influence on the situation and his absolute responsibility for the choice he makes in it. The tension stems not only from the fact that life presented the student with the necessity to choose, but also from the fact that no element of reality allows a decision to be made on the basis of any objective criteria, for there is no system of values that would allow making a choice and justifying it, which leaves him and only him responsible for the choice. The only thing he is left with is to rely on his instincts and feelings, namely subjective criteria. In doing this, however, he must bear in mind that in this way he will not be absolved from responsibility for the choice. But he will have the sense that it is his own choice.³³ The student's problem, like the previous ones, has been widely received in ethical and meta-ethical discussion. Various elements have been pointed out, such as the nature of the situation and the precise character of the moral problem that is to be solved.

For E.J. Lemmon, the situation is a moral dilemma with a trait specific of a whole group of dilemmas that are of fundamental importance for the person who is to make a choice. He claims that the student faces, on one hand, an obligation towards his mother resulting from the situation they are in. The element of this is the dependence of her happiness on her son's presence. On the other, he feels a duty to get involved in the defence of the country. It may not be as clear in content as his obligation to his mother, but it certainly is noticeable. It may be described as civil duty. The author points to uncertainty both regarding the consequences of every course of action, as well as in terms of which obligation is stronger. Another quality of the dilemma is crucial to him too, i.e. it requires making not only a concrete choice but making a more fundamental one, which will be decisive for the student's moral outlook and may even require a change of views or at least their clarification. This quality concerns fundamental attitudes, which – in simplification – encompass answering the question about how important political engagement is for the student.³⁴

Analysing this example, P. Railton stated that it differs from many situations that are typically considered moral dilemmas. It is hard to describe the available options of conduct as obligations. The compulsion that he feels to stay with his mother on the one hand and to join the resistance on the other seem to make different use of the term "must." It is more justified to speak here of moral ideas,

³² Jean Paul Sartre, *Existentialism is a humanism*, including, *A commentary on the stranger* (New Haven & London: Yale University Press, 2007), pp. 30–31.

³³ *Ibidem*, pp. 29, 30.

³⁴ Edward J. Lemmon, "Moral Dilemmas," *The Philosophical Review* 1962, No. 2, pp. 154–155.

since we would hardly agree that everyone is obliged to subject one's life totally to one's parents, even in hardship, just as it is not easily acceptable that every young person is obliged to fight for the state. Hence, the student could look for a compromise between the available options. It seems he refrains from doing so precisely because of the notion of certain moral ideas – sacrifice for the family and sacrifice for the state. He wants to be fully loyal to both, because this is how he perceives himself. This, however, means that the discussed situation is rather the problem of being true to oneself, one's own identity and the related ideals, and not the issue of fulfilling moral obligations.³⁵

D. Statman focuses primarily on the uncertainty that accompanies the student's choice. He cannot know the future, and his chosen course of action will cause certain consequences of various levels of probability, for it is easier to envisage the effects of staying with mother than joining the resistance. Materialisation of the latter may be prevented by many events, and eventually it may end in complete failure. Even if the student joined the resistance, it is unknown how long he would last, what tasks he would have to carry out, and so on, so it is hard to say whether the option is good or bad. The moral problem before him is insoluble not because he knows the bad consequences of each option, but precisely because he lacks knowledge about the consequences.³⁶

R.B. Marcus uses the dilemma as an example of a particularly dramatic situation in which a choice is accompanied by a sense of guilt. The student must choose one of the options, hence it would seem that he has no influence on the elimination of the other. The choice is only his, but the mutual incompatibility of the options is part of the objective situation, therefore all sense of guilt caused by the choice made could seem unjustified or even false. The author objects to such a view, and claims that sense of guilt is vital even in situations over which we have no influence, or in which our influence is minimal, because such feelings express the dramatic quality of situations, allow them to be identified as dilemmas, and motivate us to avoid them in the future. This avoidance may be carried out by proper management of one's life as well as correct design of institutions.³⁷ T.C. McConnell continues in the same vein in his reflections on moral residuum.³⁸

³⁵ Railton, *The diversity*, pp. 149–151, 157–159.

³⁶ Statman, *Moral Dilemmas*, pp. 17–18.

³⁷ Ruth B. Marcus, "Moral Dilemmas and Consistency," *The Journal of Philosophy* 1980, No. 3, pp. 129–130.

³⁸ Terrance C. McConnell, "Moral Residue and Dilemmas," in *Moral Dilemmas ad Moral Theory*, ed. H.E. Mason (New York–Oxford: Oxford University Press, 1996), pp. 37–38.

1.2. The concept of moral dilemmas

1.2.1. The problem of defining moral dilemmas

The examples of moral dilemmas were selected to show the variety of situations which are described as such in theoretical reflection. Although there are many similarities between them, each has slightly different qualities. As can be observed, they are also interpreted differently. As a result, a theoretical dispute on the concept of dilemma, its definition and scope, continues. Both issues are, naturally, connected but in different ways. A definition by providing criteria of the use of the term indicates those qualities of situations that are common to all dilemmas, whereas the question of scope concerns mainly differentiation from other practical problems. Of course, both questions are of great significance as regards the usefulness of the concept in a specialised discipline, namely judicial and legal ethics. In this section, the questions will be outlined, and more systematically discussed later.

In literature there are several definitions of moral dilemmas. The most common and also least precise is the situation of a subjectively difficult choice whose source is an objective moral conflict. Hence, a dilemma always concerns a specified individual who faces irreducible collision of various obligations and does not know how to proceed.³⁹ Despite the lack of precision, the term has clear advantages because it indicates that the concept contains both subjective and objective elements, though their list and characterisation are disputable. According to E.J. Lemmon, who initiated modern discussion on moral dilemmas, they are about a subject who is obliged to do something and at the same time not to do it, when these two statements are simultaneously true.⁴⁰ To C.W. Gowans, moral dilemmas are a broader class of cases, i.e. when a subject must choose between two different options but, because of the circumstances these options are mutually exclusive.⁴¹ Later discussion concentrated significantly on the nature of these obligations. For example, W. Sinnott-Armstrong insisted that moral dilemmas occur only in conflict of obligations (moral demands) and not, for example, ideals. He also emphasised that, in some cases, the obligations are equal, namely none prevails over another,

³⁹ Chyrowicz, *O sytuacjach*, p. 45.

⁴⁰ Lemmon, *Moral Dilemmas*, p. 148.

⁴¹ Christopher W. Gowans, "The Debate on Moral Dilemmas," in *Moral Dilemmas*, ed. Christopher W. Gowans (New York–Oxford: Oxford University Press, 1987), p. 3.

which makes the options symmetrical, and in consequence moral dilemmas are sometimes insolvable.⁴²

Although there is no unanimity on the understanding of moral dilemmas and whether they really exist or are only theoretical conceptualisations, several points of reflection related to this concept may be distinguished. They may also be treated as elements of a moral dilemma's structure, with the assumption that, in various views, they are ascribed different importance, and sometimes their existence is questioned. It is possible to distinguish objective and subjective elements of the structure of a moral dilemma. The first one comprises: 1) the alternativeness and disjunction of options 2) their symmetry in the sense of lack of superiority of any, and 3) the existence of a moral conflict resulting from the necessity of doing harm when any of the options is realised. Subjective elements of moral dilemma include: 1) serious problems with making a choice, 2) responsibility for harm done after making the choice 3) existence of moral residuum, namely an internal effect, such as a sense of guilt or pangs of conscience. All these elements will be discussed in detail later.

On the grounds of the above criteria – not sharp yet but already giving orientation – one may try to distinguish the concept of a dilemma from other practical problems. Thanks to this, it will not only be possible to answer the question of whether a concrete situation that a lawyer may face in their professional life is a moral dilemma, but also to define what it is if it does not meet the criteria. Such assessment will be made in reference to a number of examples of situations from various branches of law and various legal professions, in the second part of this book. For that reason, the following practical problems other than moral dilemmas in the strict sense have been distinguished: 1) conflict of conscience, 2) legal dilemma or the problem of subjection to law, 3) the problem of the application of law, 4) the problem of interpretation, 5) conflict of values when they can be balanced by hierarchisation or optimisation, 6) conflict of roles, 7) subjectively hard choice, 8) epistemic dilemma. All these kinds of practical problems will be discussed later.

⁴² Sinnott-Armstrong, *Moral Dilemmas (Philosophical Theory)*, pp. 11–20.

1.2.2. The structure of moral dilemma

1.2.2.1. Objective elements of the structure of a dilemma

1.2.2.1.1. Disjunction of options

The first element of a dilemma is alternativeness and the disjunction of options, which follows from the already quoted definitions. The options cannot be chosen at the same time, and the choice between any of them is necessary. It has to be stressed that we use the term “option of action” since this comprises action as well as nonfeasance. The options often make the structure of a given dilemma a choice between undertaking some activity or not, but it may also be the choice between two actions. In any case, they are irreconcilable, and not on the normative level, for example as in logical contradiction between norms simultaneously ordering a certain way of action and those proscribing it. Such contradictions, not only between norms but also obligations or moral ideals, create contradictory reasons for action, which is analysed as part of reflection on other elements of dilemmas, especially their symmetry. Here, it is truly impossible to follow two options of conduct. In a dilemma, the subject’s choice is an “either-or” one.

Though it could seem that this element is least disputable, it is sometimes remarked that although popular examples of dilemmas indeed assume mutually-exclusive options, but it the choice between them is not necessary. It could be possible to leave the course of events to proceed, namely assume that since the problem is irresolvable, then fate should decide. As it has been pointed out, Railton sees in such situations a more complex problem of a multi-level nature. For example, if we can save one of two people who, without our intervention, will surely die, then in the first place we have to answer the question of whether to make the choice at all or to let the things happen. This moment is crucial because one may argue that, by deciding to make a choice, we decide to take responsibility for it, and hence the death of the unchosen person burdens us. The lack of choice would also be a concrete choice in itself, since it would mean the death of two people. By deciding to make a choice, we may save one person. Resolution according to this argument gives rise to a second problem, that of a specific choice.⁴³

We may also interpret the above analytical conclusion to mean that the concept of dilemma has considerable potential against the subject’s passivity. If it typically has the form of a disjointed alternative between action and abandonment (in case of simple dilemmas), or has two disjointed alternatives,

⁴³ Railton, *The Diversity*, pp. 157–158.

the first of which is between action and nonfeasance and the second between two actions (in the case of multi-level dilemmas), then on a more general plane one may say that the subject faces the problem of whether to interfere in the course of events or just to observe it. Naturally, this is typical, not constant. However, the above examples of moral dilemmas show they are often, even typically, formed like this. In such situations, we are clearly concerned that we only witness or observe, which is followed by the realisation that such a stance is improper. It is accompanied by the thought that perhaps something could be done to avoid the evil, or at least to try, for even if such an attempt fails, then it is valuable as action, more so than passivity; but another quality of dilemmas, showing that action may be as bad, prevents unequivocal acceptance of this conclusion.

1.2.2.1.2. Symmetry of options

The second element of moral dilemma is its symmetry of options. This means the lack of superiority of any option, which generates an insolvable moral conflict, for there are no reasons that would endorse one option more than another. The duties or obligations of the decision-maker are exactly the same in the case of either option, and there are no grounds to differentiate them. So, this is not only an issue of cognition of reasons by the subject, but their objective lack. As it has been said, devising any extra-moral arguments for one choice would be to create a kind of rationalisation not reliant on truly exiting reasons. Neither does the fact no choice leads to negative consequences provide justification for making a specific decision. This in no way this resolves the dilemma, the essence of which is that a subject is forced by the circumstances to sacrifice one of the options for another.⁴⁴ It is sometimes pointed out that thus understood symmetry of options is hard to find in reality, dramatic choices typically lead us to find reasons for preference of one of the options⁴⁵ which is not only rationalisation but also in itself gives real reasons which allow the choice to be made.⁴⁶

Irrespective of this scepticism, it has to be noted that the sources of symmetry of moral dilemmas may be of two kinds.⁴⁷ The first stems from the perfect equality of values that provide reasons for options. They are held to be equally important, so the choice between them is impossible. For instance, the life of every human has the same value, hence it is inadmissible to sacrifice one person to save another. This way of understanding symmetry is faulty in the sense that,

⁴⁴ Sinnott-Armstrong, *Moral Dilemmas and Incomparability*, pp. 323–324.

⁴⁵ Statman, *Moral Dilemmas*, p. 11.

⁴⁶ Sorensen, *Moral Dilemmas*, pp. 292–293.

⁴⁷ Chyrowicz, *O sytuacjach*, pp. 187 et seq.

if values are equal and cannot be simultaneously realised, then it does not matter what choice we make. Since sacrificing one will entail the same detriment, and the choice must be made, then its content becomes unimportant and may equally be determined by tossing a coin. For that reason, another source of symmetry of options is more often indicated, namely the incommensurability of values. This term means a situation in which two values are neither equal nor superior, for there is no scale that would allow such comparison. The consequence of the incommensurability of values is their incomparability. For instance, human life is of incommensurable value and so cannot be compared with the safety or well-being of others. The incidents of incommensurability create only approximate equality, making it hard for us to find reasons for any solution, so the options seem symmetrical.⁴⁸

The examples of dilemmas discussed above illustrate the symmetry of options, including the one resulting from the incommensurability of values. One may also observe here that the questionability of symmetry in some way confirms the lack of mutual scale of values in particular situations. If we look at the problem of admissibility of calculation, whether to save a greater number of people at the cost of one, then the incompatibility of reasons which may be formulated in such a situation becomes evident, for reasons formulated in both the conventionalist and the deontological perspectives. Adopting the former would mean that options are not symmetrical because saving a greater number of people is more valuable, and so these reasons prevail. Adopting the latter would mean ascribing every human life the same value and the prohibition on contributing to anyone's death. Hence, the options would not be symmetrical, and the non-conventionalist reasons would prevail. Both views explicate our intuitions as regards values, for we can agree simultaneously that it is worth saving many people and that every life is equally important. The irreconcilable incompatibility of both views is due to the values being incommensurate – there is no scale on which we could base the statement that the value of the lives of a number of people is greater than that of an individual, yet nor is there a measure to justify the opposite conclusion, that an individual's life is more precious than those of many people.

1.2.2.1.3. Moral conflict and harming

The third element of a dilemma is the moral nature of the conflict causing symmetry of options and doing moral evil irrespective of which one is chosen.

⁴⁸ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 322 et seq. On the different positions in debate on incommensurability of values see: Sylwia Wojtczak, *O niewspółmierności wartości i jej konsekwencjach dla stosowania prawa* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2010), pp. 39–77.

This is crucial since it makes the discussed situations moral dilemmas and not simply difficult choices. The necessity of deciding between disjointed and symmetrical options may occur in many walks of life, but these will not always be moral dilemmas. This by no means underestimates their importance or the pains taken on many occasions by the subject who has to resolve them. Surely, their accurate resolution requires prudence, and all other virtues may be helpful. They occur mainly in conflicts between the subject's preferences and their beliefs. It should be noted that there is no collision of moral values which would generate reasons for options typical for a dilemma. Such a collision is objective and real, whereas preferences and beliefs are subjective, and perhaps situations of difficult choices reveal to the subject the contradictions between them. Perhaps resolution will require the subject to step back from some of them, thus making them coherent. The process may be painful, but does not lead to doing moral evil by itself.

When we consider moral conflicts, however, their consequences are not limited to the subjective sphere. They occur in reality as harm done by the subject. Making one's attitude to options coherent, and thus making the choice, is ineffective, for the harm done is objective. This is mostly why the discussed situations are tragic. It is also important here that the evil is inevitable because it follows from not following the other course of action. Hence, moral dilemmas are never choices between good and bad, but between bad and bad. The dispute on the scope of negative effects for which the subject may be ascribed responsibility continues. Undoubtedly, the effect must in any case be foreseeable.⁴⁹ The occurrence of unforeseeable effects, such as those related to accidents or catastrophes, may be an element of the subjective attitude to one's own conduct, but is not part of moral dilemma. As regards foreseeable effects, it is debatable whether the subject is responsible for them since they cannot be avoided. Maybe only for those which were directly intended, as the supporters of the double effect doctrine propose.⁵⁰

Some aspects of this dispute will be discussed with subjective elements of a dilemma, especially the accompanying sense of guilt. It is worth remarking here that bringing forth the problem of the impossibility of avoiding negative effects may be a source of arguments for the subject's passivity, hence against

⁴⁹ Chyrowicz, *O sytuacjach*, p. 302.

⁵⁰ For considerable literature on the double effect doctrine see i.a. the collection of studies: Paul A. Woodward, ed., *The Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle*, (Notre Dame: University of Notre Dame Press, 2001). See also: Thomas A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford–New York: Oxford University Press, 2006) and Barbara Chyrowicz, *Zamiar i skutki: filozoficzna analiza zasady podwójnego skutku* (Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1997).

activism, namely the support of those these opposite to the one mentioned when discussing the disjointedness of options. Naturally, this concerns only those dilemmas in which one option is based on action and the other on non-action. As already mentioned, action is supported by the conviction that maybe evil can be at least minimised. So the subject does calculation, which generates reasons for choosing one of the options. Hence, they take the consequentialist perspective. The main argument against activism, and for passivity, is that since evil in a situation of dilemma cannot be avoided, then there is no reason for the subject to contribute to it in any way. This will happen whether they act or look passively at the events. The argument follows from the agent-centred prerogatives connected with the deontological perspective.⁵¹ According to this, the subject has the full right to consider primarily the consistency of their actions with their moral principles, and be guided by their own preferences as long as they do not breach these principles. Hence, they are not obliged to create the best possible state of the world.

1.2.2.2. Subjective elements of the structure of a dilemma

1.2.2.2.1. Difficulty of choice

Objective elements of the structure of a dilemma correspond to subjective elements. Although it is impossible to allocate each so that one objective element corresponds fully to exactly one subjective, the following dependence may be indicated: apart from disjointed alternativeness of options, the sense of subjective difficulties with making the choice accompanies a dilemma, which is its fourth element. Naturally, dilemmas cannot be reduced only to such difficulties. Not every sense of confusion and impotency about a decision is a dilemma. If in typical life circumstances I cannot decide on the future, and my preferences collide and cause discomfort, this does not mean that I face a moral dilemma. As already noted, a dilemma requires that a subjective sense of difficulties is related to objective moral conflict, which provokes such state in my mind. Hence, it cannot result from colliding preferences, even if they concern non-trivial matters, were crucial in terms of life scale, or were connected with sad circumstances and suffering.

It seems fundamental, as in the case of other subjective elements of dilemma (i.e. moral residuum and sense of guilt), to distinguish two aspects of difficulty with choice-making. First, the cognitive one, which means that the subject recognises their difficulty with choice-making as effect of moral conflict. Therefore, they can identify it and indicate values on both sides. They

⁵¹ Kagan, *The Limits*, p. 75.

also understand reasons related to every option, and see the impossibility of deciding on their basis. Second are the emotional aspect made up of various experiences due to recognition that the situation is basically insolvable. Very different emotions, such as tension or recurring unrest oriented to revising the options and reasons over and over again are at stake. This may also be fear of consequences of any choice. Hence, it should be stressed that subjective difficulty of choice is the situation of a subject finding it impossible to decide, and the one that is particularly uncomfortable.

Subjective difficulty of choice as an element of moral dilemma is hence more than indecision. In effect, such situations are described as dramatic.⁵² Dramatic quality refers to life categories and not literary ones, coming from the Greek term *drama*, applied to action. A subjectively hard or dramatic choice is always related to a decision about action. Therefore, although it follows from objective circumstances, it is not simply a misfortune falling on an individual. They must choose how to behave, and the choice is accompanied by internal conflict. The subject feels as though their integrity were being questioned. Since a dilemma is not simply a conflict of preferences or beliefs, but moral one, maintaining integrity seems impossible. The subject here feels the hopelessness of their condition.

1.2.2.2.2. Moral residuum

Difficulties with decision-making are part of dilemma, accompanying its resolution. Hence, they concern the time before a decision is made, and are related both to increased intellectual strain and to negative emotions. A crucial element of dilemma is also the occurrence of similar states after the decision, especially when all the effects of a choice have materialised. Most generally, they are called moral residuum, namely a kind of internal effect of a dilemma and the fifth element of its structure. The very term *rediduum* is Latin and means remainder, residue. Therefore, it may be said that we apply a geological-chemical metaphor when speaking of moral residue. Every dilemma encountered in life is not only a drama, but also a powerful experience that leaves something behind. The nature of the residue is disputable, but it is typically described as a sense of guilt or qualms of conscience. Despite soft boundaries between these states, it seems that they may be distinguished on the basis of their source. According to B. Chyrowicz, moral residue is related to the awareness of evil resulting from a chosen course of action (even though it was inescapable), or to the realisation

⁵² Statman conceives moral dilemmas as tragedy, see: Statman, *Moral Dilemmas*, p. 19 while Chyrowicz speaks about dead end situations or situations with no way out, see: Chyrowicz, *O sytuacji*, p. 21.

of loss due to the unmaterialised, unchosen option.⁵³ These usually co-occur, but it may be assumed that moral residue is less likely, due to the sense of loss, unlike sense of guilt, which is typical for negative consequences of choice. In line with the adopted terminological convention, sense of guilt will be discussed in the following section as a separate element of dilemma.

According to T.C. McConnell, the existence of moral residue is used in debate as an argument for the existence of dilemmas. The realness of feelings proves they are not just situations based on theoretical schemes absent from life. He is critical about this argument. He marks that three types of moral residue are usually discussed: 1) the remorse or guilt that agents experience after acting in conflict situations, 2) the duty to apologize or to make amends that arises after acting in a conflict situation, 3) the second-order moral requirement to structure one's life so as to minimize conflicts between basic rules and principles.⁵⁴ As it has been said, the first type is usually identified with the concept, though the others seem essential as they make it possible for dilemmas to play not only negative but also positive roles in our lives. Thanks to moral residue we may gain motivation to act, including in the long-term. In effect, we may not only want to minimise the risk of the occurrence of further situations of this kind, but also to change our lives. Perhaps these situations were brought on by our carelessness, lack of reflection or respect for moral principles. Then, the whole related drama may provide an impetus for different behaviour in the future. It may be treated as a life lesson.

McConnell's scepticism in reference to moral residue as an argument for the realness of dilemmas seems to result from – as Chyrowicz remarks – treating dilemmas in categories of emotional experiences, whereas it is important to find objective grounds in the case of qualms of conscience, just as in the case of subjective problems with choice-making. As a result, not only emotions but also a crucial cognitive element, namely that we are able to recognise these objective grounds, is involved.⁵⁵ On one hand, such dualistic structure of moral residue renders it impossible for this to stand as the only argument for the existence of dilemmas. Hence, we cannot automatically accept that the situations in life accompanied by such a state are dilemmas. On the other hand, since moral residue has a cognitive aspect, it may also mislead us. Hence, it may be helpful but needs to be controlled. If such a view seems paradoxical, it should be stressed that the discussed concept occurs, as a rule, after making the choice, so its practical utility is not about providing criteria of recognising

⁵³ Chyrowicz, *O sytuacjach*, p. 214.

⁵⁴ McConnell, *Moral Residue*, p. 36.

⁵⁵ Chyrowicz, *O sytuacjach*, pp. 142–143.

a given situation as a dilemma. Perhaps it is so in theory, but then we look at a subject's activity as a whole – their behaviour in the face of necessity of choice, the decision itself and their behaviour after making it and after the occurrence of effects. In practice, it is about motivating us to minimise risk and make a life change.

1.2.2.2.3. *Guilt and dirty hands*

The sixth and final element of dilemma is the sense of guilt related to the effects of the choice. This means that the subject takes responsibility for the harm done. As said, it is strongly connected with the issue of moral residue, except that it is not simply remorse due to an unrealised, unchosen option, but is connected with negative effects of the decision taken, which would be inescapable by discarding one of the options. According to Chyrowicz, the significance of this element of dilemma is basically related to the fact that remorse due to not realising an option is felt in various situations. For example, when due to alternativeness of options we cannot realise our desires or beliefs and so are forced to resign from full satisfaction in this respect.⁵⁶ We do not describe such situations as dilemmas because they lack the element of an objectively present bad effect. Experiencing a dilemma would not be full if this objective circumstance did not have its counterpart on the subjective side. The discussed element therefore concerns the relation of the subject to the objectively evil effect that is a consequence of their choice.

Like the last two elements, the sense of guilt has cognitive and emotional aspects, for it is not just self-blaming by the subject when there are no grounds to do so. Such situations certainly take place and can be connected both with someone's personal traits as well as misrecognition of the effects of one's conduct. However, in moral dilemmas the subject is able to recognise that the effect of their action was doing harm. They notice the connection between their action or non-action and its negative effects. Although they realise the objective impossibility of avoiding them, the connection is unquestionable, so even if they did not feel responsible for the choice, they do for the consequences. This realisation generates emotions of various nature, which may embrace concern, remorse and other feelings similar to those that occur in other subjective elements of dilemma. It may be an incessant recurring sensation that choosing another option was possible, which equals the intellectual possibility of recognising the symmetry of options. Most specific for the discussed element of dilemma seems to be that, in place of the sense of conflict accompanying the choice comes the sense of losing innocence, also termed "dirty hands."

⁵⁶ Ibidem, p. 135.

The last phenomenon increases the dramatic nature of dilemmatic situations: although the subject could not avoid doing harm, they feel responsible for it. In effect, it may be said that a person who faces a dilemma becomes guilty even before the choice, for however they decide they will not be able to unburden themselves of responsibility. One can say that facing a dilemma means to have one's innocence lost.⁵⁷ That's because there is no possibility to avoid dirty hands. In this context, the term "lack of moral luck" is often used. The debate on this is a kind of continuation to the discussion on the concept of dilemma.⁵⁸ However, it should be noted that, irrespective of the moral luck issue, the problem of dirty hands is crucial also for the already hinted at concept of passivity and activity by the subject in the face of dilemma. For the occurrence of dirty hands is an argument both against agent-centred option, and the related deontological perspective, as well as against justifying action for a lesser evil, related to the consequentialist view. Dirty hands means that a subject's passivity, justified by their right to non-contribution to evil and preservation of moral innocence, is based on the false and illusory assumption that, in the face of dilemma, such innocence is possible. This does not work the other way around, namely that action is always justified because it aims to lessen evil and increase good. In such cases, the harm done will also charge the subject. Both perspectives seem insufficient, as they lean towards absolution for the subject. Perhaps the dirty hands concept allows a step beyond them, because it points to the necessity of making choices and taking responsibility for their consequences. It tells us that, in some situations, one has to have dirty hands and that it is how life is, and that no moral argumentation can ease the burden of responsibility.

1.3. Other practical problems

Reflections on the definition and elements of moral dilemma give grounds for distinguishing it from other practical problems. As has been said, it was assumed for the sake of this book that there is a whole number of such problems, which will be discussed briefly in this section. They will be used in the second part of the book to qualify examples of situations in which lawyers from different

⁵⁷ Christopher W. Gowans, *Innocence Lost. An Examination of Inescapable Moral Wrongdoing* (New York–Oxford: Oxford University Press, 1994), pp. 218 et seq.

⁵⁸ See the collection of studies: Daniel Statman, ed., *Moral Luck* (New York: State University of New York Press, 1993) including the most basic papers on the topic reprinted. On relation between moral luck and moral dilemmas, see: Timothy J. Dunn, *Moral Dilemmas and Moral Luck*, Dissertation, Rice University, 2001, available at <https://scholarship.rice.edu/handle/1911/17957>, accessed on 13th August 2018.

legal professions and practising in various branches of law may find themselves. Naturally, it is impossible here to discuss in detail specific practical problems and the theoretical issues that relate to them. Only basic explanations will be presented, the understanding of which has been accepted for our purposes. Most typically, this refers to the most standard and conventional understanding of a given term. However, it should be stressed that the specific practical problems form a typology rather than a classification. Boundaries between each may sometimes be soft.

1.3.1. Conflict of conscience

The first group of practical problems similar to moral dilemmas are conflicts of conscience. Applying this concept in ethics has a long tradition, mainly connected with the Aristotelian-Thomist current, within which it is understood as the subject's ability to self-assess their acts. They make this assessment in the light of natural law, which they already recognise, so judgments of conscience rely on the application of general rules to concrete situations. The recognition of these rules is not a matter of conscience, but of what is traditionally called pre-conscience or *synderesis*. It is an ability to understand fundamental rules of conduct, which are given in a natural way. It is a kind of practical ability, and not theoretical cognition. Therefore, conscience depends on the ability to understand natural law, and judgments of conscience are based on judgments concerning its rules. Conflicts of conscience appear when judgements contradict reasons for action that are formulated on another basis, such as positive law or other social institutions. The latter is not a practical ability, but is a source of reasons for action too. In effect, the reasons for conscience and legal reasons may conflict.

Obviously, any approach to such conflicts differs regarding whether one represents natural law or legal positivism. Not entering the dispute, it has to be remarked that contemporarily supporters of natural law rarely claim that its incompatibility with positive law means an objective repeal of the latter. However, they claim such a positive law has no binding force in conscience, and that reasons following from conscience prevail in this dispute. Yet, this requires acceptance of a very strong view as regards the natural foundations of conscience. For positivists, objective legal reasons prevail. In each case, both obedience to positive law and being guided by objections of conscience are possible, and vice versa: conduct against one's own conscience in preference for institutional reasons. In both cases, though, there is no balance of reasons, so the consequent symmetry of options, characteristic for moral dilemma, is lacking. Therefore, we may say that conflict of conscience is a situation similar

to moral dilemma in the strict sense, but with asymmetry of options: one of the duties is more important, for example due to the exigencies of a law or broader institutional norms including professional duties, and so on, which, despite the superiority of one of the duties, its fulfilment raises qualms of conscience, a sense of guilt or moral residuum of a different kind, and before it scruples and doubts occur. The source may be the subject's beliefs.

1.3.2. Legal dilemma, or the problem of subjection to law

Legal dilemmas are the second group of practical problems which can be distinguished from moral dilemmas. The term is not universally used and so requires additional explanation. The issues behind the term may be described as problems of subjection to law. They concern situations in which a subject finds reasons against subjecting themselves to a specific law enforcement act, such as a court decision, that are not related to conscience but to legal grounds. Thus, a legal reason on which a given law enforcement act is founded can be countered by other legal reasons. Simultaneously, there are no procedural legal means to take into account the latter. A legal dilemma is, for example, a situation where to a judge or lawyer a valid decision is against the law, but there are no means of contesting it. Hence, problems of this kind occur as a result of lack of procedural completeness of a legal system, namely technical or procedural gaps in law. In a situation where a subject notices such a faulty but irrefutable decision, on the basis of which they have to act (that is, to treat it as a given), this may cause serious conflict.

However, it should be stressed that the nature of this conflict is not moral, and at least because of that we cannot speak of moral dilemma in strict sense. It is a problem completely within the institutional sphere. However, other elements, such as alternativeness, symmetry of options and the difficulty with decision-making, justify the use of the term dilemma here, albeit in the strictly legal sense. The tension between activism and passivism is also characteristic here. What differentiates these cases from conflicts of conscience is the clash between two legal reasons, not one legal and one moral reason. What differentiates legal dilemmas from other legal problems, such as those in law enforcement or interpretation, is the lack of specific judicial discretion. The latter may be both a discretionary power intentionally conferred by the law-maker to law enforcement organs as well as epistemic discretion, which is connected with the necessity of making evaluations in determining the binding legal norm and its meaning. In conclusion, a legal dilemma, or the problem of subjection to law, is

a situation requiring issuance or execution of a decision, ruling, order and so on, which in the view of the person legally responsible for execution is illegal.

1.3.3. The problem of the application of law

The third group of practical problems clearly distinct from moral dilemmas is related to the application of law. The most typical activities for the judges and legal profession, connected with issuing decisions in individual cases on the basis of general norms, are involved here. The application of law may be disputable and occur in an adversarial proceeding, but not necessarily so. Irrespective of the type of proceedings envisaged by a given legal system in reference to a given group of cases, a basic structure of application of law may be distinguished. It is always necessary to determine the legal and factual basis of a decision, to subsume facts to legal norms, and to determine the legal effects of a decision. Naturally, this scheme is criticised from the position of theory of argumentation as incomplete (i.e. as not including external justification of the basis of a decision) and hermeneutics of law as irrelevant (i.e. as erroneously considering the turn of actions taken, which should rather be presented within the scheme of the hermeneutic circle). However, it seems that, despite its simplifying nature, it remains valid. Due to the complexity of the application of law, this view relates to a number of practical problems, which however do not have the nature of moral dilemmas. Particular stages are basically about carrying out technical and cognitive activities, which give the institution applying law knowledge of facts related to the case and the binding norms.

Practical problems occur during the application of law when the organ needs to make a decision. This pertains to both decisions of a procedural nature, directing the whole proceedings and cognitive processes within it, and the fundamental decision and determination of its legal consequences. Practical problems related to interpretation of law will be discussed separately in this work. As concerns the remaining scope, it should be noted that situations in which the authority has judicial discretion are particularly problematic. The most characteristic instances of such discretionary power include the degree of penalty within a statutory range in criminal cases, and determining compensation in civil cases. Judicial discretion may also follow from general clauses, namely provisions that purposely use indeterminate phrases, which often require evaluations to be made. In conclusion, the problem of the application of law is a situation requiring a decision using discretionary powers but also applying a general clause. These situations require evaluation rather than determination of meaning.

1.3.4. The problem of interpretation

The fourth group of practical problems includes issues related to interpretation of law. They may also be hard to resolve and have serious consequences. However, it is difficult to regard them as dilemmas in the strict sense, for fundamentally they are about determining the meaning of legal provisions, or reconstructing a complete and unequivocal legal norm on their basis. Hence, they are actions pertaining to a legal text and are carried out primarily using linguistic and systemic means. These operations apply canons of law interpretation established by tradition. They are sometimes described as theories of law interpretation, which gives them a prescriptive nature and makes interpretation of law a kind of methodology. Irrespective of the view, in interpretation of law, there is generally no symmetry of options or moral conflict. Neither is there a moral residue after interpretational decisions. According to widespread theories, interpretation in general is a cognitive activity in which ethics does not play any significant role, perhaps apart from general guidelines of honesty and diligence. However, it should be stressed that interpretational problems tend to be very complicated, and may come close to the concept of dilemma as regards the level of difficulty.

This especially concerns situations in which interpretational measures require evaluation. This happens mainly when interpretation legal rules with recalling function of the law and aimed at determining extensive or restrictive interpretation. Then, arguments referring to values prevail over the linguistic qualities of law. Theories of interpretation usually dispute that the relation of the subject to the resolved problem is cognitively relevant in such situations. As a result, whether the interpreter has subjective difficulties in deciding or experiences the situation as a dilemma is insignificant from the perspective of the correctness of the decision. It seems that such a method is not fully correct because, due to various elements of a situation that give rise to the context for interpretation (such as a sense of obligation to the party of the proceedings, or the foreseen extra-legal results of the decision), judges and lawyers may face dilemmas connected with or in some way overlapping interpretational problems. This obviously concerns exceptional, extreme situations, which is by the way compatible with the adopted understating of a moral dilemma. Though, it should be remarked that accepting this view would mean that the boundary between both kinds of practical problems is fluctuant. Nevertheless, in conclusion we may state that, not being moral dilemmas, the problems of interpretation are situations requiring an interpretational decision that is not obvious, resulting, for instance, in extensive or restrictive interpretation, and mainly entailing the necessity to interpretation recalling function of the law.

1.3.5. Conflict of values when they can be balanced by hierarchisation or optimisation

The fifth group of practical problems are the conflicts of moral values that do not cause moral dilemmas. This group covers situations where moral conflict does not mean the disjointedness or symmetry of options or doing harm. In other words, there are such ways of resolving the conflict – such practical reasoning – that allow the right choice to be made. As result, such situations do not seem dramatic and with no way out, though simultaneously they are not devoid of difficulties. They also have a clearly moral nature, and are not simply situations of subjectively hard choices resulting from, for example, conflict of preferences. On legal grounds, such conflicts are usually viewed as collisions of principles. Principles are modes of conduct different from rules. Basically, principles are norms requiring to realise certain values, and are inconclusive because they do not indicate concrete models of conduct but define values only generally. Rules, however, contain clear patterns of conduct which form a conclusive basis for the evaluation of concrete situations. There are two basic views of principles in philosophy of law, deontological and axiological. Both claim that collision of principles, namely conflict of values, may be resolved by balancing; however, they perceive its essence differently.

The deontological perspective, represented by R. Dworkin, assumes that balancing is about stating the relative weight of a given principle in the context of a concrete factual state. This allows one principle to be given primacy over another in resolving a concrete case, this principle being the one carrying the greatest weight. This may be described as hierarchisation, although it should be noted that it has only a relative nature, bearing on a concrete case. Therefore, balancing does not assume one universal hierarchy of values, but there is always one right answer, one best interpretation of principles, which is the resolution of a given case. Finding this interpretation may require superhuman effort, but is possible. In the axiological perspective, represented mainly by R. Alexy, balancing also requires stating the weight of particular principles, but its essence is the optimisation of values at conflict. Hence, a solution must be found that will allow simultaneous realisation of both values to the greatest possible extent, taking into account limitations due to their relative weight and the possibility of realising another value. In conclusion, a conflict of values is a situation requiring the realisation of two values, usually in the form of competing principles. The choice between them is not symmetrical as they are balanced by hierarchisation or optimisation. Therefore, there are more courses of action than the given alternatives.

1.3.6. Conflict of roles

The sixth group of practical problems is the conflict of roles. The concept of social role is well-grounded and widely used both in social sciences and in professional ethics. They are a set of formal and informal requirements, obligations and role models connected with performing certain tasks or holding certain positions in society. Roles are distinguished primarily according to functional-systemic criteria. For professional roles, around which ethical-professional reflection focuses, the social distribution of work is crucial. Particular legal practitioners, such as judges, prosecutors or counsels may be seen as professionals. They are distinguished within the social division of work in general. Naturally there are conflicts between the roles, namely that they are given different tasks that cannot be realised simultaneously: for example, one cannot be defence lawyer and prosecutor at a time. This is irreconcilable with the idea of separation of roles within court proceedings. However, when speaking of conflict of roles in professional ethics, we may point to some other, more specific situations.

First, there may be situations in which, within particular legal professions, various tasks are performed on the basis of which more specific roles could be distinguished. For example, a lawyer may perform the role of representing a client before court, and advise them in their business activity. A prosecutor is, at least in some systems, simultaneously an investigator and then prosecution counsel. Particular roles refer to slightly different principles of professional ethics and at least potentially may clash. This may pertain to situations in which a lawyer is to advise a client or organise their activity, and then to audit it. This kind of conflict of roles may be described as internal. External conflict is also possible, when certain extra-professional roles collide with professional life. This concerns both private roles, such as being a parent, and public activity, for example, political, administrative or business. As it has been said, conflicts of this kind are typically potential by nature, hence, the regulations often stipulate the separation of certain activities or functions in order to prevent conflicts of interest. However, if a conflict occurs, then it is usually resolvable by requiring resignation from a certain role. This may be a hard choice, but fundamentally it lacks the traits of moral dilemma in the strict sense. Summing up, conflict of roles is a situation in which at least two roles are performed at the same time, the fulfilment of which cannot be reconciled in abstract or in concrete circumstances, for example in relation to one person.

1.3.7. Subjectively hard choice

The subjectively hard choice is the seventh kind of practical problem different from moral dilemmas. It has been mentioned many times that a sense of difficulty of choice, or even a split decision, is not enough to acknowledge the choice as a dilemma, for a dilemma must be caused by objective moral conflict and symmetry of alternative options. If the objective elements are missing, then the causes of difficulties of a choice probably exist only for the subject and their relation to external circumstances. Preferences which may be of various nature and strength, and so concern not only trivial things, but also those of fundamental importance in human terms, are primarily meant here. A subjectively hard choice may be how to spend holidays or a free evening, but also whether to start a family or continue a career which precludes marriage and offspring, so it may also concern professional life. These choices resemble moral dilemma for at least two reasons.

First, they include disjointedness and symmetry of options. If preferences are mutually exclusive, and their materialisation is equally desired by the subject, the level of difficulty with decision-making may be similar to that of dilemmas. Moreover, since the choice entails non-realisation of one option, regret typically follows. What's more, in making important life choices, the consequences of such decisions may cause unhappiness, for it may turn out that our decision led to an insurmountable barrier to our plans or dreams, and it will be regretted at the end of the day. For that reason, these situations should be approached very prudently. However, despite these similarities, they are not moral dilemmas in the strict sense because they lack moral conflict, harm as effect, and hence also grounds for sense of guilt. Summing up, it may be said that a subjectively hard choice is a situation in which the options of action are not the subject of obligation and do not entail the execution of evil, but they are mutually exclusive and may be held as similarly attractive.

1.3.8. Epistemic dilemma

The final, eighth group of practical problems may be described as epistemic dilemmas. This term is not universally used, hence to distinguish epistemic dilemmas from moral ones, the following starting point should be adopted: moral dilemmas may be regarded as cognitive problems since the subject is unable to discern reasons which would allow resolution. The cause of this inability is not the lack of proper cognitive skills or a mistake made in specific circumstances, but objective qualities of a certain situation and the moral conflict related to them. Therefore, moral dilemmas are not only epistemic but

also ontological, which means the dispute about their existence is part of the debate on moral realism. The definition of dilemma presented in this chapter assumes the existence of moral facts and the possibility of their recognition, thanks to which the subject is always able to identify a given situation as a dilemma, albeit one incapable of being solved. It could certainly be said that, thanks to recognising the impossibility of resolution, they are able to define a given situation as a dilemma. Therefore, the order of cognition is opposite to the theoretical order in which the existence of a dilemma leads to the impossibility of recognising reasons.

The term moral dilemma always refers to situations of cognitive uncertainty about how to act, whereas in cognitive dilemmas the subject is not so much unable to resolve the problem when circumstances are fully recognised, as unable to completely recognise these circumstances. Thus, a different type of uncertainty is involved. In this view, the inability to recognise would mainly concern the possible effects of every option of action, which, due to objective reasons, are unforeseeable. Hence, this uncertainty concerns simple facts and not moral facts. Naturally, this type of uncertainty may also breed great difficulties with making choices and tension within the subject. Therefore, it should not be ignored and it deserves distinction as a separate practical problem (although its nature is not wholly practical as its resolution relies mainly on extra-practical cognition of reality). Despite that, decision-making in uncertainty is clearly a practical problem. Summing up, an epistemic dilemma is a situation of inability to make a decision, or difficulty in doing so, due to lack of sufficient knowledge, for example the assessment of effects or unknown circumstances that may become apparent in the future.

1.4. Conclusions

In conclusion to this introduction, it has to be stressed that the notion of dilemma may be treated as central in contemporary meta-ethical debate. However, much controversy it raises, its meaning is precise. It means such situations of conflict of duties or obligations in which the choice of one of the courses of action necessarily entails the impossibility of some other action, hence bringing about a concrete evil, and simultaneously the choice of one of these courses is necessary. These are not simply situations of subjective difficulties with making a choice, or ethical controversies about legal regulations of certain institutions. The dilemma situation is always related to the problem of necessity of evil done and moral responsibility for it, namely the problem of dirty hands.

The symmetry of courses of action, their equivalence basically precluding any rational choice between them, is also characteristic of dilemmas thus understood. Therefore, moral dilemmas are often called dead end situations. They are truly dramatic, and encountering them in life usually means real misfortune to a subject. As a rule, one cannot envisage nor avoid them. They are always contextual – depending on external factors one cannot influence. Hence, it can be argued that facing moral dilemmas is a matter of a certain moral luck, which means exemption from moral responsibility for one's choice.

Discussing moral dilemma thus defined requires, from a situation to which we refer, a number of specific conditions to be met. It has significant consequences which will be the subject of further reflection in this book. First, it makes sense to ask whether dilemmas thus understood really exist, that is, whether we really encounter deadlock situations in life, or whether it is always possible to find arguments for a certain choice. This can be the acceptance of a lesser evil, motivation by special duty in relation to some other subject, or by the requirements of a social role. These reasons may converge, and it seems they very often do in professional ethics, including legal and judicial ethics. Here, the requirements of a professional role or the obligations to client are usually decisive.

The idea that, due to specific professional obligations in legal and judicial ethics, we do not deal with moral dilemmas in the above sense, is the thesis of this book. It derives from combining meta-ethical discussions concerning moral dilemma with the fact that lawyers act in a specific institutional context and play defined professional roles. Yet this thesis must not be taken as eliminating or simplifying all moral issues arising from institutions. This would mean that a subject entering an institution by, for example, becoming a judge or lawyer, would lose some element of their subjectivity, namely moral authorship and responsibility. But the thesis pertains only to moral dilemmas in a specific theoretical sense. However, it also reveals that quite a number of other deep and serious moral problems exist in the legal profession. As already mentioned these fall into two categories.

First, there is a group of problems that can be termed meta-dilemmas of legal ethics. They concern matters that are fundamental to reaching decisions on more detailed issues that may arise in the course of a lawyer's day to day professional life. Meta-dilemmas do not in this way become less real than the latter problems. Certainly, they are less frequently resolved in a reflective and deliberative manner, but the choices they present must be made at least implicitly. For they are indispensable for making daily decisions with respect to at least a minimum level of coherence. The kinds of meta-dilemmas in legal ethics will be discussed in further chapters of part one of this book. Second, there are situations which at first glance seem moral dilemmas or are regarded as such, but that do not meet the

criteria of moral dilemmas in the sense derived from meta-ethics. They constitute another type of ethical problem. The book applies the term *prima facie* dilemmas to the former, and moral dilemmas in the strict sense to the latter. This distinction will be used mainly in the second part of the book.

It should be noticed, that the review of a number of different situations contained in a second part of this book assumes not merely a cognitive value. Given situations are not only examples for issues discussed in a first part of the book. They can easily be used in legal education. It applies both to legal ethics courses, as well as particular branches of law lecturing. There are presented in the book in context of specific laws and legal professions. Though, they operate on Polish law, yet it seems, that they can easily be applied to many other jurisdictions belonging to the culture of civil law and analogous institutions as described in this examples can be found in this jurisdictions. Moreover, Many examples seem to have universal character and be employed in common law context. Using those examples for educational purpose is easier, or rather at all possible, due to the distinction between *prima facie* moral and meta-dilemmas. For presenting such an unsolvable moral dilemma to the students, and then living them without any answer would reduce the purpose of this sort of education. However, this purpose can only gain validity, if it is proven that in many cases, even though at the first glimpse it seems to be implausible, the unresolved situations can be shifted to practical problems other than dilemmas. It addition, it is possible to describe the meta-choice of a judge or lawyer, which in fact constitutes the resolvability. For student it means to achieve a certain capability or intellectual sensitivity which will allow them to identify and understand particular choices. The question of how does it look in concrete cases, as well as how more or less could the class' scenario look like will be answered i.a. in next chapter.

Chapter 2. Lawyers' and Judges' Deontological Dilemmas

Paweł Skuczyński

2.1. Importance of institutions and lawyers' and judges' moral dilemmas

In this chapter the perspective changes. The general ethical perspective is replaced with a more specific, legal ethical one. Types of situations occurring in a particular social practice, namely law, will be discussed. It will be considered, among other things, how its particular nature affects these situations, i.e. whether they differ fundamentally from the known examples discussed on a general level, and whether it is justifiable to identify practical problems triggered by these situations as moral dilemmas. As mentioned in the introduction, the considerations were divided by distinguishing three levels – deontological, axiological and moral responsibility. This is also how the following chapters were distinguished. The present one relates to the deontological plane. Types of situations in which duties collide will be discussed here mainly, as well as other, to a certain degree similar, types of ought, namely obligations and ideals.¹ The initial sections discuss how to understand these duties, or more broadly – duties resulting from a professional role – and their relation to other categories of duties, including moral and legal, resulting from other roles, etc. However, it should be stated immediately that, perhaps counter-intuitively in some ways, the considerations will not be dominated by the problem of the relationship between legal and moral norms and the possible consequences of the possible incompatibilities here.

¹ Hereafter in this chapter the term “ought” will be used basically as a most general concept embracing other normative categories such as duties, obligations, ideals and norms (principles and rules).

The explanation of this is related to another issue raised in the initial sections of this chapter, namely that of institution. The specific perspective of legal and judicial ethics does not simply mean that legal issues will appear with or instead of moral problems. Speaking of law as a certain social practice we mean a certain separate and organised activity that takes place on a social scale and according to institutionalised patterns. And although, of course, there are many views of what social practices and institutions are, there is no doubt that they are crucial for understanding practical problems in all professional ethics. This is best evidenced by their use of a professional role notion – taken from social sciences and usually understood systemically-functionally. Hence, they are specific duties and ideals related to the position occupied as part of the social division of labour and performed tasks. Naturally, professional roles can also be understood in a way that does not involve any strong social ontology, for example as part of a certain discourse based on a specific type of social interaction.² However, this does not change their institutional character. The existence of institutionalised professional roles affects the complexity of practical problems in many areas of life, including for judges and lawyers.

The scope of this book does not allow analysis of the concept of an institution or presentation of its various views. Therefore, only some concepts will be presented, these being those that take into account the importance of institutions in practical philosophy, in particular in the analysis of the concept of dilemma. The first discussed is the view of E.J. Lemon, who initiated the contemporary interest in moral dilemmas and drew attention to institutions as an important issue in this context. Next, the views of J. Raz will be presented. As already pointed out in the introduction, the concept of exclusionary reason proposed by this author may be of great importance to our considerations. Finally, there will be the more contemporary views of B. Wendel, who emphasises lawyers' moral duty of fidelity to law resulting from institutions.

This view is also very important for considering moral dilemmas of lawyers and judges. In general, it can be said that all these concepts face the following difficulty: do institutions raise moral dilemmas? When one has some professional role, can one find oneself in extraordinary situations with no way out, that would never occur beyond these institutions? Do institutions impose on us such special moral duties which, multiplying the number of possible moral dilemmas, complicate our moral life? Or is it the other way around, that institutions help us cope with many practical problems? Do they, by imposing special obligations on us, make it easier for us to make choices, reduce the

²Przemysław Kaczmarek, *Tożsamość prawnika jako wykonawcy roli zawodowej* (Warszawa: Lexis Nexis, 2014), pp. 150 et seq.

number of possible dilemmas and consequently simplify our moral life? The following sections analyse this difficulty.

2.1.1. Role-duties and relation-obligations as institutionalised ought

Let's start with J. Lemmon's views. In his classic work that initiated contemporary interest in moral dilemmas, he distinguished five types³ of moral dilemmas, though clearly indicated that other typologies may also be correct. The first type is conflict between principle and obligation, while the second is when duty conflicts principle. First of all, these two types will be useful in later considerations. Other types of dilemmas, as the author emphasises, are more complex. As the third, he indicates the situations in which "there is some, but not conclusive, evidence that one ought to do something, and there is some, but not conclusive, evidence, that one ought not to do."⁴ The fourth involves situations where "either decision in effect marks the adoption on the part of the agent of a changed moral outlook."⁵ The fifth is "the kind of situation in which an agent has to make a decision of a recognizably moral character though he is completely unprepared for the situation by his present moral outlook."⁶ It seems that the last three types of moral dilemma do not concern institutionalised duties, but values, beliefs and attitudes. Therefore, in further considerations, they will be omitted, and they are mentioned only for the sake of completeness.

Therefore, the question arises as to how duties and obligations should be understood, and how they differ. With reference to the first concept, the author stated that:

Man's duties are closely related to his special status or position. It nearly always makes sense to ask of a duty "duty as what?" The most straightforward case is that of duties incurred in virtue of a job: thus one has duties as a policeman, duties as headmaster, duties as prime minister or garbage-collector. In many societies, family relationships are recognized as determining duties: thus there are duties as a father, mother, son, or daughter (...) I do not think there are such things as one's duties as a human being.⁷

³ Lemmon, *Moral Dilemmas*, pp. 150 et seq.

⁴ *Ibidem*, pp. 152–153.

⁵ *Ibidem*, p. 155.

⁶ *Ibidem*, p. 156.

⁷ *Ibidem*, p. 140.

On the other hand, with regard to the term obligation, he noted that:

If duties are related to a special position or status, which distinguishes the man holding the position or status from others, obligations on the other hand are typically incurred by previous committing action.⁸

In the greatest simplification, it can be said that duties are connected with performing certain social roles, while obligations exist within the framework of specifically shaped relations. This is why it is often very difficult to separate and identify them in a given situation. For example, if we analyse children's obligation to parents to help them in old age, then we can reach two conclusions. First of all, we can treat it as children's duty resulting from their role that could be described as being a child. Secondly, however, we can also claim that it is an obligation arising from the need to reciprocate the care that specific parents had given their children for many years. Both interpretations seem to be correct, although they have different consequences.

As mentioned, the first two types of moral dilemma highlighted by the author are about the inability to meet an obligation, or duty, and a general moral principle simultaneously. The first group of J. Lemmon's cases was illustrated by the following example:

friend leaves me with his gun, saying that he will be back for it in the evening, and I promise to return it when he calls. He arrives in a distraught condition, demands his gun, and announces that he is going to shoot his wife because she has been unfaithful. I ought to return the gun, since I promised to do so—a case of obligation. And yet I ought not to do so, since to do so would be to be indirectly responsible for a murder, and my moral principles are such that I regard this as wrong. I am in an extremely straightforward moral dilemma, evidently resolved by not returning the gun.⁹

However, in relation to the second group of cases, he indicates that “duty conflicts with principle every time that we are called on in our jobs to do things which we find morally repugnant.” The essence of both types of dilemmas is therefore the conflict between institutionalised ought and moral principle. For the author there are two basic ways to solve such dilemmas. First, we can take a kind “higher-order principle” like “Always prefer duty to obligation” or “Always follow moral principles before duty or obligation.” Second, “we may have in advance a complex ordering of our various duties, obligations, and the

⁸ *Ibidem*, p. 141.

⁹ *Ibidem*, p. 148.

like-putting, for example, our duties as a citizen before our duties as a friend.”¹⁰ Legal and judicial ethics literature has many proposals to resolve this tension between institutionalised and “pure” ought. It is impossible in this book to discuss the whole debate around the issue, hence further discussion presented in this section develops both views indicated by J. Lemon, with reference to the most characteristic concepts.

It should be noted that, on the basis of legal and judicial ethics, the starting point of many disputes in this respect is usually the view that in moral conflicts institutionalised ought take precedence over pure or general moral oughts. According to this view, if the ought resulting from a professional role or professional relations cannot be carried out simultaneously with the moral ought, the first one takes precedence. So, even if it happens that the subject faces a choice between the oughts of both types, it will not be a moral dilemma in the strict sense. An institutional ought creating such a conflict at the same time solves it by having priority. Of course, a few questions arise in connection with such a view, for example, what are the reasons for the priority of institutional oughts? In addition, one can also ask whether adopting such a view indeed removes moral dilemmas from a professional perspective. Both questions will be present in further considerations in this section. However, when it comes to the first of them, it should be said that – in reference to the views of J. Lemon – the reasons can be two-fold.

First of all, they can refer to the universal perspective of practical reasoning, which gives institutional reasons the indicated rank. In this approach, the priority of these reasons would, in principle, apply to all professional roles in the social division of labour. It would thus not be anything specific to judges' ethics or legal ethics. Secondly, they can also be justified from a particular perspective of specific institutions. In particular, they may arise from the specificity of legal professional roles and their exceptional position within the legal framework. It seems that these perspectives are not always clearly separated. The first one is answered by J. Raz's considerations regarding the notion of the exclusionary reason, which show how institutionalised duties have priority over other practical reasons. The second way of thinking can be found in B. Wendel's thesis that the professional role of a lawyer is special and associated with fidelity to law, and therefore also the priority of duties and obligations arising from it.

Interestingly, in both cases we can refer to supportive arguments from conceptual necessity, which would eliminate the existence of moral dilemmas, for we could only speak of *prima facie* dilemmas, namely situations that would be dilemmas if there were no reasons for the priority of institutional ought in

¹⁰ Ibidem, pp. 150–151.

the case of conflicts of ought's. However, this priority is not obvious and results from certain reasons that are formulated at a different level than the other reasons for each of the options. By isolating this level, one can speak of *prima facie* as well as meta-dilemmas, whose relation is that thanks to resolutions at the level of meta-dilemma one cannot speak in a professional sphere about moral dilemmas in the strict sense, but only *prima facie* dilemmas. Thanks to resolutions at the level of meta-dilemmas, *prima facie* moral dilemmas turn out to be decidable and, as a consequence, they can be included in one of the other groups of practical problems. This will become more apparent in discussion of the above-mentioned authors' concepts.

Before getting at that discussion, it is worth noting that J. Lemmon concludes his arguments by emphasising the significance of dilemmas for moral life. At the same time, he ascribes them a specific significance by regarding them as less of a tragedy or a no-way-out situation, and more of an opportunity. He points out that, since a subject is able to cope with the choice they face – and in principle, dilemmas are in the author's opinion, resolvable problems, although extremely difficult ones – they will also progress morally. Dilemmas compel us to a kind of moral activism, to reflect, and often to change our beliefs. In this respect, he uses a metaphor:

There may come a point in the development of a painter, say, or a composer, where he is no longer able to go on producing work that conforms to the canons of composition which he has hitherto accepted.¹¹

It could be added that a dilemma is such a situation in which by participating in a specific practice, one is confronted with the question about validity of institutional duties guiding one's actions. They entail not only the necessity to choose, but also to look at the functioning of institutions themselves. Although they always require an individual choice, they attract attention to the system in which they appear. So even if they turn out to be just *prima facie* dilemmas, thinking about many situations as dilemmas has a deep moral sense. That is maybe another argument for considering using moral dilemmas in legal education.

2.1.2. Institutionalised ought as exclusionary reasons

The view on the priority of institutional duties is usually associated with the concept of exclusionary reasons by J. Raz. In order to understand it well, and to understand how it affects moral dilemmas, it is necessary to start with the fact

¹¹ Ibidem, p. 157.

that, for Raz as regards sphere of practical reasoning, reasons are of fundamental significance. At the most general level, he defines them as relations between facts and persons. Reasons are therefore always “to someone” and find application in specific situations. Their defining trait is that they have a dimension of strength, or weight, thanks to which, it is possible for the subject to balance them and resolve which are overriding and which are weaker and must yield. However, it should be noted immediately that being overridden by reasons of greater weight is not the only reason why a given reason will not be applicable. Situations in which a given reason depends on meeting certain conditions, including cancelling conditions, are possible and frequent. If the latter are met, the reason is not applicable, even if it has not been overridden by other reasons. Another important aspect of reasons is that they are the source of “critical attitude towards behaviour which conforms to or conflicts with the statement,” which “manifests itself in action and in other beliefs, attitudes and emotions,” and also “in addition to the first critical attitude an additional critical attitude directed towards aspects of the world other than the beliefs people have.”¹²

Among reasons understood this way, the author distinguishes the first-order and second-order reasons for action. This distinction makes sense because of the way in which collisions between particular types of arguments are resolved. As mentioned, as a rule, this is done by balancing based on the relative weight of reasons. However, in the case of first-order and second-order reasons, this is not the case. In such conflicts, the latter always prevail. This is because “a second-order reason is any reason to act for a reason or to refrain from acting for a reason.” As a consequence, these reasons relate primarily to other reasons and thus indirectly affect the decisions. Among the second-order reasons, the most common are exclusionary reasons, which are “a second-order reason to refrain from acting for some reason.” It is a general principle of practical reasoning that exclusionary reasons always prevail over first-order reasons. The latter can thus be out-weighted both by other first-order reasons and by exclusionary reasons. It is also important that exclusionary reasons cannot be overridden by first-order reasons, but can give way to other second-order reasons.¹³ The concept of exclusionary reason is crucial for J. Raz to clarify the concept of rule, including legal rules and their role in practical reasoning.

Before this is discussed, it should be noted that what has been said so far allows us to reconstruct the argument about the priority of institutional obligations before moral obligations. Exclusionary reasons, regardless of

¹² Joseph Raz, *Practical Reason and Norms* (Oxford-New York: Oxford University Press, 2002), pp. 19, 25–27, 32.

¹³ *Ibidem*, pp. 36, 39–40.

whether they are rules, promises or orders, disable balancing at the first-order reasons level. Acting on command is the most obvious example here. It is also used by J. Raz himself. If a soldier receives an order, e.g. to requisition a truck, it is his or her duty to do what is required of him or her, without judging whether the order is correct, whether the truck will be really useful or whether it might deprive the people who own it means of support, etc. Even if he or she is aware of these various reasons that might endorse different options of behaviour, he or she should not take them into account. It is by virtue of the order itself, being an exclusionary reason in a soldier's practical reasoning. Taking into account the various first-order reasons would be permissible only if the order itself allowed it, e.g. due to the lack of orientation in the situation on the side of the issuing party. The author emphasises that the soldier may of course have contradictory feelings about seeing some first-order reasons for the option of behaviour other than the order, but the latter prevails here under the logic of practical reasoning.¹⁴ The author says that:

When the application of an exclusionary reason leads to the result that one should not act on the balance of reasons, that one should act for the weaker rather than the stronger reason which is excluded, we are faced with two incompatible assessments of what ought to be done. This leads normally to a peculiar feeling of unease, which will show itself when we wish to censure a person who acted on the balance of reasons for disregarding the exclusionary reason and when we have to justify someone's acting on an exclusionary reason against claims that the person concerned should have acted on the balance of reasons.¹⁵

Thus, one can speak in such situations about subjective feelings of the subject which perhaps correspond to the subjective elements of the dilemma discussed earlier. It is therefore about a difficult choice, sense of guilt and dirty hands. Nevertheless, the subject is eventually able to recognise their duty, despite seeing an alternative way to assess a given situation based only on balancing of first-order reasons. There is no uncertainty as to how to proceed, but only awareness of the existence of an alternative assessment, discarded on the basis of exclusionary reason.¹⁶

Subjective feelings, however, do not exhaust all problems that may arise in connection with exclusionary reasons in practical reasoning. There may also be at least two other types of situations. First of all, it is possible to encounter the already mentioned problem of cancellation conditions for exclusionary

¹⁴ *Ibidem*, pp. 41–43.

¹⁵ *Ibidem*, p. 41.

¹⁶ *Ibidem*, p. 43.

reasons. The subject facing the contradiction between behaviour resulting from an exclusionary reason and the balancing of first-order reasons may evade the former if they determine that certain conditions are met. They can be varied and, for example, refer to the extraordinariness of the situation. They may also be unclear and cause interpretation problems, which will further complicate the situation. These conditions, however, must result from the same basis as the exclusionary reason, e.g. to be part of an order, rule etc.

Conflict of second-order reasons, including exclusionary reasons, is also possible. This could be, for example, a conflict between an order and a rule or between two promises or between two rules, as well as many other cases. Of course, there may also be situations where such collisions can be solved with cancellation conditions, e.g. an illegal order cannot be executed. Undoubtedly, there will also be situations in which, for example, valid and justified rules can generate dilemmas as a result of a collision between them. The author writes about such situations that:

We do not surrender our judgement altogether. But our deliberations are not about what is right on the balance of reasons. They concern the second-order question of whose judgment regarding the balance of reasons to trust. Our problem becomes a problem of justifying an exclusionary reason.¹⁷

This problem can be seen more clearly when we turn our attention to J. Raz's discussion of various types of rules as exclusionary reasons, including first of all mandatory norms. He emphasises that in the majority of cases they are "both a first-order reason to perform the norm act and an exclusionary reason not to act for certain conflicting reasons." As such they are "justified as time-saving devices and as devices to reduce the risk of error in deciding what ought to be done," as well as "labour-saving devices."¹⁸ They can perform all these functions because they disable balancing of first-order reasons, and at the same time – with a few exceptions – contain a specific obligation. Sources of rules, however, may be different, as may the reasons that endorse them. As the author emphasises:

Rules are not ultimate reasons. They have always to be justified on the basis of fundamental values. This is a result of the fact that norms are exclusionary reasons. A reason not to act for reasons cannot be ultimate. It must be justified by more basic considerations.¹⁹

¹⁷ *Ibidem*, p. 64.

¹⁸ *Ibidem*, pp. 58–59.

¹⁹ *Ibidem*, p. 76.

A consequence of this statement is the necessity to supplement practical philosophy with a plane including a theory of values, and – as J. Raz adds – the plane concerning a theory of responsibility. This assumption is also accepted in this book. However, it has to be remembered that one can speak of “relative independence of norms from their justifying reasons” which “explains why they are regarded as complete reasons in their own right and why we hypostatize them and treat them as objects.”²⁰ This means that only when there is a need to resolve a conflict between exclusionary reasons should the subject weigh the justification of the rules. Otherwise they will be excused if they are guided by a rule (or, for example, a promise, an order, etc.). It would confirm that, in the discussed perspective, dilemmas are in principle resolvable, but it is possible to distinguish the meta-dilemma level, on which this solvability depends.

An additional element of reflections to be considered is that, in the case of judges and lawyers, there is a particular type of institutionalised system of norms. For Raz, most generally speaking “Institutionalised systems are sets of norms which either set up certain norm-applying institutions or which are internally related in a certain way to these.”²¹ These institutions can be described as the primary organs, and therefore in approximation simply public institutions, and in the case of the law, of course in the first place, the courts. For the author “They are institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong.”²² It is particularly important, however, that:

The introduction of primary organs is not a simple addition to a normative system. Their introduction radically transforms the system adding to it a whole new dimension, that of authoritative evaluations of behavior.²³

The difference the existence of the primary organs makes in a given system of norms lies primarily in the fact that they have the authority to resolve disputes, but they can do so only on the basis of norms belonging to this system. Therefore, a general norm is addressed to them to exclude reasons other than the norms institutionalised in this system. In other words, for example, judges cannot take into account reasons other than legal norms because this is ruled out by their professional role. This is not accidental, but results from conceptual necessity. Otherwise, the courts could not be treated as primary organs. They must adopt a legal point of view, which in their case is exclusive.

²⁰ *Ibidem*, p. 79.

²¹ *Ibidem*, p. 132.

²² *Ibidem*, p. 136.

²³ *Ibidem*, p. 142.

A different description of the role of a judge is therefore not possible without misunderstanding. J. Raz emphasizes that:

the judges who judge a man from the legal point of view do not necessarily deny the validity of other reasons which bear on his action. They may well believe that there are other reasons which, all things considered, justify his action. Yet they may condemn it because theirs is a judgment from the legal point of view only.²⁴

It can be said that taking non-legal reasons would mean a violation of exclusionary reasons necessarily related to the role of the judge. It would be going beyond the legal point of view, perhaps taking on another role. However, it should also be remembered that it follows from the essence of law as an institutionalised system of norms that the rulings are authoritative. Therefore, they are binding even if they are wrong, and therefore also if the judge got into balancing reasons which should not be taken into account. This makes a meta-dilemma that the judge may face particularly weighty.

Of course, this is the sphere of our interpretations of J. Raz. Thanks to them, the importance of institutions in the ethics of judges and lawyers, as well as the problems of dilemmas on these grounds, becomes visible. Metaphorically speaking, institutions act here as a kind of lever or gear, which makes the judge's decision authoritative. In the normative sense it is imperative, and in the social sense objectified. This creates a meta-dilemma in which an alternative can be indicated. On the one hand, for the above reasons, a judge cannot deal with a specific problem that he must solve as if it concerned only them. The institutional context here excludes non-legal reasons, which would be reasons uniquely for the judge. Of course, not only judges may only take the legal point of view and omit all non-legal reasons:

The ideal law-abiding citizen is the man who acts from the legal point of view. He does not merely conform to law. He follows legal norms and legally recognized norms as norms and accepts them also as exclusionary reasons for disregarding those conflicting reasons which they exclude.²⁵

In the case of citizens, it is only an ideal, but for judges it is a necessity. On the other hand, it may happen that the non-inclusion of extra-legal reasons will lead to negative consequences for the party whose case the judge decides, or for other parties. The institutional nature of law will reinforce the negative consequences. For the judge, this may be a serious reason to accept such an understanding of their role, so as to neutralise such negative consequences.

²⁴ *Ibidem*, p. 143.

²⁵ *Ibidem*, p. 171.

However, this would mean abandoning the legal point of view. Then, however, they expose themselves to other types of negative effects. Namely, if they adopt an understanding of their role otherwise than as objectively determined by the institution, then the institution will still work in accordance with its internal logic. This may bring an accusation of going beyond one's role and using the institution for other, e.g. personal, goals. Some could consider such behaviour as abuse of power.

It should be emphasised that such situations are not simply problems arising from the judge's failure to accept the law they are obliged to apply. Of course, such issues may also appear and lead to conflicts of conscience. However, the discussed meta-dilemma will more often appear in situations where systemic problems need to be solved. For, if the public authorities are based on the division of tasks and each of them has the appropriate competences, then, according to what has been said, none of them should go beyond them. However, when one of the institutions fulfills these tasks incorrectly, and other institutions only uphold the wrong state of affairs, the consequence may trigger a serious systemic problem. It can be said that it will be a result of neglect. In such situations, the judge's meta-dilemma will take the form of the question of whether the court should actively try to fix such complex systemic problems, or act passively according to the rules, not only not to solve the problem, but to join the group of institutions that consolidate it.

2.1.3. Institutionalised ought as professional value

B. Wendel approaches the problem of the priority of an institutionalised ought over a pure moral ought a little differently. He adopts a perspective dealing primarily with legal ethics, that is, problems related to attorneys and legal counsels, and not issues related to judges, as Raz did. According to the author, on the most general level the basic problem of legal ethics is not simply the difference between the rules of professional role and general morality or the principles of justice, but whether the former have political legitimacy. Embedding discussion in the context of legitimisation differs from the traditional approach, according to which a lawyer's task is to act in a loyal way in the interests of their client. It also allows the establishment of an original proposal that the role of a lawyer is not determined by acting in the interests of their client, but fidelity to law, and also treating the law with respect. According to Wendel, the law is not the limit of a lawyer's activity, which should be directed by the client's interests, but it constitutes their role. The similarity Raz's concept is immediately clear, even if Raz limited this to the role of a judge. Wendel, however, goes beyond

the Raz's considerations, because his approach is not simply an analytical or descriptive theory, but is based on "political normative considerations relating to the ethics of citizenship in a liberal democracy."²⁶

The normative perspective, referring to political legitimacy of the law, allows a slightly different solution to the problem of not taking into account non-legal reasons. Here, too, dilemmas are solvable, but this results from attributing positive value to the lawyer's role. This value results from political legitimacy and at the same time justifies departures from pure moral ought. It can be seen that this also confirms the inability to resolve the fundamental problems of professional deontology without taking into account the dimensions of values and moral responsibility. The value to which Wendel most often refers is legality. At the same time, this is defined as a political value. As a consequence, lawyers are understood as quasi-political players, performing important political functions in a political community. This is also a significant difference compared to traditional views. The latter refer to the opposition of general morality, addressed to every person, and professional ethics, addressed to the performer of a given role. However, if one adopts a political perspective, instead of people, one should speak of citizens – as follows from assuming participation in the political community – free and equal. At this point, the author refers to such classics of liberal political thought as J. Rawls.²⁷

The traditional approach to legal ethics, which was mentioned several times here, is described by Wendel as Standard Conception. It consists of three basic principles: Principle of Partisanship (lawyers are obliged to act only in the interests of their client), Principle of Neutrality (lawyers should not judge their client and their affairs, and consequently interfere with them based on their beliefs) and Principle of Nonaccountability (as long as a lawyer acts in a role, they should not be judged in moral terms, but through the prism of rules of the professional role).²⁸ Standard Conception is usually justified by reference to such categories as client's autonomy, dignity and procedural fairness.²⁹ On such grounds, one can also consider the problem of moral dilemmas. At first glance, it also seems to introduce their resolvability, making the client's interests the paramount criterion. However, first, this lacks sufficient justification, because none of the above arguments can justify the priority of a category as formal and indefinite as the client's interests. Second, in the absence of sufficient justification of superiority, these interests become one of the reasons that is

²⁶ W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010), pp. 5–8.

²⁷ *Ibidem*, pp. 11, 18, 23.

²⁸ *Ibidem*, p. 29.

²⁹ *Ibidem*, pp. 31 et seq., 37 et seq., 44 et seq.

subject to balancing and, as a consequence, more conflicts are possible when these interests are contrary to the law or to the lawyer's beliefs.

That is why the author proposes an approach which includes an alternative to each of the Standard Conception principles. He suggests replacing the Principle of Partisanship, i.e. ordering lawyers to act only in the interests of their client, with the imperative of implementing a client's legal entitlements. He understands the latter as "substantive or procedural right, created by the law, which establishes claim – rights (implying duties upon others), privileges to do things without interference, and powers to change the legal situation of others (e.g., by imposing contractual obligations)." They can be created by both the legislator as well as courts and public administration. They can also be created by citizens themselves, e.g. by means of contract.³⁰ Actions to protect them will usually be the same as acting in the interests of the client, but will allow less frequent moral conflicts to be solved in line with the essence of the lawyer's role. The justification for this position is the aforementioned general thesis that the role of a lawyer is constituted by fidelity to law, which results from the understanding of lawyers as quasi-political players. Only this approach legitimises not being guided by pure moral obligation in conflict situations. The law is in principle legitimised, and so are the roles of lawyers as its implementers. Such legitimacy is missing if one assumes that their task is to pursue the client's interests.

The consequence of this approach is that lawyers should not look at the law from the external perspective of the client's interests and choose legal means so that it these interests may be fully serviced, but should adopt an internal point of view. This requires defining the client's legal position and legal entitlements. The author refers here, among others, to H.L.A. Hart, but it is clearly visible that he adopts a normative perspective, not a descriptive one. He claims, for example, that:

The good citizen regards the law as a source of reasons, while bad citizen's reasons are essentially unaltered by the law, except insofar as the law is another source of negative consequences like being deprived of liberty or property.³¹

Thus, he values the adoption of the internal and external points of view by imposing on this the distinction, of clearly political character, between a good and a bad citizen. The internal point of view is not just a conceptual condition of law – a presupposition – as it is in contemporary legal positivism, but also

³⁰ *Ibidem*, p. 50.

³¹ *Ibidem*, p. 62.

a postulate. It seems that it is necessary to give the general idea of fidelity to law a normative character and translate it into more detailed duties. An example of the latter may be the claim of how the position adopted by the author influences the problems related to the interpretation of law:

The ethical principle for lawyers defended here is that loyalty to clients *within the law* requires lawyers to interpret the law, assert positions, plan transactions, and advise clients on the basis of reasons that are internal to the law. Relying on extra-legal considerations like the justice org efficiency of law is not permitted (...) Fidelity to law requires to aim at recovering the best understanding of the existing law.³²

This principle is somewhat mitigated in the procedural context, where the views presented by lawyers are balanced by the opposite position of the other party within the adversarial framework. It is stronger when a lawyer advises a client in relation to planned actions, for example, drawing up a legal opinion, or drafting a transaction.

Of course, the approach proposed by Wendel does not solve any problems, which he realises perfectly well. From the perspective of the moral dilemmas we are interested in, two seem particularly interesting. First of all, he notes that in legal practice there may be situations when it turns out that the client does not have legal entitlement, which is the result of some circumstance or malfunctioning of the institution. In such cases, there are many indications that legal entitlement should be due to the client, but objectively is not due. However, the lawyer's assessment is not moral in nature here, but in a way it results from the logic of the legal system. Wendel describes such situations as windfall cases.³³ This may give rise to a lawyer's sense of dilemma that they should somehow help the client and fix any systemic errors. However, this would mean going beyond the legal entitlement of the client, and thus questioning fidelity to law. It would also mean going beyond the role of a lawyer. All the feelings and all discomfort of lawyers associated with such situations are important, but cannot influence their decisions if they are to remain faithful to their role. This importance will be the subject of reflection.

In the context of moral dilemmas, it is also worth mentioning the following view of the author. He formulates the assumption that attaching lawyers to the principle of zeal advocacy and focusing on the interests of their client may be related to the fact that this principle significantly simplifies the lawyer's normative universe and allows all possible moral dilemmas to be solved

³² Ibidem, p. 71.

³³ Ibidem, p. 73.

according to a simple criterion – always in favour of the client.³⁴ In this way, the value of legality is neglected and conflicts between various values that may appear here are overlooked. The author writes that:

Claiming to work as *lawyer* while simultaneously claiming no obligation of fidelity to law would be self-undermining. The role of lawyer, as distinct from other social roles (such as lobbyist, activist, or radical), is constituted by relationship between the role occupant and existing positive law.³⁵

It can therefore be said that not recognising legality as the basic value for the role of a lawyer is, in Wenedel's view, a mistake that leads to a completely false understanding of this role and the inability to distinguish it from many other non-legal activities.

Regarding the Principle of Neutrality, i.e. the prohibition of assessing the client and the case and interfering in it due to one's own convictions, the author claims that the reference to the values of legality and the rule of law gives rise to replacing this neutrality with fidelity to law. Therefore, he also excludes a lawyer's pure moral ought, but such exclusion leaves no vacuum. Instead of moral assessments of the client and the manner of their conduct, the lawyer should be guided by legal assessments of the case. Moreover, Wendel claims that any conflicts and problems with lawyers' decisions are more likely to result from the institution's lack of legitimacy than the conflict between them and material justice. The issue of legitimisation of the law and the role of lawyers is presented by Wendel with the help of multi-layered argument. Generally speaking, this legitimisation takes place through the fact that "procedures of legal system constitute a means for living together, treating one another with respect, and cooperating toward common ends despite disagreement." However, he rejects legitimisation of the deliberative democracy type and is content with the less ambitious goal that the legal system is to guarantee fair procedures. So, this is a more realistic and not an idealistic approach. Consequently, it confirms that legal ethics is part of political ethics.³⁶

The author also adopts the common sense assumption that his theory applies to a just society. In the case of societies affected by extreme injustice, completely different problems arise due to the total lack of legitimacy. However, as long as such legitimacy is provided, and the disagreement between citizens mainly concerns the application of general principles, "substantive injustice of law is not a basis for conscientiously objecting to the duty to respect the law."³⁷ He stresses

³⁴ Ibidem, p. 78.

³⁵ Ibidem, p. 84.

³⁶ Ibidem, pp. 87–95.

³⁷ Ibidem, pp. 95–97.

it even more, pointing out elsewhere that “If it is not possible to interpret the law correctly to reach the just result, then it may be the case that the local injustice must be tolerated by lawyers even while it is resisted by citizens.”³⁸ The role of a lawyer based on fidelity to law clearly excludes consideration of moral reasons and includes a general requirement to respect the law. However, this is not a requirement of absolute obedience to the law. At this point, Wendel’s approach is clearly different from Raz’s. The law for the former is not simply an exclusionary reason, but only “very weighty reasons, which should be overridden only in extraordinary circumstances.”

The author uses a normative and not a conceptual argument here. He claims that the value of the law is that it allows for coexistence even when deliberation does not bring results because of disagreement between citizens, and should therefore be respected. It may, however, happen that disobedience to the law can be justified by strong reasons. It is crucial, however, that the role of a lawyer in relation to citizens is distinctive because the latter have more scope to disobey the law. This near-absolute duty of obedience to the law on the part of lawyers makes them closer to the role of a judge than their clients.³⁹

Finally, when it comes to the Principle of Nonaccountability, the author starts from a critical view that this principle can make lawyers the tools of doing evil and thus entangle them in a phenomenon known as the banality of evil. At the same time, however, he does not agree with the position that being guided by moral obligations, and not an institutionalised professional role, can solve this problem and prevent such entanglement. At the same time, he does not question the duality of the subject as a human being capable of moral evaluation and the subject as a performer of a role guided by professional norms.⁴⁰ What the legal ethics should focus on in the context of this dualism is the avoidance of the danger that the professional role will be like a hat one can put on and off and thus change the criteria for assessing one’s own actions. This would mean a complete alienation of the lawyer from his role and a serious threat of being caught up as a tool in causing evil. The author proposes to avoid this difficulty by the thesis he describes as incorporationist. He claims that every person performing a specific social role creates something that can be called a practical identity. This means adopting an internal point of view when the subject reflects on their actions. In the case of lawyers, this is a legal point of view. It is fundamental for formulating assessments and making decisions. What

³⁸ *Ibidem*, p. 103.

³⁹ *Ibidem*, pp. 114–122.

⁴⁰ *Ibidem*, pp. 156–157.

is important, however, is that it does not preclude the possibility of looking at the same actions and decisions in purely moral terms.⁴¹

This is clearly visible in the problem of dirty hands. The author raises this issue by referring to the tradition of political ethics from T. Hobbs, N. Machiavelli and M. Weber. On such grounds, the role and mission of a true politician requires and legitimises deviations from pure moral obligations. Actions taken in this way, however, can be evaluated from a moral perspective. In other words, each action can be assessed from two perspectives, i.e. purely moral and political ethics, in which the legitimacy of certain institutions pointing to the performance evaluation criteria should be taken into account. The divergence of assessments in both perspectives leaves the subject with dirty hands. Wendel writes about this as follows:

The “dirtiness” of the agent’s hands is a function of being able to evaluate an act from multiple perspectives – such as political and ordinary moral values, or agent-neutral and agent-relative considerations.⁴²

According to earlier arguments, legal ethics is part of political ethics, and lawyers are quasi-political agents. Consequently:

Paradoxically, a lawyer who seeks to have no authorship relationship whatsoever with wrongdoing also commits moral wrongdoing, only this time in respect of the *political* reasons for respecting a valuable social institution. If there are genuine moral obligations and genuine political obligations that require incompatible actions, there is no way to resolve this dilemma without doing wrong in virtue of one or the other evaluative domain.⁴³

In other words, the author uses the concept of dirty hands to show that fidelity to law does not remove moral agency. He uses the term quite broadly because he includes all suffering, guilt and regret caused by the divergence of assessments of one’s own actions from a professional and moral perspective. Hence, one can probably identify it simply with the subjective elements of a moral dilemma.

The duality of perspectives by which the subject evaluates their action explains what causes the sense of dirty hands in specific situations. It should be remembered, however, that the author assumes, in principle, the priority of the rules of performing a professional role and the near-absolute obligation to obey the law. This results from the fact that the whole concept of legal ethics is

⁴¹ Ibidem, pp. 161–162.

⁴² Ibidem, p. 170.

⁴³ Ibidem, p. 171.

based on the concept of fidelity to law. It means, however, that possible moral dilemmas are resolvable in this view. The options of conduct associated with legal reasons prevail over possible options based on moral reasons. The same applies to institutionalised rules of a professional role, which exclude unique use of moral ought in the event of a collision. However, the question arises: what is the sense of dirty hands on the part of the lawyer in this case? Does it have any function that can be explained? Wendel argues that all kinds of moral conflicts and related dirty-hands phenomenon act as “moral remainders.” They are “non-action-guiding evaluative concepts” that perform two essential functions. First, they allow lawyers to develop a morally sensitive style of practice, and secondly, they lead to understanding the inadequacies of the binding law.⁴⁴

It can therefore be said that the function of moral remainders is to shape the reflexivity of both the subject and the whole practice. This statement is all the more important as it confirms the general thesis around which the considerations in this book concentrate, that in judicial ethics and legal ethics it is difficult to talk about undecidable moral conflicts, and thus about moral dilemmas. However, *prima facie* dilemmas are present. The phenomenon of dirty hands, in Wendel's view, confirms that the latter play a positive role. Even if the moral world of legal professions seems simplified, because institutions remove the existence of real moral dilemmas, it is not the case that these institutions relieve lawyers entirely of dilemmas. Moral life remains complex, but in a different way. It might even be appropriate to say that this life is more complicated because of the existence of an institution, because it introduces a duality of perspectives when it comes to assessing activities. The existence of dirty hands in spite of the lack of undecidable moral dilemmas is an expression of this complication. It is very likely that this is the price that lawyers pay for participation in the system, which solves many practical problems on the one hand, but also generates new ones, characteristic only for the system. These problems are, among other things, a result of institutions malfunctioning, and will always raise questions about the scope of responsibility for their functioning, and whether lawyers should make efforts to repair these systemic errors. However, this is a question that no longer concerns deontology but other areas of legal and judicial ethics.

2.2. Types of professional legal dilemmas

The reflections from the previous sections present some aspects of the theoretical dispute over lawyers' moral dilemmas. It can be mentioned that

⁴⁴ *Ibidem*, pp. 165–175.

the dispute is so advanced that some authors even distinguish different phases. Hence, the “first wave” connects the subject to moral philosophy and focuses on conflicts between ordinary morality and the lawyer’s role morality. The “second wave” focuses on the role of legal representation in maintaining and fostering a pluralist democracy.⁴⁵ The positions discussed above correspond to particular waves. However, the briefness of this discussion is manifested by the fact that, for example, approaches which negate the resolvability of dilemmas by adopting the concept of exclusionary reasons have not been included. These are, for instance, various positions, which D. Luban referred to as “acts over polices,”⁴⁶ thus proclaiming that the deontological level is not sufficient to consider such problems and discussing them in perspective of values and responsibility theories is necessary. Also, all theories of situational ethics or ethics of responsibility are skipped. They will be discussed in the next chapters. At this point, one should turn to examples of situations that can illustrate which deontological dilemmas exist in judicial and legal ethics.

Examples of four dilemmas of judges were selected for discussion. It is assumed here that there is much literature on lawyers’ dilemmas, while judges’ dilemmas seem to be less well researched. They were selected in such a way that one can see the similarity between them and the best-known examples of moral dilemmas that philosophers use, which were discussed in the first chapter. They are also based on similar conflicts. Therefore, individual situations were distinguished according to the collision patterns: professional duty vs. professional duty, professional duty vs. professional obligation, professional obligation vs. professional obligation and professional obligation vs. professional ideal. It should also be noted that the dilemmas discussed in this chapter have been partly reproduced in the second part of this book. They have been developed by different authors, so the views on the nature of a given problem may differ slightly. In this chapter, reflections on them are, in principle, broader.

2.2.1. First dilemma: professional duty vs. professional duty

The first type of dilemma follows from a collision of duties created by professional roles. It is most characteristic because it is duties that primarily

⁴⁵ David Luban, W. Bradley Wendel, “Philosophical Legal Ethics: An Affectionate History,” *The Georgetown Journal of Legal Ethics* 2017, No. 30, pp. 337 et seq.

⁴⁶ David Luban, *Lawyers and Justice. An Ethical Study* (Princeton: Princeton University Press, 1988), pp. 117–118. Cf. Przemysław Kaczmarek, “Etyka prawnicza Davida J. Lubana: moralna ocena czynów, podmiotowość, odpowiedzialność,” *Archiwum Filozofii Prawa i Filozofii Społecznej* 2018, No. 1, p. 24.

determine the normative structure of a professional role. As mentioned above, including in theory of moral dilemmas, a symmetrical reason for exclusive options is mainly determined by duties of equal status. This makes situations occurring in professional contexts easily comparable with classic examples of moral dilemmas. P. Foot does this when discussing the driver's example:

Suppose that a judge or magistrate is faced with rioters demanding that a culprit be found for a certain crime and threatening otherwise to take their own bloody revenge on a particular section of the community. The real culprit being unknown, the judge sees himself as able to prevent the bloodshed only by framing some innocent person and having him executed.⁴⁷

She clearly points out that:

The question is why we should say, without hesitation, that the driver should steer for the less occupied track, while most of us would be appalled at the idea that the innocent man could be framed. It may be suggested that the special feature of the latter case is that it involves the corruption of justice, and this is, of course, very important indeed.⁴⁸

In both cases, as regards the number of victims in any of the options the situation is very similar, hence one could argue that a judge faces a choice similar to that of the driver, i.e. the sacrifice of one life to save more others. Every reasonable person can easily conclude that, in both situations, the choice should be different. In the driver's case we would admit a kind of calculation of the number of victims, while the judge we would view this as inadmissible. This statement should be treated as obvious, but it allows a more serious problem to be raised: namely why it is so? The author asks, "Why can we not argue from the case of the steering driver to that of the judge?"⁴⁹

In her opinion, the distinction between positive and negative duties is crucial for the different assessment of both situations:

The steering driver faces a conflict of negative duties, since it is his duty to avoid injuring five men and also his duty to avoid injuring one. In the circumstances he is not able to avoid both, and it seems clear that he should do the least injury he can. The judge, however, is weighing the duty of not inflicting injury against the duty of bringing aid. He wants to rescue the innocent people threatened with death but can do so only by inflicting injury himself.⁵⁰

⁴⁷ Foot, *The Problem of Abortion*, p. 2.

⁴⁸ *Ibidem*.

⁴⁹ *Ibidem*, p. 3.

⁵⁰ *Ibidem*, p. 4.

The positive obligation to provide help to those who are in danger of being lynched could be realised only at the cost of breaching the negative duty of not doing harm to the accused. If the judge did that, they would become the perpetrator themselves. However, in this context a crucial question may be posed, namely whether this claim may be generalised for all cases involving the consideration or non-consideration of the extra-legal consequences of their ruling by the judge.

For it can be reasonably argued that judges and lawyers in general always have a negative obligation, following from their professional role, not to allow the breach of legal rules or to use the law as an instrument of harm. Hence, they may consider only such results of their rulings which are directly foreseen by the law – legal effects – which belong to the normative sphere. Any consideration of extra-legal effects existing in reality could be assessed as breaching legal norms at least, or even perhaps as lack of impartiality. Hence, in the discussed situation there is no moral dilemma because there is no symmetry of options – there are clear institutional reasons for one of them. Generalising, such a conclusion could be applied to all similar situations, although it is based on some previous decisions which should be explained.

First, it can be seen that the view according to which a lawyer may consider only legal effects, that only these effects can generate reasons for a decision, and that all extra-legal effects are beyond their interest, may be identified as formalist. At the other extreme, there are instrumentalist views that point to the necessity of considering various extra-institutional aims in legal decisions, because such decisions are never made in a vacuum but in a specific social and economic context. Both positions predicate statements of normative nature, so the latter, for example, cannot be identified with legal realism and its indeterminacy thesis, according to which the content of adjudications is not determined by legal rules, or at least not only, but by many facts. They influence judicial decisions by virtue of causal relations and not by providing normative value. This may also occur in an unconscious way. It has to be stressed that, in this discussion, such a view is not useful because the problem of moral dilemmas is the problem of reasons to act. If a lawyer decides to consider in their reasoning the extra-legal effects of a decision, or does the opposite, they do so on the normative level. Here, the opposition between formalism and instrumentalism is essential.

However, it may be said that, in the above example, and surely in many others, the judge with complete conviction will give primacy to their negative obligations and will not sacrifice the accused to save potential victims of a lynching. Such a judge would not in this manner because they were a supporter of formalism and the opposite decision would be inadmissible instrumentalism. Certainly, there are many examples of instrumentalism being

used in the reasoning that courts, such as in cases related to business activity. However, making a moral choice seems more important than choosing between formalism and instrumentalism. As has been remarked, only distinguishing positive and negative obligations entails such a choice made at a higher level, namely a deontological one. It loses significance when we look at the problem with a consequentialist's eyes. Then, the agent-centered option, namely that which is guided by one's own preferences provided that no evil is done, must yield before the general calculation of the amount of evil that will follow both options of conduct. In the discussed example, such a meta-decision in favour of deontology seems in line with our intuitions.

But let us take another example, in which symmetry of options is more visible and the dilemma between deontologism and consequentialism clearer. On 7 January 2016, the Polish Constitutional Tribunal issued judgment⁵¹ to discontinue proceedings on the consistency with the Constitution and the Act on the Tribunal of five acts of the Sejm of 25 November 2015, citing the lack of legal grounds for the Sejm (the lower house of Polish parliament) of the previous term's election of a Tribunal judge, and for the subsequent election of five replacement judges by acts of the Sejm of 2 Dec. 2015. The reason for discontinuation was the inadmissibility of a decree being issued due to the Tribunal's lack of competence (which lies primarily in studying the consistency of normative acts and not individual acts with acts of higher order). The Tribunal decided that the above acts did not fall into this category, either formally or substantively, so refused to look into the case. This ruling is interesting because, among other things, it was issued in an early stage of Poland's "constitutional crisis," and for that reason is significant for the further course of events. Simultaneously, it upholds the Tribunal's opinion both on the understanding of a normative act and in reference to the mentioned acts of the Sejm concerning their lack of legal grounds, i.e. that they are neither normative nor creational nature, but are partly statements and partly resolutions.⁵²

In substantiation, the Tribunal stressed the exceptionality of the circumstances in which it adjudicated, and referred to the extra-judicial activities it undertook:

In this situation, the Constitutional Tribunal – in the spirit of responsibility for maintaining the constitutional order in the state, respecting the principle of cooperation of the authorities expressed in the preamble

⁵¹ Case No. U 8/15.

⁵² Piotr Radziewicz, Piotr Tuleja, eds., *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego czerwiec 2015–marzec 2016* (Warszawa: Wolters Kluwer, 2017), p. 47.

to the Constitution and protecting fundamental constitutional values – attempted to cooperate with the legislative and executive authorities, in particular with the President, becoming a party to the dialogue in seeking a constitutional solution to the disputed issues and striving to overcome as soon as possible the controversy affecting the very essence of the democratic state of rule of law.

In spite of these circumstances and – as one can only presume – being aware of their possible consequences, which it did not stop by its decree, the Tribunal accepted that its scope of freedom:

Was indicated first of all in the Constitution, defining its position in the structure of organs of public authority, its tasks and competences granted to it for that goal. By interpreting legal regulations concerning its activity, the Tribunal refrained from interpreting them extensively (*interpretatio extensiva*), remaining at the so-called literal interpretation (*interpretatio declarativa*).

In further argumentation, the Tribunal considered it inappropriate to assess the appealed resolutions, which meant that they remained in practice and de facto influenced the ongoing functioning of the Constitutional Tribunal itself.

Three dissenting opinions were put forward. The most interesting was formulated by M. Zubik, who did not share the position excluding the possibility of the Tribunal reviewing the constitutionality of the Sejm's resolutions of November 25, 2015. The author – like the Tribunal – emphasised the uniqueness of the circumstances of adjudication, stating that:

For the first time in its history, the Constitutional Tribunal faced the problem of assessing the resolutions of the Sejm which explicitly enter into the sphere of regulation forming constitutional matter and demanding the regulation of given social relations in the form of a normative act. This requires adapting the Tribunal's statements to the specificity of the situation being assessed. Simple reference to the previous jurisprudence regarding the law-making resolutions of the Sejm to resolutions of a different nature had to raise the question about the usefulness of this *acquis* to the resolution of a case pending before the Tribunal. In my opinion, this case is a precedent.

Then, arguing for a functional and, consequently, broader interpretation of the Tribunal's powers, he stated that “in a democratic state of law it is unacceptable to assume that a certain sphere of law-making activity of the Sejm, as the central state body, would be completely out of control as regards constitutionality.” He also emphasised that “A different interpretation means accepting the practice of circumventing constitutional norms defining the forms

of taking actions by the state authorities. It also results in narrowing the scope of the Tribunal's implementation of the hierarchical control of norms, and thus leads to the weakening of the principle of the supremacy of the Constitution."

This decision met with comments from legal academia, which pointed out the advantages and disadvantages of the position adopted both in the ruling of the majority and in the dissenting opinion. As P. Radziewicz emphasises, in this way the Tribunal "did not violate its subject-matter jurisdiction and did not enter the scope of other constitutional state organs, but – to maintain its verdict under the law system – had to disregard the actual effects of resolutions, remaining in a certain isolation in relation to current political and legal events." An alternative outlined in a separate opinion would require "a creative reinterpretation of the means of action or the competence basis of the Tribunal, in order to include – on the border of political position or, unfortunately, outside it – the valid meaning of the Sejm's resolutions in the adjudication."⁵³ According to the author, the problem of the Tribunal can be understood primarily as the tension between a formalistic and realistic approach.

In turn, T. Pietrzykowski, clearly approving the position of the Tribunal, referred to the above dissenting opinion, seeing in it "concern about practical consequences of admitting the possibility of lawmaking resolutions of the Sejm which, however – due to lack of features of a normative act – are not to be evaluated" by the Tribunal. He notes that the arguments it raised "refer mainly to the assessments indicating that the legal order in which certain acts are not subject to effective control of their constitutionality, is clearly worse than the one in which each such act may be examined by the Constitutional Tribunal." Consequently, he claims that "mere disapproval of the way the powers of different authorities are established is not enough to recognise that it can be interpretively modified to achieve all desired effects."⁵⁴ The author points out that such an approach is completely consequentialist in nature. Although he does not say so, one might wonder, therefore, whether the position of the majority could not be described as principled or deontological, and as such opposed to the approach represented in the dissenting opinion.

On the other hand, K.J. Kaleta states in this book that the position of the Tribunal, although consistent with the current constitutional acquis is, however,

⁵³ Piotr Radziewicz, "Kontrola konstytucyjności uchwał Sejmu (uwagi na marginesie postanowienia TK w sprawie U 8/15)," *Państwo i Prawo* 2016, No. 7, pp. 63–64.

⁵⁴ Tomasz Pietrzykowski, "Czy TK powinien był umorzyć postępowanie w sprawie uchwał Sejmu? Krótki komentarz do postanowienia TK z 7 stycznia 2016 r.," *Obserwator Konstytucyjny*, available at <http://niezniknelo.pl/OK2/artkul/czy-tk-powinien-byl-umorzyc-postepowanie-w-sprawie-uchwal-sejmu-krotki-komentarz-do-postanowienia-tk-z-7-stycznia-2016-r/index.html>, accessed on 13th August 2018.

attributing to “the resolutions a meaning different from both their exact wording and the intention of the draft’s proponents revealed in the justification of the draft. More significantly, such interpretation would ignore the real impact which these resolutions (...)” It means that it abstracts from the actual effect that these resolutions had in the legal order, and, therefore, their influence on the correctness of judges’ positions, which will directly affect the ability to adjudicate in the future. On the other hand, the standpoint from the dissenting opinion, although “aiming to counteract the resolutions’ real effects in the legal system – would require acknowledging the constitutive nature of parliamentary resolutions, and in consequence redefining the universally accepted criteria of the normativity of a legal act for the sake of analysed individual case. This would mean breaking with previous *acquis constitutionnel* and the dominant opinion of legal scholars. Such proceedings expose judges to accusations of acting *contra legem* and of the instrumental treatment of jurisprudence and legal doctrine’s *acquis*.”⁵⁵ The author states that this choice has “traits of dilemma in the strict sense,” and the tension visible in it primarily concerns the passive and active attitudes of judges.

It should be noted that the quoted comments can be grouped in a diagram in which the standpoint of the Tribunal appears as formalistic, deontological and passivism, and the proposition contained in the dissenting opinion as realistic, consequentialist and activism. So, these are two different attitudes to the fundamental judicial problem faced by the Tribunal, and they can be conceptualised differently. However, there are no good arguments for choosing one of them or, rather, each one has as many pros as cons. Therefore, I intend to defend the claim that the choice between these attitudes is moral and, due to specific circumstances of the case, takes on the form of a meta-dilemma. These circumstances are predominantly the anticipated effects of the ruling that will occur in the sphere of systemic practice. Both the Tribunal and the authors of the dissenting opinion were aware of them, but only in the latter case can a clear demand for their inclusion be found. While the former stated that it took up its moral responsibility in this area, it tried to pursue it in the extra-judicial sphere, for example in cooperation with the President of the Republic of Poland. In the dissenting opinion, these effects were to have a clear impact on the legal view presented in it – or, more broadly, the theoretical choice.

In the discussed example, one can also see the stack structure of choice. The Tribunal had first to decide whether to settle the matter, and only if the answer to that question was positive, to start examination of its substance. From

⁵⁵ See Krzysztof J. Kaleta, Chapter 9: *Lawyers’ and Judges’ Dilemmas in Constitutional Law*, case No. 11 in this book.

a legal point of view, such a structure is, of course, determined by the priority of formal issues before the merits, and more specifically by the need for each public authority that begins to hear the case to examine its own jurisdiction. In the discussed perspective, the matter is no longer so obvious, because it was possible to reasonably assume or even anticipate that the refusal to subject the Sejm's resolutions to legal control also means they will not be subjected to such control by any other body, will cause them to remain legally binding (but not valid), and will have negative political consequences. Therefore, the lack of a substantive choice turned out to be a definite choice, and thus one can speak about the existence of alternative and disjointed options of conduct.

In the situation of the Tribunal, the options can be considered as symmetrical in the sense of both theories concerning its sources. On the one hand, one can argue that the lack of a good solution resulted from the "perfect equality" of the options. Each of them would lead to equally negative consequences that would be detrimental to equivalent values. If, for example, the stability of institutions and the Tribunal's ability to exercise its competences were regarded as such values, it can be argued that both options (as accepted by most judges and proposed in dissenting voices) carry the same detriment, which generates the same strong reasons for each of them. Leaving the Sejm's resolutions in force by refusing to control them was one of the elements of the later destabilisation of the Tribunal. However, it can be reasonably assumed that the adoption of an activist attitude would result in the exacerbation of the existing systemic dispute and contribute to this destabilisation. But, it can also be argued that both options are associated with incommensurable values, namely of "approximate equality" only. The entanglement of the Tribunal in the systemic dispute resulting in the destabilisation of its own position is something other than a change in jurisprudence that undermines the stability of views on its scope of competence. Avoiding the first is related to the reasons concerning systemic practice, while in the second case institutional considerations are at stake. It is difficult to compare them with each other, which is the result of their justification through incommensurable values – on the one hand belonging to the political-systemic sphere, and on the other to the legal-systemic one.

One may also suspect that there occurred subjective elements of the dilemma, i.e. the difficulty of choice, a sense of regret over the unfulfilled option, and perhaps also guilt over not anticipating the foreseeable consequences of the ruling. All this is testimony to the fact that the decision made was not right. Perhaps it was the best possible in those circumstances. The whole situation can be interpreted as a moral dilemma. Even if it is not a dilemma in the strict sense, because eventually some arguments prevailed, it shows the characteristic conflict that occurs in adjudication – it seems that it is most adequately the

conflict between two duties arising from a professional role. On the one hand, it is a negative obligation not to violate the law or use it to inflict evil, including taking into account only the effects of adjudication provided for by law. On the other hand, it is a positive obligation to find such solutions that will have the best consequences, including extra-legal ones. When we consider this situation as resolvable in favour of the first option, it is most likely because we reason from a deontological perspective that privileges the first of the duties. If we reason the reverse, then we accept the consequentialist view and we become legal instrumentalists.

It is also a choice between different concepts of the role of a judge or lawyer, and can therefore be useful in the ethical education of jurists. Putting this type of situation before legal trainee and asking whether the judge is not a bit like the driver in the car dilemma will reveal to them the deeper choices they will face in their professional life. The level of understanding that may arise from such an exercise seems to be more complete than just presenting similar problems through the prism of only legal-philosophical concepts well-established in education. We can, of course, present the tension between deontology and consequentialism in professional ethics, for example by presenting the theory of R. Dworkin's jurisprudence, which gives priority to the deontological perspective, but requires the best interpretation, including with respect to the non-legal consequences of the ruling. Another example is the philosophy of G. Radbruch, whose position may explain why lawyers are ready to privilege deontological thinking, but at the same time shows that there is a threshold of negative consequences of law and jurisprudence that is unacceptable. These theories can also be helpful in discussing and solving individual dilemmas. It seems, however, that they are significant voices in the discussion, the subject of which becomes fully clear in an ethical-professional view referring to moral dilemmas.

2.2.2. Second dilemma: professional duty vs. professional obligation

Since we have asked the question of whether a judge happens to be, in a moral sense, in a situation similar to that of the trolley driver, one can ask another one: whether they can also face a choice such as Heinz. As already mentioned, in jurisprudence, this dilemma is known primarily as the basis for distinguishing the ethics of justice and the ethics of care. The first consists in respecting general principles and universal values, the other concentrates on specific relationships, empathy and willingness to help. Heinz has to choose between these ethics

because the situation requires him either to act against the fundamental legal institutions due to concern for his wife's life, or to respect these institutions at the price of watching her die. In discussions with lawyers about this dilemma, attention is quickly focused on whether he should be criminally responsible in the light of the applicable rules, to what extent mitigating circumstances should be taken into account, etc. More fundamental questions about whether there are moral obligations in one's professional life, of such power as Heinz's in relation to his wife, and whether caring for another person can put a judge or lawyer in a situation of moral dilemma about how to treat established and irrepressible institutions in a specific dramatic situation are less frequent.

Before we try to answer this question, it is worth quoting two statements of women studied by C. Gilligan, which seem to be helpful in understanding the essence of the problem. The first is Ruth, who:

Sees Heinz's dilemma as a choice between selfishness and sacrifice. For Heinz to steal the drug, given the circumstances of his life, which she infers from his inability to pay two thousand dollars, he would have "to do something which is not in his best interest, in that he is going to get sent away, and that is a supreme sacrifice, a sacrifice which I would say a person truly in love might be willing to make." However, not to steal the drug "would be selfish on his part. He would have to feel guilty about not allowing her a chance to live longer." Heinz's decision to steal is considered not in terms of the logical priority of life over property, which justifies its rightness, but rather in terms of the actual consequences that stealing would have for a man of limited means and little social power.⁵⁶

Therefore, it seems to be important to the ethics of care not only to focus on the relationship, but also to treat the obligation towards it as an important reason to act. The social context of the whole situation is also important. Perhaps Heinz should violate the moral duty prohibiting him from stealing not only because his wife relies on him and he has a moral obligation to her. The latter is in some way strengthened by the difficult material and social situation of the couple struggling with the disease. Unable to rely on the community in which they live, they must rely more on each other. C. Gilligan writes about this in the following way:

Moral dilemmas are terrible in that they entail hurt. Ruth sees Heinz's decision as "the result of anguish: Who am I hurting? Why do I have to hurt them?" The morality of Heinz's theft is not in question, given the circumstances that necessitated it. What is at issue is his willingness to

⁵⁶ Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development* (Cambridge Mass. and London: Harvard University Press, 2003), p. 101.

substitute himself for his wife and become, in her stead, the victim of exploitation by a society which breeds and legitimizes the druggist's irresponsibility and whose injustice is thus manifest in the very occurrence of the dilemma.⁵⁷

Therefore, no element of moral dilemma distinguished according to the analysis conducted in the previous chapter is questioned (infliction of evil and sense of guilt are mentioned here) but its social origins are exposed. It is the institutions that create such difficult choices as Heinz's. He must do evil not only because he is morally obliged to help his wife and take care of her well-being, but because no one else is able to do it within the institution. This can, of course, form the basis for fundamental criticism of institutions as unjust. Since they themselves create situations that require violation of their basic principles, it means that they are poorly designed. However, this does not change the fact that there is a dramatic choice in the individual situation.

The choice between duties arising from institutions and the sense of moral obligation towards others is also visible in the story of the lawyer Hilary, another woman examined by C. Gilligan. Her moral beliefs evolved with age, but she always tried to maintain internal consistency. Initially, she tried to follow the principle of not doing evil to others. However, she quickly reached the conclusion that this was not really possible because one is often forced or even obliged to do so. For life is full of tensions and conflicts that cannot be resolved with such an obvious yet too simple principle. She was also unable to follow the principle of self-interest. The author describes one of Hilary's professional experiences:

Deliberating whether or not to tell her opponent of the document that would help his client's case, Hilary realized that the adversary system of justice impedes not only "the supposed search for truth" but also the expression of concern for the person on the other side. Choosing in the end to adhere to the system, in part because of the vulnerability of her own professional position, she sees herself as having failed to live up to her standard of personal integrity as well as to her moral ideal of self-sacrifice. Thus her description of herself contrasts both with her depiction of her husband as "a person of absolute integrity who would never do anything he didn't feel was right" and with her view of her mother as "a very caring person" who is "selfless" in giving to others.⁵⁸

Therefore, acting in accordance with institutional models ruled out being guided by a sense of obligation towards others. One can suspect that it also

⁵⁷ *Ibidem*, p. 103.

⁵⁸ *Ibidem*, p. 135.

gave rise to feelings of guilt or dirty hands, although this is not explicit in the passage. However, it should be assumed that the problem here is not only the impossibility of following one's own beliefs because they and professional duty are mutually exclusive. The moral conflict in this situation is due to the impossibility of fulfilling a moral obligation to another person resulting from the fact that they do remain in a specific, albeit remote, social relationship. The author writes:

Though she has access, as a lawyer, to the language of rights and recognizes clearly the importance of self-determination and respect, the concept of rights remains in tension with an ethic of care. The continuing opposition of selfishness and responsibility, however, leaves her no way to reconcile the injunction to be true to herself with the ideal of responsibility in relationships.⁵⁹

One can of course raise doubts that in this case there is no symmetry of options because in fact any moral commitment to the trial opponent is too weak to balance the professional duties resulting from the role of the lawyer. This applies in particular to trials organised in adversarial way. This principle is the basis for the lawyer's loyalty towards the client, and demands of them that they pursue that client's interests, privileging them in relation to the interests of other people, and certainly requiring them to give it priority over the interests of the other party. There is also a lack of moral obligation in the sense of that which Heinz has in relation to his wife, or even a lawyer in relation to their own client. A trial opponent does not treat the lawyer of the other party as someone they can trust, rely on and expect help from.

It can be argued that the moral obligation towards another person results from the very essence of interaction. For then, an ethical relation is always created in the first place. It has a direct character in the sense that it is established between two entities that recognise this subjectivity. It is not mediated by institutions. Subjects do not meet as holders of specific social roles. To form ethical relations and create a moral commitment only a meeting is needed. It is the source of moral responsibility for another human being, which, however, is existential and not normative. Only such a relationship can be a source of ethics. In this view, therefore, this moral obligation is the source of the norms of conduct, including duties.⁶⁰ Without questioning the validity of this way of thinking, it should be noted that, however, this is a slightly different understanding of moral obligation than that used in the above considerations. Until now, we have used it in the sense of a specific ought towards a particular

⁵⁹ *Ibidem*, p. 136.

⁶⁰ Kaczmarek, *Tożsamość*, pp. 132 et seq.

person, resulting primarily from one's social role played in relation to them – being someone's spouse, representing someone in court, or simply being a party to a contract. Institutions introduce diversity here, i.e. we no longer have the same moral existential obligation to feel responsible for people we meet and whose lives we may influence, but we do have a moral normative obligation to treat certain people as distinguished. We have special moral obligations to them, not just general ones. Using the term moral obligation in this sense lets us ask whether the special nature of this ought may interfere with duties arising from the role that is at the same time the source of this obligation. This is very important in the case of professional roles.

It seems that such a conflict between professional duty (resulting from the requirements of institutions) and professional obligation is possible. Let us look at another example from the ethics of the judges to clarify this. On April 27, 2017, the Wrocław Court of Appeal passed a judgment,⁶¹ in which it dismissed the judgment of the District Court by acquitting the accused of committing the crimes they were charged with, namely deeds consisting of claiming influence in a state, self-governmental institution, an international or national organisation or in a foreign organisational unit with public resources, or convincing other persons of the existence of such influences, and undertaking mediation in order to settle the case in exchange for financial or personal or the promise of this (Art. 230 of the Penal Code), and leading another person to an unfavourable regulation in respect of their own or someone else's property by means of misleading or exploiting a mistake or inability to properly understand the action taken in order to obtain financial gain (Art. 286 Penal Code). The accusation was the result of a special operation carried out by the Central Anti-Corruption Bureau (CBA) in 2007.

The main objections in the appeal case presented by the defence lawyer consisted in the fact that, in their opinion, the operation was carried out in violation of the provisions of the Act on the CBA. Not only were the conditions for initiating it not met, but also the actions of the person cooperating with this service were a form of inciting the accused to commit a crime. As a consequence, inclusion of material thus gained in the evidence, and its recognition as the basis for making relevant findings of factual information originating from this operation, were in violation of the standard of a fair criminal trial. The boundaries of the free assessment of the evidence collected in the case were also exceeded, in particular the materials from the CBA special operation and explanations of the defendants, which led to an inconsistent and internally contradictory admission that, on the one hand, these materials

⁶¹ Case No. II AKa 213/16.

came from illegal operational and reconnaissance activities and as such should not form the basis for determining relevant facts, and, at the same time, that in the absence of their unambiguous credibility, it is possible to use them as evidence, though ancillary only, in establishing the facts of the case. Incorrect assessment of evidence also consisted of the improper assessment of the degree of guilt attributable to the defendants, ignoring the duration and intensity of pressure exerted on them, resulting in an abnormal motivational situation in which the defendants, provoked to corruption only by their relations with those demanding their specific activity regarding an associate of the CBA, who is not an official of the service, accepted the method of solving the case suggested by this associate.

Indeed, the court of first instance expressed the opinion that there were no grounds to assume that the formal conditions for the implementation of the special operation according to the mentioned regulations were fulfilled, and in its opinion the testimony of the CBA's collaborator, including classified evidence, must lead to the conclusion that there was no reliable information which could initiate activities related to operational control. The Court of Appeal shared this assessment of the evidence, and then defined the basic issue that had to be resolved as follows:

The essence of the problem in the case under review boils down to the following issue. The court of first instance assumed that (...) in relations with the accused, he was an inspirer of corrupt activities, initiated such actions towards the accused and incited them to such actions. The accused took the financial gain as a result of the provocation. It has already been indicated above that the District Court considered that the formal conditions for implementing the special operation were not met. In connection with the above, the problem arose whether the evidence thus obtained could be used against the accused, be the basis for factual findings and, as a consequence, be the basis of a conviction.

This issue therefore concerns the application of the "fruits of poisoned tree" doctrine. Despite various disputes pending in the jurisprudence of the criminal trial, it was not considered part of the Polish legal order at the time of deciding the case. It was introduced only by the Act of 27 September 2013,⁶² amending the act on the Code of Criminal Procedure and some other acts that came into force on 1 July 2015, establishing a new Art. 168a of the Code of Criminal Procedure (CCP) in the wording: "It is unacceptable to carry out and use the evidence obtained for the purposes of criminal proceedings by means of a prohibited act, referred to in art. 1 § 1 of the Criminal Code."

⁶² Journal of Laws of 2013, item 1247.

Quickly, because of the Act of March 11, 2016 amending the act on the Code of Criminal Procedure and some other acts,⁶³ this provision was given the following wording: "Evidence cannot be considered inadmissible only on the grounds that it was obtained in violation of the provisions of the proceedings or using a prohibited act referred to in Art. 1 § 1 of the Penal Code, unless the evidence was obtained in connection with the official's performance of official duties as a result of murder, deliberate injury or deprivation of freedom." This change meant, therefore, a quick end to the binding of the fruit of a poisoned tree doctrine in the Polish criminal trial. It was left in the law only to a reduced extent, limited to the most serious crimes.

Such a legal status naturally only complicated the task of the Court of Appeal. For the legislator clearly first introduced the doctrine of the fruit of a poisoned tree, following the delineated philosophy of the criminal trial, and then – after a political change – they expressed the opposite will, based on another axiology. In such a situation, the Court of Appeal had to conclude that:

The current wording of the provision allows the use of evidence obtained in violation of the provisions of the proceeding or by an offence (...) disqualifying only evidence obtained as a result of murder, deliberate injury or deprivation of freedom, and in the case of a public official disqualification occurs furthermore when they obtained evidence in violation of the provisions of the proceedings or by means of a prohibited act.

In the case of provocation, it was a co-worker and not an official of the CBA who gave testimony, therefore, the Court of Appeals also stated that:

It should be pointed out that this is a highly controversial solution (...) because it does not restrict the parties to the proceedings in their private gathering of evidence even by means of a prohibited act, except for evidence obtained as a result of murder, deliberate injury or deprivation of freedom, which as a result is an incentive to collecting evidence in violation of provisions not included in the above catalogue, which is closed. In addition, it should be noted that a significant drawback of the discussed regulation is the weakening of the guarantees protecting the participants of the proceedings and other people from obtaining evidence in a way that infringes the protected goods, which involves the fulfillment of features of a prohibited act.

In this situation, the Court of Appeal refused to apply Art. 168a of the CCP in regard to the part which, in its opinion, is contrary to the Constitution of

⁶³ Journal of Laws of 2016, item 437.

the Republic of Poland, in particular the protection of human dignity, the right to privacy and information autonomy. It also stated that evidence could be considered inadmissible if it was obtained in violation of the provisions of the proceedings, or by means of an offence, while violating the provisions of the Constitution of the Republic of Poland. It should be remarked that, according to the Court, the refusal to apply in part Art. 168a of the CCP is *ultima ratio*. The court reached a conclusion only after considering other possible forms of taking into account the constitutional standard in its resolution, and in particular the reconstruction of the norm from the statutory provisions and the Constitution of the Republic of Poland (co-application) and pro-constitutional interpretation. None of these possibilities could be applied due to the far-reaching incompatibility of the act with the Constitution of the Republic of Poland, and so the Court reached for its ultimate solution, i.e. refusal to apply the provision.

It should be noted that the ruling of the Court of Appeal is controversial not only because it aroused political emotions and public calls to institute disciplinary proceedings against the judges. A court's refusal to apply a law is not a standard solution in the system of Polish law, or in any system in the continental legal culture. There are a number of arguments for allowing such a possibility when the application of a law in a specific case would violate the constitutionally guaranteed rights of a party. However, there are also opposite arguments, including, in particular, the possibility of asking the Constitutional Tribunal to rule on a legal question. Submitting such a question entails suspension of proceedings until the Tribunal adjudicates. The Court of Appeal, therefore, not only refused to apply the law, choosing instead to apply the Constitution directly, but also bypassed the Constitutional Tribunal.⁶⁴ Despite all doubts and negative consequences resulting from such a resolution, the Court of Appeal decided that the arguments for the benefit of the accused prevailed. This allows us to look at this matter not only as a problem of a complicated legal problem, but also as a moral dilemma that resembles Heinz's dilemma. One option of the procedure is justified by reasons referring to institutional duties, the other by a moral obligation towards the party to the proceedings.

This claim may seem very counter-intuitive to lawyers. However, attention should be paid to the following issue: undoubtedly, the role of a judge is the application of the law as expressed by act of parliament, unless the presumption

⁶⁴ It should be noticed, that this judgement was issued in context of the constitutional crisis which takes place in Poland since 2015. On its basis, many often claim, that as a result of changes within the Constitutional Tribunal, as well as the effect of its improper cast, the Tribunal lost its legitimacy and credibility as an independent court of judicial review.

of its constitutionality is overturned in the form provided for by the Constitution. This is the judge's professional duty, firmly grounded in theory and practically in the culture of statutory law. At the same time, however, this role results in the creation of a special professional obligation in relation to the party to the proceedings. This is because, from the point of view of this party, the role of the judge is not only to apply the law, but to conduct an independent and impartial hearing of their case. It can reasonably be assumed that this is the expectation of anyone appearing in court, whether in a civil or criminal case, including the accused. Importantly, this is not just some unjustified, accidental expectation, but flows from the very ethical principles of the judge's role. Independence and impartiality do not mean being blind, as suggested by the famous but ancient and in some way misleading image of justice. Such an interpretation would mean a bureaucratic and impersonal approach, although it may emphasize the importance of the autonomy of the decisions made by the judge. However, another interpretation is also possible, identifying independence and impartiality with involvement in the resolution of the case and accepting moral responsibility for it. It requires the judge to make an effort, and possibly also expose themselves to negative consequences.

Above all, however, in this approach the general principles of independence and impartiality materialise each time a case is heard, in the form of professional obligation to a party. It exists somewhat aside from the legal relationship between the court and the party, and demands that we also deal with a moral relation. This is a situation analogous to ethics of lawyers, in which we can also speak about the general task of lawyers, consisting of loyal representation of the client, grounded in the relations of trust and a given client's reliance on a particular lawyer. In the case of adversarial proceedings, the judge has such a commitment to more than one person, which makes a significant difference and can also be a source of practical problems, perhaps also moral dilemmas. However, if we accept the interpretation proposed here, then it is clearer why problems such as that which faced the Court of Appeal in the above example can be interpreted as moral dilemmas similar to Heinz's dilemma. The court faced the choice of whether to follow the usual institutional models and thus let events follow their normal course (which would probably have been a non-controversial action), or to break this general pattern due to the moral obligation to the accused, who was not only the target of unlawful provocation, but had also been facing proceedings against them for ten years.

The Court of Appeal endorsed the second option and it seems that the sense of moral obligation or even some concern could have played a role in this. Of course, the mental states of judges cannot be analysed. Only justification is available, so we only make a certain interpretation here. However, it should be

emphasised that this does not mean the necessity of any identification, emotional involvement or positive assessment of the accused. It is only about relationship and obligation. As with Heinz, in fact, it is not important how strong the bond between the spouses is. Perhaps it has even vanished. The relationship of reliance on someone, which generates this obligation, is important. Because of this, the Court of Appeal – just like Heinz – made a difficult choice, entailing negative consequences. However, it takes responsibility for it. It is possible to argue in the same way as Ruth did above, interpreting Heinz's dilemma, i.e. that in some way the dilemma of the Court of Appeal was created by a malfunctioning system – the bad behaviour of special services, excessive length of proceedings, frequent changes of legislation in a sphere very sensitive axiologically. The burden of resolving this situation fell on the Court of Appeal. In order to fulfill its moral obligation, it may have considered it necessary to take upon itself the effect of doing some evil, and so it would get its hands dirty. In order to resolve the situation created by the institution, it had to act against its principles, but in this way perhaps saved specific individuals.

2.2.3. Third dilemma: professional obligation vs. professional obligation

Another type of dilemma faced by judges and lawyers is that of conflict between two professional obligations. A general example may be Sophie's dilemma, the tragedy of which is that she is forced to choose which of her children to save. Symmetry of options seems to be the fullest of all discussed situations, because there is no moral reason for giving priority to one of the children. There is also an obligation to protect them and help them, which is of a special nature, resulting from being a mother. Therefore, it is a different choice than if it concerned unknown people, which of course does not mean that in the latter case it would not be a moral dilemma or be less dramatic. The fact that we are dealing with identical obligations also makes a significant difference in relation to other troublesome situations. Just as one may have doubts about whether even in this case there is perfect symmetry of options (e.g. the chances of survival of a child will be taken as reason for a choice), one may also wonder if such dilemmas may arise in legal professions.

The basic doubt may arise from the fact that lawyers, in principle, have the same professional obligations towards all their clients, and judges to the parties to the proceedings. If in the first case, there is an inability to simultaneously represent clients loyally, then it is a conflict of interest. The basic rule in this respect is that one should withdraw from representing each client whose

interests are contradictory so as not to favour any of them or give them an unjustified advantage. In the second case, analogous functions are fulfilled by rules concerning the exclusion of a judge. If they were involved or had an interest in a case in any way, or were related to one of the parties, they should be removed from adjudicating on the case. External assessment of various circumstances and whether they raise doubts as to the impartiality of the judge is a basis for excluding them. Thus, anything that could unbalance a judge's obligations to the parties to the proceedings would result in their disqualification. In particular, this applies to the appearance of any additional obligations, which may be the source of non-legal relations, e.g. family or collegial relations. In other words, legal professions assume that a lawyer or judge has an equal professional obligation to all clients or parties, and that the way to avoid conflicts related to this is to withdraw from representing or conducting a case.

This would lead to the conclusion that a moral dilemma resulting from the conflict of two symmetrical professional obligations of lawyers is actually impossible. In a normally functioning legal system, there is always the possibility and at the same time the obligation to resolve such a conflict. If, therefore, it would appear that a lawyer faces a dilemma similar in structure to Sophie's choice, the system, in principle, requires that they refrain from making it and pass the case over to someone else. Such a claim, though true, is limited in scope, and does not take into account the following essential circumstances. In the professional context, a moral obligation results from the professional role, trust in the lawyer or judge and relying on them. Hence, it seems that if such a conflict occurs in a situation because of its objective elements, it will also occur when another lawyer or judge deals with it. They will be equally obliged to clients or parties. It is only the modification of the situation itself, for example in such a way that the clients are no longer represented by one lawyer, but by two different ones, that resolves conflict of interest. However, the solution does not seem so be easy in the case of judges. The essence of a legal dispute in our legal culture is that the conflict between the parties is to be resolved by one person equally obliged to each of them, i.e. by a judge.

This in turn is the source of another problem. It could be argued that, in legal disputes, the conflict of professional obligations is permanent, since the judge must resolve each case. By their choice, one of the parties enjoys winning the case while the other side loses and is disappointed. Nevertheless, we are not ready to say that there is a moral dilemma in every case. Of course, this is because the decision is based on the factual and legal basis, and therefore on the basis of substantive reasons. So, it is not a decision made by weighing professional obligations or other non-substantive reasons. This is due to the role of the judge and their professional duty. As mentioned above, it may happen that

professional duty and professional obligation may be in conflict and generate a moral dilemma. As a rule, however, it will not be so, and adjudication on the basis of and within the law will not lead to such a situation. The fact that there are winners and losers in the proceedings does not in itself cause a violation of professional obligations in relation to the parties. It is precisely about the judge being guided only by substantive reasons and not breaching their professional duty for the benefit of the other party.

This is in line with the traditional way of understanding a judge's impartiality – the sense of moral obligation towards the parties cannot lead to favouring one or prejudicing the other. It concerns both a judge's subjective attitude and the objective evaluation of their behaviour. Therefore, a judge should not only be impartial, but neither should they give any cause for their impartiality to be doubted. This is emphasised by ethical codes. Limited only to trans-national codes, one can indicate the following examples:

The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment. (...) To guarantee impartiality, the judge: – Fulfils his judicial duties without fear, favouritism or prejudice; – Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimises the situations which might lead to a recusal.⁶⁵

This is similarly presented in *The Bangalore Principles Of Judicial Conduct* of 2002:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. Application: 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice. 2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.⁶⁶

B.W. Wendel considered such, and similar requirements that professional ethics puts before judges in the context of contemporary legal-philosophical debate regarding, among other things, the limits of rights, including the dispute between H.L.A. Hart and R. Dworkin on the discretionary power of judges. He

⁶⁵ European Networks of Councils for the Judiciary Working Group Judicial Ethics Report 2009–2010, p. 4.

⁶⁶ The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002.

put forward the thesis that it is impossible to assess the impartiality of a given judge and the decisions issued by them on the basis of a criterion referring to whether it was solely determined by legal reasons or whether they also followed non-legal reasons. This problem was discussed in this work, among others, on the occasion of discussing the dilemma of taking into account the extra-legal effects of the ruling. For there is no possibility of empirical examination of this fact (we cannot penetrate the judge's mind), and the scope of legal reasons is, by its nature, controversial (due to interpretive concepts in law). Consequently, it must be considered that:

the right approach to judicial ethics is to focus on the application side of the distinction between the content of law (which may or may not be susceptible of determination on the basis of social facts) and standards for its application. Where there are multiple plausible interpretations of existing cases, statutes, and other applicable legal norms, all we can reasonably expect is that a judge will deliberate in good faith and reach the conclusion she believes represents the best reading of the governing law.⁶⁷

However, we can assess it, above all, by the way in which a judge gives reasoning to their decision, both in writing and verbally. It is obvious that the manner of conducting the proceedings, including behaviour at the hearing, may be the basis for formulating such assessments. In particular, treatment of the parties, addressing them using appropriate forms and avoiding certain gestures are important here. Despite the above conclusions, which are, moreover, in line with well-grounded views on the acceptable behaviour of judges, it seems that one can indicate situations that are dilemmas. Generally speaking, they will consist in the fact that one professional obligation will require certain behaviour towards one of the parties (and will include implementation of the principle of impartiality), but professional obligation to the other party will require that such behaviour should not be taken, also due to impartiality. The choice before the judge in that case would bear the mark of a moral dilemma.

Another example will illustrate this. In Polish law, property claims (with some exceptions) expire after ten years from the date they become due. This means that, in accordance with Art. 117 § 2 of the Civil Code, a person against whom a claim could be made may evade satisfying the claimant unless they waive the right of limitation, once the expiry date has been reached. The institution of limitation balances two values: the interests of the creditor and the security of legal transactions. As the Supreme Court puts it, in the case of a limitation period for claims for damages:

⁶⁷ W. Bradley Wendel, "Impartiality in Judicial Ethics: A Jurisprudential Analysis," *Notre Dame Journal of Law, Ethics & Public Policy* 2008, No. 22, p. 321.

In fact, the interests of the perpetrator (the debtor) and not of the victim (the creditor) is protected by the institution of limitation of property claims. But not only the debtor has interest in the fact that their uncertainty as to the existence of the obligation was limited in time and the cessation of this uncertainty could be determined on the basis of unambiguous, objective measures. This restriction primarily serves the stability and certainty of social relations, which is the primary purpose of the statute of limitations.⁶⁸

For the discussed example, it is also important that before the court the possibility of releasing the debtor from the claim can only take place on a clearly raised plea of limitation. Thus, the court does not take into account the statute of limitations *ex officio*, and if no defence is made, the court will award the claim. The principle of free party disposition or – simple – principle of party-control in civil proceedings is applied here primarily, which means that the parties are those to dispose of the subject of the dispute and act in their own interests, according to their own interpretation. An additional justification for such a solution is that the legislator, balancing the creditor's interest and the security of legal transactions, did not attempt to eliminate the possibility of settling obsolete claims completely. The debtor may therefore satisfy the claim despite the statute of limitations.

In this context, the following situations were very common.⁶⁹ In disputes between parties when the creditor is a professional, usually an entrepreneur represented by a professional, and the debtor has no experience and is often affected by ineptitude and appears alone in court, the plea of limitation was not raised. The party that could refer to it was simply unaware of it due to ignorance of the law or lack of understanding of the situation. Not only that, they often involuntarily accepted the claim, for example by asking for the debt to be divided into instalments, which interrupts the running of the statute of limitations. Thus, they unconsciously deteriorated their legal situation. As mentioned above, the court was then bound not to file objections and cannot take into account the statute of limitations *ex officio*. Recognising the actual inequality of the parties resulting from extra-legal circumstances, judges often faced and in non-consumer cases still face a difficult choice. Motivation to

⁶⁸ Resolution of the Supreme Court of 17 February 2006, case No. III CZP 84/05, *Biuletyn SN* 2006, No. 2.

⁶⁹ I am using here past tense because on 13 April 2018 the parliament issued an amending Act on Civil Code and some other acts, Journal of Laws item 1104, which is in force since June and September 2018. The Act added § 2¹ to art. 117 according to which once the term of limitation is expired any claim against the consumer cannot be pursued. This rule is meant to solve the problem discussed in the example used in this section. However, it concerns only the debtors who are consumers and the general rule of not to take into account the statute of limitations *ex officio* stays valid.

counteract such situations in some way is particularly strong when reasons of equity are also involved, because the party not raising the appropriate defence not only worsens their legal situation, but also significantly their life situation. Usually, this is connected with the consequence of depriving them of part of their means of support. The conditions for granting legal aid are not always met, even though access to such would probably equate the parties' chances, because a professional is usually able to find out about the possibility of limitation period.

Actually, the only option that the court has is to somehow draw the attention of the party to the possibility of using such a defence. From the legal point of view, the right of the court to provide, if the need arises, the necessary instructions to the parties and participants in the proceedings in the case without a professional representative results from Art. 5 of the Code of Civil Procedure. However, this provision states that such explanations may relate to procedural acts. As emphasised in a ruling by the Supreme Court, this provision:

It may be applicable only when protection of the party's procedural rights requires it (...) it cannot be extended to the sphere of the rights or claims provided for in substantive law and the manner of their implementation. The obligation envisaged in these provisions – which may mitigate the influence of *ignorantia iuris nocet* principle in the civil proceedings – is an expression of moderate formalism in this process. It cannot, however, lead – with the disruption of the elementary rules of the civil proceedings – to courts helping in the effective realisation of claims filed by the party.⁷⁰

In another ruling, the Supreme Court decided that:

Court information and instructions relate to procedural actions made by the parties. It is, therefore, about the admissibility and advisability of performing certain procedural actions at a given stage of the proceedings and in the resulting procedural situation, for example, requesting exemption from court costs, requesting the establishment of a public lawyer, keeping the terms and dates for appeals, etc. (...) Provision of Art. 5 of The Code of Civil Procedure therefore does not impose on the court that parties and participants in proceedings without a lawyer or legal adviser should be instructed about the legal grounds for pursuing certain claims either by bringing an action or by filing a relevant objection, as a special remedy (...).⁷¹

⁷⁰ Judgment of the Supreme Court – Chamber of Civil Cases of 22 August 2000, case No. III CKN 873/00.

⁷¹ Judgment of the Supreme Court – Chamber of Civil Cases of 8 June 2000, case No. V CKN 60/00.

Invoking limitation has far-reaching substantive-legal consequences for the other party, and is associated in principle with the dismissal of the claim.

Even greater doubts arise from an ethical-professional point of view. Making a suggestion as to the direction of the party's procedural tactics is basically providing legal assistance. It should be expected that the other party will perceive this as biased behaviour, demonstrating lack of impartiality and causing imbalance in the parties. It should be assumed that they will not accept the argument that it serves to compensate the actual disproportion of the parties. It cannot be ruled out that it will be interpreted as a judge transgressing in their role. Such a risk is also perceived by the Supreme Court:

The regulation does not impose on the court the obligation to instruct the party as to every procedural act. Its scope is determined by the "process need." It would be such a need to provide guidance or instruction if the action or omission of a party would have negative legal consequences for them. However, it is not the court's duty to substitute the party in the proceedings and take over the role of its legal representative.⁷²

In another ruling, the Supreme Court noted that:

Anyone who engages in litigation and decides to conduct a case without the participation of a professional representative must assume that they have a sufficient understanding of how to handle this case (...) If the complaint formulated in cassation be accepted, the court would not help the party in the process but in fact would substitute it essentially, indicating exactly what each trial action should look like.⁷³

Despite these decisions, or perhaps precisely because of them, the situation of the judge in the discussed example bears the marks of a moral dilemma. Identical professional obligations to both parties in the specific circumstances of significant actual inequality of the parties require conflicting behaviours, i.e. simultaneously providing and withholding guidance for the weaker party. In a sense, the judge must choose how to behave towards one party at the cost of the other, with the obligation to show them the same commitment.

It can be argued that the judge, without taking any action, allows the proceedings to develop in accordance with the principle of free party disposition. The parties are to argue and the judge is only a neutral arbitrator. This is how the legal system is constructed, in particular civil proceedings. Limitation is one of those institutions in which the legislator has balanced the legal values

⁷² Judgment of the Supreme Court – Chamber of Administrative, Labour and Social Security Cases of 13 May 1997, case No. II UKN 100/97.

⁷³ Judgment of the Supreme Court – Chamber of Civil Cases of 5 August 2005, case No. II CK 18/05.

and interests of the parties. If it were considered appropriate, the possibility of invoking the statute of limitations *ex officio*, or of the court providing guidance on substantive law would have been foreseen. It would also probably provide for wider access to free professional legal assistance. Such argumentation, as it has been noted several times, transfers considerations from the level of individual choices to the sphere of criticism of systemic solutions. This move is most justified, but it does not absolve individuals from making decisions and taking responsibility for them. We are dealing here with a situation where the lack of a resolution is also a resolution. The creation of a dilemma by the institutions cannot automatically transfer responsibility onto them, just as it cannot be transferred by critical attitudes.

The problem that the judge faces here can also be seen as a conflict between two approaches to impartiality. On the one hand, there is a traditional understanding of this principle in legal culture, as a requirement for the impersonal treatment of the parties and far-reaching passivism. This view is sceptical about the judge entering into dialogue with one party and actively reconstructing their interests from their statements and motions filed during the proceedings. Impartiality is therefore understood here as full neutrality towards the parties. On the other hand, there is a less traditional approach – but perhaps better suited for the challenges of modern legal affairs – according to which this principle is connected with the judge’s professional duty of active listening to the parties to the proceedings. According to this approach, the judge should not just listen to the parties passively, but probe their statements even if they do not meet legal standards of expression. If necessary, they should actively intervene in the dispute and direct it towards including all relevant circumstances. Therefore, they should not behave as an observer of a party dispute, but as its moderator.

The already mentioned rules of judicial ethics indicate that respect and the ability to listen are equally as important as impartiality:

Society and its members expect a judge in the exercise of his functions to respect them and hear them. Respect may be thought of as the judge’s aptitude to show due consideration to people’s position and their dignity. Listening should be viewed as the judge’s aptitude to pay attention to the exposition of facts and technical reasoning put forward by the parties and their counsel.⁷⁴

⁷⁴ European Networks of Councils for the Judiciary Working Group Judicial Ethics Report 2009–2010, p. 4.

Whereas, as pertains to equality of treatment requirement, they state that:

Quality of treatment requires the judge to give everyone that to which he is entitled, both in the process and in the result of any case, through recognising the uniqueness of each individual. The judge has consideration for all persons who appear before him and makes sure to treat them equally. He is aware of the objective differences between different categories of people and works to ensure that each party is heard, understood and respected. He ensures that nobody can say that he has been ignored, or patronised, or despised.⁷⁵

Therefore, impartiality must also be apparent in the active behaviour of the judge, who should probe the statements of the parties and be actively interested in their arguments. Instructions given in court also serve this point, because one of the aims of giving them to the parties is that the latter understand the direction in which the trial is going and are not surprised by the resolution. It is also about building trust between the parties and the court.⁷⁶ In the countries of Central Europe, this way of thinking is often associated with court paternalism in a socialist system. It seems that the above argumentation proves that wrong. Furthermore, a remedy for court paternalism, namely an extremely party-controlled and adversarial system, turns out not to be the best either, at least because it puts before judges such dilemmas as in the discussed example.

2.2.4. Forth dilemma: professional obligation vs. professional ideal

Similar properties that reveal the ambivalent character of institutions in moral dilemmas can also be seen in the next situation. It involves the conflict of professional obligation and professional ideal, but it seems that instead of this first obligation, professional duties can also be involved. It is characteristic of the dilemmas identified here that the reasons for one of the options of conduct arise from a moral ideal, and thus a much less specific and individualised obligation. In the previous chapter, an example of such a dilemma was the choice of Sartre's student who hesitated between staying with an elderly mother in order to take care of her and leaving her to join the resistance movement and defend his homeland. A concrete obligation to the mother is in conflict here with the general ideal of a citizen or patriot engaged in the affairs of their country, ready for sacrifice in its defence. Therefore, the question should be asked whether

⁷⁵ *Ibidem*.

⁷⁶ Aneta Łazarska, *Rzetelny proces cywilny* (Warszawa: Wolters Kluwer, 2012), pp. 518 et seq.

a lawyer, and in particular a judge, can find themselves in a situation such as Sartre's student, and what arguments are provided by the institutional context and the professional role for each of the options.

It should be emphasised that judges and lawyers are used to opposing strict duty contained in legal rules to other types of it similar to the moral ideal in the sense used here. So, for example, the distinction between morality of duty and morality of aspirations, which was used by L.L. Fuller in his legal philosophy, is quite firmly rooted here, including in legal and judicial ethics. Both types of obligations differ in that the morality of duty formulates rules (the observance of which is a certain minimum requirement for an orderly society) and the morality of aspirations, which sets the pattern for the fullest realisation of human abilities. Quoting A. Smith, the author explains this difference as follows:

The morality of duty "may be compared to the rules of grammar." the morality of aspiration "to the rules which critics lay down for the attainment of what is sublime and elegant in composition." The rules of grammar prescribe what is requisite to preserve language as an instrument of communication, just as the rules of a morality of duty prescribe what is necessary for social living. Like the principles of a morality of aspiration, the principles of good writing, "are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions of acquiring it."⁷⁷

Therefore, one cannot equate morality of aspirations with principles as an ought which cannot be qualified as a strict duty because it dictates the realisation of certain values. As already mentioned, such principles always require balancing to determine whether and to what extent in a given situation they will apply. However, principles refer, like rules, to the realisation of a specific state of affairs, while morality of aspirations concerns certain skills, in particular related to a specific activity. Hence, morality of aspirations is closer to the notion of virtue than the rules of conduct. Fuller writes about this in the following way:

The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was

⁷⁷ Lon L. Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1969), p. 6.

condemned for failure, hot for being recreant to duty; for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best.⁷⁸

Failure to realise morality of aspirations is therefore not a moral evil in the same sense as non-compliance with duties. However, it causes the improper performance of one's professional role and, ultimately, failure in this field. For this reason, Fuller, for example, is ready to define this type of morality in the field of legislation as the internal morality of law. Therefore, professional ethics cannot be reduced to obedience to duties, and always requires striving for the fullest implementation of the professional ideal, namely the best development and use of one's professional skills.

Treating moral ideals as the morality of aspiration has several advantages. First, it goes beyond the perspective outlined by the Sartre student's dilemma. The latter seems to be based on a fairly characteristic conflict between the generally understood involvement in public affairs – the role of the citizen and democratic values – and private life, including professional life. With some intuitive assumptions, we can assume that in both spheres we have ought that in certain circumstances can provide conflicting reasons. Acting in the public interest may be at the expense of private life or vice versa – while complete fulfillment of obligations in the private sphere may not leave room for the realisation of civic ideals. Usually, however, we would be inclined to consider that the reasons are not fully symmetrical here. First, because in the private sphere we usually deal with obligations towards specific persons, and being a citizen means an ought of an abstract nature – depending on the approach, towards the nation, society, etc. Therefore, duties and obligations seem to have more weight than moral ideals. We are ready to accept abandoning civic engagement in order to fulfill private duty as justified, and evaluate the opposite action as a sacrifice.

If, however, we equate moral ideals with the morality of aspirations and transfer considerations to the professional ground, the conflict between them and duties and obligations cannot be understood as a conflict between the two spheres, one of which can ultimately be abandoned. It is impossible in this approach to reduce a profession only to duties and obligations, and in this way to give up ideals. It would have to be based on abandoning the development and use of the skills necessary for a given activity, which in fact would be tantamount to resigning from the activity itself in favour of only amateur involvement characteristic of lay people. Hence, including moral ideals among

⁷⁸ *Ibidem*, p. 5.

the requirements of a professional role, and treating them as preconditions of good professional practice, allows them to be treated more convincingly as a source of reasons for action equal to the reasons resulting from professional duties or professional obligations. This is also consistent with the classical understanding of professions, meaning those of which the essence involves not only fulfilling duties and obligations, but also certain moral ideals. Through these ideals, an element of profession is commitment to the realisation of the public interest, as well as the special prestige and satisfaction associated with their performance.

Since moral ideals as a part of professional ethics can be a source of symmetrical reasons in relation to reasons arising from duties and obligations, it is possible to consider what type of moral dilemmas it may cause. It seems that there are two basic possibilities resulting from the fact that these ideals include the obligation to develop and use the skills necessary in a given field as much as possible. The first conflict would consist in the inability to simultaneously form or develop one's own professional abilities and fulfill all professional commitments. In practice, this is usually found in such situations when a given professional, due to the excess of work, has no time to improve their skills or broaden their knowledge. The dilemma of such situations becomes evident when we imagine a doctor who has a choice either to take care of all patients in need of help, but abandon their own professional development, or to improve their skills, but at the expense of leaving some patients without proper care. It can be argued that, like in other situations considered in this chapter, such choices are usually the result of malfunctioning systems of distribution of services of a given type. This is a form of conflict between quantity and quality of provision. However, the systemic nature of the problem does not eliminate the need to make an individual and extremely difficult choice.

The second type of conflict would consist in the inability to reconcile the full use of professional skills without violating one's professional obligations. These are specific but seemingly not uncommon situations in which, along with their professional development, more complex and more responsible tasks appear before professionals. For, just as abandoning professional ideals usually means professional failure, their implementation is conducive to success. It is assumed that this success is not only a matter of preferences, but it also has a moral dimension. Namely, professional ideals mean not only the obligation to develop one's abilities, but to use them in such matters and activities for which they are adequate. Therefore, it is not morally neutral when we undertake tasks that overwhelm us if we do not fully develop our professional abilities. Nevertheless, it is not neutral either if we already have fully developed capabilities, but we do not undertake more ambitious tasks. This is a waste of what we have achieved

in a given profession. This is intuitive, for the fact that certain functions or positions are held by people with insufficient competence means we are ready to blame those who would be fully fit to perform them, but did not want to take them, for example because of their own convenience or fear of responsibility. To be understood well, this is not about the moral obligation to make a career or get promoted. It is about the moral obligation of development, certainly associated with some professions, which implies career and promotions, the refusal of which seems to hinder this development. However, there are certain situations in which arguments based on moral obligations may speak for refusal. In some situations, this can be seen as a moral dilemma.

Let us use a specific example, again concerning a judge. On February 15, 1989, in the final phase of the decline of the Polish People's Republic (PPR), the Sejm adopted a bill establishing the Foreign Debt Servicing Fund (FDSF). It was supposed to be one of the state's special purpose funds, the aim of which was to repay Polish foreign debt and to collect and manage financial resources allocated for this purpose. The real task of the fund was to buy foreign debts of the PPR on the secondary market at significantly reduced prices resulting from low rating of the debt. The operations of the Fund, due to inconsistency with international law, were carried out informally, often through "substitute" people or companies. As a consequence, the operations of the Fund were often undocumented. This led to the fact that its managers in 1989–1991 appropriated public funds and caused losses of PLN 334 million. These events were called one of the biggest scandals in Poland.

The indictment against the people managing the Fund was sent to the court on February 19, 1993. However, it was returned to the prosecutor's office for refiling. It was not re-entered until January 16, 1998. The material gathered by the prosecutor's office was extensive and complicated. As a consequence, the first hearing did not take place until December 2000. The presiding judge, B. Piwnik, conducted the proceedings in a very efficient manner. However, it turned out that the case could not be examined as it could be subject to the statute of limitations. If the statute of limitations taken to mean from the time the offence was committed, i.e. more than ten years earlier, criminal proceedings would have to be discontinued in August 2001. It was not discontinued as a result of the interpretation that the provisions introducing the new Penal Code of 1997 set new rules for the statute of limitations, extending them for acts of indictment up to 15 years. According to the new rules, the statute of limitations would take effect in August 2006 in that particular case. When it seemed that the proceedings could be completed before that time, Judge Piwnik was appointed (on October 19, 2001) by the President of the Republic of Poland, at the request of the Prime Minister, to

the position of the Minister of Justice. She held this function until July 6, 2002. Then she returned to the bench. However, the trial regarding the Fund had to be restarted in accordance with the applicable rules, and the first hearing of the new trial took place in September 2002.

This re-ignited the statute of limitations debate, which became the subject of acute political dispute. Some opposition parties formulated the accusation that the appointment of the judge to the position of Minister of Justice was a deliberate act calculated to lead to the activation of the statute of limitations. As a consequence, after the next election, won by the previous opposition, on June 3, 2005, the law was passed that changed the rules. After the changes, the allegations in the discussed proceedings would be time-barred in August 2011. This solution was criticised in turn as affecting citizens' trust in the state and as a form of statutory interference in the justice system in a specific case. In fact, the discussed case was explicitly referred to in the justification of the draft act as an example of pathology, which should be counteracted. As a result of the legal question of the court regarding these doubts, the Constitutional Tribunal expressed its opinion in a judgment of October 15, 2008⁷⁹ which stated:

The reading of the justification for the draft amendment bill reveals that the case of the FDSF has become an important inspiration for the amendment of the Act. This part of the justification for amending the penal code should be very critically assessed from the point of view of the nature of the law-making process. Since legal regulations, and in effect legal norms, are of general and abstract nature, they should not be made for individual cases. However, the challenged provisions are of a normative nature, and the justification indicates that it is about counteracting certain negative phenomena.

In the end, however, the Tribunal did not share the view that extending the period of limitation was unconstitutional. This does not change the basis of criminal responsibility and only extends the time frame for the application of this responsibility. In the Tribunal's view, the extension of the limitation period eight years on from the previous adjustment of those dates cannot be considered too frequent either, the more so because it was connected with an increase of statutory penalties for certain types of crimes. The Tribunal only observed that:

The reasoning of the Amendment Act reveals a dangerous tendency of criminal policy, manifested in legislative policy, extending periods of

⁷⁹Case No. P 32/06.

limitation of crimes, consisting in attempts to replace state failure in the area of administering justice with statutory changes, in particular limitation periods. By signaling this phenomenon, especially in connection with the above-mentioned political motivation for specific offenses specified in the explanatory memorandum of the Amendment Act, the Constitutional Tribunal emphasises that, in a democratic state, in accordance with the principle of division of power, neither executive and legislative power can substitute justice in the implementation of its functions.

Finally, after a long trial, on March 29, 2005, a court of first instance judgment was issued, sentencing the accused to imprisonment and fines. Then the verdict has been partially altered in the court of first instance as a result of cassation judgment by the Supreme Court. The case could be considered terminated after the verdict of the Court of Appeal, which was passed in June 2009, upholding sentences of the lower courts.

The above situation may be an example not only of a legal problem and a political conflict, but also of a moral one. Judge Piwnik at some point faced the choice of whether to accept the offer to take the position of Minister of Justice. Of course, it is not in itself moral, but at the very least prudential, concerning preferences. The decision to take such a serious and political function is vitally important and probably difficult. However, it can be argued that, in these specific circumstances, it was also a moral choice. This is primarily visible as regards the effects of both options. On one hand, and obviously for every judge, their departure from court always involves the necessity of starting criminal proceedings from scratch, which entails a number of difficulties, including for those who have to wait for justice. This is particularly evident in complicated cases, where it takes many months to prepare the judge for the first hearing. In this situation, there was also a clear risk that the statute of limitations would become activated. The possibility was significant and predictable, although there was no certainty that it would actually take place. On the other hand, refusal to accept a position and staying in court would have a negative effect of not being able to use one's professional experience in managing the justice system, designing changes in legislation, etc. It should not be thought that this is a consequence affecting only the one refusing a new position or promotion, although of course this element comes to mind in the first place. It occurs in objective reality as an exclusion of certain actions in the public interest that could be taken by a particular person.

The occurrence of both effects is subject to uncertainty. However, greater uncertainty is visible in the case of the second option, i.e. taking up a new position. It immediately gives rise to the intuition to choose an option more certain in the sense of the predictability of its effects. Such a way of reasoning

would, however, lead to the absurd elimination of any risk arising from actions aimed at improving a given state of affairs. The problematic character of the whole situation is therefore not based on the difference in the predictability of the effects of each option. Rather, one can point to a conflict of values and a contradiction in the arguments for these options. These reasons can be reconstructed as follows. The existence of a kind of relationship between the judge and the case speaks for the refusal to accept the proposal above all. It certainly is the basis of social expectation that the judge will oversee the case from beginning to end. The question arises of whether this expectation is also morally justifiable. It is difficult to treat it as a professional duty because it would mean a kind of prohibition, for example, giving up service or promotion, which would be contrary to the idea of professional development. In addition, a judge always hears cases, and if these are criminal cases they will have to restart should the judge depart.

However, it seems that one can speak of a kind of professional obligation of the judge to hear the case without interrupting it. Of course, this is not absolute by nature, but neither is it morally neutral or unimportant whether the judge resigns or not. From the fact that it is possible to leave, it does not follow that one has full freedom to choose the reasons and the moment of resignation. Although in our legal culture judges are generally required to take an impersonal approach to the parties of the proceedings due to the principle of impartiality, this requirement is not infringed upon by the identification of each judge with individual cases that they conduct and for whose resolution they accept responsibility. It can also be said that the very principle of starting a criminal trial from scratch if the judge is changed, precisely realises this value, although, of course, this solution is also supported by cognitive issues in evidentiary proceedings. In this situation, Judge Piwnik, when asked how she assessed the whole process, and what she thinks of the threat of limitation risk and whether she regretted leaving for the Ministry of Justice, answered:

Time for assessments will come later (...) I hope that there will be no such situation that all charges will be time-barred, and the lesson that we learn from it is necessary, also important in terms of the proposed statutory changes (...) One cannot say there are irreplaceable judges.⁸⁰

The aim of these considerations is not to evaluate a particular choice of the judge. It is worth noting that, as in many situations of a dilemma, the whole complex and expanded problem is again the result of a badly functioning

⁸⁰ Interview with Judge Piwnik available at <https://wiadomosci.wp.pl/piwnik-mam-nadzieje-zenie-bedzie-przedawnien-ws-fozz-6036727692141185a>, accessed on 20th July 2018.

system. Its emergence is not a consequence of the judge's actions. However, this does not change the fact that an individual choice must be made. The system's feature, consisting in the substitutability of judges, neither belittles this choice nor reduces its moral importance. In any case, it can be said that, in other positions, including government ones, there is also no "irrevocable rule." The lack of such a rule makes both options symmetrical in this respect. This allows us to see in the discussed situation the insolvable conflict between the professional obligation not to leave the case, and the ought, resulting from professional ideals, to undertake tasks and responsibilities that are adequate for the development of one's own abilities.

Chapter 3. Lawyers' and Judges' Axiological Dilemmas

Marcin Pieniążek

3.1. Introduction

It must be pointed out that in this chapter the concept of value is assumed as a starting point in the analysis of the phenomenon of legal dilemmas. Also “zero” or “preliminary” is the meta-axiological¹ dilemma concerning the acknowledgement of the very idea of value as “valuable” and introducing it (or not) into the set of terms defining a given phenomenon. Essentially opposing solutions to these problems are offered by the currents classified as “anti” or “pro-axiological.” Naturally, the basic line of deliberations will be developed from the “proaxiological” perspective, accepting the thesis about the existence of some *universum* of values in some form. Here, in the first order, an insight will be offered into the issue related to the *modus existendi* of values (primary or secondary, objective or subjective, etc.) and its consequences for legal axiology.

It is to be emphasised that a lawyer's or judge's decision about taking a stance about the values' mode of existence entails consequences both in the spheres of law and legal ethics. For this reason, dilemmas will be presented with reference to the difference between the “axiology of law” and the “axiology of legal ethics.” This distinction is not of a disjunctive nature, at least partly because values such as the rule of law occur commonly as the bases of both systems. Nevertheless, from the perspective of legal axiology, special dilemmas are revealed concerning, among other things, the relationship between values and constitutional principles, the hierarchy of values in a particular legal dogmatics, and the preference for substantive or procedural values. On the other hand,

¹ Understood as follows: “Axiology is a branch of philosophy treating values. It considers various types of values and aims at determining their specificity. It undertakes reflection on the way values exist and the conditions in which they are realised. It considers various relations between values.” As cited in: Leszek Kasprzyk, Adam Węgrzecki, *Wprowadzenie do filozofii* (Warszawa: PWN, 1981), p. 27.

dilemmas characteristic of the axiology of legal ethics include, among other things, the preference for values typical of the private or public law sphere of a lawyer's or judge's work. Furthermore, I will demonstrate cross dilemmas resulting from tensions between the axiology of law and the axiology of legal ethics manifest in, for example, the conflict between rule of law and a lawyer's or judge's obligations concerning confidentiality.

The pro-axiological perspective is especially important for those representatives of legal theory and practice in whose opinion values exist before norms and are the source of their binding character. The assumption of the primary nature of values in relation to norms does not determine the mode of their existence, which is posited in many ways. However, according to the contrary assumption, norms are primary to values, are their source and not their result. The above stated, fundamental legal-philosophical dilemma is related to the question whether values emerge at the beginning or the end of a norm-forming process. Thus, the values-norm relationship will in this argument form one of the reference points prompting analysis of numerous specific issues (e.g. the issue of embedding values in a normative system of law, relations between values and constitutional rules, etc.). Hence, the present chapter aims to present various levels of meta-axiological and axiological dilemmas, all potentially important to a lawyer and their work. They will be presented from the most general to the more specific, all of which occur in typical situations of professional life. The proposed analysis is theoretical, and prepares the field for a review of problems diagnosed by practice, connected with a reference made by a legal professional (a judge, defence lawyer, and prosecutor) to the *universum* of professionally significant values.²

3.2. Can a lawyer or a judge reject the existence of values? The “anti-axiological” perspective

At this stage I make the assumption that a lawyer's or a judge's opinion on the mode of existence of values correlates with their preferred philosophy of law.³ This also includes situations in which a lawyer denies the existence

² The idea of *universum* of professionally significant values means the widest horizon within which a lawyer or a judge, in their professional perspective, may perceive values. Hence *universum* comprises legal, ethical-professional and all other values that may be linked to the axiological dilemmas of a lawyer.

³ Dilemmas due to adopting incompatible orientations: legal-theoretical and ethical-professional will be discussed in the further part of the chapter.

of values by adopting an extremely realistic normativist view. Then, in some generalisations, settling the dilemma in which a lawyer opts for or against the existence of a certain mode of values occurs on the grounds of the theses of one of the competing currents in jurisprudence.

As already remarked, the preliminary meta-axiological dilemma concerns the affirmation or rejection of the thesis about the existence of values as such, that is, the adoption of a “pro” or “anti-axiological” stance. The question of the *universum* existence of values, fateful for legal dilemmas, may take either an extreme or a moderate form. The extreme anti-axiological current includes nihilism and emotivism (less-developed on the grounds of philosophical positivism), legal realism (e.g. Scandinavian), and normativism (propounded within continental legal positivism). The moderate anti-axiological current includes the varieties of continental legal positivism which in theory question the co-relation between legal norms and moral values, and in practice create their own axiology covering, among other things, legal security, the sovereign's will and procedural justice.⁴ The above enumeration is not closed, aiming only to outline an approximate sketch of stances which it is possible for a lawyer or a judge who discards the thesis of the existence of a values *universum* to adopt.

3.2.1. The extreme anti-axiological position

Can nihilism,⁵ a radically sceptical stance in the light of which values do not exist, be reconciled with fundamental assumptions concerning law and the lawyer's or judge's work? Nihilism, by postulating the rejection of the idea of values, but also postulating “life without dogma,” is at odds with the constitutive traits of law according to which the actions of attorneys, judges, etc. are at least determined by binding legal norms. In other words, nihilism embodies the antithesis of the obligational character of law, thus a lawyer or a judge cannot be a nihilist, at least in the perspective of their role in the process of the application of law.⁶ So, the question of a whether a lawyer or a judge could be a nihilist would have to be answered “no,” even if law were held as a closed autopoietic (self-

⁴ These values may also include the scientific character of law, logicity of legal reasoning etc.

⁵ The 19th-century nihilism developed within philosophical positivism and was represented, for example, by E. Renan. However, its roots are to be found in three theses formulated in antiquity by Gorgias in the dialogue: *On Nature* 1) nothing exists; 2) even if something exists, nothing can be known about it; 3) even if something can be known about it, knowledge about it can't be communicated to others. Cf. Władysław Tatarkiewicz, *Historia filozofii*, vol. I (Warszawa: PWN, 1998), vol. I, p. 39 and vol. III, p. 129.

⁶ As regards the concept of a lawyer's role see Kaczmarek, *Tożsamość prawnika*, pp. 13 et seq.

generating) system apart from any external, including axiological, justifications.⁷ This is the case since nihilism negates every concept of systematism – including that in which the system *per se* is understood as a value.

Emotivism is also a pronounced anti-axiological current, which, on the grounds of empiricism and logic, assumes that valuations only express feelings (approval, disapproval) in response to other people, events, opinions, etc.⁸ So the original dilemma concerning the *modus existendi* of values decided by a lawyer or a judge in favour of emotivism means the adoption of a radically reductionist and subjectivist concept of those values.⁹ However, unlike nihilism, the emotivist view does not necessarily negate the constitutive qualities of law, for it may be recognised that every valuation is only the expression of emotions “similar to an approving burp after a good dinner”,¹⁰ and at the same time holds a thesis, drawn from empirical premises, about the existence of law. Thus, it is possible to be an emotivist lawyer on the grounds of the anti-axiological system.

Emotivism influenced the philosophy of the development of law, especially by corresponding with the ideas propounded by Scandinavian legal realism.¹¹ This current, like other realist trends, rejected all “metaphysical speculation” on law, reducing the basis of law to psychologically conditioned, observable repeatability in human behaviour.¹² In the light of these assumptions, A. Hägerström, founding father of the current, denied the existence of objective values.¹³ Also, A. Ross symptomatically claimed that reference to justice in a discussion is like banging a table with a fist in order only to elevate someone’s subjective expectation to the rank of absolute value.¹⁴ Simultaneously, the

⁷ The theory of the autopoietic system was developed, for example, by Niklas Luhmann. Cf. Ryszard Sarkowicz, Jerzy Stelmach, *Filozofia prawa XIX i XX wieku* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1998), p. 159.

⁸ Peter Vardy, Paul Grosch, *The Puzzle of Ethics* (London and New York: Routledge, 2016), p. 92.

⁹ Iwona Bogucka, Tomasz Pietrzykowski, *Etyka w administracji publicznej* (Warszawa: Wydawnictwo LexisNexis, 2009), p. 49.

¹⁰ Cf. Richard H. Popkin, Avrum Stroll, *Philosophy Made Simple* (London: Elsevier, 2014), pp. 54–55.

¹¹ The chief representatives of this current were: V. Lundstedt, K. Olivecrona and A. Ross. Cf. Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 114.

¹² The realistic approach also includes the psychologism of L. Petrażycki and American legal realism, however the views of Scandinavian realism allow for an authoritative explication of the anti-axiological standpoint. For instance, in the case of American realism it is more complicated because, among other things, the pragmatism at its core (in James’ form), despite its declared empiricism, assumes the influence of values on the process of cognition. See: Władysław Tatarkiewicz, *Historia filozofii*, vol. III (Warszawa: PWN, 2001), p. 199. Cf. Jerzy Stelmach, *Współczesna filozofia interpretacji prawniczej* (Kraków: Wydział Prawa i Administracji Uniwersytetu Jagiellońskiego, 1995), pp. 39–40.

¹³ Cf. Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 113.

¹⁴ Alf Ross, *On Law and Justice* (London: Stevens & Sons, 1958), as cited in: Bogucka, Pietrzykowski, *Etyka w administracji publicznej*, p. 50.

realists, including the Scandinavians, studied the normativity of law as a certain cognisable phenomenon *inter alia* in the psychological, social, or institutional (court), dimensions. Therefore, a realist lawyer or a judge adopting an anti-axiological and anti-metaphysical stance when facing a “preliminary dilemma,” will consistently invoke the concept of law as a cognisable “psychological fact” or “social fact.”¹⁵

In turn, a normativist lawyer or judge will support the anti-axiological view on totally different grounds. Normativism here is understood according to H. Kelsen's *Reine Rechtslehre* concept, which is a radical variant of continental legal positivism. In the light of key normativist theses, law is a hierarchical, autonomous and self-organising normative system.¹⁶ Hence, it is qualified solely to the sphere of duty (*Sollen*) and is separated from the empirically cognisable being (*Sein*).¹⁷ Simultaneously, in Kelsen's theory an ordinary norm is binding as long as it belongs to the system of law, which means that it does not require any external, (including axiological) justification. However, the problem of values in the theory being discussed is revealed in the perspective of the “basic norm” (*Grundnorm*), from which the binding character of the whole system follows. Whereas in the case of a dynamic system the anti-axiological stance is consistent, in a static one, according to R. Sarkowicz and J. Stelmach, Kelsen “nears legal natural solutions,”¹⁸ for a dynamic system is based on formal competence relations between norms, and, in its basic norm, expresses no objective values or positive law content.¹⁹ Contrary to this, in static systems the relations between norms relate to content, and *Grundnorm* has the ultimate value.²⁰ As is known, Kelsen's legal system was originally dynamic, but the philosopher subsequently stated that there are also static elements which together form a mixed system.²¹ Despite the controversy related to the latter perspective, a normativist lawyer or judge will regard their dilemmas as formal and material conflicts of duties, and not of values. Axiology, being incongruent with the paradigm of “pure law theory,” will be redundant in corresponding legal thought, even at the level of discussing the content of constitutional legal rules.

¹⁵ In the Polish history of law, Kelsen's original standpoint, according to which the law is a dynamic normative system, was opposed, i.a., by Z. Ziemiński. Cf. Zygmunt Ziemiński, *Wartości konstytucyjne* (Warszawa: Wydawnictwo Sejmowe, 1993), p. 8.

¹⁶ Cf. Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 47.

¹⁷ Stelmach, *Współczesna filozofia interpretacji*, p. 38.

¹⁸ Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 48.

¹⁹ *Ibidem*.

²⁰ Ryszard Sarkowicz, Jerzy Stelmach, *Teoria prawa* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1996), p. 181.

²¹ Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 47.

It has to be remarked that taking an extreme anti-axiological stance does not free a lawyer from dilemmas concerning their choice of the preferred concept of law, which may negate the existence of values due to a realist or normativist approach. Basically, a lawyer does not need values either when they reduce law to empirically cognisable regularities of the world or when they understand law as pure duty. Therefore, the anti-axiological dilemmas identified are conditioned to some extent by the thesis deduced from D. Hume's idea of the separation between the spheres of being and obligation (*mutatis mutandis* reflected in the distinction between *Sein* and *Sollen* in Kelsen's theory).

3.2.2. The moderate anti-axiological position

A moderate anti-axiological attitude may be correlated with the practice carried out within continental legal positivism. In its theoretical layer, by trying to make law scientific the current also claims the separation of law and morality, of the identity of law and acts, and of the "reproductive" role of the lawyer or the judge in the process of interpreting the law, as well as adopting the syllogistic model of the application of law.²² Continental positivism stemmed, *inter alia*, from the polemic with metaphysical assumptions of natural law, including its substantive axiology.²³ In consequence, law was considered by the positivist lawyer or judge as a normative system derived from the will of an empirically understood sovereign. However, literature suggests that this current worked out its own axiology in which the key role was played by legal security.²⁴ In addition, the sovereign's will became a *sui generis* value serving the final justification of the binding character of positive law. Hence, at least in this aspect, positivism recreated the axio-normative relations typical of the contested, substantive version of the law of nature.

Another group of values embraced by legal positivism was related to its claim of the law as scientific, comprising the lawmaker's rationality, the method's scientific character, logicity of reasoning, the unambiguity of legal text, the systemic nature of law, etc. A special place is occupied by the "rationality" of the lawmaker, being at the same time an interpretational presumption and an axiological premise justifying the validity of law.²⁵ Last but not least, procedural justice – a positivist value present in the phases of creating and applying law, is to be identified as a value ranked above justice in the substantive view, because

²² Sarkowicz, Stelmach, *Teoria prawa*, p. 179.

²³ Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, p. 33.

²⁴ Stelmach, *Współczesna filozofia interpretacji*, p. 32.

²⁵ As regards the rationality of the lawmaker see: Tadeusz Biernat, *Legislacja. Analiza procesu* (Kraków: Wydawnictwo Oficyna Wydawnicza AFM, 2016), pp. 46–48.

of the already mentioned leading role of legal security.²⁶ Furthermore, the remark that the positivists elevate the procedural aspect of law (procedurality) to the rank of a value in itself comes to mind. This means that this trend, by assumption anti-metaphysical, worked out its own specific axiology related on the one hand to the claim of making law scientific, and on the other to the dogma of the omnipotent role of the sovereign as the ultimate source of the validity of law.

3.3. The “pro-axiological” perspectives and their inner differentiations. Seven dilemmas of a lawyer or a judge

As has been pointed out, a lawyer's or judge's axiological dilemmas may reasonably be discussed on the grounds of those concepts that claim the existence, in any form, of the *universum* of values. In saying this, though, one has to stress the wide variety of views included in the pro-axiological perspective discussed. This diversity results in a lawyer facing a number of fundamental dilemmas. Without claiming to present a definitive catalogue of such dilemmas, I would like to focus on seven, which are in my opinion fundamental. The first dilemma is related to the objective or subjective mode of existence of values. The second concerns the adoption of a definite – cognitivist or non-cognitivist – perspective of value cognition. The third is strongly related to a lawyer's legal theory, and concerns their orientation to material or procedural values. The fourth is related to the question of whether values are primary or secondary in nature, especially whether they are the source or result of binding legal norms. The fifth concerns the characterisation of the bond between values and a normative system of law. The sixth is related to the identification of a set of values that forms the axiological basis of a normative system of law. The seventh concerns the problem of hierarchisation within the *universum* of professionally significant values.

The two first dilemmas concern fundamental meta-axiological issues, with the remainder touching upon questions closer to the practical dilemmas faced by a lawyer, pertaining to the “axiological basis” of a normative legal system. It should be noted that the choice between them translates to a choice of the preferred concept of law and legal ethics (law of nature, phenomenological, existential, etc.). The decision also determines the connections of the axiology

²⁶ Sarkowicz, Stelmach, *Teoria prawa*, p. 180.

of law and legal ethics, thus conditioning the process of the realisation of law (its creation and application) by a legislator, judge, lawyer, etc.

3.4. First dilemma: a value's *modus existendi*. Objective or subjective values?

3.4.1. Axiological objectivism (absolutism)

The first dilemma faced by a lawyer or a judge is the question of whether values are objective (absolute) or subjective (relative).²⁷ According to the objectivist view, values appertain to some form that is primary to evaluations, norms and things. For example, T. Ślipko, on the grounds of the Christian paradigm, claims that values (truth, beauty) are “idealities of objects” that have a “form of being higher than others,” and simultaneously are extra- and trans-subjective, making “unattained ideals of human conduct.”²⁸ In antiquity, a similar view was proposed by Plato's objective idealism,²⁹ was later reflected in the concept of Unity by Plotinus,³⁰ and then in Christian thought combined the concept of the “idea” with God's substantiation.³¹ Absolutist ideas were also held, with some reservations, by I. Kant.³² In another perspective, the objectivist view was adopted by utilitarianism, which correlated the problem of good and evil with empirical verification of the basic value, namely human happiness.³³

²⁷ It is worth recalling W. Tatarkiewicz's view, who divided theories of values into maximalist and minimalist. The former claim objectivity an absolutism of values, whereas the latter: subjectivism, relativism, sociology, historicism, conventionalism, scepticism and nominalism. After: Bohdan Dziemidok, “Aksjologia Władysława Tatarkiewicza,” in *Teoretyczne i praktyczne kłopoty z wartościami i wartościowaniem. Szkice z aksjologii stosowanej*, ed. Bohdan Dziemidok (Gdańsk: Wydawnictwo Słowo/obraz terytoria, 2013), p. 251.

²⁸ Tadeusz Ślipko, *Zarys etyki ogólnej* (Kraków: Wydawnictwo WAM, 2004), p. 201.

²⁹ Frederick Compton, *History of Philosophy Volume 1: Greece and Rome* (London–New York: Continuum, 2003), pp. 164–166.

³⁰ *Ibidem*, pp. 465–466.

³¹ Augustin's views, who claimed that “eternal truths” are God's ideas, are the bridge between Platonism and Christianity. St Thomas, on the ground of Aristotelianism, stated that there are three kinds of non-substantive “universals” one of which is “independent from objects” (*universale ante rem*) that is an idea within God's mind, a pattern according to which God created the real world. Cf. Władysław Tatarkiewicz, *Historia filozofii*, vol. I (Warszawa: PWN, 2001), pp. 196 and 274.

³² Ślipko, *Zarys etyki ogólnej*, p. 205. W. Tatarkiewicz points out that I. Kant, in his critique of traditional proofs of metaphysics, simultaneously held that God's existence is one of the postulates of practical reason. After: Władysław Tatarkiewicz, *Historia filozofii*, vol. II (Warszawa: PWN, 2001), pp. 177–178.

³³ Władysław Tatarkiewicz, *Historia filozofii*, vol. II (Warszawa: PWN, 2001), p. 125.

Modern objectivist theories include the intuitionism of G. E. Moore, according to whom good is an objective quality and simultaneously intuitively simple and hence indefinable.³⁴ The absolutist stance also approaches the phenomenological ethics of values (developed by M. Scheler and N. Hartmann), which presupposes that values exist *a priori*, materially and independently from objects.³⁵

In the wide objectivist current discussed, T. Pietrzykowski distinguishes ethical monism and pluralism. In the light of the former there supposedly exists an absolute hierarchy of values creating together a coherent system of moral evaluations. Within monism there may be distinguished monism “in the strict sense,” expressed in the view that all values are instrumental in relations to a certain head value (God in Christianity, happiness in utilitarianism, etc.) and monism “in the broad sense,” in which there are more objective values but they make a coherent and organised system.³⁶ Pietrzykowski also includes pluralism of values in the sense understood by I. Berlin as the objectivist view. According to Berlin, pluralism is not identical with relativism, and the philosopher claims that “multiple values are objective, are rather an immanent part of the essence of humanity than arbitrary products of subjective personal inclinations.”³⁷ Thus, according to this opinion, values exist independently of individuals' preferences, with simultaneous recognition that they do not form a coherent system of hierarchy apart from a very narrow set called by Berlin the *common minimum*.³⁸ Hence, in specific instances, values may be mutually incompatible, collisional or exclusive, which leads to conceptual and empirical conflicts.³⁹ Moreover, in light of Berlin's key thesis, the objective existence of a comprehensive set of values precludes the settlement of many axiological dilemmas. This follows from the “incommensurability”⁴⁰ of values, namely the lack of any common

³⁴ Vardy, Grosch, *The Puzzle of Ethics*, p. 89.

³⁵ Cf. Max Scheler, *Der Formalismus in der Ethik und die materiale Wertethik: Neuer Versuch der Grundlegung eines ethischen Personalismus* (Leipzig: Meiner Verlag, 2014); Nicolai Hartmann, *Ethik* (Berlin: Walter de Gruyter, 1962). Cf. Marcin Pieniżek, *Etyka sytuacyjna prawnika* (Warszawa: LexisNexis, 2008), pp. 115 et seq.

³⁶ Tomasz Pietrzykowski, *Etyczne problemy prawa* (Katowice: Naukowa Oficyna Wydawnicza, 2005), p. 31. Cf. Leszek Kołakowski, *Czy diabeł może być zbawiony* (London: Wydawnictwo Aneks, 1984), p. 93.

³⁷ Beata Polanowska-Sygulska, *Pluralizm wartości i jego implikacje w filozofii prawa* (Kraków: Księgarnia Akademicka, 2008), p. 60.

³⁸ B. Polanowska-Sygulska writes that Berlin purports the existence of the common minimum of values, and simultaneously refrains from delivering their catalogue or characterisation. Cf. Polanowska-Sygulska, *Pluralizm wartości*, p. 62.

³⁹ Cf. *ibidem*, pp. 64–66.

⁴⁰ Dilemmas also concern the meaning of the concept of “incommensurability.” S. Wojtczak indicates a number of possible understandings of the concept of incommensurability, including incomparability, the lack of common measure, the impossibility of ordering, the lack of transitive

scale of comparison.⁴¹ It has to be noted that a different view was expressed by representatives of phenomenological ethics of values, such as Scheler and Hartmann, according to whom *a priori* values may always be compared and ordered in the act of preference, thanks to axiological intuition.⁴²

3.4.2. Axiological subjectivism (relativism)

The subjectivist current in turn comprises ideas rejecting the thesis of the real existence of values and an objective axiological order. In this light, man not only learns but also creates values by deriving them from evaluations, norms, observed facts, etc.⁴³ According to its proponents, subjectivism is confirmed by the diversity of opinions about values and their hierarchy in “various human groups.” In this context, M. Szyszkowska notes the formation and coexistence of dual axiological systems: verbally recognised, “usually made of pompous norms and based on noble ideals,” and practically applied systems.⁴⁴ Therefore, according to Szyszkowska, there are no such values, “including good,” whose importance would be independent of human reason, feelings and will. Thence, values depend on the subject that cognises and the subject of cognition.⁴⁵ Szyszkowska indicates that axiological subjectivism may take individualistic or universalistic form. In the former case, the subject creating the value is an individual, in the latter – a set of individuals.⁴⁶ Universal subjectivism may manifest in the opinion that it is a defined majority of people that decide about

relation in some ordering relation, indeterminacy, tragicality and the lack of a consistent pattern of decision making. Cf. Wojtczak, *O niewspółmierności*, pp. 39–65.

⁴¹ Pietrzykowski, *Etyczne problemy prawa*, p. 32.

⁴² Cf. Nicolai Hartmann, “Specyfika intuicyjnego poznania wartości,” in *Wypisy z „Etyki,”* ed. Nicolai Hartmann (Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika, 1999), pp. 90–100.

⁴³ In this perspective, the problems of changes in the axiological basis of law in the time of transition from a centrally planned state to a democratic state are covered by the joint publication entitled *Dynamika wartości w prawie*, ed., Krzysztof Pałecki (Kraków: Księgarnia Akademicka, 1997).

⁴⁴ M. Szyszkowska, *Etyka* (Białystok: Kresowa Agencja Wydawnicza, 2010), p. 12.

⁴⁵ *Ibidem*, p. 13.

⁴⁶ In Polish sociology of law the subjectivist view which goes beyond the purely individualist perspective is postulated, i.a., by K. Pałecki. According to him, on one hand values should not be described idealistically (e.g. as Platonic ideas) and metaphysically (e.g. as objects and states of affairs transcendentally determined), on the other hand they are not to be understood only as subjective experiences (e.g. in the psychological reductionism perspective).

Therefore, Pałecki declines the existence of values that are “objective,” independent from feelings, judgments, determining, etc. of concrete people, but he accepts that it is empirically possible to state whether a certain object is a value within a given culture, society, group, place, time, etc. He refers to the so-called relational ontology of social life proposed by P. Bourdieu and L. Wacquant. Cf. Krzysztof Pałecki, entry: “Aksjologia prawa,” in *Leksykon socjologii prawa*, eds. Anna Kociołek-Pęksa, Mateusz Stępień (Warszawa: Wydawnictwo C.H. Beck, 2013), pp. 2–3.

values. For example, according to E. Durkheim morality is formed by society as “collective representations.” A particular variant of universal subjectivism is conventionalism, according to which values are determined by social contract. The most advanced subjectivist view states that values are dependent on a certain culture and are subject to constant modifications over time.⁴⁷ Within this stance, the aforementioned emotivism developed, which assumes that statements about values are pointless and are only a sign of a subject having had some experiences.⁴⁸

Ślipko names, among others, the following modern subjectivist theories of values: pragmatism (Dewey), sociologism (Durkheim, Levy-Bruhl), philosophical neo-positivism, and existentialism (Schlick, Sartre). Notably, existentialism accepts that man creates moral values in each act of choice as the realisation of fundamental and authentic human value, i.e. freedom.⁴⁹

3.4.3. “Cross trends”

The above enumeration is not exhaustive and serves only to signal the richness of possible absolutist and relativist pro-axiological views. To complement this picture, it is worth remarking on the cross trends that break the boundaries of the classifications indicated. Some of them, as for example the Christian version of the phenomenological ethics of values (represented by, among others, D. von Hildebrand and E. Stein), adopt an accommodating stance between different objectivist views, while other trends, such as Christian existentialism, refer to subjectivist currents but finally opt for the absolute existence of values. A contrary case is the phenomenological ethics of R. Ingarden,⁵⁰ stemming from the absolutising and *a priori* theory of values, and yet resulting in conclusions of a, to some extent, relativist nature. Ingarden believed that a value is dependent on and relative to the object, and is not, in itself “an independent object.” More precisely, according to the philosopher, values are built on a certain object and in some special way adhere to it, despite the value itself being “an entity (*entitas*) of quite special structure.” Eventually, according to Ingarden, a “value stems from the very essence of an object,” which causes the whole object to manifest dignity proportional to the value, namely the *dignitas* of existence.⁵¹

⁴⁷ Szyszkowska, *Etyka*, p. 14.

⁴⁸ Pietrzykowski, *Etyczne problemy prawa*, p. 34.

⁴⁹ Ślipko, *Zarys etyki ogólnej*, p. 205.

⁵⁰ Cf. Roman Ingarden, *Wykłady z etyki* (Warszawa: PWN, 1989), pp. 123–126.

⁵¹ Cf. Andrzej Póltawski, “Wartości a ontologia Ingardena,” in *Roman Ingarden a filozofia naszego czasu* (Kraków: Polskie Towarzystwo Filozoficzne, 1995), p. 114.

3.4.4. The lawyer or the judge and the *modus existendi* of values

It is also worth posing the question of whether a lawyer or a judge accepting some mode of existence of values can remain “professionally unaffected” by them. One may reflect that a lawyer’s ambivalence to values will be regarded differently depending on whether the realisation (especially application) of law will be defined as a reproductive (legal positivism) or creative (legal hermeneutics) process. The difference indicated comes from the role ascribed to the subject in the process of the application of law, which, in the light of quasi-logical concepts of subsumptive reasoning, does not involve the axiology of the subject, which is “the mouth of a statute,” whereas in the light of phenomenologically oriented legal hermeneutics, this fully involves the interpreter’s ontology and axiology.⁵² Therefore, on the grounds of positivist orientation, a lawyer’s or judge’s axiological ambivalence is admissible, perhaps desirable, especially when we rigorously support the thesis of the separation of law and morality.

Meanwhile, in the light of phenomenology and the assumptions of legal hermeneutics, the lawyer’s or judge’s taking of sides regarding certain values will affect the final shape of the realisation of the law. Hence, it needs to be reiterated that the choice of a specific theoretical-legal orientation, both on the macroscale of the preferred paradigm of law and on the microscale of each lawyer’s or judge’s convictions, is reflected directly in the settlement of axiological quandaries.

3.5. Second dilemma: the dispute considering the cognition of values. Cognitivism or non-cognitivism?

The issue of the objective or subjective existence of values is correlated with the epistemological question of their cognisability. The resulting dilemma leads to opposing views – cognitivism and non-cognitivism, whence the objectivist stance is usually connected with the former and the subjectivist with the latter. Pietrzykowski specifies that, while objectivism does not have to imply cognitivism (since the conviction about the objective existence of values

⁵² In the light of some phenomenological views, the act of embracing values by intuition equals to the subject’s perception that these values “call for embodiment.” Simultaneously this demand is “powerless” and its realisation depends on the subject alone.

may be accompanied by a thesis about their non-cognisability), subjectivism basically implies a non-cognitivist view (from the non-existence of values flows the notion of their non-cognisability).⁵³ Cognitivism states that really existing values may be the subject of cognition, but this is the only common denominator within this diversified current, for it comprises antagonistic naturalist and anti-naturalist views. Naturalism comprises all the concepts viewing values as psychological, sociological, and other phenomena, which may be the subject of empirical cognition.⁵⁴ Famous criticism of the above approach was advanced by Moore, who pointed out that attempts to define words referring to good and other values by means of empirical notions or qualities are unauthorised and lead to naturalistic fallacy.⁵⁵ This is the perspective to which adhere, *inter alia*, the concepts postulating the cognition of values by means of extra-empirical experience, i.e. intuition. Not surprisingly, anti-naturalistic intuitionism has many faces, including the *a priori* rationalistic (I. Kant), empiricist (G.E. Moore) and phenomenological (M. Scheler, N. Hartmann, R. Ingarden). One should add that anti-naturalism also comprises Platonism and Christian ethics, for in their light, though values (ideas) exist objectively, they are not subject to scientific-empirical cognition.⁵⁶

In turn, non-cognitivism assumes that values are defined not by cognitive judgment but an evaluating one, being the source of the reaction (emotional, volitional, etc.) of man to some object.⁵⁷ Hence, values do not exist as objects cognisable within a scientific paradigm. This assumption is held by the abovementioned emotivism⁵⁸ and prescriptivism (R.M. Hare).⁵⁹ As has been pointed out, the non-cognitivist stand is linked with axiological subjectivism, and in extreme cases with nihilism, meaning the total rejection of the concept of values; hence, the latter situation boils down to adopting an anti-axiological position, with the hinted at consequences.

⁵³ Pietrzykowski, *Etyczne problemy prawa*, p. 36.

⁵⁴ Szyszkowska, *Etyka*, p. 19.

⁵⁵ Vardy, Grosch, *The Puzzle of Ethics*, pp. 88–89.

⁵⁶ Cf. Popkin, Stroll, *Philosophy Made*, pp. 54–55.

⁵⁷ Szyszkowska, *Etyka*, p. 14.

⁵⁸ Cf. Vardy, Grosch, *The Puzzle of Ethics*, p. 92.

⁵⁹ Ślipko, *Zarys etyki ogólnej*, pp. 169–170.

3.6. An illustration of meta-axiological dilemmas: the constitutional value theory of Z. Ziemiński

The meta-axiological and epistemological problems outlined above have been reflected in Polish theory of law. Z. Ziemiński's reflections on constitutional values are a sound example of this. Ziemiński sees the very concept of values as polysemic, and indicates that, on the one hand, they are regarded as "modalities of being, and even in some way, as beings," and on the other as "something that is positively or negatively valued by someone or some groups of people." As regards the issue of the objective or subjective mode of being, the author adopts a moderately subjective, cognitivist and naturalistic sociological view, as he claims that the acceptance of values by people from a certain milieu or cultural circle is a kind of "social fact." That is why Ziemiński settles for a "down-to-earth, psychological or sociological understanding of values, to which the constitution and legal system are to be subjected."⁶⁰

Elsewhere, the author indicates that he confines himself to viewing values as that which undergoes the approving of disapproving assessment of some subjects.⁶¹ As a result, he remarks that "the view which we defined as a sociological understanding of values has direct political importance and should be included in discussions on constitutional values." Simultaneously, according to the author, it should not be claimed on this basis that the "philosophical view, or rather views, are of secondary significance."⁶² He continues: "Strong faith in the absolute, objective nature of certain values because they are determined by an omniscient and good God or cognisable by God in an intuitive manner, introduces in disputes over the values of a legal system an undisputable element within a certain creed, a kind of axiom or even certainty, at least as concerns supreme values."⁶³ Ultimately, Ziemiński asserts that "without going into philosophical disputes, and limiting to general credo [...] one may set a certain circle of supreme values acknowledged by people of good will." Therefore, he proposes the division of values into those that are based on God's assessments, on particular people's assessments, and on group assessments arrived at in various ways.⁶⁴ Moreover, he claims that values accepted by society are reflected in certain democratic institutional forms; hence, decisions about values will "to

⁶⁰ Ziemiński, *Wartości konstytucyjne*, p. 16.

⁶¹ *Ibidem*, p. 21.

⁶² *Ibidem*, p. 15.

⁶³ *Ibidem*, p. 16.

⁶⁴ *Ibidem*, p. 21.

some extent” rely on the procedures adopted. This means that, according to Ziemiński, procedural values are a special case of values.⁶⁵

3.7. Third dilemma: substantive or procedural values?

3.7.1. Substantive theories of values

While the two above dilemmas bear on universal axiological and epistemological problems, the following five have direct resonance in the professional activity of lawyers and judges, as the third quandary is related to the question of the primacy of substantive or procedural theories of values. In legal philosophy, this issue particularly concerns the problem of justice,⁶⁶ but cannot be reduced to it alone.⁶⁷ Substantive theories share at least one assumption, according to which the concept of values (good, justice beauty, etc.) refers to objectively existing beings.⁶⁸ The first group are supranaturalist theories, and also cognitivist and anti-naturalist ones, which are founded on Plato's thesis about the real and ideal existence of values.⁶⁹ This view was adopted and strengthened in Christian philosophy, e.g. Thomistic, where the ontological foundation of all values (goods) is God.⁷⁰ Naturally, in the perspective of Christian philosophy, it is not only substantive values that are justified by God's wisdom, but also procedural ones.

Another group of substantive theories of values comprises those naturalist theories yielding empirical (sociological, behavioural, etc.) opinions whose criterion of value distinction is factual and refers to a certain social or mental human condition. As has been pointed out, such an understanding of values corresponds with the assumptions of the naturalist version of cognitivism. This group also includes utilitarianism, correlating values with measurable human happiness and unhappiness (J. S. Mill).⁷¹

⁶⁵ Ibidem, p. 26.

⁶⁶ Cf. Stelmach, *Współczesna filozofia interpretacji*, pp. 135–142.

⁶⁷ Theoretical-legal considerations also concern, i.a., substantive and formal rationality. Cf. Krzysztof Palecki, ed., *Dynamika wartości w prawie* (Kraków: Księgarnia Akademicka, 1997), pp. 18–19.

⁶⁸ I refer here to the classification of theories of justice proposed by R. Sarkowicz and J. Stelmach. Cf. Sarkowicz, Stelmach, *Teoria prawa*, pp. 189–190.

⁶⁹ Cf. Kasprzyk, Węgrzecki, *Wprowadzenie do filozofii*, p. 81.

⁷⁰ Władysław Tatarkiewicz, *Historia filozofii*, vol. I (Warszawa: PWN, 2001), p. 276.

⁷¹ “The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as

The third group of substantive theories of values includes contemporary phenomenological concepts. They share the conviction that values exist *a priori* and absolutely, and that they are cognisable in “primordial experience,”⁷² i.e. by axiological intuition.⁷³ Moreover, in the opinion of phenomenologists (Scheler, Hartmann, Tischner), values exist informally and autonomously from their “carriers.”⁷⁴ As has been pointed out, a special case is the concept presented by Ingarden, who claimed that values are not independent from the objects that are their carriers.⁷⁵

The fourth group of substantive theories of values comprises “institutional” views.⁷⁶ According to these, values are created as a result of the activity of a certain social, religious, state, legal and other institutions.⁷⁷ This position is therefore moderately subjectivist and simultaneously naturalistic and cognitivist. Institutional theories⁷⁸ may be regarded as special cases of conventionalism, which claim that values are determined by means of a social contract.⁷⁹ The argument propounded against these theories, in the sociology of law, is that the “axiological basis [of law] cannot be decreed” because it is a “product” of a complex process of conviction-shaping, stabilisation of positions, formulation

they tend to produce the reverse of happiness.” John S. Mill, *Utilitarianism* (London: Parker, Son and Bourn 1863), pp. 9–10.

⁷² Beata Trochimska-Kubacka, *Absolutyzm aksjologiczny. Rekonstrukcja oparta na aksjologii Ricketa, Schelera i Hartmanna* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1999), p. 45.

⁷³ Cf. Marcin Pieniążek, entry: “Teoria etyki sytuacyjnej prawnika,” in *Leksykon etyki prawniczej: 100 podstawowych pojęć*, eds. Paweł Skuczyński, Sebastian Sykuna (Warszawa: Wydawnictwo C.H. Beck, 2013), pp. 405–406.

⁷⁴ M. Scheler, “To, co aprioryczne i to, co formalne w ogóle,” in *Der Formalismus in der Ethik und die materiale Wertethik*, vol. 2 (Bern – Munich: 1966), p. 67, in Scheler, Adam Węgrzecki (Warszawa: Wydawnictwo Wiedza Powszechna, 1975) pp. 139 et seq.

⁷⁵ Roman Ingarden, “Czego nie wiemy o wartościach,” in *Przeżycie – dzieło – wartość* (Kraków: Wydawnictwo Literackie, 1968) pp. 67–82. Cf. Bogdan Ogrodnik, *Ingarden* (Warszawa: Wiedza Powszechna, 2000) p. 127.

⁷⁶ Institution is defined as “a set of legal or customary norms concerning the organisation of a given sphere of life,” “a public establishment” within a certain area, “an organisation, or an agency based on defined norms,” etc. Cf. Władysław Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem* (Warszawa: Oficyna Wydawnicza RYTM, 2006) p. 258.

⁷⁷ R. Krajewski gives several possible classifications of institutions. Among other classes, the author divides them into courts and tribunals (including the Supreme Court, general courts, the Constitutional Tribunal, the Tribunal of State), main judiciary institutions (e.g. the Supreme Chamber of Control, National Broadcasting Council), Prosecution, law enforcement authorities (e.g. Prison Service, Railway Guards), professional associations of legal professionals (e.g. the Bar, legal advisers, the institution of a notary public), and other organs (e.g. a Parliamentary Committee of Investigation). Cf. Radosław Krajewski, *Leksykon instytucji wymiaru sprawiedliwości i ochrony prawa* (Warszawa: C.H. Beck, 2007).

⁷⁸ Cf. Sarkowicz, Stelmach, *Teoria prawa*, p. 188.

⁷⁹ Szyszkowska, *Etyka*, p. 13.

of ideals and ideologies, and their internalisation.⁸⁰ It must be mentioned that institutional theories are only a step away from procedural theories, since the “value-making” activity of bodies and organs is connected with the application of certain norms, rituals, etc.

3.7.2. Procedural theories of values

The question of preferences of substantive or procedural values touches upon the core of practical legal dilemmas. They are the more important since legal positivism elevated “procedurality” to a value in itself. It is notable that the last few decades of legal philosophy have brought about a renaissance of the procedural theory of justice, in the light of which, most simply, “just” means compliant with previously adopted rules.⁸¹ It is worth remarking in this context that J. Rawls, in *A Theory of Justice*, distinguishes “perfect” and “imperfect justice.”⁸² According to him, the former is when procedure in every case guarantees a decision’s compliance with the adopted rules, while the latter relates to this effect being attained in most cases.⁸³ Rawls points out that, typically, decision-making procedures in social matters meet, at most, the requirements of imperfect procedural justice, the example of which is a criminal trial.⁸⁴ As has been indicated, the procedural view of values does not, in legal philosophy, end with the question of justice. For example, in the legislative process, the substantive and formal rationality of the law maker may be distinguished.⁸⁵ The literature also contains the division into the substantive and procedural rule of law.⁸⁶

The procedural axiological perspective also comes into prominence in the concepts of the law of nature of changeable content,⁸⁷ e.g. that of L. L. Fuller, who names eight principles of the rule of law, which can be regarded as procedural values: the generality of laws, due promulgation of laws, non-retroactivity of laws, clarity and intelligibility of laws, non-contradictoriness, that laws should not require conduct beyond the powers of norm-addressees, constancy over

⁸⁰ Krzysztof Pałeczki, “Zmiany w aksjologicznych podstawach prawa jako wskaźnik jego tranzycji,” in *Dynamika wartości w prawie* (Kraków, Księgarnia Akademicka, 1997) p. 27.

⁸¹ Sarkowicz, Stelmach, *Teoria prawa*, p. 191.

⁸² John Rawls, *A Theory of Justice* (Cambridge-Massachusetts: Harvard University Press, 2009), p. 74.

⁸³ Lech Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* (Warszawa: LexisNexis, 2005), p. 210.

⁸⁴ Rawls, *A Theory of Justice*, p. 75.

⁸⁵ Pałeczki, “Zmiany w aksjologicznych,” p. 18.

⁸⁶ Cf. Ziemiński, *Wartości konstytucyjne*, p. 85.

⁸⁷ Stelmach, *Współczesna filozofia interpretacji*, p. 30.

time, congruence between official action and declared rule.⁸⁸ In the widest procedural perspective, it may be said that all that has been created in keeping with certain rules is valuable (good, beautiful). Scheler's phenomenology is an example of such a theory of moral good, where good is a result of an act of preference that chooses the values of superior order, e.g. spiritual (justice), which are ranked above the lower order values, e.g. utilitarian (pleasure).⁸⁹ Let us add that one of the detailed problems in the procedural theory of values concerns determining their source, which may be God's wisdom, a sovereign's will, or an autopoietic legal system, etc. Here, the question of grounding appears, and as a result so does the issue of the reduction of procedural values to a certain being (as indicated, for example, in the formalised activity of some "value-making" institution).

3.7.3. The lawyer or the judge and substantive and procedural values

It is to be stressed that a lawyer's or judge's practical dilemmas result from their daily confrontation with the dialectics of substantive and procedural values on different levels of the realisation of law (creation, interpretation, application, etc.).⁹⁰ Such dialectics develop on the grounds of particular branches of law, especially when their "substantive" axiology is "enforced" with relevant procedural rules (private legal, penal legal, administrative legal, etc.). K. Pałecki, when analysing changes in the axiological-substantive foundations of a legal system, warns about the potential of taking "refuge in formalism and procedure both by law-makers and practitioners."⁹¹ With the unfettered prevalence of procedural values over the material come risks indicated by critics of legal positivism, such as G. Radbruch. Such dominance also means the possibility of the untrammelled creation of axiology by rulers within legal security as formally understood.⁹² In this context Radbruch writes about "a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form."⁹³

⁸⁸ See: Lon L. Fuller, "The Morality That Makes Law Possible," in *The Morality of Law: Revised Edition* (NewHaven-London: Yale University Press, 1969), pp. 33–94.

⁸⁹ Cf. Manfred S. Frings, *Max Scheler – A Concise Introduction into the World of Great Thinker* (Louvain: Duquesne University Press, 1965), pp. 113–120.

⁹⁰ Cf. Stelmach, *Współczesna filozofia interpretacji*, p. 143.

⁹¹ Pałecki, "Zmiany w aksjologicznych," pp. 12–13.

⁹² Stelmach, *Współczesna filozofia interpretacji*, pp. 145–146.

⁹³ Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," *Oxford Journal of Legal Studies* 2006, Vol. 26, No. 1, pp. 6–7.

3.8. Fourth dilemma: values towards norms – generic or derivative?

3.8.1. “Thinking in accordance with norm” and “thinking in accordance with values”

The fourth dilemma concerns the issue of the primary or secondary existence of values. At its core is the question of whether values are the source of norms and valuations, or the contrary – the product of their generalisations? This dilemma, closely tied to the problem of the objective and subjective existence of values, has important consequences for the creation and application of law. The acceptance of the thesis of the fully secondary nature of values, especially substantive ones, gives scope for arbitrary law-making at the “sovereign’s will,” in extreme cases “including every despotic whim and caprice.”⁹⁴ The secondary character of values will be also assumed by scientific anti-metaphysical currents, including philosophical and legal positivism. A similar stance is taken by conventionalism, in which, as has been indicated, values are the result of a social contract. Of course, the primary nature of values will be postulated by the supranaturalistic law of nature, as well as by those naturalistic currents that regard values as irreducible facts (social, mental, etc.), and by phenomenological views of values as primary, irreducible, and *a priori*.

To illustrate the essence of the dilemma between the primary and secondary nature of values and its implications for the lawyer’s or the judge’s activity, one may refer to the phenomenological theory of values, developed in opposition to the scientific assumptions of philosophical positivism. In this context, attention is drawn to the ideas of the Polish phenomenologist J. Tischner, who compares “thinking according to values” with “thinking according to norms.”⁹⁵ According to Tischner, the influence of a positivist paradigm caused humanistic “ethical thought” to fall under the influence of the model of the technical sciences. This influence is also manifested in a tendency to change man to certain actions through external stimulation. Tischner claims that the basic concern of such thinking about man is the formulation of universal norms which “like machine instructions are to provide order in society.”⁹⁶ According to the philosopher, the

⁹⁴ Gustav Radbruch, “Five Minutes of Legal Philosophy,” *Oxford Journal of Legal Studies* 2006 Vol. 26, No. 1, p. 13.

⁹⁵ Józef Tischner, “Norma i wartość,” in *O człowieku. Wybór pism filozoficznych* (Wrocław: Zakład Narodowy im. Ossolińskich, 2013), pp. 241–243.

⁹⁶ Józef Tischner, “Sztuka etyki,” in *O człowieku. Wybór pism filozoficznych* (Wrocław: Zakład Narodowy im. Ossolińskich, 2013), p. 235.

flaw in this “technical ethics” based on the above assumption is that it starts with a norm referring to human conduct, namely it tries to formulate general, abstract rules of conduct towards man. In the phenomenological and dialogical perspective, Tischner accentuates that, in a situation of contact with another human, “we first intuitively perceive values that this man has in himself.” We do not try to “recall from memory” any norm of conduct, which according to the philosopher is “technical and void.” In other words, in our perception of another man’s “being” we intuitively grasp the objective and primary value that our behaviour has towards him.⁹⁷ A similar point of view was promoted by the currents of the phenomenologically-oriented legal hermeneutics, which include primary values in the ontologically-conditioned process of the realisation of law. For example, M. Piechowiak, quoting A. Kaufmann, says that “in the process of finding resolutions, a legal norm meets concrete life conditions.” The “sense” found in the result, in which “the idea of law, alternatively legal norm and life conditions must be identical,” makes the “nature of things.” This nature is “a methodical place of the connection of reality with value,” and simultaneously “a proper carrier of objective legal sense.”⁹⁸

One should also mention the idea that legal axiology is secondary to norms and follows from the act of law-making. For instance, M. Kordela claims that “The only way to gain the status of a legislator’s value is his clear decision, typically simply being a constituting act. In this view, every value comes as an effect of creation. All in all, a legislator creates values and does not protect, guarantee or enforce [them].”⁹⁹ Kordela continues that “As long as the legislator does not give [...] values the rank of legal value, out of his own clear decision made in the form that is precisely determined by procedural norms, a certain sphere remains extralegal. It is this law-making *fiat* that transforms, constitutively and not declaratorily, certain values, primarily moral ones, into values belonging to the axiology of law.” Therefore, according to the author, the above process is determined not by the content of values but their form.¹⁰⁰

⁹⁷ Cf. Tischner, “Sztuka etyki,” pp. 361–372.

⁹⁸ Marek Piechowiak, “Arthura Kaufmanna próba przewyciężenia pozytywizmu prawniczego,” *Studia Prawnicze* 1993, vol. 1(115), pp. 9–10.

⁹⁹ Marzena Kordela, “Zasady prawa jako normatywna postać wartości,” *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2006, LXVIII – vol. 1, p. 43.

¹⁰⁰ Kordela, “Zasady prawa,” p. 44.

3.8.2. Are values necessary in a normative system of law?

As has been indicated, extreme stances that are purely normative and simultaneously anti-axiological are hard to support (this is the problem that was revealed even in Kelsen's theory in relation to *Grundnorm* in the "static system"). At the same time, many legal-theoretical concepts assume the existence of axiological foundations of a normative system of law, where the mode and justification of their existence may vary and be the subject of a dilemma, for the spectrum of ideas spans from the law of nature to naturalist legal-sociological concepts, and from substantive to procedural concepts. Nevertheless, according to Ziemiński, the content of a legal system comprises a definite and inherent set of values even if it is not articulately stated in regulations.¹⁰¹ Also, according to Radbruch, who represents the axiological current in neo-Kantism, law always aims at the realisation of certain values, while value refers both to the empirically existing being and to the ideally-formally existing duty.¹⁰² Radbruch names three values "characteristic of every positive law-statute." justice, legal certainty and "the purposiveness of the law in serving the public."¹⁰³

The relation between values and a normative system was also captured by R. Dworkin in his concept of law consisting of rules (norms) and "principles, policies and other sorts of standards"¹⁰⁴). In this theory, the problem of values is revealed in "hard cases," in which the zero-one binding character of legal rules cannot be applied,¹⁰⁵ for values are a store of relevant principles that are weighed in hard cases. G. Maroń observes: the "weighing of principles by a judge only partially, though *lege artis*, answers the need to satisfy the values protected by that of legal rules."¹⁰⁶ In the same vein, M. Dybowski notes: "a judge's decision in Dworkin's concept is 'political' due to the political character of rights which in turn are axiologically justified in the system of values expressed in a normative social structure – 'political morality'."¹⁰⁷ This means that, in Dworkin's concept, political rights are integral parts of moral values accepted by a society.¹⁰⁸

¹⁰¹ Zygmunt Ziemiński, *Wstęp do aksjologii dla prawników* (Warszawa: Wydawnictwo Prawnicze, 1990), pp. 71 et seq.

¹⁰² Sarkowicz, Stelmach, *Teoria prawa*, p. 33.

¹⁰³ Radbruch, "Statutory Lawlessness and Supra-Statutory Law," p. 6.

¹⁰⁴ Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013), pp. 38 et seq.

¹⁰⁵ *Ibidem*, pp. 105 et seq.

¹⁰⁶ Grzegorz Maroń, *Zasady prawa. Pojmowanie i typologie a rola w wykładni prawa i orzecznictwie konstytucyjnym* (Poznań: Wydawnictwo Ars boni et aequi, 2011), p. 80.

¹⁰⁷ Maciej Dybowski, "Ronalda Dworkina koncepcja zasad prawa," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2001, LXIII — vol. 3, p. 112.

¹⁰⁸ Dybowski, "Ronalda Dworkina koncepcja zasad prawa," p. 107.

The relations between values and fundamental legal rules are also outlined in R. Alexy's theory. Maroń points out that, in the light of the philosopher's opinions, the rules of law are "optimising requirements," indicating not exactly how to act, but requiring that a certain desired state of affairs (goal, value) be realised to the greatest extent possible within the legal and factual possibilities.¹⁰⁹

As has been said above, even legal positivism is not free from specific axiology in the foundations of a normative system of law. Also, in the light of H.L.A. Hart's positivist concept, law, as a minimum standard, has to contain rules that protect an individual, their life, security, property, maintenance and functioning within society.¹¹⁰ The "protected goods" that he mentions may thus, in Hart's concept, be regarded as "valuable" and correlated with the "minimum content of natural law."¹¹¹ Moreover, Hart directly points out the relations between moral values and a positive law system: "The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. [...] In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values."¹¹²

Furthermore, on the grounds of legal sociology, Pałecki claims that a certain set of values is a "hidden element" of a legal system, being incorporated into law through the processes of rationalisation and legitimisation. However, these must be values having some special relation to norms, namely the multiplication, maintenance or occurrence of these values due to the realisation of relevant norms. Pałecki suggests calling the set of values that have such a relation (rationalisation and legitimisation) with a certain legal system the "axiological foundation" of this law.¹¹³ This term will be used in further discussion.

3.9. Fifth dilemma: what is the bond between values and a normative system of law?

The fifth of the dilemmas identified concerns the characterisation of the bond between values and norms in a legal system. This characterisation is primarily related to the question of how values become part of an axio-normative system

¹⁰⁹ Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), p. 47. Cf. Maroń, *Zasady prawa*, p. 43.

¹¹⁰ Herbert L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), pp. 193–200.

¹¹¹ Cf. Sarkowicz, Stelmach, *Filozofia prawa XIX i XX wieku*, pp. 44–45.

¹¹² Hart, *The Concept of Law*, pp. 203–204.

¹¹³ Pałecki, "Zmiany w aksjologicznych," pp. 19–20.

of law. The line of argument runs analogous to the polarisation of opinions concerning the primary or secondary mode of the existence of values. On one hand, there are stances according to which values are *ab initio* a natural part of the legal system. These include the law of nature, the concepts of G. Radbruch, R. Dworkin, and others mentioned in this group. On the other hand, there are views that hold values to be part of the system due to the legislator's decision. Typically, these are positivist views, verbalised in Kordela's position mentioned above. However, the problem of the characterisation of the bond between values and norms in a legal system also concerns a more practical issue, namely the question of the grounding of legal rules, the most important norms in the system, in its axiological foundation. The issue has particular bearing on the way constitutional principles and fundamental rules of particular branches of law are embedded in the relevant "axiological backstore." In the nomenclature of the sociology of law, the problem concerns describing the mechanism by which legal principles undergo legitimisation and rationalisation in the context of a certain set of values.

M. Zieliński, in the context of constitutional values, generally claims that the "principles of law in the directive view protect particularly important values (goods). Or, in other words, values form the basis underlying particular principles."¹¹⁴ Maroń, however, holds that what decides about the status of legal principle is not mere possession of a certain characteristic of a norm, but the intensity with which this quality is manifested in a concrete norm – e.g. "not so much the protection of 'a value', but protection of a value particularly important in the legal order."¹¹⁵ Kordela offers a simple and original clarification claiming that the principles of law, not being legal norms, are a specific form of the set of elements belonging to values.¹¹⁶ In other words, according to the author, they take the form of normative principles when they are introduced to the legal system by the decision of a lawmaker.¹¹⁷ S. Tkacz also proposes withdrawal from distinguishing the concepts of "values" and "principles," especially in the aspect

¹¹⁴ Maciej Zieliński, "Zasady i wartości konstytucyjne," in *Zasady naczelne Konstytucji RP z 2 kwietnia 1997 roku. Materiały 52. Ogólnopolskiego Zjazdu Katedr Prawa Konstytucyjnego w Międzyzdrojach (27–29 maja 2010 r.)*, eds., Andrzej Bałaban, Przemysław Mijał (Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2011), pp. 33–35.

¹¹⁵ Grzegorz Maroń, "Zasady prawa jako składnik kultury prawnej," in *Konwergencja czy dywergencja kultur i systemów prawnych?* as cited in <http://arch.prawo.ug.edu.pl/teoria/uploads/zjazd/Maron.pdf>, p. 3, accessed on 1st March 2017.

¹¹⁶ Kordela, "Zasady prawa jako normatywna postać wartości," pp. 41–52.

¹¹⁷ More on the (modified) theory of relationships between legal principles and values: Marzena Kordela, *Zasady prawa. Studium teoretycznoprawne* (Poznań: Wydawnictwo Naukowe UAM, 2012), pp. 101–149.

of constitutional problematics, for the principles of law serve the realisation of certain values, or values may not be ascribed legal relevance.¹¹⁸

However, for instance, in the legal-sociological perspective the identification of values and norms is an oversimplification, especially in the context of changes taking place on the axiological foundation of law and the normative effects of these transformations. According to Pałecki, the concepts of values and norms refer to different phenomena, and the relation between them is that the appearance of a value due to the fulfilment of certain norms gives meaning to their content and binding nature, and thus, as mentioned, serves to rationalise and legitimise these norms.¹¹⁹ Pałecki also claims that the dependence between values and norms in the system is “strong,” which means that no change in law can take place without a change in the axiological basis, and “reciprocal;” namely, every change of this basis must entail a number of other changes in the system.¹²⁰ Thus, Pałecki holds that modifications of an axiological basis are of key importance to the whole problem of changes in the law.¹²¹

3.10. Sixth dilemma: what is the lawyer’s or the judge’s *universum* of professionally significant values?

3.10.1. The scope of the axiological basics of law

Thus we reach the perspective of the sixth of the legal dilemmas that were identified, that concerning the question of the set of values belonging to the “axiological foundation of law.” This point will also cover the related question about the scope of the “axiological foundation of legal ethics.” Further reflection will serve to bring into focus the dilemmas revealed in the comprehensively understood *universum* of a lawyer’s or judge’s professionally significant values.

In the light of previous reflections, a question arises: Is the “axiological basis of law” a given, once and for all, and may its possible change be the source of dilemmas in the process of law enforcement? The answer depends on the *modus existendi* of the postulated (objective, subjective, primary, secondary, etc.) values. Irrespective of the possible polarisation of opinions, Ziemiński draws

¹¹⁸ Sławomir Tkacz, *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie (od dogmatyki do teorii)* (Toruń: Wydawnictwo Adam Marszałek, 2014), p. 285.

¹¹⁹ Pałecki, “Zmiany w aksjologicznych,” p. 20.

¹²⁰ Ibidem, p. 21.

¹²¹ Ibidem, p. 21.

attention to the necessity of maintaining “axiological consistency,” which is “one of the elementary conditions of a legal system’s effectiveness.” This consistency, according to Ziemiński, means that the norms of a given legal system are axiologically justified by a correspondingly ordered system of values, which the realisation of legal norms is to serve.¹²²

For example, (as has been said) in Radbruch’s opinion there is a three-element set of values specific for every positive law which form a hierarchy in which the highest value is justice, the second legal certainty, and the lowest – the purposiveness of the law in serving the public.¹²³ Radbruch adds that justice requires that law be stable (*sicher*). The author indicates that, where there is a dilemma “between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice.”¹²⁴ The context for Radbruch’s diagnosis is the conflict between the positivist and “law of nature” views of the axiological basis of law.

In the Polish literature, Kordela undertakes probably the most detailed attempt at cataloguing “legal values,” which are derived by her from the Constitution’s preamble and regulations, as well as from sentences and judgments of the Constitutional Tribunal. According to Kordela, this set comprises: freedom, justice, cooperation and dialogue, state security, legal order, the protection of the environment, health, public morals, freedom and the rights of other people, legal certainty and trust in the law, the public interest, the common good, every individual’s good, a child’s good, freedom of conscience and creed, freedom of speech, freedom of public debate, freedom of public meetings, party autonomy, the family and marriage, the protection of property, the reliability and efficiency of public institutions, the effective and uninterrupted functioning of organs of public authority for the public, the autonomy of local government units, the autonomy of communes, the good of the judiciary, the quest for the truth about an act and its perpetrator in a criminal trial, and the client’s good, the independence and impartiality of the judiciary, the independence of public radio and television, care of military veterans, the free and effective activity of trade unions, balancing the budget, the unity of the state’s financial economy, maintaining the political power of democratically chosen structures, and defence. Kordela also adds that “normative beings” gain the status of values, e.g. the general principle of social justice, the specific principle of equality, the

¹²² Ziemiński, *Wartości konstytucyjne*, p. 7.

¹²³ Radbruch, “Statutory Lawlessness and Supra-Statutory Law,” p. 6.

¹²⁴ *Ibidem*, pp. 6–7.

legality principle, and the right to education and information.¹²⁵ The author also cites the opinion of Constitutional Tribunal, which stated that, in some cases, “values are protected but not absolute,” which hints at the dynamic nature of the set of values forming the axiological basis of law.

3.10.2. Constitutional values as an axiological basis in the view of Z. Ziemiński

On the other hand, the most theoretically elaborate attempt to catalogue legal values, especially constitutional ones, can be found in Ziemiński's views. He claims that law has to serve the realisation of human interests, and for that reason it has to allow for the realisation of certain values. According to Ziemiński, these are both “independent values” as well as “instrumental values of the higher order.”¹²⁶ It is worth remarking that, in his opinion, law in itself may be an instrumental value, since it authorises an individual to carry out certain conventional actions.¹²⁷ The author specified that law may be a value because it orders other subjects' conduct in a manner that is advantageous for a given individual, both passively, in the case of legally protected freedom, as well as actively.¹²⁸

As has been pointed out, Ziemiński analyses the issue of the axiological basis of a legal system in the context of the set of constitutional values, among which he discerns three categories: first, values that directly boil down to fulfilling the interests of particular citizens (respecting those human rights which are in a given country's jurisdiction); second, instrumental values, which serve the realisation of those interests, and institutional values connected with organising actions leading to the realisation of the good of an individual and the public; third, ideological values related to the ideological goals that the state power is to serve.¹²⁹ Ziemiński additionally points out special “legal values,” worked out by doctrine, such as the “adversarial system” and the “principle of substantive truth” in criminal law.

Ziemiński develops and specifies the above catalogue of constitutional values. The author puts in first place the values directly determining the social situation of particular individuals. In particular, he draws attention to the value of providing freedom of action within a certain area. Simultaneously, the author

¹²⁵ Kordela, *Zasady prawa. Studium teoretycznoprawne*, pp. 125–127.

¹²⁶ Sławomira Wronkowska, ed., *Z teorii i filozofii prawa Zygmunta Ziemińskiego* (Warszawa: Oficyna Wolters Kluwer Business, 2007), p. 247.

¹²⁷ *Ibidem*, pp. 249–250.

¹²⁸ *Ibidem*, p. 249.

¹²⁹ Ziemiński, *Wartości konstytucyjne*, p. 29.

distinguishes between the freedom “to” carry out certain actions (deriving from equality before the law) and the freedom “from” certain risks, including formal-legal and substantive limitations (concerning life, health, threats to security of economic existence). Ziemiński states that the value founded on the first category of values is the supreme value of the personal dignity of citizens (art. 30 Constitution of Poland).¹³⁰

The second group includes instrumental and institutional values, the primary goal (and measure of importance) of which is the protection of values of the first category. Among instrumental values “mentioned in constitutions” Ziemiński names the obligations of the state to: provide proper ecological conditions, means of supporting the development of science, culture, and education, and to provide the necessary infrastructure for economic activity. Among institutional values the author includes: guaranteeing the democratic character of the state’s ruling institution and of administering public affairs. In the case of the “legal state postulate,” this is related to, *inter alia*, institutions securing respect for a citizen’s rights, and to institutional values which are created by the principle of the tripartite separation of powers.¹³¹ Ziemiński adds that “an instrumental value of further order” is the creation of legal institutions which allow for the realisation of justice postulated according to a defined, usually complex, formula of justice.¹³²

As was mentioned above, the third group includes “ideological values,” meaning that a state assumes responsibility for the promulgation of certain values within society. This form of values is controversial, according to this author, since it may lead to imposing unrecognised values on citizens by coercive means. Ziemiński emphasises the importance of “autonomous values,” belonging to the closest, constitutional axiological basis of law. According to him, these include: freedom, security (personal, social and legal), equality (in law and before the law), property (with certain functional limitations). Ziemiński also includes in the strict axiological basis of law the fundamental instrumental and institutional values such as “realisation of social rights,” “democratic institutions and procedures,” (e.g. the procedure of constituting state organs and the procedure of lawmaking), and “self-governmental institutions.”¹³³ With the perspective of corporate ethics problems in mind, one may entertain the thought that maybe those institutions of professional self-government mentioned in Art. 17. Section 1 of

¹³⁰ *Ibidem*, p. 58.

¹³¹ *Ibidem*, p. 59.

¹³² *Ibidem*, p. 59.

¹³³ *Ibidem*, pp. 60–80.

the Constitution of Poland are also institutional values in the axiological basis of a normative legal system.

Ziemiński, when tackling detailed questions, points to the complex nature of a fundamental value, namely procedural and substantive “rule of law.” In a similar vein, the author writes about “social justice,” indicating not only its procedural and substantive concept, but also the distributive as well as commutative foundations. In the latter case, he shows that the constitutional idea of justice is multidimensional and combines “in roughly undetermined proportions” “egalitarian and merit” elements (depending on one’s “effort and achievements”).¹³⁴ Thus, according to the author, the idea of social justice is a concept of “underspecified semantic reference.”¹³⁵ Ziemiński uses an understanding of the above concept to signal the influence of economic criteria that are, for instance, contradictory to some assumptions of Catholic social doctrine.¹³⁶ He complements the catalogue of basic values with independence and sovereignty, of which the former is political, the latter a concept arising from international law.¹³⁷

3.10.3. From the “axiological basis of law” towards the “axiological basis of legal and judicial ethics”

In the preceding analyses, the key role was played by the concept of the axiological basis of law. Simultaneously, the beginning of the chapter formed a thesis that a lawyer’s or judge’s approval of a certain theory of legal values correlates with their theory of ethical-professional values. A possible meta-axiological discrepancy, resulting, for example, from adopting a positive concept of the axiological basis of law and a simultaneously natural ethical-professional perspective, may be a source of deep professional dilemmas. Hence it is possible to posit a thesis that, on the grounds of a certain axiological paradigm preferred by a lawyer or a judge, the set of ethical-professional values cannot exist in a fundamentally abstract relationship with the set of legal values. For this reason, the term “*universum* of professionally significant values” was used in the introduction as comprising both sets.¹³⁸

¹³⁴ Ibidem, p. 85. This refers to the Aristotelian concept of commutative and distributive justice. Cf. Aristotle, *Nicomachean Ethics*, book V, 1130b30 – 1131a5 (Oxford: Oxford University Press, 2002), p. 162.

¹³⁵ Ziemiński, *Wartości konstytucyjne*, p. 86.

¹³⁶ Ibidem, p. 87.

¹³⁷ Ibidem, p. 89.

¹³⁸ The further fragment of the chapter will cover possible dilemmas concerning legal and ethical-professional values.

It has to be emphasised that opinions in the literature state the fundamental identity of the axiological basis of law and axiological basis of legal ethics. According, for instance, to M. Kuryłowicz, ethical values are the most universal and lasting of the multiple values that have been carried through from Roman law to contemporaneity. The author points out that the characteristics of Roman law include its foundation on the ideas of good and right (*bonum et aequum*) and also such concepts as *iustitia* (justice), *humanitas* (humanity, kindness), *aequitas* (fairness, equality), *fides* (faith, trust), *honestas* (honesty, reliability) and others at the junction of law and ethics. Kuryłowicz continues that the ethical values identified find expression in well-known Roman definitions of law as the art of applying that which is good and right (*ius est ars boni et aequi*) and justice (*iustitia*) as the stable and unchangeable will to grant everyone their due rights. According to the author, law and justice are connected by three rules of law-abiding conduct (*iuris praecepta*): honest life (*honeste vivere*), not harming anyone (*alterum non laedere*) and granting everyone their dues (*suum cuique tribuere*). It is conspicuous, Kuryłowicz concludes, that these are simultaneously fundamental imperatives of human conduct, in which the unity of ethics and law is expressed.¹³⁹

Accepting the thesis on the common *universum* of legal and ethical-professional values of a lawyer and a judge does not mean that this set is internally homogenous and non-conflicting (this issue will be dealt with later). Just the opposite, the indicated high complexity level of the axiological basis of law may also justify standpoints such as those which say that a lawyer's or judge's dilemmas are insoluble (this includes opinions that values are incommensurate). Nevertheless, adopting a certain theory of values and a correlated vision of those values' *universum* allows the profession-conditioned plane of axiological dilemmas of a lawyer, bailiff, judge and so on to be set down.

3.10.4. Lawyers' and judges' ethical-professional values and their variability

3.10.4.1. The scope of the axiological basis of legal and judicial ethics

Here, the set of specific ethical-professional values expressed in codes of legal and judicial ethics should be described.¹⁴⁰ As follows from the content

¹³⁹ Marek Kuryłowicz, "Notariat w europejskiej kulturze prawnej," in *II Kongres Notariuszy Rzeczypospolitej Polskiej. Referaty i opracowania*, ed. Romuald Szytk (Poznań–Kluczbork, Wydawnictwa Notariatu, 1999), p. 148.

¹⁴⁰ In codes of legal ethics, axiological principles usually are expressed in the 'language of principles'. However, as a result of current findings it has been accepted that a principle is always

analysis of these codes,¹⁴¹ legal professions (and related professions such as the civil service) have a relatively consistent basic axiology, comprising at least public trust in the profession,¹⁴² prestige, dignity of the profession, carefulness, self-improvement, independence, selflessness, respect for the dignity of others, respect for superiors and law corporation authorities, professional confidentiality, collegiality, good manners, and conscientiousness in financial matters. It perhaps needs to be verified, but the above list comprises a universal axiological basis for public trust professions,¹⁴³ and also concerns doctors, physiotherapists, and others.

The original and common trait of legal sets of ethical-professional values is, in my opinion, propounding to the foreground a respect for the rule of law, which makes a direct connection with the above outlined axiological basis of law. In other words, it is (at least) the rule of law that cements the common

founded in a specific value, thus in the following discussion we speak about ethical-professional values.

¹⁴¹ *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu (Kodeks Etyki Adwokackiej)* [*The Rules of Ethics for Advocates and the Dignity of the Profession (Code of Ethics for Advocates)*], annex to the resolution of The Polish Bar Council No. 32/2005 of 19th November 2005 as amended by resolutions of The Polish Bar Council No. 33/2011 – 54/2011 of 19th November 2011; *Kodeks Etyki Radcy Prawnego* [*The Code of Ethics of Legal Counsel*], annex to the resolution No. 3/2014 of the Extraordinary National Convention of Legal Advisers of 22nd November 2014; *Kodeks Etyki Zawodowej Notariusza* [*The Code of Ethics for Notaries*], annex to the resolution No. 19 of the National Notary Council of 12th December 1997, as amended; *Zbiór Zasad Etyki Zawodowej Prokuratorów* [*The Set of Principles of Professional Conduct for Prosecutors*], annex to the resolution No. 468/2012 of 19th September 2012; *Zbiór Zasad Etyki Zawodowej Sędziów* [*The Set of Principles of Professional Conduct for Judges*], annex to the resolution No. 16/2003 of The National Council of the Judiciary of Poland of 19th February 2003, as amended; *Kodeks Etyki Zawodowej Komornika Sądowego* [*The Code of Ethics for Court Enforcement Officers*], annex to the resolution of the National Council of Judicial Officers No. 909/IV of 8th February 2012; *The European Code of Good Administrative Behaviour* passed by The European Parliament on 6 September 2001; Regulation No. 70 of the Prime Minister of 6th October 2011 *W sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz w sprawie zasad etyki korpusu służby cywilnej* [*On guidelines in the scope of observing principles of the civil service and on principles of ethics of the civil service corps*]; *American Bar Association Model Rules of Professional Conduct* (1983), as amended; *American Bar Association Model Code of Judicial Conduct* (1990), as amended.

¹⁴² It is to be considered whether public trust makes a constitutional value in the light of Polish Law; however, it certainly belongs to the group of fundamental legal values. *Mutatis mutandis* this would be indicated by the wording of art. 17. par. 1 of the Constitution, which states: “By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.” The Constitution of the Republic of Poland of 2nd April 1997, Journal of Laws of 1997, No. 78, item 483, as amended.

¹⁴³ It should be noted that public trust as a value belongs to the axiological principles also of those legal professions whose representatives though not being representatives of public trust professions in a strict sense, are state officials (judges, prosecutors, bailiffs, members of civil corps). Cf. Tomasz Stawecki, entry: “Zaufanie,” in *Leksykon etyki prawniczej: 100 podstawowych pojęć*, eds. Paweł Skuczyński, Sebastian Sykuna (Warszawa: Wydawnictwo C.H. Beck, 2013), p. 442.

universum of legal and ethical-professional values, both on the macro scale of all legal professions, as well as on micro scale of a lawyer or a judge as an individual displaying concrete ethical-professional beliefs.

3.10.4.1. Axiological diversification in the public and private law

However, one has to draw attention to the internal variability of the *universum*, which is manifested in the differentiation and specification of the ethical-professional sets of values of a lawyer, judge, prosecutor and so on.

K. Palecki indicates that, in addition, the "axiological basis of law may occur in different versions in different communities serving various functions within the same system of law."¹⁴⁴ An essential premise of this variability is the reference of a particular legal profession to the axiology of the spheres of public law or private law. In this context, Z. Ziemiński's opinion should be cited, that the typology of values which law "must serve" defines on one hand the value of law as a means of fulfilling or securing that which is beneficial for particular individuals, and on the other hand the value of law as a means of attaining that which is in the interests of society as a whole.¹⁴⁵ By this, Ziemiński highlights the potential internal conflict of an axiology of law, since in practice its realisation may result in a dilemma related to the domination of either the public or a particular interest.¹⁴⁶ In the light of the above argument, the lawyer's or judge's axiological dilemmas therefore stem from, *inter alia*, tensions between sets of values that are typical for the two defined spheres. It is obvious that the axiological conditioning of public law is strongest in judicial, prosecutorial and civil service ethics, while the conditioning of private law prevails in the ethics of the bar and even more so in the legal adviser's.

The above conclusion is confirmed by analysis of the legal provisions of sets of rules of professional ethics, as well as of the constitutional acts of the professions cited. The private law perspective manifests itself, for example, in the *Code of Ethics for Advocates*, which declares such values as: protecting a client's interests, freedom and independence, truthfulness,¹⁴⁷ freedom of expression, restraint and tact in dealings with a court, offices and institutions, dignity of people engaged in the case, kindness, courage and honour in defence of one's clients, particular scrupulosity in financial matters in relation to the client, trust in relations with the client, respect for the bar council authorities, respect

¹⁴⁴ Palecki, "Zmiany w aksjologicznych," p. 22.

¹⁴⁵ Wronkowska, ed., *Z teorii i filozofii prawa Zygmunta Ziemińskiego*, p. 247.

¹⁴⁶ Ibidem. It is a reference to Ulpian's legal maxim: "*Publicum ius est quod ad statum rei Romanae spectat, ius privatum est quod ad singulorum utilitatem.*"

¹⁴⁷ In accordance with par. 11 *The Set of Professional Conduct and Professional Dignity Principles of Advocates* a lawyer must not give false information to court knowingly.

of the internal law of the corporation, cooperation with the bar authorities, and the traditions associated with practising the profession.¹⁴⁸ As indicated, loyalty to the client and other values already mentioned are central also to *The Code of Ethics of Legal Advisers*. In the proposed view, specific, ethical-professional public law values come to prominence in judicial, prosecutorial and civil service ethics. For example, the set of specific values of judicial ethics includes impartiality, the interests of the court the judge works in, the interests of the judiciary, and the constitutional position of the power of the judiciary. The original regulations of the ethical-professional values set of Polish notaries derive from the nature of activities on the cusp of the spheres of public law and private law.¹⁴⁹ The particularity of the Polish bailiff's professional ethics derives from operation on the border of these two spheres.¹⁵⁰

Thus, a lawyer's or judge's axiological dilemmas essentially result from the complexity of the *universum* of their professionally significant values and the individual's gravitation towards the sphere of public law or private law. Hence, the result of the division thus outlined is a dilemma concerning public interest and private interest, the interest of the client and law abidingness, professional confidentiality and public security, and so on. Moreover, axiological diversification of legal professions linked to the sphere of public law generates further dilemmas, for example between independence and impartiality (values of judicial ethics) and hieratic, organisational subjection (sometimes called "loyalty to supervisors"¹⁵¹). These axiological discrepancies are so fundamental that I. Lazari-Pawłowska writes about the "socially accepted mutual conflict of social roles of the legal professions" of a prosecutor, judge and lawyer, each of whom plays a specific role in the legal-procedural public sphere.

¹⁴⁸ This value is expressed in the preamble to *The Rules of Ethics for Advocates and the Dignity of the Profession (Code of Ethics for Advocates)*.

¹⁴⁹ This observation is confirmed by the wording of par. 10 and 16 *The Code of Ethics for Notaries*. Par. 10 states that "a notary as a person of public trust endowed by the state with certain functions to exercise public authority law enforcement functions, should in their conduct use best efforts to maintain balance between the public character of their actions and the freelance status [of the office]." In accordance with par. 16 "a notary ensuring law enforcement in line with the will and intention of parties is at the same time obliged to maintain loyalty to the state." *The Code of Ethics for Notaries*, annex to resolution No. 19 of The National Notary Council of 12th December 1997, as amended.

¹⁵⁰ Cf. Marcin Pieniążek, "Teoria etyki komorniczej wobec założeń współczesnej etyki działalności gospodarczej," in *Etyka zawodowa komornika sądowego*, ed. Andrzej Marciniak (Sopot: Currenda, 2016), pp. 145–161.

¹⁵¹ Cf. par. 16 item 3 of the Regulation No. 70 of the Prime Minister of 6th October 2011. *W sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz w sprawie zasad etyki korpusu służby cywilnej*, Polish Monitor of 2011, No. 93, item 953.

3.10.4.3. The lawyer and profit

Another essential factor conditioning the axiological dilemmas of lawyers, due to their assignment to public law or private law, is their relation to the basic value of economic activity ethics, namely gain (enrichment).¹⁵² Here I assume this value belongs neither to the fundamental legal values nor the ethical-professional values of a lawyer, and that it simultaneously takes a prominent place in their axiological *universum*. It is conspicuous that gain is a strong value (in Hartmann's terms), tending to subjugate other values also typical of legal ethics. Analysis of corporate sets of values carried out in this respect leads to the conclusion that the ethics of professions related to the sphere of public law clearly resist the desire to enrich judges,¹⁵³ prosecutors,¹⁵⁴ and civil servants.¹⁵⁵ Also, the Polish code of ethics for advocates, although included above in the sphere of private law due to the advocate's traditional role as defender of human rights, has significant links with ethics for court professions.¹⁵⁶ A manifestation of the understanding of the advocate's role as a participant in the "justice system" is, among other things, the ban on

¹⁵² Cf. Adam Smith, *Wealth of Nations* (New York: Cosimo Classics, 2007).

¹⁵³ § 17 section 1. "The judge must avoid personal contact and any other business relations with other entities if they give rise to doubts as to the impartial performance of duties by the judge or jeopardise the prestigious status and undermine confidence in the office of judge." § 18 section 2. "The judge should not perform any financial activities that could give an impression that he takes advantage of his position as a judge." § 19 "The judge must not accept any benefits that could give an impression that they are an attempt to exert influence on him. The judge should also ensure that the members of his family should not accept such benefits." See Resolution 16/2003 of The National Council of the Judiciary of Poland of 19th February 2003. On the Collection of Principles of Judges' Professional Ethics.

¹⁵⁴ § 18 section 1. "The prosecutor must avoid personal contact and any other property relations which could interfere with the office." §19. "The prosecutor must not accept or show that they are interested in accepting any benefits if their granting or the promise of their granting could give an appearance that they are an attempt to exert influence on them in relation to the office they hold." § 21 section 2. "The prosecutor must resign from additional employment, occupation or livelihood if it evinces itself that their continuation would interfere with performing professional duties." See *The Code of Professional Ethics for Prosecutors*, annex to resolution No. 468/2012 of 19th September 2012.

¹⁵⁵ § 4. "Pursuant to the principle of impartiality, a member of the civil service corps particularly must not: 1) accept any benefits from the parties involved in the cases he or she conducts; 2) accept any form of retribution for public appearances if they are related to his or her office; 3) continue additional employment or livelihood if further performance of this work may affect the cases conducted within his professional duties; 4) carry out trainings if this could affect impartiality in the cases conducted." See Regulation No. 70 of the Prime Minister of 6th October 2011. W sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz w sprawie zasad etyki korpusu służby cywilnej, [*On guidelines in the scope of observing principles of civil service and on principles of ethics of the civil service corps*] The Polish Monitor of 2011, No. 93, item 953.

¹⁵⁶ Czesław Jaworski, "Etyka adwokatów," in *Etyka prawnicza. Etyka nauczyciela zawodu prawniczego* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2002), pp. 39–40.

advertising expressed in the abovementioned code of conduct, which indicates the marginal place of gain in the set of corporate values.¹⁵⁷ Nevertheless, the influence of the axiological paradigm of business ethics is the strongest on the legal advisor, which is a legal profession closely linked with the free market. The expression of the influence of business ethics on a young Polish legal adviser's ethics are, i.a., the frequent changes of codes of conduct, which signifies the search for the corporation's identity in the context of dynamic transformations of the market economy.¹⁵⁸ The bailiff's ethics, located in Polish law on the border between public and legal law, are also subject to the influence of values typical of the ethics of economic activity.¹⁵⁹

3.10.5. Types of possible dilemmas

This means that a lawyer's or judge's *universum* of professionally significant values includes first, legal values, second, ethical-professional values, and third, "heavy" values, which practically "encroach" the axiological basis of legal professions. From this perspective, a lawyer or a judge may face four types of dilemmas. The first type includes various ethical-professional values. For example, an advocate may experience a conflict between a client's interests and cooperation with the bar authorities. The second type concerns conflicting legal values – for example, a judge has a dilemma between the freedom of the accused and public security. The third type is related to the confrontation of ethical-professional values and legal values. This dilemma may concern, on one hand, the ethical-professional value of professional client-lawyer confidentiality, and on the other, such legal values as the reliability and efficiency of the functioning of the organs of public authorities in the interests of society as a whole. The fourth dilemma arises from conflicting ethical and legal values, e.g. respect for law versus "heavy" values such as gain, which is fundamental to the ethics of economic activity.

On top of the above dilemmas are stacked those already noted – the mode of existence of values, preferences of substantive or procedural values, the primary or secondary status of values in relation to norms, etc. The complexity

¹⁵⁷ §23. "An advocate is prohibited from using advertising and from seeking clients in a manner inconsistent with the dignity of the profession, or in cooperation with entities seeking clients in violation of law or principles of social coexistence." See *Code of Ethics for Advocates*.

¹⁵⁸ Founding theses as regards professional ethics of legal counsels were adopted in 1983 by the First National Council of Legal Counsels; the rules (codes) of ethics for legal counsels were passed in: 1987, 1995, 1999, 2007 and 2014 (resolution No. 3/2014 of the Extraordinary National Council of Legal Counsels of 22nd November 2014. The code became effective on 1st July 2015).

¹⁵⁹ Cf. Pieniżek, "Teoria etyki komorniczej," pp. 145–161.

of such potential axiological tensions raises the question of whether there is in fact any solution to a lawyer's or judge's dilemmas. This issue will be raised in the next point, in the context of the hierarchical ordering of values.

3.10.6. Cognition of *universum* of professionally significant values. Remarks concerning the axiological consciousness of a lawyer or a judge

It has to be added that the dilemmas indicated concerning the scope of the *universum* of professionally significant values are manifest provided that a lawyer or a judge is able to discern them. In other words, a practical condition of deciding a dilemma is that the lawyer or a judge has a properly developed axiological consciousness. In this context, for example, among the possible anthropological, psychological and other theories within which the issue of human axiological consciousness is discussed, one may focus on the phenomenological one. On the grounds of this theory, Hartmann developed the concept of the field of axiological consciousness, understood as the widest horizon or field within which man is able to distinguish values.¹⁶⁰ The philosopher compares the range of this "extra-empirical sense" to the maximum scope of the ability of the human eye to perceive colours. Hence, it is in the individual field of the axiological consciousness of a lawyer or a judge that the legal, ethical-professional and "foreign" values that he perceives appear; and thus, it is in this field that axiological dilemmas are revealed. However, Hartmann emphasises that "the sense of values" is limited and calls this "the principle of narrowness of axiological consciousness."¹⁶¹ This allows an explanation of the limitations and differentiation of the sets of values of particular legal ethics (e.g. connected with the spheres of public or private-law), and simultaneously gives a handhold by which to grasp the specialised character of the axiological dilemmas facing a lawyer or a judge.

Moreover, according to Hartmann, a "heavy" value present in the field of axiological consciousness entails related values, and at the same time ousts their opposition.¹⁶² This means that the client's interests, impartiality, etc, entails a correlated set of values and blunts the perception of those in opposition. Hence, due to the attraction and detraction processes, values that

¹⁶⁰ Nicolai Hartmann, *Mysł filozoficzna i jej historia. Systematyczna autoprezentacja* (Toruń: Wydawnictwo Comer, 1994), p. 118.

¹⁶¹ Jan Galarowicz, *Fenomenologiczna etyka wartości* (Kraków: Wydawnictwo Naukowe Papieskiej Akademii Teologicznej w Krakowie, 1997), p. 169.

¹⁶² *Ibidem*, p. 169.

are typical of the axiological universe of an advocate, judge or prosecutor may form a representative set, although the formation of this set is related to the experience of dilemma and the act of preference of some values over others. On the other hand, the “principle of the narrowness of axiological consciousness” allows an explanation of why values typical of the ethics of economic activity, especially gain, may practically supersede fundamental legal and ethical-professional values such as the profession’s dignity, justice, legality, etc. The theory outlined makes sense as long as values may be compared: e.g., for phenomenologists all of them are objectively *a priori*. Thus, the view presented makes no sense to supporters of the radical concept of the incommensurability of values.

3.11. Seventh dilemma: can values in a lawyer’s or a judge’s axiological universe be hierarchised? The commensurability and the disparity of values

The seventh and the last of the dilemmas discussed refers to the hierarchisation of professionally significant values, together with a determination of the scope of a lawyer’s or judge’s axiological *universum*. This dilemma is therefore an aspect of the correlated processes of ordering and preferring values within this universe, such processes being both quantitative (scope) as well as qualitative (hierarchy). As an example of the above correlation, we may take the cited opinions of Radbruch, who claimed that fundamental legal values make up a tri-modal set, in which the highest place is taken by justice, followed by, respectively: “legal certainty” and the “purposiveness of the law in serving the public.”¹⁶³ The noted difference between the universes of values that are typical of legal professions in the spheres of public or private law is also manifest in defining their varied scopes, as well as in the divergent results of preferences for values arrived at in “the field of axiological consciousness” of a judge, prosecutor, advocate, etc.

In the context of previous analyses, the novelty is: are values from a lawyer’s or a judge’s axiological universe mutually comparable, namely can they form a consistent hierarchy? It is, therefore, a question about the practical possibility of solving multiple axiological dilemmas revealed in professional legal life. In this respect, I propose a division between the possible stances into “optimistic”

¹⁶³ Gustav Radbruch, “Ustawowe bezprawie i ponadustawowe prawo,” in *Filozofa prawa* (Warszawa: PWN, 2009), pp. 249–250.

and “pessimistic.” In the light of the former, it is possible to solve the conflict of values, which means that the values professionally relevant to a judge, adviser, etc., can be arranged in hierarchical order.

Presumably, the most representative example of such a theory is the Christian version of the law of nature. In the philosophy of law, optimistic views also include R. Dworkin's concept, since in “hard cases” the judge-Hercules is always able to make the only just decision.¹⁶⁴ This group also comprises the phenomenological concept, in which the hierarchy of *a priori* existing values is each time determined in the act of their preference.¹⁶⁵

In the light of pessimist views, however, axiological dilemmas are insoluble due to the immanent incommensurability of values. This group includes, in particular, the abovementioned concept of pluralism of values presented by I. Berlin. Speaking of pessimism – according to S. Wojtczak, the crucial point of Berlin's pluralism is the thesis that “we are fated to make choices, and every choice may entail a harm that cannot be repaired.”¹⁶⁶ At the same time, according to Berlin: “the world that we encounter in ordinary experience,” in which “we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.”¹⁶⁷ Likewise, according to the philosopher there is no common measure, no single standard for a hierarchisation of values that would be universally valid. B. Polanowska-Sygułska points out that, in situations of axiological dilemma, there is no possibility of referring to some supreme criterion that would allow settlement. Thus, Berlin's vision of axiological reality is one in which “one cannot have everything.”¹⁶⁸

In a similar view, Ziemiński writes about constitutional values: “Naturally, it would be most beautiful if the constitution declared totally unrestricted freedom of economic activity, totally unbound use of property, and the equality of citizens, full social security and a wide range of social allowances – but it has to be acknowledged that realisation of these values is collusive, and simultaneously, a declaration of their unreserved realisation would make

¹⁶⁴ Dworkin writes: “I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules. I suppose Hercules is a judge in some representative American jurisdiction” after: Dworkin, *Taking Rights Seriously*, p. 132. Critically about the theory of one right answer, from the perspective of the values incommensurability theory: Wojtczak, *O niewspółmierności*, pp. 418 et seq.

¹⁶⁵ Cf. Adam Węgrzecki, *Scheler* (Warszawa: Wydawnictwo Wiedza Powszechna, 1975), pp. 161–168.

¹⁶⁶ Wojtczak, *O niewspółmierności*, p. 62.

¹⁶⁷ As cited in: <https://plato.stanford.edu/entries/berlin/>, accessed on 12th June 2017.

¹⁶⁸ Polanowska-Sygułska, *Pluralizm wartości*, p. 64.

a pretty naïve demagogy.”¹⁶⁹ Similarly, according to Berlin, full liberty may conflict with total equality, and justice with mercy etc.

3.12. Summary

This short review, leading through seven increasingly detailed dilemmas to the question about a lawyer’s or a judge’s original “anti” or “pro” axiological orientation, by no means extinguishes the abundance of issues that it is possible to discuss. In conclusion, it is worth adding that legal dilemmas concerning values may, in the greatest simplification, have an inner nature (intrapersonal), or external (interpersonal).¹⁷⁰ In the former case, they concern values “visible” in the individual field of a lawyer’s or a judge’s axiological consciousness, in the latter, they encompass values covered by axiological discourse taking place in corporations of advocates, prosecutors, judges, but also society in general. In this vein, Pałecky stresses that “The problem of the occurrence (or non-occurrence) of some common values and their similar hierarchy among various categories of people making, applying, enforcing and/or abiding by the law, namely the problem of the subjective convergence of the axiological basis of law (or the lack of it), causes great inconvenience.”¹⁷¹ It is interesting that a happy resolution of the intrapersonal and interpersonal axiological dilemmas of a judge, advocate or bailiff is of key importance for maintaining their identity as performers of a given professional role.¹⁷²

Naturally, the multi-faceted nature of the dilemmas outlined goes way beyond the dichotomy indicated, and is subject to original characterisation on the basis of each of the noted pro-axiological stands. For instance, Polanowska-Sygulska, in the context of Berlin’s pluralism, points out that there are three levels on which we may experience conflicts of values. First, they may appear within a given morality between different values. An example can be the collision between an advocate’s obligations (e.g., towards the client and the court) which are impossible to meet simultaneously. Second are conflicts within values, often complex in structure, which can make their components, or alternative interpretations, collide.¹⁷³ In the case of legal dilemmas, this may mean, e.g., divergent interpretations of constitutional

¹⁶⁹ Ziemiński, *Wartości konstytucyjne*, p. 58.

¹⁷⁰ Cf. Pietrzykowski, *Etyczne problemy prawa*, p. 32.

¹⁷¹ Pałecky, “Zmiany w aksjologicznych,” p. 22.

¹⁷² Cf. Kaczmarek, *Tożsamość prawnika*.

¹⁷³ Polanowska-Sygulska, *Pluralizm wartości*, p. 65.

values such as justice (commutative, distributive), security (legal, social), etc. But different interpretations of values on the grounds of the dogmatics of particular branches of law (e.g. security may be differently understood in criminal law and labour law may also arise). According to Sygulska, the third level of dilemmas concerns tensions between comprehensive "life models."¹⁷⁴ Therefore, values may be differently ordered by a lawyer or a judge preferring liberal, Christian, and other "life models."

In a similar context, Ziemiński notes: "if different creeds meet and members of society have different intuitions as to their main values, it is easy to have deep conflicts and aggression, despite calling for tolerance and respect in axiological pluralism. In turn, disputes begin over understanding and the admissible limits of tolerance and pluralism, disputes the settlement of which requires meta-axiological assumptions in a class of their own."¹⁷⁵ Certainly, the legal axiological dilemmas outlined come to the fore in all arenas of the process of realising law, starting with its creation,¹⁷⁶ and these dilemmas can be experienced by lawyers acting as legislators (namely the "real lawmakers"¹⁷⁷). However, it may be assumed that the practical dilemmas of judges, advisors, etc. are most likely to occur in the phase of the application of the law. Such dilemmas may result from a collision of "legal values," fundamental to particular branches of a legal system, such as "substantive truth" and "adversarial conduct" in criminal procedure. For that reason, one has to pay attention to potential "inter-branch" dilemmas referring to the interpretation and hierarchisation of values, being the effect of divergent axiological perspectives of particular legal dogmatics (such as "material responsibility," which is understood in one way in Polish civil law and another in labour law¹⁷⁸). Neither, in daily practice, can a lawyer or a judge avoid the abovementioned dilemmas concerning the axiological basis of professional ethics resulting from, i.a., the specificity of the spheres of public and private law as indicated. Hence, it is obvious that lawyers' or judge's dilemmas may concern any part of the *universum* of professionally significant values that is visible in their field of axiological consciousness. The complexity of the above picture surely gives strong arguments to proponents of the concept of the incommensurability of values. Some comfort to the adherents of an ordered

¹⁷⁴ Polanowska-Sygulska, *Pluralizm wartości*, p. 66.

¹⁷⁵ Ziemiński, *Wartości konstytucyjne*, p. 16.

¹⁷⁶ On the role of values in the law-making process see Biernat, *Legislacja*, pp. 22–31.

¹⁷⁷ On the distinction between a real and formal legislator see Michał Błachut, Włodzimierz Gromski, Jacek Kaczor, *Technika prawodawcza* (Warszawa: Wydawnictwo C.H. Beck, 2008), p. 5.

¹⁷⁸ Cf. Sebastian Koczur, *Aksjologia odpowiedzialności materialnej pracownika* (Warszawa: Wydawnictwo C.H. Beck, 2016), p. 24.

and hierarchised *universum* may be brought by codes of professional conduct, petrifying the hierarchies of values typical of particular legal “professions of public trust”.¹⁷⁹ Ethical codes are, therefore, in the interpretation presented, corporative “road signs” indicating the desirable direction for settling axiological dilemmas that touch judges, advocates or prosecutors.¹⁸⁰

¹⁷⁹ Cf. art. 17. Section 1 of the Constitution of the Republic of Poland of 2nd April 1997, Journal of Laws of 1997, No. 78, item 483, as amended.

¹⁸⁰ Cf. Pieniążek, *Etyka sytuacyjna prawnika*, p. 279.

Chapter 4. Lawyers' and Judges' Responsibility Dilemmas

Przemysław Kaczmarek

4.1. Introduction: which and whose responsibility?

In a discussion of moral dilemmas in legal ethics, a variable – the kind of profession, is used. In the case of defence lawyer, it is acknowledged that the key moral dilemmas concern limits of loyalty to the client, conflict of interests and moral assessment of the client's conduct,¹ while in relation to judge the fundamental dilemmas focus on the concept of impartiality, and the potential conscience clause.²

In this part of my work I assume that there are some moral dilemmas common to lawyers and various other legal professions,³ e.g. the problem of responsibility.⁴ Theoretical grounds for this assumption are provided by the findings of Alasdair MacIntyre in his essay "Moral Dilemmas,"⁵ which depicts three situations which (can) create a moral dilemma. The first dilemma covers

¹ Donald Nicolson, "Making Lawyers Moral? Ethical Codes and Moral Character," *Legal Studies* 2005, No. 25, p. 602; Robert F Cochran Jr, Deborah L Rhode, Paul R Tremblay, Thomas L Shaffer, "Symposium: Client Counseling and Moral Responsibility," *Pepperdine Law Review* 2003, vol. 30, pp. 592 et seq.

² Sandra Berns, "Judicial Decision and Moral Responsibility," *Adelaide Law Review* 1991, No. 13/119, pp. 119 et seq.

³ I adopt a narrower meaning of legal profession, which in particular covers: judges, defense lawyers, legal advisors, prosecutors, see: Magdalena Kozłowska, "Teoretyczne aspekty badań nad stereotypami zawodów prawniczych," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace z nauk Politycznych* 1984, vol. 20, pp. 138-139.

⁴ See: Iwona Bogucka, "System odpowiedzialności urzędnika," in *Etyka urzędnicza i etyka służby publicznej*. Vol.13, eds. Roman Hauser, Zbigniew Niewiadomski, Andrzej Wróbel (Warszawa: C.H.Beck, 2016), pp. 175 et seq; Jacek Hołówka, "Dylematy moralne w zawodach prawniczych," in *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, ed. Elżbieta Łojko (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2006).

⁵ Alasdair MacIntyre, "Dylematy moralne," (trans. K. Liszka) in *Etyka i polityka*, scientific ed. Adam Chmielewski (Warszawa: PWN, 2009).

situations in which a person plays various roles in the public sphere between which are in conflict. The second is related to this, as it concerns situations when a person aims at perfection within the performed roles, resulting in stepping up the conflict outlined above. The third is related to the scope of responsibility resting on the role player. The importance of these dilemmas increase in the light of previous situations, i.e. performing various roles in the public sphere.

The grounds of these moral dilemmas may be seen in decisions of an ontological and epistemological nature.⁶ The issue of role conflict reveals the question: Who am I as a lawyer – only a role player or also a citizen? One dimension of this dispute is the question of the autonomy of the law from other social practices, or the independence of professional ethics from public ethics. This discussion also covers the question about the ways of law cognition. For this reason, the indicated entanglement in ontological and epistemological issues will be seen by presenting dilemmas related to a lawyer's responsibility.

In this scope I distinguish three basic dilemmas, which take the following forms:

- 1) Whether a lawyer's responsibility is reduced to acting according to normative settlements on the level of the legal text and the acts of the professional self-governments, or the measure of responsibility takes into account other factors, e.g. public morality and legal culture, when making a decision?
- 2) Whether responsibility is reduced to suffering the consequences for faults, or it may be treated as an obligation to action, the aim of which is not only avoiding negative consequences or creating good results?
- 3) Whether responsibility for acting within a role lies with the lawyer as a person who takes decisions, or maybe on law as a normative system, or, in the case of defence lawyer, on the client whom they represent?

I will try to show the outlined dilemmas in the light of three comparisons: a) positivist vs communicative concepts of law, b) retrospective vs prospective view of role responsibility, c) organisational vs personal responsibility.

Yet before I discuss these dilemmas, I will focus on the concept of responsibility. To that end, I will refer to ethical discourse. Within this there may be seen two basic views of responsibility, as ontological-ethical and transcendental-pragmatic.⁷ The presentation of both views sets tasks of a reconstructive nature. The last chord I strike in this book will be an attempt

⁶ More on the essence of moral dilemmas, see: "Moral Dilemmas," Stanford Encyclopedia of Philosophy, available at <https://plato.stanford.edu/entries/moral-dilemmas/>.

⁷ More in: Anna Nowicka, *Odpowiedzialność: ujęcie deontologiczne. Status pozytywnej odpowiedzialności prospektywnej w filozofii Immanuela Kanta* Dissertation at University of Poznań 2012, available at <https://repozytorium.amu.edu.pl/bitstream/10593/4171/1/Anna%20Nowicka-doktorat.pdf>, accessed on 13th August 2018.

to answer the question of how the two ideas of responsibility may be used in discussion of the above-mentioned moral dilemmas.⁸

4.2. Two positions of responsibility in ethical discourse

4.2.1. Preliminary remarks

The aim of this chapter is to present two positions on responsibility, that is, ontological-ethical and transcendental-pragmatic. The two views concern a description of human identity or assessment of conduct in ethical discourse. Their representativeness is not the only argument for presenting these positions, as their recorded adaptations in ethical-professional discourse are also important.⁹ The fulfilment of the adaptational task also accompanies the following reflections. Because of this, I consider the choice of views to be justified.

4.2.2. Responsibility as an ontological-ethical category

The goal of the following analysis is to present responsibility as an ontological-ethical category. This view has formed in two phases. One started in the first half of the 20th century, when, after the experiences of the First World War, the tendency to present responsibility as ontological became stronger, while in the 1960s, the transformation process consisting of presenting responsibility as ethical became noticeable in ethical discourse. The grounds for this change may be seen on one hand in further social experiences (especially the Second World War), and on the other in meta-theoretical changes. Within the latter, the key role was played first by a linguistic shift and then by an ethical one, which at the beginning of 1980s resulted in the change of the ethical discourse

⁸ See: Neil Levy, "The Responsibility of Lawyers and the Responsibility of Philosophers," *Australian Journal of Legal Philosophy* 2004, No. 29, p. 173.

⁹ Paweł Skuczyński, *Status etyki prawniczej* (Warszawa: LexisNexis, 2010), chapter 3; Tomasz Barankiewicz, *W poszukiwaniu modelu standardów etycznych w administracji publicznej w Polsce* (Lublin: Wydawnictwo Katolickiego Uniwersytetu Lubelskiego, 2013), chapter 2; Przemysław Kaczmarek, "Model prawnika w kontekście ontologizacji odpowiedzialności" in *Z zagadnień teorii i filozofii prawa. Lokalny a uniwersalny charakter interpretacji prawniczej*, ed. Przemysław Kaczmarek (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009).

panorama.¹⁰ This change depended on prioritising ethics over ontology. Below, I will outline the two perspectives of responsibility.

4.2.2.1. *Ontologisation of responsibility*

The ontologisation of responsibility replaces the Cartesian “I think, therefore I am” with “I am, therefore I respond.”¹¹ According to this, an individual is seen in the context of responsibility, which characterises their identity. So responsibility is understood as a constitutive attribute of man. In this sense, we use responsibility not to depict fault or as some character trait that may be acquired, but we ascribe this category ontological status describing the structure of a human being. In this perspective, responsibility is a descriptive category according to which man is responsible, and, as Filek notes, irrespective of whether they live responsibly or not. This means that qualifying someone’s conduct as irresponsible assumes acknowledgement of their responsibility, for only if we recognise that a person as responsible may we charge them with irresponsibility. In this sense, responsibility is not constructed on fault but the opposite. It is because we assume human responsibility that we can classify their acts as irresponsible. In an attempt to characterise responsibility thus understood, let us remark upon Hans Jonas’ distinction between formal and substantive responsibility.¹² When speaking of formal responsibility, we refer to the idea of responsibility for a deed done or omitted. This responsibility is held as a consequence of one’s deeds done, whereas substantive responsibility is presented as a constitutive quality of a subject, which obliges moral responsibility.¹³ Responsibility thus understood therefore obliges us to act.

Presenting above mentioned distinction Jonas point out that formal responsibility assumes ascribing of causality of acts. This responsibility pertains to the idea of responsibility in juridical the sense, i.e. in penal and civil laws. The common denominator of formal responsibility is the presumption that it refers to acts committed and becomes real due to the external intervention of some specific subject.

The substantive view refers to responsibility not regarding the act and its consequences, as an “*ex-post-facto* account,” but by an end, the fulfilment of which demands action. Responsibility thus understood is seen as an positive

¹⁰ Jacek Filek, *Ontologizacja odpowiedzialności. Analityczne i historyczne wprowadzenie w problematykę* (Kraków: Baran i Suszczyński, 1996), p. 15, Jacek Filek, ed., *Filozofia odpowiedzialności XX wieku* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2003), pp. 6 et seq.

¹¹ Filek, *Ontologizacja*, p. 7.

¹² H. Jonas, *Zasada odpowiedzialności. Etyka dla cywilizacji technologicznej*, trans. M. Klimowicz (Kraków: Platan, 1996), pp. 167–172.

¹³ *Ibidem*, p. 16.

qualification. In this sense, responsibility means that the subject is responsible "for the matter," as Jonas puts it. This responsibility is ontological, as it is connected with the human being and is by nature morally binding. The grounds for this obligation may lie in the role performed. Formal responsibility refers to misdeed. Courts, for example, refer to this sense of responsibility, qualifying committed acts with causality. Responsibility thus understood assumes, unlike in the substantive dimension, tribunalisation of responsibility in the external sense, for it indicates an institution which qualifies a deed within formal responsibility. In regard to substantive responsibility, the concept of a tribunal is more elaborate. It is worth stressing that reference to self-responsibility as the inner tribunal does not exclude an external tribunal in the form, for example, of interpretive community.¹⁴

Responsibility in the substantive view is often accused of absolutisation, as it is indicated that in this sense the human being is responsible for everything, including the past.¹⁵ The rebuttal of this charge, on the one hand stresses that one may speak of responsibility for the past, since it determines contemporaneity, while simultaneously the historical dimension of responsibility thus understood is stressed.¹⁶ On the other hand, the charge of absolutisation is rebutted by stressing that it is not maximalist by nature, but only renders the image of man, who by living responds to the events he witnesses.¹⁷ In this sense, responsibility is not understood as duty being a consequence of being human, but as a constitutive quality of this state.

The presented ways of considering universality of ontological understanding of responsibility are not the only ones. I would like to have a closer look at the one which views responsibility in the context of the role that man plays in social practice. One of the first authors who paid attention to that was Georg Picht, who indicates that the tasks we are to fulfil in practice build responsibility for the correct fulfilment of the committed role.¹⁸ The thesis is drawn from the assumption that the concept of responsibility is linked with competence to realise the consigned task.¹⁹ By adopting such a view of responsibility, one may accept that the concept that social role sets the scope of responsibility,

¹⁴ Filek, *Filozofia odpowiedzialności XX wieku*, p. 268.

¹⁵ Georg Picht, "Pojęcie odpowiedzialności," (trans. K. Michalski) in *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*, selection, translation, ed. Jacek Filek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004), pp. 146–147.

¹⁶ Andrea Folkierska, *Sergiusz Hessen – pedagog odpowiedzialny* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2005), pp. 51–61.

¹⁷ Paweł Krupiec, *Problem odpowiedzialności w kontekście współczesnego sporu wokół moralności autonomicznej* (Kraków: Wydawnictwo Naukowe Papieskiej Akademii Teologicznej, 2005), pp. 39–40.

¹⁸ Picht, "Pojęcie odpowiedzialności," p. 151.

¹⁹ *Ibidem*, p. 151.

within which a human is conscious that their action has a real influence on the reality in which they function. A similar view is formulated by Józef Tischner, who designates the scope of responsibility with the term responsibility field.²⁰ This sets the scope within which we may ascribe to a certain individual the possibility of real causality. In a similar way, the concretisation of a “universal” sense of responsibility, by referring to function performed in social practice, is also carried out by Johannes Schwartländer.²¹ It is worth remarking here that Schwartländer refers to the judge persona when writing about the ontologisation of responsibility. He considers judicial activity in the context of duty (first order responsibility) and responsibility (basic responsibility).²² The judge’s obligation boils down to acting according to normative decisions on the level of the legal text, whereas responsibility assumes the inclusion of various other factors, i.e. not only textual.

The presented reflections indicate that it is possible to consider the ontologisation of responsibility in reference to particular professional groups. This view is legitimised by Jonas, by making a distinction between natural and contractual responsibility.²³ The author indicates that natural responsibility is related to being human. The archetype of this is the parent-child relation.²⁴ Contractual responsibility, in turn, is a consequence of social obligation; of accepting a specific task. In this way, responsibility does not arise in consequence of an action, but obliges one to do a deed:

this is circumscribed in the content and time by the particular task; its acceptance has in it the element of choice, from which one may later resign or be released. Also, in its inception at least, if not in its course, there is some degree of mutuality involved.[...] the responsibility draws its binding force from the agreement whose creature it is, and not from the intrinsic validity of the cause.²⁵

Contrary to natural responsibility, the contractual form is founded on the social role played and has strong social foundations.²⁶ According to Jonas,

²⁰ Józef Tischner, “Etyka wartości i nadziei,” in *Wobec wartości* Dietrich von Hildebrand, Jan Andrzej Kłoczkowski, Józef Paściak, Józef Tischner (Poznań: W drodze, 1982), p. 100.

²¹ Johannes Schwartländer, “Odpowiedzialność jako podstawowe pojęcie filozoficzne,” in *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*, selection, translation, ed. Jacek Filek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004), pp. 177–180.

²² Schwartländer, “Odpowiedzialność jako,” p. 182.

²³ Jonas, *Zasada odpowiedzialności*, pp. 174–176.

²⁴ *Ibidem*, pp. 180–182 and 232.

²⁵ *Ibidem*, p. 175.

²⁶ Nowicka, *Odpowiedzialność: ujęcie deontologiczne. Status pozytywnej odpowiedzialności perspektywnej w filozofii Immanuela Kanta*, p. 5.

contractual responsibility as role responsibility may delimit two modes for the person holding such responsibility: leaving room for choice or not.²⁷ The presented division into natural and contractual responsibility leads to the distinction between responsibility “for someone” and “for something,” respectively.²⁸ Accepting responsibility as being responsible “for someone” is borne out in the context of the primary experience of the other person’s face. By adopting this view, it is indicated that one is responsible for “the other.” This responsibility may be ascribed in the sense of referring to natural responsibility distinguished by Jonas. When responsibility is viewed as being responsible “for something,” the reflection focuses on public activity.

The presented view of responsibility is related to the legal discourse by Wilhelm Weischedel.²⁹ For this purpose, he distinguishes legal responsibility as a paradigm of social responsibility.³⁰ In discussing legal responsibility, Weischedel starts by laying out its juridical sense. In analysing it he becomes convinced that responsibility thus understood concentrates on the perpetrator and more specifically on ascribing to him guilt on the grounds of having committed an illegal act.³¹ However, he acknowledges that this is not the only possible view of discussing a legal act in the context of responsibility. Continuing this thought, he indicates that carrying out the presented qualification precedes the thought process, and in this context he discusses the fundamental notion of responsibility, describing it as legal responsibility of the second degree. This responsibility focuses on the act of arriving at a decision. This process contains various stages of the decision-making. One of them concerns the way of answering the question on right course of action. In this scope, the choice is between opening oneself to the analysed case or adopting a closed stance.³² When given a choice, making a decision requires, according to Weischedel, to bring out and engage in the existential understanding of “I”.³³ To denominate this act the author uses the term basic responsibility. For this reason, he assumes that the substantive dimension of formal responsibility may be understood from the perspective of its foundations.

²⁷ Jonas, *Zasada odpowiedzialności*, p. 176.

²⁸ Jan Kielbasa, “Wciąż więcej pytań,” *Znak* 1995, No. 10, p. 30; Picht, “Pojęcie odpowiedzialności,” p. 139.

²⁹ Wilhelm Weischedel, “Istota odpowiedzialności,” in *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*, selection, translation, ed. Jacek Filek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004), p. 85.

³⁰ Weischedel, “Istota odpowiedzialności,” p. 86.

³¹ *Ibidem*, p. 87.

³² *Ibidem*, p. 90.

³³ *Ibidem*, p. 91.

Weischedel thus draws attention to the possibility of looking into legal responsibility as an illustrative category: a) ascribing to the perpetrator a specific qualification (legal responsibility of the first degree) and b) the process of arriving at a decision, in which the formal and substantive dimensions may be distinguished (basic legal responsibility).³⁴ Basic responsibility, contrary to the first degree, concentrates on self-conscience (however this does not preclude the concept of community as an institution before which one is responsible). Responsibility thus understood focuses on the decision-making process, in which the subjective “I” meets “I” as a social being. The above perspective of legal responsibility refers to the individual. In this light, the jurist’s behaviour is not passive but requires activity.

4.2.2.2. *Responsibility as an ethical category*

The presented view of responsibility problematising the question “who is man?” was used by Emmanuel Lévinas and Paul Ricoeur. Both authors, abolishing the difference between ethics and ontology, hark back to the Heideggerian difference between “a being” and “Being.” This statement finds justification in the ontological structure of human identity,³⁵ which assumes that a human is responsible, irrespective of their way and quality of life.³⁶ This means that qualifying someone’s behaviour as irresponsible presupposes responsibility, for only if we acknowledge that someone is responsible can we charge them with irresponsibility.

The presented view of responsibility – referring to the ontological aspect – was developed by Lévinas and Ricoeur. The former’s idea, crucial in this regard, abolishes the assumption of the identity of the same, which aims at creating totality. It also opts for “deconstruction” with the category of “alterity,” which concentrates on what is different, separated, singular.³⁷ Thus, thinking according to the category of “identity” assuming the certainty of action on what is identical – homogeneous, is broken up by the category of difference. Difference is not something external but is inscribed in the structure of something or someone; it differentiates the structure from within.³⁸

³⁴ Ibidem, pp. 110–111.

³⁵ Martin Heidegger, *Bycie i czas*, trans. B. Baran (Warszawa: PWN, 2005), p. 362.

³⁶ Jacek Filek, “Odpowiedzialność jako podstawowe pojęcie filozofii przyszłości,” in *Życie, etyka, imni. Scherza i eseje filozoficzno-etyczne* (Kraków: Wydawnictwo Homini, 2010), pp. 219 et seq.

³⁷ Emmanuel Lévinas, *Całość i nieskończoność. Esej o zewnętrzności*, trans. M. Kowalska (Warszawa: PWN, 1998), pp. 35–36.

³⁸ See: Emmanuel Lévinas, *Inaczej niż być lub ponad istotą*, trans. P. Mrówczyński (Warszawa: Fundacja Aletheia, 2000), p. 202; Paul Ricoeur, “Przedmowa. Zagadnienie bycia sobą,” in *O sobie samym jako innym*, trans. B. Chelstowski (Warszawa: PWN, 2005), pp. 11 et seq.

In the presented view, sensitisation to the situation of choice and to the related responsibility for a decision taken is essential. Responsibility becomes an ethical category, which presents the identity of an individual not as something given, but requiring engagement of the subject. This view means “returning moral responsibility from the finishing line (to which it was exiled) to the starting point (where it is at home).”³⁹ This view of responsibility presents the interpreter as one who, when deciding moral and cognitive dilemmas, is not fully burdened by external factors. This means the problematisation of such a method of reading the underlying ideas of professional codes of ethics which assumes ethics modelled on law, i.e. based on compliance and leaving no room for the individual and the choice they make. Bauman’s words are an apt illustration of this ethical option:

Ethics is thought of after the pattern of Law. As Law does, it strives to define the ‘proper’ and ‘improper’ actions in situations on which it takes a stand. It sets for itself an ideal [...] of churning up exhaustive and unambiguous definitions; such as would provide clear-cut rules for the choice between proper and improper and leave nor ‘grey area’ of ambivalence and multiple interpretations. In other words, it acts on the assumption that in each life-situation one choice can and should be decreed to be good in opposition to numerous bad ones [...].⁴⁰

As concerns the above view of moral responsibility in relations to social roles, Bauman claims that none of the roles we perform can fully determine our real identity: “Apart from the category of ‘performer of a role’, we are truly ‘ourselves,’ and as such we bear full responsibility for our acts.”⁴¹ When revealing the connections between role playing and responsibility, Bauman remarks:

Dissection of responsibility and dispersion of what is left results on the structural plane in what Hannah Arendt poignantly described as the “rule by Nobody” on the individual plane it leaves the actor, as moral subject, speechless and defenceless when faced with the twin powers of the assigned task and the procedural rules.⁴²

According to Bauman, a defence against the presented way of the formation of the role player’s identity may be sought in presenting moral responsibility as an identity trait of the role performer. In this perspective, we deal with exposure of individual responsibility as a quality describing a role player’s manner of

³⁹ Zygmunt Bauman, *Etyka ponowoczesna*, trans. J. Bauman oraz J. Tokarska-Bakir, translation revised by Z. Bauman (Warszawa: PWN, 1996), p. 26.

⁴⁰ *Ibidem*, p. 18.

⁴¹ *Ibidem*, p. 29.

⁴² *Ibidem*, p. 169.

action, which is to prevent disburdening the subject from deciding moral dilemmas. Therefore, the question “Am I acting responsibly?” connotes potential scepticism of discourse rules, and becomes a hallmark of moral responsibility.

This view of responsibility as ontological-ethical seems to have inspired Philip Selznick to construct a theory of moral institutions in legal discourse.⁴³ This advocates the image of reflective-responsive legal-administrative institutions. One of the assumptions of the theory of moral institutions is of responsibility as a category describing the action of people in institution and the functioning of organisations in the public sphere.

4.2.3. Responsibility as a transcendental-pragmatic category

At this point I will present the second of the views mentioned in the introduction, i.e. transcendental-pragmatic. This will be done in two steps. First, I will present its fundamental concept of communication community, then I will bring under closer examination the basic assumptions of the transcendental-pragmatic view of moral responsibility.⁴⁴

4.2.3.1. The concept of communication community

In presenting the tools with which I intend to offer insight into moral responsibility as transcendental-pragmatic, I will refer to Jürgen Habermas.⁴⁵ Key in his project is the distinction between the legitimation crisis and motivation crisis of an individual to act within an institution.⁴⁶ The this distinction illustrates two problems, the first concerning the legitimacy of expert actions on the social plane (legitimation crisis), and the second focuses on the concept of an individual’s self-awareness as a member of society or an institution (the individual’s motivation crisis).

⁴³ Philip Selznick, *The Moral Commonwealth. Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992). See also: Barankiewicz, *W poszukiwaniu modelu standardów etycznych w administracji publicznej w Polsce*, pp. 104–106.

⁴⁴ More on this subject in Kaczmarek, *Tożsamość prawnika*, chapter IV.

⁴⁵ Jürgen Habermas, *Teoria działania komunikacyjnego*, vol. 2. *Przyczynek do krytyki rozumu funkcjonalnego*, trans. A.M. Kaniowski, trans. revised by M.J. Siemek (Warszawa: PWN, 2002).

⁴⁶ Karina Stasiuk, *Krytyka kultury jako krytyka komunikacji. Pomiędzy działaniem komunikacyjnym, dyskursem a kulturą masową* (Wrocław: Uniwersytet Wrocławski, 2003), pp. 76–79; Andrzej M. Kaniowski, “‘Postawa krytyczna’ a etyka. Problem uniwersalizacji,” in *Racjonalność współczesności. Między filozofią a socjologią*, eds. Helena Kozakiewicz, Edmund Mokrzycki, Marek J. Siemek (Warszawa: PWN, 1992), pp. 71 et seq.

In response to these two problems, Habermas outlines the concept of an ideal communication community, whose rules of action are to be recognised and understood by society. This recognition is to be the factor raising trust in law.⁴⁷ For this reason, as the German social philosopher stresses, law should be, at least to some extent, understandable to the addressee. Meeting this ethical postulate, Habermas sees regarding the rules of discourse as the basis of law. The acceptance of this assumption is to allow an individual to secure their rights and pursue them. It may be said that, in the intricacies of legal regulations, to draw attention to the formal dimension of law, and through this gaining its recognisability in the public sphere, is to provide democratisation of law-making and execution.⁴⁸ The expression of the adopted presumption is the formation of the vision of law in which procedures play the role of democracy watchdog, and serve to bring to fruition the common good.⁴⁹ This presumption seems to have a key influence on the emerging image of the legal community as the ideal communication community. In this view, the image of a participant in legal practice is founded on the transcendental concept of a communication community which sets the way of action.

Using the established rules of action therefore becomes the condition of law's recognisability, not only in the social dimension but also institutionally. In this context, the discursive dimension of ethics is a tool by which to prevent the replacement of the power of argument with the argument of power. For this reason, the actions of discourse participants are determined by the requirements of correct communication, which Habermas defines as conditions of the "ideal speech situation," meaning the rules or clearness, truthfulness, honesty, freedom of argument, providing the discourse participants with equality and eliminating all forms of coercion. The concept of discourse thus understood is based on the assumption of communication competence, and the mutual acknowledgement and honesty of its participants. They form a communication community based on legitimate rules of discourse.

4.2.3.2. Responsibility of the communication community

In communication, responsibility is transcendental-pragmatic, and is oriented to justify rules of discourse which are to validate the way of

⁴⁷ Jürgen Habermas, *Posłowie, Faktyczność i obowiązkiwanie. Teoria dyskursu wobec zagadnień prawa i demokratycznego państwa prawnego*, trans. A. Romaniuk, R. Marszałek (Warszawa: Scholar, 2005), p. 575.

⁴⁸ This is pointed out by Marek Czyżewski, see: "Wprowadzenie do wydania polskiego," in Jürgen Habermas, *Strukturalne przeobrażenie sfery publicznej*, trans. W. Lipnik, M. Łukaszewicz (Warszawa: PWN, 2007), p. IX.

⁴⁹ Jürgen Habermas, *Posłowie. Faktyczność i obowiązkiwanie*, p. 587.

understanding and acting in institutional practice.⁵⁰ Such interpretation is proposed by Karl-Otto Apel, when speaking of moral responsibility in relation to the ideal communication community.⁵¹ For Apel, responsibility lies with an individual as a member of the communication community.

In the presented view, responsibility takes the form of the deontic rule of discourse, which provides the participants in an ideal communication community with the readiness to solve conflicts in accordance with a binding, intersubjective model of action. Responsibility thus understood, viewed as a value, is reduced to respecting the discourse rules, for which one becomes co-responsible by being a participant. Hence, moral responsibility has a primarily institutional dimension and it may be interpreted in the context of a claim to legitimise discourse rules within the communication community.⁵²

Moral responsibility is formed on the transcendental idea of the communication community. Bearing this image of responsibility in mind, it is worth mentioning the possible situation of conflict between institutional and personal morality. In this context, Apel states unequivocally that the concept of responsibility “can neither be reduced to individual accountability nor allows for the individuals unburdening themselves from personal responsibility, by, e.g., shifting it onto institutions or social systems.”⁵³

It may be said that Apel, by revealing the conflict between institutional morality and individual feeling, simultaneously proposes intersubjective ethics whose validity may be sought in discourse rules. Hence, the key becomes the notion of the communication community, and institutional morality determines the form of the professional role. Thence, the problem of validating the discourse becomes so crucial.⁵⁴ This claim is grounded on the adopted method represented by the transcendental dimension of pragmatics in the view presented by Apel. Contrary to classical pragmatism, the transcendental view stands firmly by the claim for the legitimisation of a discourse. Transcendentalism as a method relies on searching for grounds, foundations, which are sought in discourse rules, so that what is determined on their basis gains legitimisation. In this way

⁵⁰ Karolina M. Cern, Bartosz Wojciechowski, “O związkach między dyskursem prawnym a moralnym,” *Principia* 2011, vol. LIV–LV.

⁵¹ Karl-Otto Apel, *Diskurs und Verantwortung, Das Problem des Übergangs zur postkonventionellen Moral* (Frankfurt am Main: Suhrkamp Verlag, 1988), pp. 318 et seq.

⁵² Bartosz Wojciechowski, *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych* (Toruń: Wydawnictwo Adam Marszałek, 2009), chapter 3.1; Skuczyński, *Status etyki prawniczej*, chapter 3.6.

⁵³ Karl-Otto Apel, “Uniwersalistyczna etyka odpowiedzialności,” trans. Z. Zwoliński, *Etyka* 1996, No. 29, p. 9.

⁵⁴ Ewa Kobylińska, “Etyka w wieku nauki (o transcendentalno-pragmatycznej etyce dyskursu K.-O. Apela),” *Kultura Współczesna* 1993, No. 1, p. 27.

the requirement that every discourse participant confirm their belonging to a communication community through the fact of accepting its rules and acting according to them acquires the form of a regulatory idea determining the way of functioning within an institution.⁵⁵ Legitimation of this condition on the ethical level determines the image of moral responsibility as transcendental-pragmatic.

On the basis of the above findings, it may be said that moral responsibility as transcendental-pragmatic is founded on the concept of the communication community. Responsibility thus understood is first of all intersubjective. In this view, responsibility is legitimated as a result of consensus within the communication community. The ethicality of responsibility thus understood is defined and complemented by the notion of the communication relation. On these grounds, it may be said that responsibility has an institutional dimension while morality is sociological. Contrary to responsibility as ontological-ethical, this view concentrates on the problem of the self-knowledge of a subject acting within an institution. The exposition of subjective agency in the institutional structure is the hallmark of responsibility as ontological-ethical. Therefore, the subject's identity is presented as being created due to potential tension between what is intersubjective and what is subjective.

4.3. Moral responsibility in legal and judicial ethics: three choices' dilemmas

4.3.1. Preliminary remarks

In this chapter I will present the three moral dilemmas related to the responsibility of the lawyer as a role performer. The first concerns the interpreter's role in the process of the execution of law. It takes the following form: is the lawyer's responsibility reduced to acting in line with normative decisions on the level of the legal text as well as of the professional self-government's decisions, or should the measure of responsibility is to take into account other factors, such as public morality and legal culture when making a decision? The second dilemma is about the choice between the retrospective and prospective view of role responsibility, and takes the following form:

⁵⁵ Andrzej Lorenz, "Röd kontra Apel. Krytyka pragmatyki transcendentalnej z pozycji problematyzmu," in *Przełom komunikacyjny a filozoficzna idea konsensusu*, ed. Beata Sierocka (Wrocław: Oficyna Wydawnicza, 2003), p. 144. See also: Marek Zirk-Sadowski, *Rozumienie ocen w języku prawnym*, Łódź: Uniwersytet Łódzki, 1984), pp. 47–48.

is responsibility reduced to bearing consequences for misdeeds, or is it to be treated as an obligation to act in such a way as to not only avoid negative consequences but create good results? The third dilemma is about the choice between personal and organisational responsibility. The choice may be outlined as: does responsibility for acting in a role lie with a lawyer as a person who makes decisions, or with the law understood as normative system, or in the case of defence lawyer, on the client whom they represent?

4.3.2. First dilemma: responsibility in the positivistic and communicative concept of law

The first of the dilemmas: is the lawyer's responsibility reduced to abiding by the rule of law, or should extra-textual factors also be taken into consideration, may be presented in reference to ethical-professional and legal-philosophical discourse.

In ethical-professional discourse, the outlined dilemma may be presented as follows: do subjective decision or rules lie at the core of an issue that is the subject of moral evaluation?⁵⁶ The former resolution is summarised as “the acts over policies” strategy, the latter as “policies over acts.”⁵⁷ Adopting the first approach, the interpreter tries to take action determined to a great extent by personal morality. However, the choice of this strategy is full of doubts. The concept of the professional role sets certain expectations rationalised by the idea of trust in legal professions. One of the expectations is not relying primarily on one's own feelings in performing professional activities. The situation is different in the case of “policies over acts.” The choice of this approach assumes that the fundamental value is to abide by the rules of the institution of which one is a member. An argument for accepting the second mentioned approach is widely known as the attitude based on the primacy: “policies over acts” leads to greater predictability of social institutions' activities. The price for accepting this is the brushing aside (a more radical thesis) or marginalisation (moderate thesis) of the personal dimension, of the moral aspect based on the assessment of the deed. According to Allan C. Hutchinson, the aim of giving a code of ethics a form that will fully disburden the interpreter may lead to marginalisation of the subjective aspect, which exposes the issues of individual ethical and aesthetic evaluative judgments in professional activity.⁵⁸ The idea of seeking a perspective

⁵⁶ Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law Inc., 2006), pp. 49–50.

⁵⁷ Luban, *Lawyers and Justice. An Ethical Study*, p. 118.

⁵⁸ Hutchinson, *Legal Ethics and Professional Responsibility*, p. 51.

that would include the individual-institutional field is illustrated by Hutchinson in the following statement:

“the challenge is neither to abandon a sense of personal morality and defer all ethical responsibility to the unique role and status of the legal professional nor to adhere to the dictates of one’s personal conscience and ignore the special responsibilities that attach to being a professional. It is a matter of creating a balance between the two so it is possible to bring together the professional and the personal in a legal ethics [...]”⁵⁹

According to Hutchinson, this dilemma refers at its foundations to the dispute about law between the positivist and communicative visions.⁶⁰ Marek Zirk-Sadowski locates an interesting problem in this perspective. The author of “Participation of Lawyers in Culture,” when presenting the dispute about the lawyer’s role in culture, states:

“This dispute manifests mainly in various ways of assessing the lawyer’s responsibility for the content of the applied law. In popular feeling, the quality of law that is made is not good, but in social opinion the expectancy of greater activity of courts prevails [...]. The postulate of changing lawyers’ attitude to law in the process of its application and demands of their clear taking the responsibility for its content ‘collides’ with radical positivism, which orders lawyers to adopt mainly cognitive attitude towards law”⁶¹

From Zirk-Sadowski’s statement one may draw the idea that the source of the discrepancy may be sought in the way of understanding responsibility for law. Andrzej Bator strikes a similar chord as he derives the grounds of the presented choice between visions of the lawyer’s responsibility in the dispute between the positivist and communicative concepts.⁶²

According to Bator, the positivist concept assumes a monological view of lawyers’ participation in creating the image of law. In this view, responsibility for law is built on a factor from beyond the subject, compliance with which

⁵⁹ Ibidem, p. 51.

⁶⁰ Allan C. Hutchinson, “A Loss of Faith: Law, Justice and Legal Ethics, Book Review of Lawyers and Fidelity to Law by W. Bradley Wendel,” *International Journal of Legal Profession* (2014), p. 5. See also: W. Bradley Wendel, *Ethics and Law. An Introduction* (Cambridge: Cambridge University Press, 2014), pp. 62 et seq.

⁶¹ Marek Zirk-Sadowski, “Uczestniczenie prawników w kulturze,” *Państwo i Prawo* 2002, No. 9, p. 6, Marek Zirk-Sadowski, “Wykładnia prawa a wspólnoty sędziów,” in *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, eds. Agnieszka Choduń, Stanisław Czepita (Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2010), p. 78.

⁶² Andrzej Bator, “Wspólnota kulturowa jako element integracji prawa,” in *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*, ed. Adam Sulikowski (Wrocław: Uniwersytet Wrocławski, 2006), p. 14.

gives the interpreter the feeling of confidence in their action. This external authority disburdens the lawyer from settling moral and cognitive dilemmas, for participation in a community is about following and abiding by the existing rules offered by external authority.

In turn, to the communicative concept of law the metaphor of law as conversation is closer. In this light, the lawyer's moral responsibility is founded on the concept of the ideal communication community, within which there is rationality in legal discourse. In the presumed picture, we leave the monologic function of language, whose role is to indicate the way of action within an institution for the sake of the dialogic perspective, for the notion of the ideal communication community reveals the image of law as a space in which a discourse is held. Therefore, the communicative image of the lawyer's participation in culture assumes a departure from monological thinking for the sake of the dialogical, in which participation means dialogue, conversation. In this view, legal culture takes on both the regulative and symbolic functions. For, on one hand, it sets via the existing institutional structure the mode of participation in the institutionalised practice. It does it by defining discourse rules, and on the other it stresses the moment law is made with the use of discourse rules. A jurist has a double role in this view, as both recipient of and kind of creator of law. When making law, the jurist is equipped with a kind of safety net providing a sense of confidence of action. This role is served by the concept of communication community, built on the universalist statements, which illustrate the concept of discourse rules creating criteria of action correctness within legal discourse.

The difference between positivist and non-positivist (communicative) visions may also be presented in the light of other three questions:⁶³

- 1) What is the source of law? In the positivist interpretation, the answer is legal rules in legal texts; in the non-positivist, it encompasses both textual and extra-textual rules,
- 2) How can legal norms lose their binding power? In the positivist interpretation, this occurs by being excluded by other legal norms or by the use of conflictual rules; from the non-positivist perspective, a legal norm may also lose its binding character as a result of conflict with extra-textual rules,
- 3) What are the limits of duty of submission to law? From the positivist perspective, the form of submission is absolute and unconditioned, while in the non-positivist view dissent is possible by creating room for defiance, which may be social, institutional or individual.

⁶³ Lech Morawski, *Podstawy filozofii prawa* (Toruń: Dom Organizatora, 2014), pp. 311 et seq.

It is also worth remarking here that treating law as a homogenous normative system was undermined as early as by Roman lawyers.⁶⁴ One of the legal maxims of that time, which highlighted the complexity of the concept of law, and is still cited, was *summum ius summa iniuria*.⁶⁵ The idea that law may turn into lawlessness assumes a discrepancy between the strict right of law (*stricti iuris*) and the sense of justice (*ius aequitas*). Acknowledging *stricti iuris* as *summa iniuria* is possible only if we assume that law is not a homogeneous normative system.

The division within the concept of law for positive law and equity law resulted in the dynamic development of praetorian law. The return to the discussion of the concept of law occurred at the beginning of the 20th century, and may be connected with the discrepancy, increasing in 19th century codifications, between *stricti iuris* and *ius aequitas*. This inconsistency was a plank in representatives of the German Historical School's construct of the "stratification of law," whose goal was to terminate this distinction and in consequence the conflict between positive and equity law.

According to this stratification, the concept law comprises three layers:

a) social law (custom law), b) state law (political law), and c) lawyers' law (now called legal culture).⁶⁶

Custom law, as the original layer of law, is society-made. In this sense, when speaking of law, we mean the moral norms preserved in a given society, for example respect for human dignity. The consequence of accepting public morality as a factor influencing legal decisions is the recognisability of law understood from the perspective of a citizen.⁶⁷ It is changed in the second lawyer of law, described as state law (political law). In this sense, law is a product of a legislating activity. Here, law is understood as a legal text. This factor is an important point of reference in a lawyer's interpretational activity. The third and final stratum is lawyers' law. Its origin is a derivative of the formation of the legal profession as a professional group. Within lawyers' law there are two spheres of activity. The first directly concerns the interpretation of textual law, and the second is related to working out a way of operation within the community

⁶⁴ Franciszek Longschamps de Bèrier, *Nadużycie prawa w świetle rzymskiego prawa prywatnego* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2004), pp. 8–9.

⁶⁵ See: Marcin Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa* (Warszawa: Scholar, 2007).

⁶⁶ Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, Vierte Auflage, (Berlin: Duncker Humbold, 1989), pp. 8 et seq. In Polish literature see: Kazimierz Opalek, Jerzy Wróblewski, "Niemiecka szkoła historyczna w teorii prawa," *Przegląd Nauk Historycznych i Społecznych* 1954, vol. V, pp. 279 et seq.; Artur Kozak, "Kryzys podstawności prawa," in *System prawny a porządek prawny*, eds. Olgierd Bogucki, Stanisław Czepita (Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2008).

⁶⁷ This is pointed out by Artur Kozak, "Kryzys podstawności prawa," p. 37.

of lawyers.⁶⁸ In the above sense, the scope of legal culture determines the harmonisation of a legal text's interpretational techniques, but also the conviction about the necessity to work out institutional morality or provide a fundamental axiological framework.

On one hand, legal culture in the above sense sets the way of operation within an institution. Thanks to this, even if it does not eliminate incorrect practices, then by acknowledging and describing them it may cause them to be regarded as deviations from accepted models. On the other hand, legal culture cognitively and axiologically disburdens the interpreter by providing them with prompts and examples of correct action.

4.3.3. Second dilemma: retrospective and prospective responsibility of role

The play *Ubu and the Truth Commission* by Jane Taylor and Wiliam Kentridge, in coproduction with the Handsping Puppet Company,⁶⁹ discusses the ills of the judiciary in the public sphere. The protagonist is Ubu – the greedy king from Alfred Jarry's play (*Ubu Roi ou les Polonais*) – transferred to the reality of the Republic of South Africa of the transformation period. Ubu King (functioning in literature as a symbol of abuse of power) is, in the mentioned play, a representative of Afrikaners, who have just lost power. Ubu, as a police officer, appears before Truth and Reconciliation Commission. To avoid punishment, he first considers destroying documents and photos that convict him, then of claiming post-traumatic stress disorder or burdening someone else with his guilt. Eventually, Ubu, justifies his actions before the Commission by the necessity to fulfil duties, saying in his defence: "These things, they were done by those above me, those below me, those beside me. I too have been betrayed! I knew nothing."⁷⁰ In the last scene of the play, Ubu (with the other characters in the play) swims away towards the sunset. Ubu symbolizes both South African police officers seeking amnesty and representatives of the machinery of the regime. Various strata of the receding apparatus and the attitude to them by the Truth and Reconciliation Commission are illustrated in the play by the figure of a three-headed hound called Brutus:

⁶⁸ Opalek, Wróblewski, "Niemiecka szkoła historyczna," p. 289.

⁶⁹ Ewa Dynarowicz, "Komisja Prawdy i Pojednania w kulturowym repertuarze nowej RPA: Południowoafrykański dramat po apartheidzie (1996–2002)," in *Kalejdoskop Afrykański. Problematyka tożsamości w literaturach Afryki przełomu XX-XXI wieku*, ed. Renata Diaz-Szmidt, Małgorzata Szupejko, (Warszawa: Oficyna Wydawnicza ASPRA-JR, 2012), pp. 210 et seq.

⁷⁰ Quote from Dynarowicz, *Komisja Prawdy i Pojednania*, p. 211, Eng. version from Helen Gilbert, *Postcolonial Plays: An Anthology* (New York: Routledge, 2013), p. 45.

JUDGE: in the matter of the state versus Brutus, Brutus, and Brutus: it has been determined that there is unequal culpability, and we thus hand down, separately, three distinct sentences. With regard to the first case: a head of political affairs cannot always foresee how his vision will be implemented. We thus exonerate you, and retire you with full pension. With regard to the head of the military: there is no evidence to link you directly to these barbarous acts. Nonetheless, an example must be made of you, or who knows where we'll end up. You are thus sentenced to thirty years in the leadership of the new state army. Finally, to the dog who allowed himself to become the agent of these ghastly deeds: you have been identified by the families of victims; you have left traces of your activities everywhere. We thus sentence you to two hundred and twelve years imprisonment.⁷¹

The play is an example of criticism of Truth and Reconciliation Commission activities. The fundamental charge concerns the manner of meting out justice to those responsible for apartheid. Within legal discourse, a strong critical voice about the Commission's activity is heard from Scott Veitch.⁷² According to him, the image of law as a system that creates responsibility is false. The Scottish philosopher of law says that what contributes to this, among other things, is the legal discourse forming a mode of action within an institution that blurs the responsibility for a decision.⁷³ In a similar vein, though more balanced, is the

⁷¹ Quote from Ewa Dynarowicz, *Komisja Prawdy i Pojednania*, p. 211, Eng. version from Helen Gilbert, *Postcolonial Plays: An Anthology*, p. 44.

⁷² Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge: Cavendish, 2007).

⁷³ *Ibidem*, pp. 29–34.

view of Peter Cane, according to whom the causes of the above mechanism may be traced in legal discourse which concentrates on retrospectively understood role responsibility.⁷⁴ To bring the problem into sharper focus, I will discuss how role responsibility is problematised in legal discourse.

One of the first authors to introduce the construct of role responsibility to legal discourse was Herbert Hart.⁷⁵ His book *Punishment and Responsibility* gives five types of responsibility: role responsibility, causal responsibility, liability responsibility, moral responsibility, and capacity responsibility. It is worth remarking that, at the turn of the 1960s and 70s, many works were devoted to responsibility in law, among others by Lon Luvois Fuller and Alfa Ross. Yet it is in Hart's work that the most interesting construct of role responsibility is presented. The theses established by the Oxford philosopher of law are used by Mark Bovens in *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations*. Bovens slightly modifies Hart's proposal, by distinguishing five kinds of responsibility.⁷⁶

The first kind is responsibility as cause, thus it is based on the cause-effect relation and its important element is guilt. The second perspective shows normative responsibility, which assumes accountability for a certain action of lack of it. The third view correlates with the second. Holding someone responsible in a legal, moral or political sense assumes the causative power of an individual. This view shows responsibility as capacity. The fourth view presents responsibility as a task. This proposal suits Hart's construct of role responsibility. The last distinguished view is responsibility as a virtue, a character trait. In this sense, we speak of responsibility as a disposition for a certain action. This view expresses a positive judgment of a person who acts. According to Bovens, perceiving responsibility as a virtue is completed by task responsibility. Since task responsibility (close in meaning to role responsibility) focuses on the function performed in the public sphere, responsibility as virtue stresses the significance of a personal disposition for a course of action within a performed role.

Also vital for presenting the importance of role responsibility are the findings of Peter Cane, laid out in *Responsibility in Law and Morality*.⁷⁷ This Australian philosopher of law, who problematised role responsibility, draws attention to

⁷⁴ Peter Cane, *Responsibility in Law and Morality* (Oxford-Portland Oregon: Hart Publishing, 2002), p. 30.

⁷⁵ Herbert L.A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968).

⁷⁶ Mark Bovens, *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations* (Cambridge: Cambridge University Press, 1998), pp. 24–25.

⁷⁷ Cane, *Responsibility in Law and Morality*, p. 30.

its two assigned meanings. In order to do that, he distinguished retrospective and prospective responsibility. The former, past-oriented, is connected with sanction, the latter emphasises moral duty that is related to being responsible for somebody or something.⁷⁸ Retrospective responsibility is negative by nature, whereas the prospective form is positive and future-oriented. Prospective stems from imposing duties, and retrospective from breaching them.⁷⁹ Prospective responsibility anticipates action, thus it establishes taking responsibility for performing a certain task in the future. Retrospective responsibility above all concerns past actions and is based on a sense of guilt. It may be attributed by division into equity-based responsibility, for a bad deed, and tort responsibility, for a deed breaching a norm. Cane uses also the term “historic” as a synonym for “retrospective,” whereas the prospective view of responsibility is associated with duty based on a role. The obligation may follow from duties imposed by a legislator or result from one’s social role. Cane, showing the difference between retrospective and prospective role responsibility, indicates the possibility of evaluating the behaviour of a judge who justifies a sentence negligently. Role responsibility in the retrospective view operates with such concepts as fault, ascribing responsibility, and norm that authorises calling someone to account. Role responsibility in the prospective view gives us conceptual categories that concern value judgments, for instance ethical and aesthetic judgments. It is by applying such concepts as taste, tact we may qualify a judge’s behaviour in categories that elude retrospective responsibility, which is deeply rooted in the grammar of analytical philosophy.

According to Cane, legal discourse is dominated by retrospective responsibility. This researcher holds it as a mistake,⁸⁰ and claims there should be a place for both retrospective and prospective responsibility. On one hand, legal liability looks backwards and assumes (potentially) holding someone responsible for a deed, while on the other hand we may understand responsibility as an idea which sets obligations and duties for the future. Arguing for such a solution, Cane thinks that linking responsibility with sanction only: “tends to conceal the importance, both within the law and elsewhere, of what I shall call ‘prospective responsibility’”⁸¹

⁷⁸ Filek, *Ontologizacja*.

⁷⁹ Christopher Kutz, *Complicity. Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), pp. 49–53.

⁸⁰ Cane, *Responsibility in Law and Morality*, p. 31. A similar diagnosis in Polish literature is given by Michał Peno, see: “Prawna odpowiedzialność z tytułu pełnionej roli społecznej,” *Acta Universitatis Lodzianis. Folia Iuridica* 2015, 74, p. 42.

⁸¹ Cane, *Responsibility in Law and Morality*, p. 30.

Cane, when drawing these conclusions, shows role responsibility in three aspects. The first is protective responsibility, founded on the retrospective view. The following two, productive and preventive responsibilities, are covered by the prospective view.⁸² Productive responsibility aims at producing good outcomes, whereas the goal of preventive responsibility is to avoid bad outcomes. Cane explains the difference between protective and preventive responsibilities by indicating that harming someone and being responsible for that differs from not taking action to prevent their harm.⁸³

According to Cane, responsibility that requires from those taking it to undertake positive actions lays the foundations of the responsibility for nonfeasance.⁸⁴ In the presented viewpoint, role responsibility is oriented to delivering good outcomes (the productive aspect) as well as avoiding bad outcomes (the preventive aspect) and also being held responsible for harm done (the protective aspect).⁸⁵ Such a concept of role responsibility assumes the formation of the role holder's identity based on recognizing that, by acting, they are accountable for this obligation.

The indicated difference between retrospective and prospective responsibilities reveals a different image of the role of the lawyer. The retrospective view of role responsibility is connected with the concept of fault. Evaluation of a jurist's work is done post factum, and is based on compliance with binding legal regulations. Such a view in the interesting way shows the prospective view of role responsibility. The view connecting responsibility with obligation resting on role focuses on society's expectations. Hence, we can understand role responsibility as a form of answering an obligation, formulated in the public sphere for lawyers. The prospective view of responsibility not only allows jurists' actions to be shown as ethically and politically engaged conduct, but also reveals the significance of the personal responsibility of the role's performer for an action which influences the image of the institution in public sphere.

The importance of the above dilemma may be measured by how a person's responsibility in a role is understood. The more the scope of responsibility is determined by an external factors, the closer it is to the retrospective view. Responsibility is measured by adaptation to binding law. But if we understand responsibility as a task to be fulfilled by a role performer, moral responsibility is no longer something illusory. In this light, the actor is no longer an impersonal

⁸² Ibidem, pp. 31 et seq.

⁸³ Ibidem, pp. 31–32.

⁸⁴ Ibidem, p. 32.

⁸⁵ Classification according to Peter Cane, see: *Responsibility in Law and Morality*, pp. 31–32.

performer in a given institution. Instead, they become responsible for the institution's image, explaining how law works and their own decisions to external observers. Hence, the player's responsibility increases since they cannot hide behind a safe point of reference but becomes a user of the institutional structure, a person from whom decision-making is expected.

4.3.4. Third dilemma: organisational and personal responsibility

The third dilemma of choice can be formulated in a following way: when speaking of moral responsibility, shall we put the stress on the person who makes a decision or on the institution within which the lawyer acts? The choice of organisational responsibility assumes that responsibility for a decision lies with institution of which one is a member, whereas acceptance of personal responsibility is reduced to acknowledging that the role player is, by making a decision, responsible for it.

The first solution – recommended by supporters of the standard view – opts for organisational responsibility. Bradley Wendel, a proponent of this view, presents an inclusionary solution assuming the adaptation of personal morality to the requirements of the role and its calls.⁸⁶ Thus, one may diminish (weaker thesis) or preclude (more radical thesis) the conflict between personal and professional morality.

Theoretical grounds for the application of this inclusionary mechanism are provided by the concept of “exclusionary reasons” by Joseph Raz. In *Practical Reason and Norms*⁸⁷ he distinguishes between first-order and second-order reasons for action. The former are reasons to carry out some act, while the latter are to act for a reason. They may take the form of a positive argument (reason to act on the most important first-order reason) or negative (reason not to act for some reason). The latter is called by Raz the exclusionary. Exclusionary reason is therefore a reason not to act on a certain reason. The consequence of using the analysed concept is the elevation of some reasons over others. According to Raz, the application of exclusionary reasons is

⁸⁶ Alice Wolley, W. Bradley Wendel, “Legal Ethics and Moral Character,” *The Georgetown Journal of Legal Ethics* 20/2010, No. 38, pp. 2, 36–37. More on this subject see: Kaczmarek, *Tożsamość prawnika*, chapter 2.

⁸⁷ Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990), Joseph Raz, *Autorytet prawa*, trans. P. Maciejko, intro. J. Kochanowski, N.E. Simmonds (Warszawa: Dom Wydawniczy ABC, 2000), pp. 32–36.

typical for professional roles.⁸⁸ Therefore, in the proposed view performing a role is an exclusionary reason for acting on the grounds of institutional morality.

The undeniable advantage of the standard stance is that it disburdens the lawyer when undertaking cases. The lawyer, when performing a role, must often carry out actions with which they may not agree as a citizen. In this situation, the argument of the “performed role” allows the lawyer to distance themselves from the action. The strength of this argument rises in a situation when a lawyer engages in actions which they personally either do not support or regard as worthy. The claim “this is not my action but that of the role which I play” allows the lawyer to abrogate responsibility for their professional activities. Maintaining distance to the accused or the victim may be treated as a means allowing for better confrontation with a reality concealing stories full of pain, suffering and evil done.

The latter of the mentioned solutions is supported by proponents of the moralist view, including among others Allan C. Hutchinson and David Luban.⁸⁹ Hutchinson, in *Legal Ethics and Professional Responsibility* draws attention to the costs of choosing the standard solution from the perspective of the private life of the role player. According to the Canadian researcher, the profession of lawyer is one that has a strong impact on daily life, among other things because of the great amount of time that this profession requires. Hutchinson claims that if we accept that the role player in their professional role perpetrated acts that they by no means accept as citizens, this may poison the lawyer’s private life.⁹⁰

According to Luban, however, the inclusionary solution offers an institutional excuse for shunning responsibility, for it assumes that moral responsibility for actions taken lies with the role and not the person who acts.⁹¹ Luban is also critical of the construct of exclusionary reasons, the grounds for this criticism being that they leave no room for correction, since the conflict between first-order and second-order reasons is excluded, hence it is impossible to question institutional decisions. There is no room for legal disobedience to law.⁹² Luban claims that, if we agree to the solution in which the role player cannot think in

⁸⁸ Raz, *Practical Reason and Norms*, p. 144. See also: Paweł Skuczyński, “Problem zakresu odpowiedzialności moralnej profesjonalistów i jego zastosowania w etyce prawniczej,” *Acta Universitatis Lodzianis. Folia Iuridica* 74, 2015, pp. 35–37.

⁸⁹ Luban, *Lawyers and Justice. An Ethical Study*, passim; Hutchinson, *Legal Ethics and Professional Responsibility*, pp. 53 et seq.

⁹⁰ Hutchinson, *Legal Ethics and Professional Responsibility*, p. 55.

⁹¹ Luban, *Lawyers and Justice. An Ethical Study*, p. 116.

⁹² J. Zajadło, “Nieposłuszeństwo sędziowskie,” *Państwo i Prawo* 2016, No. 1, p. 19.

moral categories about the acts they carry out, it is unlikely that they will think in these categories about the rules on the basis of which they act either.⁹³

The described mode of action is particularly dangerous in legal institutions and professional self-governments, since it makes responsibility hard to localise. The problem was analysed in an interesting work by Luban, Alan Strudler and David Wasserman, entitled *Moral Responsibility in the Age of Bureaucracy*.⁹⁴ According to the authors, there are four attitudes to the dilemma of the organisational vs personal responsibility of the role player.⁹⁵ The first assumes that moral responsibility can hardly be ascribed to the lawyer's action within an institution, whether in the organisational or personal perspective. The second approach claims that moral responsibility lies with the institution, and the third that it is only a matter for the individual playing a role. The fourth way recommended by the authors of *Moral Responsibility in the Age of Bureaucracy* assumes an extension of personal responsibility so that moral responsibility relies also on the institution. In that way, opposition to organisational-personal responsibility is resolved by the inclusion of both dimensions.

The starting point for Luban, Strudler and Wasserman is the statement that people acting in organisations and professional groups often lack the conscience in the role they play, with a sense of moral responsibility for their actions and their results being absent.⁹⁶ According to the authors, there are two reasons for that, fragmentation of knowledge and the choice of organisational responsibility.⁹⁷ The text criticises the solution oriented towards organisational responsibility and the approach recommending uniquely personal responsibility. However, the main axis of the criticism concerns the attitude which favours organisational responsibility. The grounds of this critique are the possibility of speaking about an institution as a moral subject, with which moral responsibility lies. Can an institution feel shame or guilt, ask the authors of *Moral Responsibility in the Age of Bureaucracy*.⁹⁸ According to Luban, Strudler and Wasserman, there is a fallacy in presenting an institution as a moral subject because, when thinking about an institution, one involuntarily directs attention to the people who work there. To justify this view, the researchers appeal to the analogy of a wall; just as the wall is built of bricks, organisations, or professional groups, are made of people that perform certain activities within them. Hence, it is impossible to speak of

⁹³ Luban, *Lawyers and Justice. An Ethical Study*, p. 121.

⁹⁴ David Luban, Alan Strudler, David Wasserman, "Moral Responsibility in the Age of Bureaucracy," *Michigan Law Review* 1992, vol. 90.

⁹⁵ *Ibidem*, p. 2365.

⁹⁶ *Ibidem*, p. 2355.

⁹⁷ *Ibidem*, p. 2356.

⁹⁸ *Ibidem*, p. 2369.

organisational responsibility without noticing the individuals. For this reason, according to the authors, it is also necessary to take into account the personal dimension of moral responsibility,⁹⁹ and to this end they arrive at the notion of extending personal responsibility. This includes five duties:¹⁰⁰

- 1) Investigation. This assumes that an individual is responsible for their gaining knowledge on the potential and real consequences of their decisions, and how they will be used by other members of the practice.
- 2) Communication. This assumes the possibility to hold morally accountable a person who has “uncomfortable knowledge” about the functioning of the institution, for not passing it to other people in the organisation.
- 3) Protection. This assumes that superiors are obliged to protect a person who informs about wrongdoings within the institution against the consequences of denouncement and the further investigation of institutional practices.
- 4) Prevention. This assumes that people in executive positions are morally obliged to prevent evil by establishing institutions that will help avoid the above-mentioned problems.
- 5) Precaution. This assumes that a person is morally obliged to create individual mechanisms that will prevent their total yielding to the role.

4.3.5. The problem of escaping responsibility in the three moral dilemmas

What is common to the discussion of the three above moral dilemmas is the exposition of costs connected with the choice of responsibility in the 1) positivist, 2) retrospective, and 3) organisational perspectives. When presenting these costs, it is pointed out that a lawyer is morally responsible for action taken, and that the choice of responsibility in the respective views gives that lawyer refuge, disburdening them of responsibility. To justify this stance, one may refer to findings of Scott Veitch, according to whom the reason why responsibility vanishes is among other things its location in complex organisational structures. This results in transferring responsibility from an individual to a legal provision. In this way, the image that the legal system purportedly bears responsibility for a decision is created.¹⁰¹ Veitch warns that this practice leads to law contributing to “organised irresponsibility,” i.e. a situation resulting in dispersion of responsibility, ascribing responsibility too much impersonality.¹⁰² According

⁹⁹ Ibidem, pp. 2370 et seq.

¹⁰⁰ Ibidem, pp. 2383 et seq.

¹⁰¹ Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, pp. 85–95.

¹⁰² Ibidem, p. 143.

to the Scottish philosopher, this mechanism is an “institutional excuse,” by which responsibility for decisions taken rests with impersonal organisational structures or a group of people. In the same vein, Zenon Bańkowski sees in the choice of legal positivism the causes of the neutralisation of moral responsibility. To Bańkowski, there is an example of “escape from responsibility” when one gives primacy to the rule of conduct according to which “if you observe the rules, then at least you do not bear responsibility and have nothing to worry about.”¹⁰³ The price for this way of building the certainty of action is the loss of: “oneself and the subject matter of the ruling on behalf of the law [...] rules are self-realising.”¹⁰⁴ As a result of this process: “the judge turns into a machine executing general law, programmed to apply law in every case in which there are conditions to apply it.”¹⁰⁵

A more balanced opinion in the discussion of a lawyer's responsibility in the perspective of choice between positivism and communicative legal views is formed by Zirk-Sadowski: “The postulate of changing lawyers' attitude to law in the process of its application and demands of their clear taking the responsibility for its content ‘collides’ with radical positivism, which orders lawyers to adopt mainly cognitive attitude towards law.”¹⁰⁶ This way of action rationalisation at least theoretically disburdens the jurist from settling moral (or cognitive) dilemmas. Nevertheless, as Zirk-Sadowski aptly remarks on the example of a judge's role: “Only the rejection of positivist textualism and taking side of judicial activism changes the cognitive situation of a judge and provides them with a possibility of bearing ethical responsibility for the content of law.”¹⁰⁷ Thence, refuge from responsibility is presented via two mechanisms. The first is retreat into the collective, the second into impersonal responsibility. To examine these two mechanisms in greater detail, let us refer to Hannah Arendt's diagnoses.¹⁰⁸

The first one is characterised by the escape into collective responsibility in which the individual dimension disperses. The second mechanism is to

¹⁰³ Zenon Bańkowski, “W przestrzeni sądenia: sędzia i niepokój spotkania,” trans. M. Pichlak, in *Z zagadnień teorii i filozofii prawa. Lokalny a uniwersalny charakter interpretacji prawniczej*, ed. Przemysław Kaczmarek (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009), p. 171.

¹⁰⁴ Bańkowski, “W przestrzeni sądenia: sędzia i niepokój spotkania,” p. 173.

¹⁰⁵ *Ibidem*, p. 173.

¹⁰⁶ Zirk-Sadowski, *Uczestniczenie prawników w kulturze*, p. 6.

¹⁰⁷ Marek Zirk-Sadowski in Paweł Skuczyński, Marek Zirk-Sadowski, “Dwa wymiary etyki zawodowej sędziów,” *Krajowa Rada Sądownictwa* 2012, No. 1, p. 15.

¹⁰⁸ Both mechanisms are presented by Hannah Arendt in: *Korzenie totalitaryzmu*, trans. part I and III D. Grinberg, part II M. Szawiel (Warszawa: Wydawnictwo Akademickie i Profesjonalne, 2008), pp. 561–565 and 568–569. In legal discourse see: David Luban, “Arendt on the Crime of Crimes,” *Ratio Juris* 2015, vol. 28, No. 3, pp. 307 et seq; Luban, *Lawyers and Justice. An Ethical Study*, p. 121.

transfer responsibility to an impersonal institutional structure. H. Arendt, when showing the mechanism of responsibility dispersion, refers to the way in which the administrative apparatus of the Third Reich was formed. It was designed so that the competences of particular officials overlapped. This was to create a self-propelling mechanism of constant competition between individuals to solicit supervisor's recognition, while in the social aspect it was intended to create a situation in which a person from outside would not know who was responsible for certain actions. A classic example of this mechanism, according to Arendt, was the way of organising academic antisemitism. In 1933, Institute for Research of the Jewish Question opened in Munich, which subsequently transformed into the Institute for the History of the New Germany, although this scope, i.e. modern history of Germany, was covered by traditional academic centres. Moreover, in 1940, another institute for the study of the Jewish Question was opened in Frankfurt, and a couple of months later yet another in Berlin under Eichmann. To Arendt, the aim of this mechanism was to escape into collective responsibility in which the individual dimension becomes dispersed. This effect is attained by the marginalisation or exclusion of the sense of prospective responsibility.

The second mechanism of shunning responsibility is based on creating a system in which decisions are made by impersonal structures. This mechanism assumes that individual responsibility is superseded by the organisational form, which exempts a person from settling any dilemmas. The goal of socialisation thus understood is to escape into a world where one is responsible for nothing. For if there is no room for discretion in the action one takes, then the task of the person "acting" in the role of expert is only to fall into line with the binding rule.¹⁰⁹ "I am not accountable for my actions, my actions are not mine but of the institution within which I act." This reasoning presupposes that moral responsibility rests on impersonal institution.

Bauman's findings also correspond with the diagnosis outlined above. According to the Polish sociologist, the above mechanisms of escape from responsibility lead to a situation in which:

Floated responsibility belongs to no one in particular, as everybody's contributions to the final effect is too minute or partial to be sensibly ascribed a causal function, let alone the role of the decisive cause. Dissection of responsibility and dispersion of what is left results on the structural plane in what Hannah Arendt poignantly described as "rule by Nobody;" on the individual plane it leaves the actor, as moral subject, speechless and

¹⁰⁹ Arendt, *Korzenie totalitaryzmu*, chapter VIII, especially pp. 304–309.

defenseless when faced with the twin powers of the assigned task and the procedural rules.¹¹⁰

4.4. Moral responsibility as “a vaccine” for escaping responsibility in general?

In the ontological-ethical perspective, responsibility is presented as a choice of attitude characterised by taking responsibility or abrogating it. Escape from responsibility is connected with immersion in impersonal structures resulting in: 1) exemption of an individual from responsibility for their decisions or 2) rationalisation of a deed as one on which one had no influence. The remark on responsibility as a descriptive category becomes more radical when the claim for not giving in to the dictate of public opinion is taken into account, for the institutional structure will be located in the context of social role. From this perspective, every attempt to disperse responsibility is also a confirmation of its crucial significance, which assumes that the role performer is responsible.

Similar diagnoses are formed when presenting responsibility as transcendental-pragmatic. According to Apel moral responsibility should be “a concept that neither can be reduced to individual accountability nor allows for the individuals unburdening themselves from personal responsibility, by, e.g., shifting it into institutions or social systems.”¹¹¹ Apel, bearing in mind the above mechanism of escaping responsibility, states: “if institutions inevitably have to “unburden” the individuals of some obligations, it must never result in the communication community of human beings capable of discourse losing their sense of responsibility (*Verantwortungsdinstanz*) or their final decision-making competence to an institution.”¹¹² In this way, moral co-responsibility is formed by the practice participants, which is founded on the concept of the ideal communication community. The image of responsibility thus understood is presented as follows: “Hence, individual actors in a sense cannot really be held accountable for these actions and activities in such a way as individuals have been held responsible for their actions according to traditional morals.

¹¹⁰ Zygmunt Bauman, *Postmodern ethics* (Blackwell, 1993), p. 126.

¹¹¹ Karl-Otto Apel, “Uniwersalistyczna etyka współodpowiedzialności,” trans. Z. Zwoliński, *Etyka* 1996, No. 29, p. 9.

¹¹² Karl-Otto Apel, “Etyka dyskursu jako etyka odpowiedzialności – postmetafizyczna transformacja etyki Kanta,” trans. T. Mańko, *Principia* 1992, vol. V, p. 7; Raul Fornet-Betancourt, ed., *Ethik und Befreiung*, (Aachen: Augustinus Buchhandlung, 1990).

Nevertheless, we have to acknowledge that we somehow are responsible also for the effects of collective activities.”¹¹³

How do both views answer the problem of escape from responsibility? To answer this question, I present responsibility in the transcendental and ontological-ethical views as two forms of dialogism. Let us remark that responsibility in the etymological sense assumes response, giving an answer. Answering “for something” at the same time implies answering “to something.” This view of responsibility gains a dialogical sense. Hence, presenting both distinguished views of responsibility as forms of dialogism is justified.¹¹⁴

According to linguistic intuition, dialogue presumes a communal momentum, being the opposite of monologue as a form of violence. In what is dialogism expressed, and does the concept rely on overcoming otherness and thus extending the sphere of what is common? Or is it just the contrary – on acknowledging the Other in their otherness? These are the questions with which one may try to identify the concept of dialogue in both views of moral responsibility.¹¹⁵

In the transcendental view, dialogue serves as a linguistic medium within a defined social practice. In this perspective, the goal of dialogism is to build a theory of communication, its subject is argumentative discourse – the conditions of its conduct and legitimisation. As Małgorzata Kowalska stresses: “In Habermas” perspective, dialogue is to bring consensus and thus level the initial difference, but at the starting point implies some community.”¹¹⁶ This community, in the light of the claim to universality, takes two forms. On one hand, it means formal community, which assumes compliance and abiding by the discourse rules. On the other, it concerns the community of values, which is illustrated by the pursuit for legitimisation of the moral point of view. The aim of dialogue as a form of consensus seems to be the definition and legitimisation of institutional morality, by which we mean a set of values and convictions shared by a social or professional group.

In the view of moral responsibility as ontological-ethical, dialogue is understood as a meeting (dialogic relation) with the Other. On the basis of

¹¹³ Karl-Otto Apel, “How To Ground A Universalistic Ethics Of Co-Responsibility For The Effects Of Collective Actions And Activities,” p. 14, <http://www.philosophica.ugent.be/fulltexts/52-2.pdf>, accessed on 13th August 2018.

¹¹⁴ Filek, *Ontologizacja odpowiedzialności*, p. 43; W. Weischedel, “Istota odpowiedzialności,” p. 84.

¹¹⁵ The same question is posed by Małgorzata Kowalska, see: “Pytanie o dialog. Habermas – Lévinas,” in *Levinas i inni*, scientific eds. Tadeusz Gadacz, Jacek Migasiński (Warszawa: Wydział Filozofii i Socjologii Uniwersytetu Warszawskiego, 2002), p. 180.

¹¹⁶ *Ibidem*, p. 180.

this relation, the subject's identity is formed.¹¹⁷ In this sense, dialogism is not a language of communication but the subject's identity structure. The fact that it is created in dialogical relation including the category of the Other allows for the interesting way of seeing of what is homogeneous.¹¹⁸ The root of shunning moral responsibility can be seen in the claim to universality, a manifestation of which is the attempt to describe a subject in reference to one factor. Therefore, the aim of dialogue is the exposition of the difference related to the way of its formation. In this way, room for choices appears and so the moral responsibility connected with making such choices emerges.

A consequence of the indicated difference seems to be that, in the first view, the concept of dialogue focuses on working out discourse rules to enable dialogue within defined pragmatics of social life, whereas in the second view of the outlined meanings, dialogue reveals the subject's structure, which in effect allows questions of their identity to be asked. Thus, dialogue is not a form of communication but an ethical foundation in which self-knowledge requires considering the Other.¹¹⁹ Moral responsibility in the transcendental view allows the creation of the image of an institution as a fence that sets the limits. In this perspective, the organisational dimension of responsibility is emphasised, while in depicting responsibility as ontological-ethical, the personal dimension of responsibility seems crucial. By presenting both perspectives as complementary it is possible to:

First, present moral responsibility in the individual-structural field. In this perspective, on one hand it becomes crucial to build legal institutions, while on the other structuring the self-awareness of the community participants is vital. Exposure of both views opposes the thesis of determinism. On this basis, it is suggested that, since we act within an institution, which does not leave room for subjective causation, we are not responsible for actions taken and the consequences are not our fault but that of the institution in which we operate. For, because our conduct is determined by institutional structure, there exists the necessity to conform to it. This view is criticised by Michael S. Moore, according to whom we are responsible for actions

¹¹⁷ Emmanuel Lévinas, *Inaczej niż być sobą lub ponad istotą*, trans. P. Mrówczyński (Warszawa: Fundacja Aletheia, 2000), p. 202.

¹¹⁸ *Ibidem*, pp. 203–206.

¹¹⁹ Emmanuel Lévinas, "Dialog: samowiedza i bliskość bliźniego," in *O Bogu, który nawiedza myśl*, Emmanuel Lévinas, trans. M. Kowalska (Kraków: Wydawnictwo Homini, 2008), p. 228; Emmanuel Lévinas, "Słowo wstępne," in Emmanuel Lévinas, *Imiona własne*, trans. J. Margański (Warszawa: Wydawnictwo KR, 2000), p. 10.

irrespective of whether or not the requirement to treat responsibility as an obligation for action is created.¹²⁰

Second, to answer the question posed in the first section of this chapter – “which and whose responsibility?” From the perspectives presented above we may understand responsibility as the quality of a professional role and the identity of the performer. In turn, when answering the question “whose responsibility?” one may point to organisational and personal aspects. The first of these dimensions is related to obligation that relies on a professional role, while the second results in the possibility of considering the role performer’s action as a form of response to the conferred task. Individual responsibility may thus be understood as a disposition to act responsibly. Referring to the etymology of the word “responsibility,” we may say that performing a role is an answer to the obligation attached to the performed role (community dimension). The answer reveals the individual dimension of responsibility, focusing on the individual performing a role. That is why role responsibility may be viewed in both the organisational as well as the individual dimension.

¹²⁰ Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997), p. 571.

Part II.
**Overview of Lawyers' and
Judges' Moral Dilemmas**

Chapter 5. Lawyers' and Judges' Dilemmas in Criminal Law

Paweł Skuczyński

5.1. Preliminary remarks

Criminal law and the law of criminal proceedings are the most characteristic branches of law. This is because criminal sanction is usually treated as *ultima ratio* of the whole legal system, and criminal action as central to the administration of justice. These branches of law are also so separate from others that they contain multiple solutions unknown or at least differently formed elsewhere. For this reason, it is to be expected that criminal law is a sphere in which specific, unique, ethical problems lie. Besides, and not coincidentally, it is criminal law – perhaps also constitutional law that nowadays has the closest link with philosophy of law, and the problems of this branch of law are most often approached from the philosophical perspective. In continental European legal culture, especially in Germany, where special attention is traditionally paid to the classification of legal disciplines, the philosophy of criminal law is distinguished. This discipline concentrates on such matters as, for example, causation and responsibility issues, and the problem and aims of a penalty.

Hence, both the structure of particular institutions as well as deeper philosophical issues may indicate the character of ethical problems that occur in criminal law, and also the kinds of dilemmas faced by judges and lawyers in this discipline. From many possible ways of describing the sources of these problems and dilemmas, the following elements seem the most important.

First, we deal with a specific configuration of actors in proceedings, especially of the parties to a dispute. In the investigation phase, there is a basic division of roles for prosecution and defendant. The former role is typically played by a public prosecutor, but it is also possible that the victim will play the role as auxiliary prosecutor. In the latter role is the person accused of committing a crime, who may (but does not have to) employ the services of a lawyer for

their defence. The division of tasks between the roles, and also the general models of their behaviour in proceedings, are determined by presumption of innocence and *in dubio pro reo* rules. The dilemmas of criminal law lawyers can also include those concerning the judge as well as the prosecuting or defending counsel.

Moreover, criminal proceedings are not homogenous. Firstly, they have two phases: investigation and court hearings. The former is, in its basic form, carried out by a prosecutor, who acts not as party to the proceedings but as the organ of their execution. When concluding an investigation, this player decides whether there are grounds for indictment, which they subsequently endorse in their role as prosecutor. The latter phase takes place before a court and aims at deciding the case. Here, the first instance and appeal proceedings may be distinguished. The passage from one phase of proceedings to another raises special ethical problems, mainly for the prosecutor, who switches their role, but also for the judge and lawyer.

The very model of court proceedings itself, one of the essential goals of which is to discover substantive truth, may be variously structured. Two rival rules in this regard are the inquisitorial and adversarial systems. The first is characteristic to the states of continental European legal culture, the second to the Anglo-Saxon sphere. This means that, in the former, the court is not only the arbitrator in a dispute between parties, but, in order to eliminate all doubts about the circumstances of a crime, it may behave actively and adduce evidence. In result, the distribution of responsibility for the outcome of the trial as well as for relations in the courtroom are different than in a classical adversarial system.

Finally, the goals of criminal proceedings are specially regulated. According to Article 2 par 1 of Code of Criminal Procedure (Poland), criminal proceedings should be conducted so that: (1) the perpetrator of a criminal offence shall be detected and called to penal responsibility, and that no innocent person shall be so called, (2) by a correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favoured the commission of the offence, the tasks of criminal procedure shall be fulfilled not only in combating the offences, but also in preventing them as well as in consolidating the rule of law and the principles of community life, (3) legally protected interests of the injured party shall be secured, and (4) determination of the case shall be achieved within a reasonable time.

The goals stated in these provisions may be taken as an expression of fundamental values of criminal proceedings. It is not always possible to meet them all at once, and balancing them – though significantly done by the legislator in concrete solutions – must be carried out during the course of the proceedings before court or other organs.

On this basis, fundamental conflicts of values may be identified in today's criminal proceedings and particular professional roles, thus creating tensions within them and being the source of various ethical problems:

- 1) Conflict between the rights of the accused (right of defence) and efficiency (speed) of proceedings. It manifests in many *prima facie* dilemmas of judges, and to a lesser extent of prosecutors and lawyers,
- 2) Conflict between substantive and procedural justice that have to be realised simultaneously. Tension due to this conflict manifests mainly in performing the role of defence, and also to some extent that of the judge,
- 3) Conflict between the principle of truth and dignity of the victimised and other participants on the proceedings, especially the witnesses. This manifests mainly in regard to hearings in which the defending lawyer, and to some extent also the prosecutor, are active,
- 4) Conflict between rightfulness and preventive goals of criminal responsibility. This is basically apparent in the judge's role, but also to some extent in the prosecutor's.

In consequence, the situations which may seem to be dilemmas in criminal law display great variety. Their review and systematisation must be preceded by two further remarks. First, they are divided into dilemmas of judges, prosecutors and defenders. The classification is not perfect, and some situations may concern representatives of other professions. Because of certain similarities between the roles, it occurs mainly between prosecutors' and defenders' dilemmas.

Second – as in other chapters of this book – a review of *prima facie* dilemmas, namely, those which are usually treated as dilemmas, is presented below. In keeping with this model, each of these situations was assessed from the meta-ethical perspective, to establish the extent to which it is a moral dilemma in the strict sense, and to which it is an ethical problem or a practical one of another kind.

Eventually, it is proven that none of these situations may be held as moral dilemmas fully meeting the definition adopted in previous parts of the book. Some of these situations seem very close to the model form of moral dilemma, but under closer inspection it is shown that some constitutive element is missing. Typically, it is the lack of evil resulting from given conduct, the possibility of action other than that originally identified, or asymmetry of options.

Therefore, the discussed *prima facie* dilemmas were in each case classified as different practical problems. On one hand, this confirms the thesis that true moral dilemmas are theoretical creations and hardly ever occur in real life. This particularly concerns the contexts in which one acts in specific institutions, or plays specific professional roles. On the other hand, it by no means suggests that moral issues are ousted or simplified by institutions. For instance, conflicts of

conscience and values which occur in criminal law, and which finally turn out to be *prima facie* dilemmas, are as serious situations as moral dilemmas in the strict sense.

5.2. Dilemmas of a judge

5.2.1. Lack of moral certainty about the factual circumstances

Facts: a case examined by the District Court in G. was referred pursuant to Art. 28 § 3 of the Code of Criminal Procedure to a panel of three judges due to its particular complexity. After the hearings, the court retired to deliberation. In the course of discussion one of them raised objections about the description of the factual circumstances of the deed being the subject of the case as presented by the other members of the panel. The judge cannot pinpoint gaps in the evidence or in his colleagues' line of reasoning but nevertheless has forebodings causing uneasiness of conscience, and, in consequence, a lack of moral certainty as to the facts. The other two judges claim that the factual circumstances of the deed were determined on the basis of all examined evidence, evaluated discretionarily with regard to common sense and indications of knowledge and life experience, namely according to Art. 10 of the Code of Criminal Procedure; they hold that the third judge's forebodings or intuition cannot be taken into account, since, in accordance with Art. 410 of the Code, only the entirety of the circumstances revealed in the course of the main court session may be grounds for sentence. However, the unconvinced judge considers not only voting against the sentence but also writing a dissenting opinion, pursuant to Art. 114 Par. 1 of the Code of Criminal Procedure.

Prima facie dilemma: the judge must decide whether to write a dissenting opinion, and thus publically manifest their lack of conviction as to the facts, assuming this may influence, for example, on any parties deciding to lodge an appeal. The other option is not to dissent, acknowledging that an uneasy conscience that cannot be translated into arguments may not be grounds to question the determinations of the whole panel.

Standard solution: filing a dissenting opinion is within a judge's discretionary, so it is not a duty but a right. To exercise it could be regarded as moral duty if the judge had knowledge about mistakes in determining facts, the application of the law, or other inaccuracies in delivering justice. However, such

a move is not usually demanded of judges, as it is deemed to be a matter for their conscience.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense because conduct neither entail moral evil nor symmetry. Dissenting opinion is not a harm to other members of the adjudication panel, as it exercises the rights inherent to each of them. Also, not writing an opinion cannot be treated as harm to, for example, the accused, since it by no means limits their rights or precludes their lodging a successful appeal. It is a situation of a subjectively hard choice, in which a judge must decide whether their personal feeling is so strong to communicate it in the form of dissenting opinion.

5.2.2. Conviction about the wrongness of a regulation

Facts: a judge hears a case in which medical doctor Anna P. is charged with carrying out an induced abortion in Marta J., with the consent of the latter but in violation of the regulations of an act, namely constituting an offence under article 152 par. 1 of the Criminal Code. The violation referred to in the indictment consisted in the fact that, although the treatment was administered with reasonable suspicion that the pregnancy was the result of a criminal offence, thus under Art. 4a Section 1 item 3 of the Act of 7 January 1993 on Family Planning, Protection of Human Foetus and Pregnancy Termination Conditions, it was nevertheless carried out in the 13th week of pregnancy, contrary to Art. 4a Section 2 of this Act, which sets the limit of 12 weeks in this matter. In the course of the proceedings it was determined that pregnancy was the result of a particularly violent rape, and that Marta J.'s life was very difficult, which aroused deep compassion in the accused, Anna P. Due to these circumstances, a conviction would be unfair, and the difference between the 12th and 13th weeks was insignificant.

Prima facie dilemma: the judge has to decide whether to reach a verdict of guilty, and consider all the circumstances of the deed as extenuating in passing sentence within the framework provided by the penal act, which would definitely be against their subjective sense of justness, or to act *contra legem*, thus risking exposure to all the resulting negative consequences.

Standard solution: in positive law culture, it is accepted that the judge's role is the application, not the evaluation, of law. Only in very rare cases of grossly unjust law are there provisions for refusal to apply it. It is hard to find grounds for it if regulations were checked and confirmed as constitutional.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense because the options are not symmetrical. Only the application of

law may bring harm, while refusal would be taken as breach of professional role and expose the judge to legal consequences. It is rather a conflict of conscience connected with law, or a legal dilemma. Its source may be the lack of legal possibility of attenuating the formalism of applying the law.

5.2.3. Contradicting expert opinions

Facts: in a case regarding an unintentional vehicular accident which caused grievous bodily harm to another person, i.e. an offence under Article 177 § 2 of the Criminal Code, finding out some circumstances of crucial significance for the resolution of the case requires special information. For that reason, the judge rendered a resolution admitting expert testimony. The expert witness statement did not, however, remove all doubts that arose in the case. In consequence, the judge stated that the situation is referred to in Art. 201 of the Code of Criminal Procedure, according to which, if the opinion issued is incomplete or unclear, contains a contradiction in itself, or opinions on the same matter are contradictory, the same experts may be recalled, or other experts may be appointed. On such grounds the judge appointed another expert, who gave an opinion with conclusions different from the previous one. In the face of two contradictory opinions, the judge called a third expert, whose statement was different from the previous two. In this situation, the judge considers: rendering yet another resolution admitting expert opinion testimony or acknowledging that some irrefutable doubts arose, and that they should lead to a verdict in favour of the defendant, namely acquittal.

Prima facie dilemma: the judge must decide whether to admit further opinions, which may prolong the proceedings and incur costs, as well as exposing them to charges of partiality and over-reliance on expert knowledge, but could finally lead to the resolution of all doubts, or to admit that ordering further opinions would be pointless in face of the hitherto expressed contradictions, and for that reason guilt beyond all doubt cannot be proven, although certain opinions indicate it.

Standard solution: in continental legal culture, criminal procedure is conducted according to the inquisitorial principle and material truth. This means that the court should hold an evidentiary hearing so that all doubts about the factual state of the case is removed, and those which cannot be removed should be considered in the defendant's favour. Deciding whether doubts are irremovable falls within the role of the judge, who draws this conclusion on the basis of evidence evaluated freely through the lens of knowledge and life experience.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because it follows from the lack of knowledge on the effectiveness of issuing yet another expert opinion. Hence it is rather an epistemic dilemma. Each of the options naturally gives rise to certain moral consequences, but the choice before the judge is epistemic.

5.2.4. Delegation of a judge vs the principle of a panel's immutability

Facts: a judge of a regional court adjudicating in the criminal division was offered delegation to the Ministry of Justice, to take up office related to an administrative review of courts' activity. The acceptance of the offer will entail suspension of adjudicating duties, and in consequence this will cause the necessity to remand the cases in his department pursuant to the principle of panel immutability as expressed in Art. 402 § 2 CCP. Some of the cases may therefore become statute-barred because of that, and the judge cannot exclude that the offer he got was intended to bring about such an effect.

Prima facie dilemma: the judge must decide whether to agree to the delegation and accept the consequences resulting from the necessity to remand the cases, including the risk of their prescription, or to decline to take on new responsibilities, which are an opportunity for personal development, in order to perform present duties with no harm to the cases they already have.

Standard solution: the issues of case assignment and delegation of judges belong to the sphere of court administration and organisation. Thus, a judge is not directly responsible for how many cases are assigned to them and how much time will be needed to hear them. The legislator, when providing for the possibility of judge delegation, did not set conditions for the conclusion of ongoing proceedings.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because by declining the delegation offer the judge will not cause harm, and if they accept it, the responsibility for the harm done, namely prescription, will be due to the organisation of the judiciary and not to the judge's decision. Therefore, it is a situation of a subjectively tough choice.

5.2.5. Waiver of professional confidentiality

Facts: The District Public Prosecutor's Office in K., carrying out preparatory proceedings, filed a motion to the District Court in K. to waive professional confidentiality from legal counsels employed by a construction company.

Proceedings are pending against the former president of the company, who is charged with acting to the detriment of the company, i.e. an offence under Art. 296 § 1 CC. The motion on waiving professional confidentiality was substantiated because, due to the suspect's activity, the documents necessary for the evidentiary proceedings were destroyed, and only interviewing the company's lawyers may lead to determining their content. The prosecution maintains at the same time that the conditions for such a waiver are met under Art. 180 § 2 CCP, namely that it is necessary for the benefit of the administration of justice and the fact-situation cannot be established on the basis of other evidence.

Prima facie dilemma: the judge must decide whether to share the opinion of the prosecutor, who is well acquainted with the evidence but also interprets the evaluative conditions of an official confidentiality waiver through the lens of the benefit of the preparatory proceedings, or to take as the supreme argument the unique character of waiving professional confidentiality, which character makes its premises subject to obligatorily restrictive interpretation.

Standard solution: the judge must interpret the premises for waiving official confidentiality in the context of a specific situation. This is due to the fact that they are general clauses, and thus the court must make *ad casum* judgements on their grounds. Therefore, it must decide whether, in a given situation, the benefit for the administration of justice takes precedence over the protection of professional confidentiality. Hence, the court is also obliged to take into account whether the prosecution really exhausted all other ways of determining certain circumstances.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because the options of conduct and the involved values were hierarchised by the legislator, who pronounced the benefit to justice administration – though, by way of exception – to take precedence. The judge's role is only to apply the rule to a specific case. Due to the general clauses used in the provisions, this requires making evaluations. For this reason, the situation is a problem of law enforcement.

5.2.6. Pre-trial detention

Facts: a prosecutor has filed, in the district court in P., a motion for the pre-trial detention of Tomasz Z. The motion stated the high probability that the suspect committed an offence of handling stolen goods under 291 § 1 CC and indicated evidence proving this allegation. The prosecutor also pointed out that the aim of remand is primarily to prevent the accused committing more deeds of

this kind, which is also very probable. The judge considering the request agrees with the prosecutor's allegations about the probability of having committed the crime and of committing similar crimes in the near future. However, he has doubts because Art. 249 § 1 CPC says that preventive measures may be applied first of all in order to secure the proper conduct of the proceedings, and only exceptionally to prevent a new serious offence from being committed by the accused. Since the prosecutor does not mention the first premise, only the second one should be considered. Yet the latter has the nature of an exception and should not be interpreted extensively. Handling stolen goods does not seem to the judge a serious offence, though the probability of committing more crimes is high.

Prima facie dilemma: the judge has to decide whether to order custody and prevent the defendant from committing further crimes, simultaneously making an extensive interpretation of the concept of "serious offence," or to dismiss the request and risk that more prohibited acts will be carried out, which may cause public discontent.

Standard solution: law interpretation is the subject of many theories explaining its course and the methods applied. It is admissible to refer to the effects of the adopted interpretational variants, and this is called functional interpretation. It may lead to departing from the literal reading of a provision, and opting for either restrictive or extensive interpretation. According to the principle *exceptiones non sunt extendae*, extensive interpretation is subject to limitations. However, this principle is not absolute.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because it concerns law interpretation. Although the options of conduct create the possibility of doing harm, i.e. on one hand not preventing further offences and on the other breaching the legal certainty in reference to the accused. However, they are not symmetrical since only the possibility of committing more offences can be considered. Furthermore, impairment of legal certainty is characteristic of non-literal interpretation. Hence the situation is a problem of interpretation.

5.2.7. Notice of defence lawyer's error

Facts: there is a criminal case with the obligatory participation of defence lawyer, and the accused has a court-assigned defence lawyer. During the proceedings, the judge notices that the defence is not properly prepared for the case – does not know the evidence, files motions whose consequences may be unfortunate for the accused, and does not challenge the prosecutor's claims.

For that reason, the judge considers applying Art. 20 § 1 CCP, namely informing the Bar Council or other competent body in the event of a flagrant dereliction of procedural duty by the defence lawyer, demanding from the dean of the proper council that they send information in no less than 30 days about the undertaken actions resulting from the notice. However, the judge has doubts about whether this action might not be seen as lack of impartiality since for the prosecutor this may mean the court's intervention for the defendant's benefit, whereas from the perspective of the defence, as intervention in their activities and an attempt to exercise pressure, which would be in the interests of the prosecution. In any case this will negatively impact the courtroom relations.

Prima facie dilemma: the judge must decide whether to send the notice and so improve the quality of the defence but worsen the perception of the court's impartiality and the relations in the courtroom, or to tolerate the unpreparedness of the defence and risk that the accused will not be properly represented, and in consequence the judge will have to conduct more *ex officio* proceedings, which could also affect the reception of their impartiality by the parties.

Standard solution: in the culture of statutory law, within the inquisitorial procedure the concept of passive defence dominates, and the court conducts many proceedings *ex officio*. As a result, less attention is given to implementation of the standards of good defence by lawyers. However, the judge can notify the professional self-governing body in the event of a flagrant breach of procedural duties by the defence lawyer. So, the judge has to decide whether dereliction of these duties is flagrant or less serious, but courtroom relations and the perception by those involved in proceedings are not premises for applying this interpretation.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, as the notice to the relevant organisation is not a harm but just the contrary – it aims at improving the defence. If possible improvement of defence by the attorney, or worsening of relations in the courtroom, were understood as some kind of harm, then it would still not be symmetrical with the evil caused by improper defence. The fundamental issue is the assessment of whether a flagrant breach of duty occurred, which is an interpretational problem.

5.2.8. Criticism of public authority

Facts: in a case in which a public official faces a venality charge, the judge stated encroachment of authority by services conducting operational activities. Notably, illicit provocation is highly probable. For that reason, the judge sent a relevant notice to the prosecution. Still, there is no doubt as to the guilt of

the accused, and a conviction is the verdict reached. The judge, aware that the services' actions border on or breach the law resulting from the policy knowingly carried out by the management, decides to deliver a harsh critique of the officers' conduct as part of their oral statement of reasons.

Prima facie dilemma: the judge must decide whether to ignore the breach of authority by the officers and acknowledge that the consequences of this will be drawn after separate proceedings on the grounds of the court's notice, or to make open criticism, exposing themselves to charges of violating matter-of-factness in a verbal statement of reasons, formulating political judgements, and inconsistency in the face of a conviction.

Standard solution: according to *The Set of Professional Conduct Principles for Judges*, in the statement of reasons for their verdict the judge should refrain from utterances going beyond the factual necessity to justify the court's position that could violate the dignity or honour of the participants in the case or of third parties. Hence, the judge must decide whether there is a factual necessity of blatantly criticising public authority. In practice, it is regarded that a court is a sphere of independence, so it is admissible that judges use poignant expressions when they think it is necessary.

Meta-ethical perspective: the situation may be seen as a moral dilemma in the strict sense, because both options entail doing harm and seem to be at least close to symmetry. For it is certainly evil not to pay attention to the malfunctioning of services and to refrain from taking the opportunity to curb this in the future. Delivering an address actively exposing not only the judge but also the judiciary to conflict and charges of lacking political impartiality may be treated as an equivalent evil. More arguments – resulting from the protection of the individual's rights in their relations with the state – seem to speak for the first option. But this situation may also be viewed as a conflict of values, since neither option is absolute, and they can be balanced. It is possible to aim for optimisation of the values involved, e.g. through mitigating some of the expressions.

5.2.9. Moral revilement of the accused

Facts: Adrian W. is accused of pre-meditated murder in a case deserving special condemnation, i.e. a deed under Art.148 § 2 Item 3 of the Criminal Code. The crime concerned the parents of the accused, and the case soon drummed up publicity. The case ended with conviction and life imprisonment. The pronouncement took place in the presence of audience consisting of media representatives, which made the judge consider the wording of the verdict so

that they were comprehensible. On one hand, he could say “felon,” “a person who does not deserve to live in society,” or “moral degenerate;” on the other hand, the judge knows that, with the maximum punishment, these formulations not only justify, but cause additional revilement of the perpetrator.

Prima facie dilemma: the judge must decide whether to use harsh words in their verbal statement of reasons, making them more comprehensible and convincing for the public, simultaneously increasing revilement of the perpetrator, or to show more restraint for the defendant’s sake, at the expense of the benefits for society that clarification of motivation for the conviction could bring to bear on public opinion.

Standard solution: as in the previous situation, *The Set of Professional Conduct Principles for Judges* can be referred to. It says that, in the substantiation of the verdict, the judge has to refrain from formulations going beyond factual necessity to justify the court’s position that may infringe the dignity or honour of participants in the case or of third parties. The judge decides whether there is a factual need for the revilement of the accused; however, the decision is theirs.

Meta-ethical perspective: the situation is close to a moral dilemma in the strict sense, although there are more doubts than in the previous one because the general preventative considerations are weaker, hence the options are symmetrical to a lesser extent. Therefore, the situation may be treated more as a conflict of values which may be resolved through balancing and optimisation, e.g. by alleviating some formulations.

5.3. Dilemmas of the prosecutor

5.3.1. Interrogation of a suspect

Facts: Waldemar Z. was charged with persistent non-compliance with his legal duty, based on a judicial decision, to care for and maintain his closest person or another person, thus putting them in the position of being unable to meet the basic needs of life, i.e. an offence under Art. 209 § 1 CC. During testimony before the prosecutor it turns out that Waldemar Z. is not oriented in his situation and rights, in spite of having been formally advised about them. In relation to this, the prosecution considers continuing the interrogation and taking advantage of the suspect’s ignorance, or giving him further information.

Prima facie dilemma: the prosecutor must decide whether to conduct an effective interrogation, taking advantage of the subject’s lack of orientation in a manner that may lead them to act against his own interests, or to explain his situation and rights to him, thus risking impairment of the interrogation’s

effectiveness, which may dissatisfy other parties to the proceedings and expose the prosecutor to a charge of lacking objectivity.

Standard solution: the prosecutor should act impartially, which is usually understood as objectivity that mandates taking into account circumstances to the benefit and disadvantage of the suspect or the accused. This is particularly important at the preparatory proceedings stage, when the prosecutor acts as the authority conducting proceedings, and not simply as a party to those proceedings as at the stage when a case is heard by the court. *The Code of Professional Ethics for Prosecutors* says that the prosecutor provides the parties and other participants of the proceedings with relevant information about their situation and rights, as well as about the duties they have. When giving the information, the extent to which the person informed can independently take actions in the proceedings, considering their age, health, mental state and resourcefulness, as well as their possibility to use the help of other people including statutory representative, defence lawyer or legal counsel, should be taken into account. Therefore, the prosecutor cannot take advantage of the suspect's lack of orientation.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, since it lacks symmetry of options. Rather, it is a conflict of values between the goals of preparatory proceedings and protecting the suspect's rights, which may be balanced both through hierarchisation and optimisation. This is realised in the code of ethics by imposing on the prosecutor the duty to inform, undertaking which cannot be treated as doing some evil.

5.3.2. Grounds for bringing an indictment

Facts: the prosecutor makes a decision to close the investigation in the case concerning Adam Z., who had been charged with murder, i.e. an offence under Art. 148 § 1 CC. The collected evidence has some gaps and contradictions, but the circumstances of the victim's death inspired the prosecutor's subjective conviction about the suspect's guilt. When considering whether there are grounds to bring indictment or to discontinue the preparatory proceedings under Art. 322 § 1 CCP, the prosecutor realises that, in criminal proceedings formed on the inquisitorial system, the court, acting *ex officio*, can make further determinations, which will remove the weaknesses of the gathered evidence and that this often happens in practice.

Prima facie dilemma: the prosecutor must decide whether to proceed with the indictment, in keeping with their subjective conviction about the suspect's guilt, and to submit incomplete and inconsistent evidence while counting on

doubts being resolved in later stages of the proceedings, or to discontinue the proceedings on the grounds of insufficient evidence, simultaneously leaving their subjective conviction about guilt unsatisfied.

Standard solution: the prosecutor should discontinue the proceedings if there are no grounds for bringing indictment. Other action would be a manifestation of unacceptable opportunism. The decision should be made in particular on the basis of assessment of the probability of the suspect having committed the act, or counting on the evidence being complemented in further stages.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because only one of the options means doing harm and so there is no symmetry. If the prosecutor has doubts about whether the evidence collected in the preparatory proceedings is sufficient, it is a matter of knowledge. Therefore, only an epistemic dilemma may be considered here.

5.3.3. Prosecutor's objectivity in inquisitorial proceedings

Facts: during a hearing of a case involving Marek S., the prosecutor realises that there is a circumstance to the advantage of the accused, namely a contradiction in the ballistics expert opinion. Noticing this advantage requires specialised knowledge which neither the defence nor the judge have. Therefore, the defence does not raise this circumstance and it goes unnoticed by the court. Hence, the prosecutor considers whether they should draw attention to the contradiction, which would be justified by the objectivity principle, or not to do that according to the principle of the adversarial system and the division of roles in proceedings.

Prima facie dilemma: the prosecutor must decide whether to indicate the contradiction and so contribute to the objective clarification of the case, which may result in acquittal from charges in the indictment, or to ignore the issue, believing that to raise it is the role of the defence, thus risking conviction based on doubtful factual grounds.

Standard solution: in the statutory law culture within the inquisitorial system, the prosecutor is obliged to remain impartial (objective) both at the preparatory stage and during examination proceedings. This means that they should always consider the circumstances for the benefit and disadvantage of the suspect or the accused. On this basis, the prosecutor is obliged to point out the circumstance for the benefit of the accused that was overlooked by the defence lawyer.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because only one option is related to doing harm, i.e. not sharing the knowledge about the inconsistency. The moral problem that arises is the question whether the prosecutor's role excuses this harm, and the division of roles balances it by the obligations of the defence lawyer. In an inquisitorial trial, it is held that there is no place for such an excuse and the prosecutor is bound to impartiality (objectivity). So, the situation may be described as a conflict of values – at most – which is balanced by hierarchisation within a professional role.

5.3.4. Abandoning prosecution

Facts: during trial proceedings in the case of Joachim B., charged with murder, i.e. an act under Art. 148 § 1 CC, a request by the defence lawyer led to examination of evidence indicating that the corpse revealed in the course of the investigation is not that of the alleged victim. In effect, the other evidence became merely indirect proofs. Hence, the prosecutor considers terminating the indictment, which under Art. 14 § 2 OF The Code of Criminal Procedure is admissible at this stage only with the consent of the accused. Filing the motion for the second time against the same person for the same act shall not be permitted.

Prima facie dilemma: the prosecutor must decide whether to support the motion in the much worse situation as concerns evidence, which may lead to the prolongation of the proceedings that will in any case end with acquittal, or to drop the charges with the consent of the accused, thus not prolonging the proceedings but closing the possibility of further proceedings against the accused.

Standard solution: like in the previous situations, the decisive rule is that of the prosecutor's impartiality understood as objectivity and consideration of circumstances including those for the benefit of the accused. If the prosecutor believes that supporting the charges is pointless, they should abandon the indictment. It should be stressed that, according to the regulations, a public prosecutor may terminate the indictment before the commencement of the court proceedings in the first trial hearing. During court proceedings in a first-instance hearing, the termination of the charges is possible only with the consent of the accused, in whose interest may be acquittal after indictment.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because only one of the options is related to doing harm, i.e. the continuation of charges contrary to the collected evidence. If the prosecutor has

doubts as to the assessment of the evidence, this is rather a problem of taking a decision in a situation of insufficient knowledge, hence an epistemic dilemma, not a moral one.

5.3.5. False confession

Facts: the prosecutor considers indicting Sebastian K., driver of a Fiat Seicento involved in a road collision with a convoy of governmental cars. The charges would be for an act under Art. 177 § 1 CC on the violation, even unintentional, of the rules of traffic safety in land, water or air, and inadvertently causing an accident. To the prosecutor's knowledge, the accused pleaded guilty during interrogation by police, but, later denied in sequence before the prosecutor and stated that the confession was extorted.

Prima facie dilemma: the prosecutor must decide whether to press charges acknowledging that the confession was extorted, which may mean conducting proceedings against an innocent person, or to drop charges, risking that the denial was dishonest and tactical.

Standard solution: in the continental legal culture and contemporary evidentiary proceedings, it is upheld that a guilty plea does not override other evidence and must be evaluated in its own light. Therefore, if with other circumstances a confession may be regarded as tactical, the prosecutor should not believe it. In this case, they should record the denial in sequence as well as the reasons for it as given by the accused, and add it to the evidence.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because it concerns the evaluation of another person's honesty. Therefore, it is a problem of taking decision in the context of limited knowledge, and consequently, an epistemic dilemma.

5.3.6. The defendant's motion for issuing a judgment of conviction

Facts: Mirosław J. Was charged with causing other people to disadvantageously dispose of their own property by placing them in error or exploiting errors or inability to properly understand the action undertaken, an act under Art. 286 § 1 CC. The case gained notoriety as the fraud involved mainly elderly people with just a little savings, which they lost in effect. For that reason, the prosecutor demanded four years imprisonment. The defendant, in the first hearing, submitted a motion for issuing a conviction sentence and six months in prison, but without conducting evidentiary proceedings. All

the premises of Art. 387 § 1 of The Code of Criminal Procedure necessary for issuing such a sentence are met, hence the court addresses the question to the prosecutor of whether they accept the motion.

Prima facie dilemma: the prosecutor must decide whether to accept that the goals of the proceedings are met by imposing the sentence requested by the defendant, especially in the context of the case's publicity and social expectations, or to continue the trial, which may prove long and costly, in pursuit of a sentence different from that requested in the indictment.

Standard solution: the regulations say that the consensual course is chiefly a matter of the prosecutor's and defendant's decision. This means that the legislator balanced the values involved, i.e. the sake of justice and the economics of the proceedings by their optimisation. The prosecutor's task is primarily to assess whether the defendant's motion is legal, and whether the aims of the proceedings will be achieved. If they think that the requested sentence is too lenient, they may object. The court, however, may condition the motion's approval on implementing the change as indicated.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because the options are not symmetrical. There is clear primacy of the demands of justice, which justifies the rejection of the solution that fully meets the values of the proceedings' economics. Besides, these values may, in principle, be realised simultaneously. The legislator also permitted their optimisation, including indirectly, by the court taking an active role in suggesting that the accused makes changes in the motion. Hence, it may be said that the situation is a conflict of values.

5.3.7. Demands in the degree of penalty

Facts: Monika W. is suspect of abandoning her child, legally a minor, an act under Art. 210 § 1 CC, which is punishable by imprisonment of up to three years. When concluding the investigation, the prosecutor issues an indictment and considers the severity of penalty to demand. Taking into account the circumstances of the act, primarily including the perpetrator's conduct, the type and degree of the duties breach, the type and degree of negative consequences of the deed, her personal characteristics and conditions, her way of living before the crime and her behaviour after, as well as the public interest in the case, it is justified in the prosecutor's opinion to request the maximum sentence. However, simultaneously, considering judicial practice and previous decisions, it is doubtful that the court shares these arguments. Hence, the prosecutor must

take into account the possibility that the sentence issued will be more lenient than that demanded.

Prima facie dilemma: the prosecutor must decide whether to demand a severe penalty, despite previous practice, while accepting the risk that a more lenient sentence will be handed down. In this variant, the prosecutor can be criticised by the court but act in accordance with their own conscience and social expectations. Or, they could demand a sentence in line with previous decisions, thus exposing themselves to pangs of conscience and criticism from the media.

Standard solution: the prosecutor is free to demand the severity of penalty within the statutory limits of punishment and directives regarding its measure. If they state that, in a particular case, it is legitimate to demand the maximum sentence, and they can justify this claim, there are no constrictions in this regard.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because the options do not lead to harm, provided that in each case the prosecutor's demand is supported by arguments. Doing away with well-worn practice certainly requires special arguments, whose power to convince the court may be difficult for the prosecutor to assess. For that reason, the situation may be qualified as requiring a subjectively difficult choice or an epistemic dilemma.

5.3.8. Appeal regarding the penalty

Facts: Karol K. was sentenced with a decree nisi because he undertook mediation for material profit in arranging a matter by referring to his alleged influences in a state institution, i.e. an act under Art. 230 § 1 CC, punishable by imprisonment from six months to eight years. On these grounds, the court sentenced Karol K. to one year imprisonment. The degree of the penalty raised public discontent for it seemed too lenient. Hence, the prosecution considers appeal. Other elements of the decision do not raise objections, and so the possible appeal would refer only to the penalty. Pursuant to Art. 438 item 4 of The Code of Criminal Procedure, a decision shall be subject to reversal or amendment if it is found that the penalty imposed is strikingly disproportionate to the offence, or, if the application or failure to apply the preventive measure, or any other measure, is unfounded, it would be necessary to prove that one year of immediate custodial sentence is strikingly disproportionate.

Prima facie dilemma: the prosecutor must decide whether to appeal in line with public expectations but with little chance of succeeding, and simultaneously

prolong the proceedings, or to acknowledge that appeal is pointless and not to lodge it, and leave the social sense of justice unsatisfied.

Standard solution: the prosecutor makes a free assessment of whether there are premises for appeal on statutory grounds. This also concerns the striking disproportionality between the offence and the penalty. If they state that it's right in a particular case to demand its raise, then there are no objections to do it.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because no harm is related to the variants of behaviour as it is not evil to use statutory rights if there provide grounds, and vice versa to refrain from using them if they provide no grounds. The situation may be viewed as a conflict of values i.e. of justice and the economics of proceedings, which due to the proceedings require a choice to be made and hence cannot be optimised. If the strength of arguments for the charges in appeal were hard to assess by the prosecutor, the situation could be classified also as an epistemic dilemma.

5.3.9. Refusal to execute the order of one's supervisor

Facts: the prosecutor, conducting proceedings in a case of promises to provide personal financial gain in connection with the performance of holding public office, i.e. an act under Art. 228 § 1 CC, received in writing, under Art. 7 § 3 of the Prosecution Service Act, an order related to the content of a procedural action – to charge a politician of the opposing party. the prosecutor included the order in his confidential case file. They do not agree with the order because they think that at this stage of proceedings there are no grounds for charges, so they demand that the order be changed or their own exclusion from the action, pursuant to Art. 7 § 4 PSA. Finally, the prosecutor supervising the prosecutor who issued the order refuses to change it or exclude the prosecutor from proceedings.

Prima facie dilemma: the prosecutor must decide whether to press charges, pursuant to the order, after exhausting legal possibilities concerning the possible change of the order, but against his evaluation of the grounds to charge, or to refuse the order against the decision of the prosecutor supervising the one who issued the order, thus acting independently but exposing themselves to disciplinary responsibility.

Standard solution: if the refusal procedure provided by the provisions of law was exhausted, and the order was not changed nor the prosecutor excluded from the procedure, then they are bound to act according to the order.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because the options are not symmetrical. Although the order concerns executing an act that is illegal, both its execution as refusal will be breach of law. In both cases, the prosecutor will expose themselves to responsibility. This formal resemblance does not endow them with the same moral weight. The situation may be classified as the problem of subjection to law, a legal dilemma.

5.4. The advocate's dilemmas

5.4.1. Accepting a subjectively unjust case

Facts: a lawyer receives a direct proposal from the accused to undertake the defence in a case of an alleged crime of aggravated sexual assault, namely under Art. 197 par. 4 of the Criminal Code. The guilt of the defendant is beyond doubt and they show no remorse in their behaviour. Both the act and the person raise moral objections in the lawyer.

Prima facie dilemma: it is a classical problem of “unjust defence.” The lawyer must decide whether to decline to represent the defendant, which will result in retarding or in some cases even precluding the formal right of the accused to defence, or to accept, which may cause discomfort or a sense of moral co-responsibility, as well as affecting their engagement in the defence at least on the subconscious plane.

Standard solution: it is a classical problem of “just defences,” which in today’s legal ethics usually is decided *in favorem* of procedural fairness, namely to provide everyone with the right to defence. In consequence, a lawyer should not be the first judge of the client, but should undertake the defence irrespective of their attitude to the act or to the defendant. Only in exceptional cases, when the subjective attitude of the lawyer would prevent effective defence, is it possible to take this as significant grounds for declining legal help. Another possibility is not undertaking any criminal cases at all and specialisation in other branches of law.

Meta-ethical perspective: the situation does not constitute a moral dilemma in the strict sense since the options are asymmetrical and there are other courses of action. The defence of the accused irrespective of their personality and the nature of the crime is, in criminal proceedings, balanced by the activity of the opposing side, namely of the prosecution. Within the distribution of procedural roles also lies the realisation of public interest by controlling court proceedings and the actions of the prosecution. Leaving the accused without defence is

a greater evil than providing them with one, unless other counsel can be found. The situation may be treated as a conflict of conscience.

5.4.2. Undertaking defence of a family member

Facts: Andrzej P. is charged with hooliganism, destroying property by setting fire to seven vehicles parked in a street in Warsaw on the night of 21/22 March 2011, an act under Art. 288 § 1 in conjunction with Art. 115 § 21. The accused is the son of a renowned lawyer specialising in criminal cases. Andrzej P. requests his father to undertake his defence, arguing that only this situation will give him a sense of security.

Prima facie dilemma: the lawyer must decide whether to undertake defence and risk that the defence actions will lack professional distance from the case and the defendant, or to decline and disappoint their son's expectations and feelings.

Standard solution: defence of a close person is not treated as an inadmissible conflict of interests, e.g. related to conducting a case in the result of which a lawyer would be personally interested. Lawyers are usually discouraged from undertaking such proceedings due to the impossibility of separating personal and professional relations, as in consequence the two spheres mix. For example, this may concern the situation of lacking distance to the case (permeation of the personal sphere into the professional), as well as the deterioration of relations in the event of professional failure (permeation of the professional sphere into the personal).

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because the options do not lead to evil, and besides, there are more variants of conduct, e.g. another defence lawyer, trusted by the lawyer, may be appointed, or the lawyer may accompany their son during hearings as audience. The situation is primarily a conflict of roles (of lawyer and father).

5.4.3. Undertaking defence of one's client

Facts: a legal adviser provided regular legal services for a general partnership in which the only partners were the spouses Jolanta and Antoni K. At some stage, the relations between the couple worsened, which affected the number of misunderstandings when conducting the partnership's affairs. For that reason, the legal adviser informed Jolanta K. that they were concerned with the situation, upon which she confessed that, for a long time, she had been abused by her husband, against whom there are proceedings under Art. 207 § 1 CC.

When the adviser asked Antoni K. if this was true, he asked the lawyer to play the role of defence in the proceedings, and suggested the possibility that the lawyer's knowledge about Jolanta K. might be used in such proceedings.

Prima facie dilemma: the lawyer must decide whether to undertake the defence in light of their previous good relations with the defendant, or to decline the defence due to good relations with the second partner and the previous mutual conduct of their business affairs.

Standard solution: it is a conflict of interests involving subjects, when the interests of present and previous clients collide, and the knowledge about the matters of the latter would give advantage to the former. As a rule, this is excluded unless professional conduct codes provide for special ways of dealing with conflict, such as applying information barriers or client's consent. On the grounds of defence lawyer and legal advisor codes, this is unacceptable. Therefore, the lawyer may decline the defence.

Meta-ethical perspective: the perspective is not a moral dilemma in the strict sense, because the options are not symmetrical. The lawyer is not bound to undertake defence, and by undertaking it they would do evil to the second party. It is a subjectively hard choice, at most.

5.4.4. Revoking power of attorney vs barring by prescription

Facts: in a case against Tomasz K., of theft by burglary, an i.e. act under Art. 279 § 1 CC, proceedings are drawn out. The period of time in which proceedings must be concluded expires soon, pursuant to Art. 102 CC, and the proceedings shall soon be discontinued due to Art. 17 § 1 item 6 CCP. The defendant uses their attorney of choice, who was authorised to defend him in the very recent phase of trial. To the knowledge of the defence, the accused had cooperated during the trial with several attorneys, who terminated their instruction due to loss of trust on the part of the client. Simultaneously, the defence lawyer noticed an increase of misunderstandings with their client, which bred suspicion that the frequent changes of attorneys were aimed at prolonging the proceedings until prescription.

Prima facie dilemma: the defence must decide whether to terminate the power of attorney, like the previous lawyers, and hence contribute to the realisation of the supposed plan of the defendant, i.e. barring by limitation, and feeling as a tool in the hands of a manipulator, or to continue the defence, regarding the misunderstandings as insufficient grounds for terminating

cooperation, but increasing the probability of a final and binding sentence before prescription in a way that is disadvantageous to the defendant.

Standard solution: codes of professional ethics claim that, as a rule, a lawyer may or should terminate power of attorney if it follows from circumstances that the client lost trust in them. This means that, when the relations between the defence lawyer and the defendant impede effective action in the interests of the latter, the former is obliged to end the cooperation. However, it is unacceptable to abuse this duty to get rid of a problematic or economically unattractive client, or in order to prolong the proceedings. But, in the discussed situation, such prolongation is the client's intention, not the lawyer's.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. If the client really behaves so as to render effective defence impossible, then its continuation would mean doing harm. The greater evil would be to remain as counsel for the defence in order to enable the client to realise their alleged plan – beneficial for the client, even if inadmissible. The potential evil caused by prescription would be lesser than the defence attorney acting to the disadvantage of the defendant, as it would contradict the lawyer's role. The difficulty with evaluating whether the client's conduct really impedes effective defence means the situation should be classified as an epistemic dilemma.

5.4.5. Undermining witness credibility

Facts: in a rape case, an act under Art. 197 § 1 CC, the defence lawyer received from the accused information on the circumstances of the intercourse, to the effect that it was voluntary, which was indicated by many actions of the aggrieved – in the defendant's opinion provoking and encouraging intercourse. The defendant claims that the accusation is a calculated act of vengeance by the aggrieved. The accused suggests submitting a motion to interrogate the aggrieved as witness, with the defence lawyer asking her a series of questions about her intimate life that would confirm his thesis.

Prima facie dilemma: the lawyer must decide whether to submit a motion for evidence for a witness interview, and ask the aggrieved questions that will be painful and stigmatising for her but would be in his client's best interests, taking the position that questioning may go as far as permitted by the presiding officer of the court, who is obliged to object to misplaced questions pursuant to Art. 370 § 4 CCP, or not to follow the defendant's suggestion, or to follow it with restraint and so risk acting to the detriment of the defendant's interests.

Standard solution: the role of the defence is to apply all legal means of action in their client's interests. In the scope of such action lies both using the client's theses about the case facts, and undermining witness credibility. Codes of professional ethics for advocates and legal advisors limit these actions by forbidding the intentional use of untrue information by lawyers, and mandate maintaining appropriate language – tact, moderation, restraint, caution and not violating the dignity of the participants to proceedings.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. Correctly performing the role of counsel for the defence and finding the truth are crucial here for the lawyer. Incorrect defence would be a greater evil, due to the particular duties of lawyer to the client resulting from their professional role. The situation may be treated as a conflict of conscience.

5.4.6. Disclosing an alibi against a client's will

Facts: in a case of burglary, an act under Art. 279 § 1 CC, when visiting in prison the accused Wiesław T., his defence lawyer received information that *tempore criminis* he was with his lover Joanna B., and so could not be the perpetrator. Simultaneously, the accused clearly forbid use of this information in the proceedings, including the plea to interview Joanna B. as witness. He justified this with his fear of his spouse Anna T.'s, anger and potential revenge by her brothers – Arkadiusz J. and Marek J.

Prima facie dilemma: the defence lawyer must decide whether to submit a motion for evidence and reveal the information collected from the client, but against his will and so expose him to his spouse's anger or her brother's revenge, or not to reveal it and thus to execute the client's will but simultaneously expose him to unjust conviction by the court.

Standard solution: the defence lawyer's task is to act solely for the defendant's benefit. Also, they have legal position to some extent independent from the defendant and are not bound by their commands, although in case of losing the defendant's trust, they should terminate the authorisation to defend. In effect, there exists the possibility for the defence lawyer to undertake exceptional acts in the interests of the defendant but against their will. The lawyer is obliged to use this possibility.

Meta-ethical perspective: the situation is not a dilemma in the strict sense, because options are not symmetrical. Correct execution of the defence lawyer's role requires undertaking actions only for the client's benefit. Not disclosing the information, which would result in unjust conviction, would be doing harm

to the client. The consequence for his family life would also be harm, but to a lesser degree from the point of view of the defence lawyer. Improper defence would be a greater evil due to the particular obligations of the lawyer to their client, resulting from their professional role. Yet, the situation can be treated as a conflict of conscience.

5.4.7. Revealing proof of guilt against the client

Facts: in a case of murder i.e. an act under Art. 148 § 1, the indictment is mainly based on circumstantial evidence. The chief weakness of the evidence collected in preparatory proceedings is the non-discovery of the alleged victim's body, and adopting a thesis of murder in relation to the victim's disappearance. This creates the high probability of the acquittal of the defendant, who in contact with their defence lawyer acts audaciously and shows no remorse. When the situation in proceedings became very favourable for the accused, they disclosed to their lawyer that they had committed the act, and revealed the place where the body was hidden.

Prima facie dilemma: the defence lawyer must decide whether to keep the information to themselves and continue their activities in the proceedings heading towards acquittal, with the awareness of the defendant's guilt and knowing it could be verified by locating the body, or to terminate the authorisation for defence and reveal this information, hence abusing the defendant's trust and acting to their detriment in a most serious way, i.e. providing aggravating proofs of guilt.

Standard solution: the defence lawyer's role is to act for the defendant's benefit, and providing proofs of their guilt would sharply contradict this task. Information is conveyed by the client in confidence and protected by professional confidentiality. In continental legal culture, the defence lawyer's confidentiality is unconditional and provides for no possibility to disclose information. In other cultures, there are exceptions related to the prevention of crimes in connection with significant damage to person or property.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. Abuse of the client's trust is acting beyond the professional role of a lawyer. It is not the task of the defence lawyer to provide proof against the defendant, even if they may be the only source of it. The confidentiality of the defence lawyer is absolute. Possible evil resulting from maintaining this confidentiality is balanced by all the powers of the bodies carrying out the proceedings and indictment. Undeniably, the situation may be a major conflict of conscience.

5.4.8. Using false information obtained from the client

Facts: Alojzy B. was accused of stealing electricity, i.e. an act under Art. 278 § 5 in conjunction with § 1, consisting of using illegal power connection in a building for several months so that current consumption was charged to his neighbour Janusz P. In a talk with his defence lawyer, the defendant denied the allegations and claimed that the increased electricity consumption in Janusz P.'s premises was due to illegal production with machinery of great power. To the defence lawyer, this claim does not correspond with the evidence, there is a probability bordering on certainty that the defendant's statement is false. However, Alojzy B. insists on using this information in his defence.

Prima facie dilemma: the defence lawyer must decide whether to use the information for the truth of which he cannot vouch, and which is almost certainly false, which will cause in themselves the negative feeling associated with using falsehood, or to refuse the client's demand and independently reject one of the versions of events, which will affect the trust of the defendant.

Standard solution: codes of professional ethics for defence lawyers and legal counsels prohibit knowing use of false information by a lawyer, but they are not responsible for the truth of information received from the client. For this reason, the defence lawyer should primarily be dissuaded from using most probably false information from the client. If the client maintains their claim, and building a defence based on this information threatens to be to the client's disadvantage in proceedings, the defence lawyer should inform the client about the possibility of making statements.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because there are more options of conduct and they are not symmetrical. The greatest harm would be done if the lawyer used the information from the client and acted to his detriment. However, due to exceptional obligations towards the client, using information from them, even if it proves false, is a lesser evil than acting against the client, provided that it is not acting for the client's disadvantage. There are other possibilities, e.g. informing the client about the possibility of making statements. Hence, we may speak of a conflict of conscience here, and if the lawyer had a problem with assessing the truth of the information and the consequences of using it for the accused's advantage, then it would be an epistemic dilemma.

5.4.9. Failure to appear at trial

Facts: in the case of Mariusz T., in which there was no need for an assigned defence, a lawyer undertook attorney duties, and in face of the difficult situation

of the accused, agreed to do it free of charge. At the same time, in another case conducted by the lawyer in a law firm in standard procedure, namely for fee, the assigned trial date coincided with that of the trial of Mariusz T. The attorney considers agreeing with the defendant that they will fail to appear at trial if the clash really occurs, to which Mariusz T. agrees, being grateful to the lawyer for conducting his case free of charge.

Prima facie dilemma: the attorney must decide whether to agree with the accused that he will defend himself in one hearing, in which case no interruption of proceedings will take place, but the client will risk negative consequences due to lack of defence, or to plea for the trial to be rescheduled and so risk the prolongation of proceedings.

Standard solution: according to the principle of loyal representation of client and disciplinary jurisdiction, presence at a hearing is one of the fundamental obligations of a lawyer, even when it is not mandatory on grounds of procedural law. If the defendant uses defence lawyer, they are entitled to expect that they will be present at every hearing, and possible collisions in this respect will be removed within the framework of legal regulations. Moreover, the standard of earnest defence cannot be graded depending on whether it is free of charge.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. Failure to appear is a greater evil than undertaking attempts to adjourn a trial. The situation is rather a conflict of values which can be solved through balancing.

5.4.10. Not lodging an unfounded legal remedy despite the client

Facts: Mariusz Z. Was accused of bigamy, i.e. an act under Art. 206 CC. Despite his defence lawyer's efforts, he was – due to undeniable facts – found guilty of alleged crime. He was ordered to pay a fine, which in the defence lawyer's opinion is mild punishment for this type of crime. Mariusz Z., however, does not share this opinion and demands that his defence lawyer appeal against the sentence in order to lower the administered fine, while the defence lawyer thinks that this will only cause continuation of time-consuming and costly proceedings without significant chances of a more favourable verdict for Mariusz Z.

Prima facie dilemma: the defence lawyer must decide whether, in face of the defendant's lack of consent for abandoning the appeal, to refuse to prepare it and terminate the authorisation to defence so that the client may get help from

another lawyer who sees the situation differently, or to bring an appeal despite of their own judgment about the chances of its effectiveness and at the same time exposing the client to long-term proceedings and costs.

Standard solution: codes of conduct for attorneys and legal counsels provide for the necessity of having a client's consent for to abandon the lodging of legal remedy. In the event of lack of consent, the lawyer must present the client with a relevant opinion, and if they do not change their will, lodge the appeal, even when it is obviously unfounded. In the latter case, the lawyer should terminate the authorisation to defend the client. Hence, the rule is to lodge legal remedy in the interests of the client, and abandoning it only an exception which must have substantive support.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. Not executing the client's will as regards the appeal is a greater evil than lodging it, even if the chances for its effectiveness were assessed as scant. The obvious unfoundedness of appeal does not occur here, and terms of a sentence are in discretionary powers of the judge, and so the chances for effectiveness of appellate issues are relatively higher than in other spheres. The situation is rather a conflict of values, which can be balanced through their hierarchisation. If a lawyer had a problem with assessing the correctness of the issues, it may also be considered an epistemic dilemma.

5.4.11. Disagreement with the defendant about a plea for judgment of conviction

Facts: a student of law, Tomasz Z., was accused of tampering with a document to pass it off as an original, i.e. an act under Art. 270 § 1 CC, in that he placed the mark on an exam sheet using the name of his academic professor. The prosecution demands six months imprisonment. After revising the case records, the defence lawyer decides that the facts and guilt of the accused are beyond doubt, and so tries to convince him to plead for a judgment of conviction to be issued, pursuant to Art. 387 § 1 CCP, and a prison sentence. However, the defendant does not agree and claims that he may submit a motion for a fine. In the defence lawyer's opinion, it would be highly probable that the prosecution would raise an objection to such a motion.

Prima facie dilemma: the defence lawyer must decide whether to stop trying to convince the accused to submit the motion for judgment of conviction and continue the proceedings, or to continue persuasion, and in the face of its

ineffectiveness acknowledge that the loss of trust from the accused has occurred, and so terminate authorisation to act as defence.

Standard solution: codes of conduct for attorneys and legal counsels do not regulate all differences in opinions between lawyer and client about how to lead the case. The regulations concern i.a. such general issues as loss of trust, and such specific ones as lodging a legal remedy. Submitting a motion for judgment of conviction is subject to general principle, so if the client does not want to lodge such a motion or insists on some particular content which is not against the law, then their will should be executed.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not symmetrical. Submitting a motion for judgment of conviction, the content of which would be in line with the client's will, but which would have lesser chances of effectiveness, is a lesser evil than terminating defence and exposing the client to difficulties due to the necessity to change defence lawyer. In this situation, we may speak of a conflict of values, which can be balanced by hierarchisation.

5.4.12. Accepting and conducting a political case

Facts: an attorney was appointed to lead *ex officio* proceedings in a case of an MP, a member of one of the opposition factions, accused of rostrum occupation and hence preventing the continuation of a parliamentary session and so by force or unlawful threat influencing the official acts of government authority, i.e. an act under Art. 224 § 1 CC. The indictment was preceded by waiver of immunity. The court panel was appointed on the grounds of new regulations, which give the president of the court full discretion in this respect. The regulations also provide that the president of court is appointed directly by the minister of justice. On these ground and other circumstances, the defendant claims that the case is political and is only a form of repression typical of an authoritarian state, and that the judgment in it had already been issued. The attorney starts to share this suspicion.

Prima facie dilemma: the attorney must decide whether to accept the case and lead it in a standard way, defending the accused but with no hope of success and simultaneously validating the court as a correctly functioning judicial authority, or to refuse and lead the case in non-standard way, and thus to protest against the situation while simultaneously failing to take a substantive attitude towards the indictment.

Standard solution: the problem has no standard solution due to its exceptional nature. Beyond doubt, defence is particularly important for the

client. The way of conducting it, however, bears professional or even personal hazard for the lawyer. It should be adjusted to circumstances. Historical examples show that, in a situation when a case is impossible to win due to political reasons, documenting the court's lack of impartiality is of crucial importance for the future in legal as well as non-legal terms.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense, because options are not doing harm to the client. In every case, the defence lawyer provides help to the client. The problem is to what ends it is to serve in a situation of a political trial. Hence, the situation is primarily a conflict of values, which can be balanced both by hierarchisation and optimalisation.

Chapter 6. Lawyers' and Judges' Dilemmas in Civil and Commercial Law

Sebastian Sykuna

6.1. Preliminary remarks

A thesis may be ventured that civil law is the most expanded legal discipline in the Polish legal system, and also the most popular one. The category does not belong to divisions used in legal sciences, but conveys the worth and significance of civil law, for everyday people carry out acts that may be classified as civil law transactions. Sometimes, we do not even realise that automatically we become subject to civil law acts, with certain legal consequences. Daily we establish various legal relationships, within which we provide some service or goods and so we oblige ourselves to certain behaviour. There's a reason for saying that each man was, is or will be subject of civil law. Hence, it is important to get some insight in this short introduction into the structure and rules that can be deciphered in civil law.

It is widely accepted that civil law is a branch of private law. In Polish legal culture, it was formed on Roman law. Most generally, it may be pointed out that civil law regulates relationships between subjects of private law. There are several branches of it. First, it concerns the so-called General part of civil law, and is regulated by the fundamental normative act for civil law, the Civil Code of 1964. The general part concerns rules and institutions which are common for the whole of civil law. It is worth mentioning here the regulation on legal entity and civil law transactions. The second part is property law. Like the General part, it was regulated mostly in the Civil Code. The most important problems of property law include rules on property, perpetual usufruct, limited property rights, and possession. The third section is liabilities, also regulated by the Civil Code, different from property law, which is effective *erga omnes*, liabilities concerning relative property rights, regulating the management of assets between civil law entities. The liabilities section regulates particular

contracts, for example sales, tenancy, leases or loans. Another section of civil law is inheritance law. In the hierarchical structure of the Polish Civil Code this is included at the end as Book Four.

Inheritance law regulates passing on property upon the death of an individual to other entities by statutory inheritance right or under a will. Another branch of civil law is family and custody law. The fundamental normative act for this section is the Family and Guardianship Code from 1964. This law regulates, among other things: entering into matrimony, dissolution of marriage, marital duties, the issues related to parental authority, and the issues of custody and guardianship. Due to the special role of family law, ethical dilemmas of judges and counsel are described in a separate part of this book.

Intellectual property law is also part of civil law, and it concerns the issues of original and non-material artefacts. Commercial law should also be described in a discussion of widely understood civil law. The main normative act especially pertaining to companies is the Commercial Companies Code of 2001. In Polish legal science it is adopted that, despite didactic and research issues, commercial law is basically part of widely understood civil law. Hence, in the title of this chapter only reference to civil law is made, which naturally does not mean that the reader will not find dilemmas that relate strictly to commercial law. Besides, in civil procedure it should be raised that, with the abolition of separate proceedings for commercial cases in 2012, cases between entrepreneurs proceed under General principles of civil law. As a result, many dilemmas that appeared before the amendment became dated. As regards procedural issues, in the Polish legal system the civil procedure was regulated in a separate normative act of 1964, the Code of Civil Procedure. It consists of three parts: examination proceedings, protective and enforcement proceedings, and a third part containing regulations in the scope of international civil proceedings. Each of these parts is very elaborate. The most detailed is Part One, including regulations for trials and non-contentious proceedings.

When describing civil law, we very often refer to some fundamental principles that may be decoded from its norms, among which the most important are: the principle of the equality of parties under the law, freedom of contract, protection of property, the doctrine of clean hands, grandfathering, and the protection personal rights, and the ban on abuse of process. Because of the introductory role of this part of the book, it does not seem necessary to analyse in detail the theoretical concept of principles in the legal system, nor the detailed discussion of every of the abovementioned principles separately. It suffices to indicate that the principles determine the direction of a court's decisions in specific cases, and in the light of which values the courts and lawyers should interpret particular provisions of civil law. It should also be stressed that both the judges

and attorneys in civil proceedings face many problems, which are related to the interpretation of substantive and procedural law. Hence, it is necessary that the dilemmas collected in this chapter refer to both spheres. Obviously, it is impossible to describe all dilemmas that accompany the mentioned participants of the civil proceedings, therefore the following selection should be treated as exemplary.

6.2. Dilemmas of a judge

6.2.1. Dissolution of a commercial company

Facts: Jan K., one of the partners in two-member limited partnership AJAKS, decided that he wanted to end cooperation within the partnership. However, he could not contact his partner for a very long time. He did not want to, and as a matter of fact could not really carry out the procedure of leaving the partnership. For this reason, he brought action at law to perform the procedure of withdrawal from partnership. He brought action to dissolve the partnership through judgment. In the petition, he stated that he had lost his trust in the partner completely and that was the main reason for his suit. Unfortunately, Jan K. did not present any details or examples of his loss of trust. When the case came to trial, it turned out that the other partner did not want the partnership to be dissolved.

Prima facie dilemma: the court must settle whether it is possible to dissolve the partnership only on the grounds of the will of only one partner, and with causes of this demand only succinctly outlined in petition.

Standard solution: the court, when hearing a case in commercial law, including commercial companies law, must make a ruling taking into account all the circumstances of the case as well as the will of the parties.

Meta-ethical perspective: in the described example, there is no ethical dilemma in the strict sense. The court faces a legal problem, as it has to assess the factual state and rule whether the indicated reasons are sufficient.

6.2.2. Partition of real estate in dissolving a partnership

Facts: Jan K., Zygmunt S. and Andrzej W. conducted business activities in the form of a private partnership WONTEX, which mainly sold office supplies. As the business proved profitable, the partners decided to purchase a property in the centre of Warsaw. After several years, Jan K., stricken by illness, decided

to leave the partnership but did not want to end his business activity officially. Although he factually left the partnership, no settlement between partners was reached. Four years later, the other partners decided they wanted to dissolve the private partnership. Due to the lack of consent, co-ownership dissolution was carried out within court proceedings. Upon learning the news, Jan K. also requested that the court take into account in the division of real estate.

Prima facie dilemma: the court, after proceedings, will have to decide whether, despite the fact that the partner Jan K. left the partnership earlier, he should receive satisfaction in the division of real estate.

Standard solution: when deciding the problem, it should be taken into account that the real estate was never the property of the partnership but only of the partners, with the annotation that they are co-owners as partners of a private partnership. Besides, the court should remark that Jan K. did not comply with the formalities.

Meta-ethical perspective: the problem is not a moral dilemma in the strict sense for the court. The court will carry out no evaluation of its possible decisions. The described factual state concerns rather a problem of application of the law, or an interpretational problem.

6.2.3. Dispute with insurer over amount of compensation

Facts: due to heavy rains, the basement of Jan K.'s house was flooded and, among the objects destroyed, was a gas boiler for heating water. Jan K. bought a new heater and claimed compensation. The insurer accepted its responsibility as to the principle and paid part of the compensation amount, refusing to pay the whole by indicating that the destroyed heater was produced in 1992, which clearly lowered its value. Hence, in the insurer's view, buying a new heater constituted not only redress of damage but also the modernisation of the boiler room, for which the insurer is not responsible within the contract for real estate insurance. The insurer stated that, in its opinion, it was possible to buy a used heater. It is worth adding that the General Terms and Conditions of Insurance do not indicate which spare parts and methods of repair should be used when redressing damage. Hence, Jan K. brought an action at law for compensation under insurance, submitting that there are no used heaters on the market, and moreover that it was technically impossible to install used equipment due to damage to the whole installation.

Prima facie dilemma: the court must decide whether replacement of the heater really was modernisation of the heating room as the defendant claims, and rule in favour of justly limited compensation.

Standard solution: in the above situation, the court probably uses expert opinion in order to confirm or disprove the circumstances claimed by the parties.

Meta-ethical perspective: the case is not an ethical dilemma in the strict sense. It seems to be a situation of an interpretational problem.

6.2.4. A civil court bound by a conviction issued by a penal court

Facts: Waldemar K. brought suit for payment of compensation for non-pecuniary damage due to his son's death. The defendant claimed that the prescription period is over as the traffic accident happened 16 years before. However, Waldemar K., in his petition, pointed out that under Art. 442 § 2 of the Civil Code: "If the damage results from a crime or an offense, the claim for remedying the damage is barred by the statute of limitations twenty years after the crime is committed [...]" The defendant's attorney presented a certified copy of the judgment acquitting the driver on charges of causing death in a traffic accident – Art. 177 § 2 CC. Irrespective of the above, during the hearing it turned out that the perpetrator of the damage, the driver, broke the speed limit and probably did not adjust their driving to take into the weather conditions.

Prima facie dilemma: in this case, the problem is that the civil court is bound by the penal court decision. What is important, according to jurisprudence, is that the civil court should decide independently whether the act that caused damage has the objective and subjective features of a criminal offence.

Standard solution: in the Polish legal system, the court is independent. It bases its decisions on its own establishment of facts and interpretation of rules of law. Independently of this, there is a certain relation between the determinations of penal courts and the decisions of civil courts.

Meta-ethical perspective: it is impossible to accept that in the above state there is any ethical dilemma in the strict sense. It is rather a problem of the application of law, or at most of interpretation.

6.2.5. Evidence preclusion

Facts: since four years there have been proceedings for pecuniary compensation under civil liability insurance, against a farmer for an accident on his farm for which he was at fault. Evidentiary proceedings ended roughly three years earlier. The court, upon the defendant's attorney's request, allowed a fourth expert opinion, because each previous one had been undermined by the defendant. Additionally, the attorney reveals new circumstances of the case and requests the appointment of further experts. The claimant's attorney, in his submissions, points unequivocally to evidence preclusion.

Prima facie dilemma: the court must decide whether, despite the end of evidentiary proceedings, to allow further evidence in the case. The court is concerned that dismissal of evidence in the future will be grounds for appeal for the party that requested it.

Standard solution: the parties in proceedings may present evidence to support their claims. Most often, however, the court will, in order to prevent prolonging the proceedings, set a time limit for final evidence motions. Naturally, it is the court which decides on accepting motions after the deadline. In the case described, it is hard to determine when the court will stop accepting further evidence motions. In each case, it will be decided by the character of submitted evidence.

Meta-ethical perspective: the described case is not an ethical dilemma in the strict sense, as the court does not make any choice on an ethical level.

6.2.6. Claim statement of a suitor

Facts: limited liability company Lewex located in Warsaw sued another commercial law company. The claimant did not support their claim with any documents attached to the suit, nor did they include in it a motion to hold a hearing. The defending party denied all claims of the suitor. However, the president of the court, when viewing the case records, decided the case circumstances support the claimant. In light of the above, and not wanting to exceed their role as arbiter, the president summoned the claimant to give precise details of their demand. Although the suitor replied with a expatiated comprehensively, this did not address the court order.

Prima facie dilemma: in view of the factual circumstances outlined above, the problem concerns the very fact of occurrence of premises for the case to be considered at a sitting in camera. The dilemma is reflected in the problem of the court's role in relation to the passive role of one of the parties.

Standard solution: in the Polish legal system, the court may decide at a hearing pursuant to Art. 148¹ § 1 of the Code of Civil Proceeding, which provides that: “the court may hear a case in camera if the defendant acknowledged the claim, or when after the submission of pleadings and lawsuit documents by the parties, as well as raising defences or objections to an order for payment or objection to default judgment, the court decides that – considering the whole of presented claims and evidence – holding a hearing is not necessary.”

Meta-ethical perspective: in the above description, there is no ethical dilemma in the strict sense. The court may summon a party to elaborate on their claim.

6.2.7. Determining the after-effects of a traffic accident

Facts: 80-year-old Joanna K. pursued a claim for compensation and its fulfilment for damage suffered and non-pecuniary damage, the cause of which she sees in an accident nine years earlier when she was hit by a reversing car. In the course of the proceedings, it was indicated that the direct effects of the accident were concussion and a superficial leg injury. Since the incident, according to Joanna K., her health had deteriorated significantly, namely memory lapses, balance problems, and eyesight disturbances started to occur, and she became more irritable. Her daughter, testifying as witness, has lived with her mother for over 20 years, and confirmed the claimant's words. She stated that both her mother's physical condition and her behaviour before the accident were normal, whereas now she requires constant care and more often suffers from intensification of the described symptoms. The court, doubtful about the distant effects of the accident, demanded an opinion of an expert neurologist, who stated that the claimant (acting probably unconsciously and unintentionally) ascribes all her ailments to the accident from nine years ago.

Prima facie dilemma: the court must decide whether the claim is viable, and should hence determine whether there is a causal relationship between the woman's accident from distant past and her present condition.

Standard solution: in Polish civil procedure, courts should use expert opinions (often more than one) in the event of doubt about the circumstances of a case, especially when special knowledge is required.

Meta-ethical perspective: in the above case, there is no ethical dilemma in the strict sense. It seems that the court's problem is about knowledge, thanks to which it could accept or reject the viability of the claim.

6.2.8. Hearing a party in civil proceedings

Facts: in 2009, Jan K.'s daughter was killed in a traffic accident. Upon the family's instigation, the father, who permanently undergoes psychiatric treatment, brought action to court. The court, in order to determine the amount of compensation to be paid, must uncover the relationship between him and the daughter. However, right at the beginning of the first hearing in the courtroom, Jan K. burst into tears and fainted.

Prima facie dilemma: the court must determine the amount of compensation. To do so objectively, it must determine several circumstances, the relationship between the deceased and the beneficiary at the time of her death being crucial among them. In this case, the court must settle the strength of the emotional attachment between father and daughter.

Standard solution: when a court cannot hear oral evidence necessary for passing judgment, it may base its verdict on other evidence. It may also summon one witness several times so that they testify on their own or in the presence of a psychologist.

Meta-ethical perspective: in the described situation, there is no ethical dilemma in the strict sense. The court must resolve the case on the basis of some evidence. Its decisions in this regard do not concern ethical issues, but legal ones, primarily of procedural type.

6.2.9. The problem of the appellate court with evidence preclusion

Facts: a defendant, who lost a case in the first instance, appealed to the appellate court. The appeal contained new evidence, which clearly confirmed the unfoundedness of the claimant's petition. The appellate court, after analysis of case records, decided that the court of first instance ruled in favour of the claimant despite the wholly passive stance of their attorney.

Prima facie dilemma: the court of second instance must consider whether, despite the evident unfoundedness of the claim but in relation to evidence preclusion, it should dismiss the appeal or rule otherwise.

Standard solution: in the Polish legal system, especially in cases from the broadly understood commercial law, great emphasis is laid on the principles of evidence preclusion and the concentration of the material submitted in court proceedings. Besides, courts should consider the situations in which a party is represented by counsel of its choosing.

Meta-ethical perspective: in this description, the problem is not an ethical dilemma in the strict sense. At most, it may be problem of the application of law or interpretation.

6.2.10. Establishing liability for damage

Facts: Jan K. brought an action to court for compensation for an industrial injury. In the course of the proceedings, it turned out that he fell from scaffolding with a safety barrier to prevent workers from falling. At the moment of the accident, Jan K. was working under a contract of mandate with a company searching for workers and delegating them to the work places of other businesses. At the site where the accident occurred, the provision, assemblage and daily technical inspection of scaffolding was in the hands of an external company, which was not the claimant's employer and was not on the premises of where the incident happened. In response to the pleading, the sued company stated that, despite their contractual obligations to correctly and completely assemble the scaffolding and to inspect it daily, this obligation did not cover providing the workers with safe and hygienic work conditions, since in this case only the employer takes responsibility. Hence, the defendant filed a motion to strike and dismiss.

Prima facie dilemma: the adjudicating authority must determine the responsibility for failure to secure the scaffolding. These findings will allow the court to ascribe liability, and potentially award the claimant compensation.

Standard solution: the court adjudicating in cases for compensation, even involving workers, must abide by the rules following from the Polish civil procedure. To issue a correct sentence, the court conducts evidentiary proceedings, surely also involving an expert opinion.

Meta-ethical perspective: in this example, the situation cannot be viewed as an ethical dilemma in the strict sense. The court must determine the facts of the case and then, if a causal relation is stated, it determines the entity responsible for the negligence. Therefore, it seems it is only epistemic dilemma.

6.2.11. Appointing a company liquidator to oversee liquidation of a partnership

Facts: Jan B., limited partner in Drux limited partnership, after several months of conflicts with general partner Andrzej W., decided that he had lost trust in his partner. Due to the lack of any possibility of continuing cooperation, Jan. B. undertakes actions to dissolve the partnership. Unfortunately, as Andrzej W. does not react, the partnership cannot be ended by virtue of

a partners' resolution, and so Jan B. brings a civil action for dissolving the partnership. Because the binding judgment to dissolve the partnership will open the way to its liquidation, by law making both partners its liquidators, Jan B. also attaches a motion to appoint a third-party liquidator.

Prima facie dilemma: the court has a problem with the partnership's dissolution, i.e. not very precise arguments for Jan B.'s motion, as well as a problem with the appointment of a liquidator.

Standard solution: in this example, the court, during the hearing with the parties, will probably try to determine the real causes of mutual conflicts between partners. Hence, the claimant will have to indicate the circumstances that caused him to lose trust in the other partner, and whether that factual state of affairs really makes it impossible to continue the partnership.

Meta-ethical perspective: in the described situation, there is no ethical dilemma in the strict sense. In order to make a decision, the court needs more information, which it should obtain from the parties. Therefore, it seems that it is a typical epistemic dilemma.

6.2.12. A partnership board member's liability

Facts: Jawex LLC and Trox LLC signed a contract in which the former undertakes to deliver goods for a certain time, and the latter to pay a certain fee for each delivery. Unfortunately, after a short time Trox stopped paying for the goods. Despite default notices, it did not settle the debt. Jawex, in view of the above, filed suit for payment, and following a trial obtained a legally binding order for payment. After submitting the order for payment to an enforcement officer, the repossession proved ineffective. Hence, Jawex invoked Art. 299 of the Commercial Companies Code, and brought an action to court against the board members of Trox. Due to recent change of board as defendants, the action indicated both the old and the new board members.

Prima facie dilemma: the court must decide whether premises for the liability of board members of an LLC concern all indicated in the pleading, or only former members, who did not submit a motion for dissolution in good time.

Standard solution: the court, while deciding the liability of LLC board members, will have to abide by the rules of the Commercial Companies Code. In this case, Art. 299 CCC seems crucial; it provides, in Par. 1 that "If enforcement against the company proves to be ineffective, the members of the management board shall be jointly and severally liable for its obligations." While par. 2 provides that: "A member of the management board may release himself from the

liability referred to in § 1 if he demonstrates that, in appropriate time, a petition for bankruptcy was filed or that composition proceedings were commenced, or that it is not due to his fault that the petition for bankruptcy was not filed or that composition proceedings were not commenced, or that the creditor did not sustain any damage despite the fact that the petition for bankruptcy was not filed or that composition proceedings were not commenced.”

6.2.13. Excessive length of time

Facts: in a district court, there are proceedings for pecuniary compensation on account of a traffic accident. Due to difficulties in determining the factual circumstances of the accident's effects on the claimant after appointing one expert to give a medical opinion, the court addressed another with the same goal in mind. Unfortunately, like the previous expert, this one also returned the case files to court without an opinion. Hence, the court addressed a third expert. After about seven months from delivering him the files, the third expert petitioned for a six-month prolongation of the term for issuing the opinion.

Prima facie dilemma: the court has a dilemma about the actions it should take to accelerate the proceedings. Hence, whether it should apply measures provided by civil proceedings provisions, in order to discipline the expert.

Standard solution: in a situation where special information is needed, the court, after hearing the parties' motions about the number of experts and their choice, may summon one or more experts to seek their advice. This norm directly follows from the Polish civil procedure. Besides, the Civil Procedure Code also provides that the court may demand an opinion from a relevant research institute. The court may demand additional explanations from the institute, either in writing or given orally by an appointed person, and may also order additional opinion by the same or another institute.

Meta-ethical perspective: in the described case, there is no ethical dilemma in the strict sense. At most, it may be taken as a problem of the application of law for the court, which must make a decision about accelerating the proceedings.

6.2.14. Contributory negligence

Facts: Jan K. was coming home at 2 a.m. under the influence of alcohol. For some non-established circumstances, when crossing the road, he stopped and lay on it facing down. In this condition, he was hit by a passing car. Despite these circumstances, Jan K. brought legal action for compensation. In the course

of the proceedings, the facts were determined as above, with the reservation that the driver exceeded the speed limit and probably used only dipped headlights in a situation where they could and should use high beams. The claimant's counsel also demanded compensation for the sustained non-pecuniary damage. In response to the petition, the defendant's side motioned to dismiss the complaint in full because of the sole responsibility of the claimant for the damage.

Prima facie dilemma: the court faces a problem related to determining the causal relations between the damage and claimant's actions. The court knows that the traffic accident was caused by the defendant, who broke the speed limit in a built-up area. However, it must also consider the claimant's behaviour.

Standard solution: the court, when issuing a ruling, first must determine all circumstances related to the case. If damage occurred, the court may judge on relevant compensation. However, if the claimant contributed to the damage, the court must determine the extent of this contribution, and take it into account when settling the amount of compensation.

Meta-ethical perspective: there is no ethical dilemma in the described case in the strict sense. The court has an epistemic dilemma, as it must determine certain facts necessary for issuing a correct verdict.

6.2.15. Refusal of indemnity by the Social Insurance Institution (Polish ZUS)

Facts: Adam W., insured in SII, had a work accident. He was hit by a 30-kilo metal pipe that fell from two metres and struck him on his back. Unfortunately, in the accident report false information was given, namely that the pipe was only 40 cm long and weighed around one kilo. In this situation, SII refused to pay compensation for the work accident, claiming that the pipe described in the report could not do such damage to Adam W. The claimant appealed against this decision of SII. In the course of the proceedings, all witnesses, apart from the OHS specialist who wrote the report, unanimously testified that the pipe was about one metre long, was filled with loose material, and could weigh about 40 kilos.

Prima facie dilemma: the court has a problem related to determining the true sequence of events in the case. It must therefore determine the credibility of a document (the accident report), and of the witnesses' testimony, this being different from the written material.

Standard solution: the court, when issuing a verdict in each case, must base its ruling on the entire gathered evidence. If it is contradictory, the court must

decide which it believes and which it refutes. Moreover, the court must justify why it denies credibility to some of the evidence.

Meta-ethical perspective: there is no ethical dilemma in the strict sense in the described case. The court must determine some factual circumstances, and on these grounds issue a correct ruling. In this case it seems to be an epistemic dilemma.

6.2.16. The court's problem with maintaining the arbitrator's role in the proceedings

Facts: a district court in W. conducts possession proceedings. Jan W., an extremely affluent businessman, filed a motion for eviction against Anna K., an 80-year-old resident of the tenement. For this purpose, he hired two excellent lawyers, who prepared litigation documents and in hearings completely discredited the witnesses for the defendant. Although Anna K. is also represented by counsel, they are appointed by the court and do not show sufficient involvement in the case. The court notices that the defence lawyer's activity not only does not support the defendant's position in the proceedings, but may also lead to her failure.

Prima facie dilemma: the court faces a problem of proper behaviour towards the parties. Due to the adversarial nature of civil proceedings, it should be markedly independent from the parties' activities. Hence, it must consider whether to interfere in any way in the defendant's actions.

Standard solution: as indicated above, Polish civil procedure is adversarial. Therefore, the parties should carry out the dispute, and the court act as arbitrator. Yet the court has some instruments that allow it to intervene in the trial and be active in the proceedings.

Meta-ethical perspective: in the described factual state, there is no ethical dilemma in the strict sense. The court is not in a situation of conflict of obligations, in which the choice of one action entails the impossibility of the other. The court must consider only how, and if, to use the proceedings instrumentation in order to discover facts regardless of the role of any of the parties. Additionally, even when adjudicating, the court may refer to the principles of social interaction, which are also pronounced in Polish civil law.

6.2.17. Remote agreement on the phone

Facts: Jan K., during a phone conversation, made an agreement with the Teleheart company for the execution of a heart echo scan and coronary calcium scan. Jan K. heard that the echo scan can be carried out via the phone, hence he assumed that the other test could be as well. The service was allegedly activated. After two months, he received an invoice, which he did not pay. Thence Teleheart took legal action. In response to the complaint, Jan K. recognised it in full, but stated he does not have money, he did not use the service and cannot pay.

Prima facie dilemma: the court faces a legal problem related to the above factual state. It will have to consider performance impossibility if it turns out that conducting an echo scan and coronary scan via the phone is impossible. Moreover, the court will have to consider the circumstances connected with the potential application of Art. 5 of the Civil Code.

Standard solution: the Polish Civil Code, in Art. 387, provides that “A contract for an impossible performance is invalid.” This is a normative reflection of the Latin principle *impossibilium nulla obligatio est*. To fulfil this maxim, the performance must be objectively impossible to carry out, and must exist at the moment of concluding the contract.

Meta-ethical perspective: in the described case there is no ethical dilemma in the strict sense. The problem of court can be reduced to the problem of the application of law.

6.3. Dilemmas of the counsels

6.3.1. Problem of witness reliability

Facts: Joanna K. took legal action for a non-pecuniary claim following an accident. Several months before, as she reported to her counsel, she slipped at the premises of a certain working place and fell over. In her opinion, the accident was caused by lack of cleanliness. After the first hearing, the court obliged the claimant to present all evidence under pain of nullity of their further presentation. A day before the deadline, the claimant contacted her counsel to inform them that she “had a witness” who will testify before court that he saw the fall in question. Counsel was greatly astonished, because he had asked the client many times if anyone had seen the event, and every time the claimant had answered, with full conviction, “no.”

Prima facie dilemma: counsel, in view of the factual state, developed doubts about the reliability of the witness. Hence, they must decide whether to continue participation in proceedings, as there are convincing signs that the client is starting to present false evidence. Counsel's problem concerns yet another issue, namely the deadline to present conclusive evidence.

Standard solution: counsel most certainly will carry out a detailed talk with the client, in which they will attempt to determine all circumstances surrounding the appearance of the new witness, and the reasons why Joanna K. had never mentioned him. The attorney should also determine how the new witness found the client.

Meta-ethical perspective: in this case, a conflict of conscience may be seen. Counsel, if they believe the witness is unreliable, may refuse to petition for them in court. On the other hand, the attorney must consider their role in proceedings, and special relations with the client.

6.3.2. High compensation from one's own employer

Facts: Jan K. had an accident at his workplace. It follows from the circumstances of the event that the fault lies completely with his employer. After consulting the attorney, Jan K. asked them to prepare and file a suit against the employer to pay claims (under third-party cover) in furtherance of the sustained accident at work. Due to severe bodily injury, Jan K. and his counsel decide they will seek a significant amount. The next day, Jan K. instructed the attorney again; he continued to demand a high amount, but also demanded formulation of the claim in such a way that the employer does not bear a grudge. Moreover, he expressed his wish that counsel will use arguments and lead the case in a way that will not antagonise the relations between Jan K. and his employer.

Prima facie dilemma: counsel faces the problem of taking a relevant line of action in this case. As a professional, they know that, in order to win high compensation for the client, they must prove negligence on the part of the employer. Therefore, it seems impossible to obtain the effect as expected by Jan K., namely to maintain good relations with the employer.

Standard solution: counsel will have to make their client realise the correlation between him as the aggrieved party and the employer as the obligor. Naturally, the attorney should act moderately during the proceedings, but maintain good representation of the client. On the other hand, it is always the client who can choose whether they want to sue their employer for compensation.

Meta-ethical perspective: in this case, there is no ethical dilemma in the strict sense. Counsel does not face a choice of an ethical nature. It seems that their problem concerns the adoption of relevant line of representation of the client, after detailed discussion of its consequences.

6.3.3. Conducting a related case

Facts: Lawyer Jan K. has provided legal services for Fox LLC for several years. Unfortunately, due to ownership changes, the president of the management board was replaced, while other positions of the board were unchanged. Then the new president, also a lawyer, terminated the requirements contract with Jan K., and asked another law firm for legal advice. After one month, the former president of the company addressed Jan K. for help. In talks, he asked the attorney to prepare a suit for severance payment. Knowing that the lawyer cannot represent him, he only requests that he prepares the necessary documents for court, and provides informal counselling during the entire proceedings.

Prima facie dilemma: Jan K. faces a dilemma. Should he help in the way indicated by the former president? Ethical norms for lawyers prohibit him from providing legal assistance if he previously provided legal services to the opposing party.

Standard solution: ethical norms bind lawyers in every professional situation. The fact that the lawyer must counsel informally does not free him from the obligation of ethical conduct. The attorney is responsible for the form and content of lawsuit documents they edit, even if they do not sign them.

Meta-ethical perspective: in the above description, there is no ethical dilemma in the strict sense. The problem of the lawyer may be reduced to interpretational issues related to the interpretation of provisions in the Code of Ethics for Advocates.

6.3.4. Contradictory expert opinions

Facts: Adam W. had traffic accident, in effect of which he sustained serious bodily injury including cerebral haemorrhage and cerebral haematoma. First, a criminal trial took place, where Adam W. appeared in court as the aggrieved party and did not have his own counsel. While the criminal case was ongoing, Adam W. asked an attorney to prepare a civil claim for compensation. For the needs of civil case, Adam W. provided an independent medical opinion, in which a specialist indicated the undeniable relationship between the accident

and the injuries sustained by Adam W. The attorney started preparing the relevant suit, but asked the client to bring him copies of all case records related to the ongoing criminal proceedings. After seeing them, the attorney learned that the criminal case would probably end in acquittal of the accused. Moreover, two expert medical opinions reached conclusions completely different from the private opinion presented by the client.

Prima facie dilemma: counsel must decide whether to take legal action for compensation in the face of the probable unfavourable resolution of the criminal case, and in relation to negative medical opinions in the evidentiary material, which the defence lawyer will most probably submit in civil case.

Standard solution: in the Polish legal system, there is a quite controversial rule expressed in Art. 11 of the Civil Procedure Code, under which "Findings of the final conviction sentence in the criminal proceedings for the offence are binding on the court in civil proceedings. However, a person who has not been charged may plead in civil proceedings for any circumstance that excludes or restricts their civil liability."

Meta-ethical perspective: in this case, there is no ethical dilemma in the strict sense. Counsel must assess the probability of winning or losing a civil case in view of the above circumstances.

6.3.5. Problem of insufficient proofs in a case

Facts: Anna B. has a serious car accident. Due to the fact that she inhabits a small town, she started treatment at the only doctor practising there. Fortunately, after a long period of convalescence, she partly recovered. She asked a lawyer from a neighbouring town for help in receiving compensation. The attorney advised her of the necessity to present evidence, namely all the medical certificates and certified copies of medical records. Unfortunately, as it turned out, the local doctor did not keep any records, and Anna B. did not have any certificates. Moreover, she informed her attorney that, due to the small local community that had the services of only one doctor, she did not want any conflict with him by incurring negative consequences due to gaps in medical documentation.

Prima facie dilemma: counsel must consider whether to take legal action in this case. Not having any evidence apart from the client's statement, they must determine if there is any chance of winning the case. The second problem concerns the doctor. Calling him as witness will probably expose him to liability for negligence of duty in respect of keeping medical records.

Standard solution: in the above factual state, counsel should have a detailed talk with the client. Together they should analyse the evidence and determine the real chances for the suit's success. The client must be well-informed about any risks connected with the submitted claim.

Meta-ethical perspective: there is no ethical dilemma in the strict sense in the above case. Counsel does not face a choice of an ethical nature. The case concerns the strategy of case conduct and the decision to initiate it.

6.3.6. Unfavourable settlement of an agreement

Facts: Jan P.'s daughter was killed in a car accident. The trial for compensation and non-pecuniary damages has been ongoing for three years. The defendant, represented by counsel, will most probably win, but due to further opinions of experts the case may yet take several years. In this state, the defence lawyer proposed an agreement. Its terms, especially the amount of compensation and redress, are grossly low and far from the amount claimed. Despite this, Jan P. is willing to accept the terms, but he asks the defence for their opinion.

Prima facie dilemma: counsel of Jan P. has to decide how to help his client as regards the choice – whether to accept the proposed terms of the settlement agreement, or to wait patiently and carry on with proceedings.

Standard solution: counsel cannot take the responsibility for the very choice their client makes. However, they must discuss in detail all the possible aspects of the case. The client must have full knowledge about the time the proceedings are expected to take, and the supposed chances for getting the claimed amount.

Meta-ethical perspective: there is no ethical dilemma in the strict sense in the described case. Counsel is not in the position of a conflict of obligations. Their role is only to explain to the client all the aspects of the case, particularly including the risks that may arise in proceedings.

6.3.7. Release of claims for accidents at work

Facts: Joanna W. had a work accident in which she sustained serious injuries such as multiple contusions, head injury and concussion. After a short period of rehabilitation, she addressed lawyer Tomasz N. for help in preparing and submitting a claim for payment of compensation and redress for the sustained bodily harm due to work accident, and her personal injury. According to the client's will, counsel prepared a claim template but, before filing it, addressed the now former employer of the client with a motion for amicable settlement.

In response, the lawyer obtained information from the defence lawyer that Joanna W., when still employed and right after the accident, received a certain amount of money and simultaneously signed a statement relinquishing all future claims relating to the accident.

Prima facie dilemma: counsel of the aggrieved has a problem concerning the next decisions in the case, especially in respect of the client taking or waiving further legal action, and thus accepting that the paid amount fully satisfies the client.

Standard solution: in this case, there is the problem of misleading counsel or at least suppressing key circumstances influencing their work and the effectiveness of the defence. In this regard, counsel should meet the client and have an honest talk about the reasons for this situation. In legal terms, counsel must consider whether the paid amount fully satisfies the client's claim, and assess the effectiveness of the statement she signed.

Meta-ethical perspective: in this case, the ethical problem lies in the potential conduct of counsel in relation to the client's suppression of the case circumstances. Counsel will have to consider whether they can still cooperate with Joanna W., or, naturally after fulfilling duties, resign from further cooperation.

6.3.8. Problem with fulfilling the client's will

Facts: Anna K. asked lawyer Jan W. to prepare and claim payment in furtherance of an accident. The court released the claimant from court fees in full. In the course of the proceedings, the court ordered an examination of Anna K. by an expert doctor. In their opinion, expert claimed the aggrieved suffered no personal injury in relation to the accident. In view of the above, Jan W. petitioned for the appointment of another expert. Significantly, the court accepted the motion and admitted a new expert. Alas, this opinion was also unfavourable for the claimant. With such evidence, Jan W., professional attorney, decided that most probably the case would be lost, and informed the client about this. He also proposed that exactly because of the high risk of the claim being dismissed, and due to the fact that the defendant is represented by professional counsel, he would petition for the claimant to be released from paying costs of the proceedings, under Art. 102 Code of Civil Procedure, despite the loss but due to her difficult financial situation. However, the claimant decisively opposed such motion, stating that the court would then certainly dismiss her claim as it would decide that even the claimant herself did not believe in her likely success.

Prima facie dilemma: counsel must consider the effectiveness of further conducting the case when the evidence clearly is to the detriment of the party they represent. Additionally, they should explain to the client the current status of the case, closely and in detail.

Standard solution: Polish civil procedure allows for the possibility to release a party from court fees, pursuant to Art. 102. In particularly justified cases, the court may award court costs from the losing party only partly, or even release them from all costs.

Meta-ethical perspective: there is no ethical dilemma in the strict sense in the described case. Potential ethical problems of counsel may concern the conflict between their knowledge about the negative effects of their client's decision and her continuing demands. Counsel should advise her of all the possible consequences of her demand.

6.3.9. Extending the proceedings upon a client's request

Facts: lawyer Jan W. was asked by a client to join a civil case, which is at its final stage. Counsel requested delivery of all case records so that they may familiarise themselves with them before accepting the power of attorney. It turned out that there will be one last hearing, in which probably the closing argument will have to be delivered. Besides, the case had been ongoing for several years by then, and there were more than 10 volumes of case records. Moreover, the client delivered them one day before the trial, although she promised to do it much earlier.

Prima facie dilemma: counsel must decide whether, in view of the lack of time to digest the entire evidence, they should undertake representation. Considering that a lawyer may refuse legal help only for grave reasons, Jan W. must decide whether the circumstances above meet this condition.

Standard solution: counsel may undertake representation even if there is little time to prepare, because only they know how much time they need. Besides, in a situation when new counsel joins a case, they may always file a motion for adjournment of hearing for the purpose of preparing for it, especially when the evidentiary material is abundant.

Meta-ethical perspective: in this case, there is no ethical dilemma in the strict sense. Counsel decides to join the case independently. Lawyers may refuse legal advice for grave reasons, under Polish law.

6.3.10. Conducting a case against another lawyer

Facts: lawyer Jan W. was asked by Anna M. to lead a case for payment of alimony against her ex-husband, Adam M. As it turned out, the potential defendant is also a lawyer, personally known to Jan W., and a member of the same law society. It followed from the documents delivered by Anna M. that Adam M. owed her more than PLN 50,000, for which the client has relevant receipts.

Prima facie dilemma: Jan W. must decide whether, under the professional code of ethics, he may conduct a case against his colleague.

Standard solution: pursuant to § 37 Code of Ethics for Advocates “A lawyer may undertake representation of a party in a case against a lawyer, and concerning their professional activities, only after previous notification of the district bar association that he belongs to.”

Meta-ethical perspective: in this description, there is no ethical dilemma in the strict sense. The situation is reflected in ethical norms that bind the lawyers, and which allow them to conduct cases against other lawyers.

6.3.11. Interviewing a witness who was formerly counsel's client

Facts: lawyer Jan K. conducts a case brought by Andrzej W., for the return of loan from Wojciech J. The main evidentiary problem is the lack of a written contract between Andrzej W. and Wojciech J. Hence, the claimant called witnesses to present evidence on the circumstances of the alleged oral agreement. In this situation, when the witnesses indicated the time and place of the conclusion of such a contract, the defendant petitioned to hear his witnesses. Among them was Adam P., who, six months before, had been Jan K.'s client. During interview, Jan K. realised that Adam P. was lying because the circumstances he indicated contradict what he had said a couple of months before, when he presented his case to the lawyer.

Prima facie dilemma: the attorney must decide how to behave in the above situation. On one hand they are counsel, currently conducting a case for their client and obliged to help them to the best of their knowledge and experience. On the other, the lawyer has information collected when conducting a different case, which contradicts what their ex-client testifies before court.

Standard solution: ethical principles in The Code of Conduct for Attorneys regulate situations where an attorney cannot provide legal aid. In the above case,

the situation is different. The attorney does not act against their ex-client but contacts them only during the interview. Moreover, the problem concerns also professional confidentiality.

Meta-ethical perspective: in the above example, there may be an ethical dilemma as the lawyer is in a conflict of obligations. On one hand, they are obliged to lead the civil case of their new client reliably and conscientiously. In this respect, the lawyer must do everything within legal norms to secure the client's victory. On the other hand, the attorney is bound to maintain professional confidentiality. In this light, if they breach the obligation to keep confidentiality, they may win the case of their client. Therefore, the lawyer's position lies between two options that cannot be reconciled.

6.3.12. Undertaking a case for eviction of an elderly person

Facts: a business man, Adam K., appeared at the offices of a law firm in W. He is well-known in the city as he became notorious for buying old tenement buildings and, after the eviction of residents, tearing them down and building modern market places and offices. Adam K. asked for the preparation and execution of a claim to eviction an elderly lady, the last resident of one of such buildings. It turned out during the conversation that she is seriously ill, but not incapacitated.

Prima facie dilemma: the attorney must consider taking the case. Significantly, under the Code of Ethics for Attorneys, they may decline defence only for grave reasons.

Standard solution: the Advocates' Profession Act does not enumerate instances when an attorney may refuse legal aid. Art. 28 mentions only serious reasons, which at most may be viewed through the prism of the attorney's personal and professional situation. In the legal sense, the attorney should also advise the client of the influence of rules of social conduct on adjudication, and the issues of abuse of substantive right.

Meta-ethical perspective: in this situation, there is no ethical dilemma in the strict sense. In the event of conflict, the attorney must justify their reasons for declining to undertake the case.

6.3.13. Counsel's problem with a contestable action for the client

Facts: Attorney Jan K. has conducted a case for acquisitive prescription for two years. The client, Adam W., took legal action to usucapion part of his neighbour's real estate. Evidence does not give significant advantage to any of the parties. Even in talks in corridors, the counsels, discussing the case, state that neither of the parties does have hard facts, and the experts' opinions are not unequivocal. Therefore, in their opinion, the adjudicating court's concept adopted in this case will have major influence. Due to the fact that the court scheduled trials once every four months, which is too rare for Adam W., he demanded that his attorney file a complaint for lengthiness of proceedings.

Prima facie dilemma: counsel must decide whether filing the complaint for lengthiness of proceedings when trials are scheduled every four months is justified. Moreover, they must consider whether the period of waiting for experts' opinions influenced the length of the whole proceedings. Additionally, bearing in mind trial tactics, counsel must consider the influence of such a complaint on the future decisions of the adjudicating court.

Standard solution: in the Polish legal system, the Act of 2004 legislates on complaints against violation of the rights of a party for cognisance of the case in court proceedings without undue delay. According to the norms that may be interpreted from this, in order to state whether proceedings in a case took excessively long, one has to assess the timeliness and correctness of actions taken by the court in order to issue a decision ending the case proceedings.

Meta-ethical perspective: in the presented case, there is no ethical dilemma in the strict sense. Counsel must substantively verify the chances for recognition of the claim. Moreover, from the legal ethics point of view, they must present to the client all the potential consequences of filing such a claim.

Chapter 7. Lawyers' and Judges' Dilemmas in Family and Guardianship Law

Sebastian Sykuna

7.1. Preliminary remarks

Both family and guardianship law, as well as civil procedure associated with them, are among of the most characteristic disciplines of law. In legal dogma classification, they belong to broadly understood civil law. Family and guardianship law regulate marital and parental relations. In the first place, as the central issue of the discussed discipline, should be mentioned the institution of marriage and related problems of entering into it, spousal rights and obligations, separation and divorce. It is worth indicating right here that the substantive law regulations are presented in their entirety in the Family and Guardianship Code of 1964.

Marriage, as an institution of Polish family law, is traditionally ascribed the following rules, or such traits are indicated. First, in Polish legal system, marriage is a relationship between man and woman only. It is worth stressing that this is a constitutional principle regulated in Art. 18 of the Polish Constitution. Second, marriage is monogamic. Hence, a woman may have one husband, and a man one wife. This rule is no novelty in our civilisational circle, since monogamy was present already in Roman law. The third quality of marriage is its durability. In principle, it is lifelong. The parties enter into the relationship not only to raise children, but primarily to be together through their whole lives. It is worth emphasising here that the concept of family does not have to refer to a couple with children; a married couple without children can also be called a family. The fourth characteristic of marriage is its equality. The egalitarianism of woman and man had to and did find its reflection in the equal position of spouses. Some, pursuant to Art. 1 § 1 CFG, also indicate as the fifth rule, secularity – for it provides: “A marriage is concluded when a man and a woman, simultaneously

present, declare, before the head of the registry office, that they are entering into marriage with each other.” It is also worth knowing § 2 of this article, which provides that: “A marriage is also concluded when a man and a woman who enter into marriage in accordance with the internal law of a church or some other religious organisation declare their intention, in the presence of a cleric, to simultaneously conclude a marriage in accordance with the Polish law, following which the head of the registry office draws up a marriage certificate. If the above conditions are met, a marriage is considered concluded at the moment the declaration is made in the presence of a cleric.”

Among the mentioned characteristics of marriage, it is worth reiterating the equality of parties and the durability of the institution. Rights and obligations of spouses may derive from the equality of parties, and so it is worth mentioning them at least partially. It is accepted that these may be non-property, namely personal, as well as property rights and obligations. It is impossible to name here all marital rights and obligations. It is worth remembering those that are commonly regarded as the most important. In the first group are included faithfulness, mutual help, cohabitation, and cooperation for the good of the family. In the second group are contribution to satisfying the material needs of the family, and responsibility and the mutual representation of spouses.

The second trait that determines further reflection on marriage is its durability. In some inevitable way, this is connected with the institution of separation and divorce. Separation entered the Polish legal system at the very end of the 1990s. The court decrees separation in a situation of a complete breakdown of marriage. Yet, if the parties decide after some time that they want to continue the relationship, separation may be rescinded by mutual agreement. Thence, this institution does not dissolve marriage. It is different, in terms of prerequisites and effects, with divorce. Under Art. 56. § 1 CFG: “In the case of complete and permanent breakdown of marriage, each spouse may request the court to terminate the marriage by divorce.” Irrespective of the above conditions being met, Polish legislation introduced additional protection for marriage: in Art. 56 § 2 CFG it was intended: “However, even despite complete and permanent breakdown of marriage, divorce is not allowed if it would be against the interest of common minor children of the spouses or if divorce would be otherwise contrary to the principles of social life.” Whereas in § 3 of this article it was indicated: “Divorce is also not allowed if requested by the spouse who is solely responsible for breakdown of marriage, unless the other spouse consents to the divorce, or if his or her refusal to divorce is, in the specific circumstances, contrary to the principles of social life.”

Other problems regulated by family and guardianship law concern the issue of a child's parentage, parental authority, maintenance obligations, custody, and

guardianship. Naturally, it is impossible to discuss in detail all these issues in preliminary remarks. Yet it is worth indicating that cases related to children frequently determine the legal and ethical situation connected with marriage. Besides, as already emphasised in the scope of negative prerequisites of divorce, in the case of a split between spouses who have children of the family who are themselves minors, the court must rule on a residence order, alimony and, in principle, set out contact of children with parents.

The issues related to parental authority, children's upbringing, and alimony may be separate grounds for court proceedings. It is worth indicating that, apart from the welfare of the family, the fundamental principle of family law as a whole is the child's welfare, and every court in Poland must adjudicate in cases that concern children with this in mind.

The dilemmas indicated and discussed above are subjectively related to a judge and the parties' counsels that appear in family proceedings. In the objective scope, they concern the main issues regulated by Polish family and guardianship law. Naturally, they by no means exhaust the catalogue of dilemmas that may be experienced by parties to these proceedings. They are only examples related to cases that are heard in Polish courts.

7.2. Dilemmas of a judge

7.2.1. In divorce cases on the decree of dissolution of marriage

7.2.1.1. *At-fault divorce*

Facts: Jolanta K. petitioned for divorce based on the exclusive fault of her husband, Andrzej K. In response to suit, the same demand was filed by Andrzej K. In court proceedings, the presented evidence confirmed that in fact both spouses were responsible for the breakdown of the marriage, yet the fault of Joanna K. seemed much greater as she was proven to have betrayed her husband, which could even be regarded as the main reason for divorce. However, the claimant maintained that the unfaithfulness of the wife was spurred by the defendant's conduct, who in the course of their marriage concentrated more on his work than marital duties.

Prima facie dilemma: the judge must decide if they should issue a judgment of mutual fault, or, due to the proven betrayal of the wife, issue a divorce decree based on the exclusive fault of the claimant.

Standard solution: the court adjudicating in divorce cases does not measure the parties' fault. Even if one of them is less guilty, the court will probably issue a divorce decree based on mutual fault.

Meta-ethical perspective: the situation is not a moral dilemma in the strict sense because there is no conflict of obligations, in which the choice of one way of conduct necessarily entails the impossibility of other action, and thus leads to evil.

7.2.1.2. Divorce decree against the worldview of the judge

Facts: Jan W. filed a divorce petition, in which he demanded a no-fault dissolution of marriage. In endorsement, he stated that the spouses do not have children, and due to complete breakdown of marriage, which lasted for dozens months, further sustaining the relationship was unsubstantiated. The claimant indicated that he does not resent his spouse, but only that the feeling he had for her died: he regards her as a friend, and not a wife. Additionally, he stated that the couple had not been cohabiting for a year and a half, and had no intimate relations. The defendant said in her response and repeated at the hearing that she did not agree to divorce, providing reasons related to her Catholic faith. This case was referred to be examined by the court, where the presiding judge was also a very devout Catholic.

Prima facie dilemma: the court will face a dilemma if they, according to their conscience, when one party wants continuation of marriage, should dismiss the suit, or to decide that since there are no children of minority and in the light of irreversible breakdown, should issue a divorce decree.

Standard solution: from the legal level, the court refers to the situation where there is no negative prerequisite for divorce – “welfare of minors.” The spouses have not cohabited for a long time, which undeniably proves the durability of breakdown.

Meta-ethical perspective: in this example, there is no moral dilemma in the strict sense. The court rules according to positive law, which provides the situations in which it should allow a divorce, and in which it may not issue such a decree.

7.2.1.3. Evidentiary proceedings with the participation of children

Facts: during divorce proceedings, each party demanded a divorce decree based on the exclusive fault of the counterparty. After interviewing the provided witnesses, it turned out that none of them had participated in the life of the spouses to the extent to be able to testify whether indeed both were responsible for the breakdown of the marriage. All the witnesses stated that the best proof

would be to hear the children. The court realised that neither of the parties would agree, claiming that the divorce caused much pain and distress to the children.

Prima facie dilemma: the court's problem in this case can be reduced to the issue of evidence. It concerns the dilemma related to hearing the children on the circumstances of their parents' cohabitation.

Standard solution: the court in this case may refuse to grant a divorce due to the children's welfare, even if maintaining this marriage would be even worse for them. Therefore, the court will most probably seek the opinions of expert psychologists on the circumstances of the relationship in this marriage and between each of the parents and the children.

Meta-ethical perspective: the problem discussed in this example is not a moral dilemma in the strict sense, for it concerns situation in which the court must issue a judgment and the examination of evidence may prove impossible.

7.2.1.4. Admitting sexually scandalising evidence

Facts: Jolanta T., filing for divorce based on the exclusive fault of her husband, Jan T., claimed betrayal by him. Among the evidence she gave, there was a video recording which unequivocally and in detail presented sexual intercourse between a man and a woman. At the hearing, the claimant indicated that the man in the footage is her husband, but she did not know the woman. Hence, she petitioned for the recording to be played to every witness, including children of the parties, in order to identify the woman, whom she would like to summon for interview eventually. Importantly, the defendant denied that it was him in the film.

Prima facie dilemma: the court has a problem concerning the presentation of evidence which clearly contains intimate content. The issue is ethically the more complicated as the target viewers are also the parties' children.

Standard solution: video or audio material may be evidence in a case. The court in divorce proceedings may play such a recording in order to determine the circumstances claimed by the parties. In this instance, the case seems more complicated as the footage contains the very intimate conduct of one of the parties.

Meta-ethical perspective: it seems that there is no typical moral dilemma nor conflict of conscience. The situation is more like conflict of law with morality or at most with aesthetics. The decision-maker must rule whether to allow the vulgar recording to be played – and so breach some moral norms or maybe even a sense of aesthetics. By doing this, however, there is a chance,

yet no certainty, that the court will gain full knowledge and so determine the objective truth in the examined case.

7.2.1.5. The problem of deficiency of evidence in ruling

Facts: in a divorce case, the claimant demands divorce based exclusively on her husband's fault. As endorsement, she enigmatically mentions his failure to meet obligations. At the hearing, the defendant confirms and agrees with his wife's claim. The parties do not have children, hence there is no negative barrier for divorce. At the parties' hearing (the only necessary evidence the court must examine), the defendant repeats that he was not a good husband and agrees with the wife. He does not tell the court what his inappropriate behaviour towards wife was about. Neither does the claimant precise the circumstances given in the suit, only demanding a divorce decree be issued based exclusively on the husband's fault.

Prima facie dilemma: the court must decide whether to rule in line with the suit, not examining the circumstances of the couple's cohabitation, or to dismiss it.

Standard solution: the court, in view of the lack of negative barrier and both parties testifying to the irreversible and complete breakdown of marriage, will most probably issue a divorce decree in compliance with the suit.

Meta-ethical perspective: in this case, the court is bound by the parties' demand and should adjudicate in line with their petition. Nevertheless, there is the question of the ethical obligation of the court to seek the truth and issue a ruling that will really reflect it.

7.2.1.6. The court bound with the parties' claim

Facts: Magdalena S. filed for divorce. The first hearing was scheduled four weeks after this. At the parties' hearing, it turned out there were no children and the parties were in extreme conflict; they did not spend time together, and were aggressive and mean to each other. The trigger for divorce was Jan S's betrayal, to which he admitted in the hearing, one week before filing the suit. Since then the relationship had been breaking down. The parties filed for a no-fault divorce.

Prima facie dilemma: the court must decide whether, in view of the complete breakdown of marriage, but without the time condition, to issue a decree dissolving marriage. It is worth indicating that the extent of breakdown is very high and fully justifies the divorce.

Standard solution: the court will probably suspend the proceedings or refer the case to mediation proceedings.

Meta-ethical perspective: the case is not an ethical dilemma in the strict sense, but rather a legal dilemma. The court notices the crisis in the marriage, but under the provisions of the law may issue a divorce decree under two conditions: complete and durable breakdown, and in the discussed example, while the breakdown has been established, its durability has not yet been stated.

7.2.1.7. Grounds for divorce

Facts: Tomasz J. filed for divorce from Anna J., after 15 years of childless living together. During the court hearing, both petitioned for a no-fault decree, yet it turned out that they still cohabit, spend time together – visit friends and entertain guests. However, for many years they have had separate bedrooms and no intimate relations. The parties state they do not love each other but are mutually companionable and helpful. Additionally, they say there are no financial obstacles for their living separately, yet they do not cohabit out of mutual liking and pleasure of spending time together. To the court's question of why they want divorce, they answer that they do not love each other and want free sexual lives.

Prima facie dilemma: in these circumstances, did the two prerequisites really occur? The court realises that, after years of marital bond, the passion fades, and sometimes turns into friendship, and so it must consider whether to issue a divorce decree (no children, the parties' will, and durable breakdown on the intimate-emotional level), or to direct the case to mediation or try to persuade the couple to attend counselling.

Standard solution: the court will most probably refer the case for mediation to determine the factual relations between the parties.

Meta-ethical perspective: it seems there is no moral dilemma in the strict sense. The case concerns the factual state and determining the factual breakdown of cohabitation.

7.2.1.8. Decree dissolving marriage

Facts: the claimant in divorce proceedings demands divorce based on the exclusive fault of her husband. She said the was that he spent too little time with her. The defendant claimed he did not agree to divorce based on his fault, and admitted having worked a lot – but because he wanted to provide a decent standard of living for both of them as they planned to purchase a house. On these grounds, conflict developed. The wife pointed out to the husband several times that she wanted to spend more time with him as she did not work. Moreover, she maintained that she wanted the house.

Prima facie dilemma: the problem of the court reduces to an assessment of the parties' behaviour towards each other and a determination of whether indeed only the husband is responsible for the crisis in the relationship.

Standard solution: in the Polish legal system, in a situation when one party initiates a no-fault divorce suit, and subsequently the other party does not agree, the demand should be changed to at-fault divorce.

Meta-ethical perspective: in the above case, no moral dilemma or conflict of conscience occurs. It seems that there is a legal problem related to determining the parties' fault.

7.2.2. In divorce cases concerning child arrangements

7.2.2.1. Contact and residence order

Facts: a regional court in Warsaw the divorce case of Mr and Mrs P. The evidence has already been examined, and the adjudicating court had no doubt that complete and irretrievable breakdown occurred. Another problematic issue was ruling the child's residence after granting divorce. Both spouses demanded a residence order in their own favour. The court admitted evidence from the expert psychologists' opinions and the court-appointed guardian pertaining to the emotional relations between the child and each parent. The conclusions were positive for both parties, and additionally the experts said the child was equally connected to the mother and the father.

Prima facie dilemma: the court's dilemma is about the necessity to determine the child's permanent place of residence with one of their parents, to the factual detriment of the other. Ordering shared custody is impossible due to the long distance between the households of the parents.

Standard solution: the court must decide on the child's residence after issuing the divorce decree. Normally, the court orders permanent residence with one of the parents, and delineates contact with the other. Apart from this solution, the court may refrain from ordering contact and just accept the custody agreement.

Meta-ethical perspective: interestingly, in this case some moral dilemma of the court may be visible. All circumstances show that the child's contact with each parent is good – the court has experts' opinions that confirm this. Moreover, both parties demand a residence order. Therefore, the court's verdict on the child's permanent residence with one party undeniably does harm to the other.

7.2.2.2. *Separating siblings in effect of their parents' divorce*

Facts: in the divorce case of spouses W., the adjudicating court has already conducted evidentiary proceedings referring to compete and durable breakdown of marriage. Yet, due to the fact that there are two children, the court must decide on their residence and alimony. During the proceedings, the parents request the division of offspring so that the daughter stays with the mother, and the son with the father. Therefore, the court would have to order the permanent residence of the daughter with the wife, and of the son with father. The spouses claimed in court that neither was financially capable nor had time to have custody of two children. In light of this motion, the court decided to refer to expert psychologists' opinions. The conclusions mentioned a strong bond between the siblings, and that separation would be highly detrimental to their mental health.

Prima facie dilemma: the court's dilemma concerns the key issue to determine, namely each child's residence with one of the parties. The court is obliged to resolve this in a decision.

Standard solution: in the Polish legal system, a court adjudicating on divorce must, when children below the age of 18 are involved, also decide on their permanent residence. Most often the parties themselves indicate where the child is to stay. In this situation, the court, in its decree, confirms this demand and only sets down the contact of the other parent with the child, or approves the custody agreement between the parties.

Meta-ethical perspective: the court faces a problem. On one hand, there is clear information from the parents that neither of them will be able to raise both children, while on the other there is an indication that separating the children will cause great trauma. The court may try to convince the parties of the necessity of joint upbringing of the children, with greater alimony on one side.

7.2.2.3. *Child's residence after divorce of their parents*

Facts: in the divorce case of Jan and Anna T., both parties demand an order for their daughter's residence in their own favour. In this complication, the court referred to expert opinion pertaining to the emotional bond between the child, Magdalena, and each parent. The opinion concluded that she was equally attached to the father and mother. Although the court may refuse to grant divorce on the grounds of a minor's welfare, in this case the evidence shows that continuing the relationship would not be good for the child.

Prima facie dilemma: both parties demand an order for the child's residence in their own favour. Typically, the court issues this orders in favour of the mother, but in this instance, there are doubts as the child clearly shows equal

attachment to both. The problem is not solved by the issue of school, since it will not change, irrespective of any verdict, due to the fact that the spouses will live close to each other after the divorce.

Standard solution: in the discussed case, the psychological examination should be deepened in respect of the child's bond with her parents. The court would probably order a further hearing of the parties and experts. Sometimes, alternating residence could be considered, though this is risky.

Meta-ethical perspective: the court faces a problem in which, in line of the original experts' opinion, every decision in its consequences will be good and bad at the same time. Due to proving similar bonds of the child with each parent, the court must undertake further activities in order to solve the situation.

7.2.2.4. The problem of an unwanted child after divorce

Facts: Anna T. and Tomasz J. decided to file for a no-fault divorce. Simultaneously, there arose a problem related to parental authority and an order for the child's residence with one of them. In the course of the proceedings, it was indicated that the mother did not want her seven-year-old daughter to live with her after the divorce, as her new partner did not wish this. The court referred to expert psychologists' opinions, which concluded that the central figure in the child's life was the mother. This state and lack of emotional bond with the father resulted from the fact that Tomasz J. lived and worked abroad for long periods of time. Additionally, due to his work, he could not look after his daughter permanently.

Prima facie dilemma: the court must decide what to do with the daughter, as a minor. In the situation when neither parent wants to take custody, the court also considers foster family placement.

Standard solution: the court in a divorce case must also issue an order for the residence of a child still a minor. Importantly, the children's welfare may be grounds for not granting divorce, even in a situation of durable and complete breakdown of marriage.

Meta-ethical perspective: in the described case there is no moral dilemma in the strict sense. The court, finding that divorce will infringe the welfare of a minor, may not grant divorce. As regards ethics, the situation would be slightly different if the court had to decree divorce and order the child's residence with one of the parents.

7.3. Dilemmas of a judge in non-divorce cases but concerning parental authority, custody and alimony

7.3.1. Problem with parental authority

Facts: After divorce, Joanna K., mother of a four-year-old, filed for termination of the parental authority of Marek K., the child's father. As endorsement, she pointed out his lack of involvement in the upbringing of the minor, and his impeding of serious decisions about the child's life. The court admitted expert opinion evidence, which concluded that the child had rare but good contact with the father. The opinion also stated that the parents had a very aggressive attitude to each other and could not agree on matters related to the child. Apart from that, the experts indicated that the only problem was the infrequent contact of the child with father, due to his working abroad. The father admitted that there was no possibility of contact more often, but he requested that his parental authority not be terminated.

Prima facie dilemma: the court must decide whether to terminate the parental authority of the father, which would facilitate the child's upbringing in terms of organisation. On the other hand, such a decision undeniably infringes the father's rights, and may also be harmful for the child. The court may also consider partial limitation of parental authority.

Standard solution: in the thus outlined factual state, the court, after conducting evidentiary proceedings, will have to either dismiss the request to terminate parental authority, limit it, or adjudicate in line with the claimant's demand.

Meta-ethical perspective: in this case there is no classical ethical dilemma. The court has several options, which naturally depend on the collected evidence.

7.3.2. Grandparents raising a child

Facts: a family court receives a motion from a guardian for foster family placement of siblings who are minors. After their mother's death (father unknown), their grandparents had taken custody of them for two years. Due to the deteriorating health of the grandparents and the increasing needs of the children, and in view of the households' lack of income increase, the supervising guardian found it necessary to seek to place the children with a foster family.

Prima facie dilemma: the court, in this example, has to decide whether the grandparents will be able to provide decent living conditions to the children as time progresses.

Standard solution: in the Polish legal system, the court adjudicating on foster family placement and other issues related to minors is directed by the premise of their welfare. This is what should matter for the court in weighing the decision.

Meta-ethical perspective: in the ethical view, the court's problem here is about balancing the values – the emotional and familial children-grandparents relationship – and the objective need to provide the minors with decent conditions in their upbringing.

7.3.3. Increasing alimony

Facts: in the divorce decree of Jan and Anna K., the court awards alimony from Jan K. in the amount of PLN 500 for the benefit of his seven-year-old daughter, Jola, who stayed at with mother. After the divorce, within four years, the man entered into another marriage, which produced two daughters. In the meantime he lost his job and registered as unemployed. Although he did some casual jobs, his earnings were too low to meet the family's needs. Despite this, he did not stop paying support for Jola. Anna K., however, demanded increased alimony to PLN 1 000. She endorsed this by claiming a drastic increase in her daughter's needs: the awarded PLN 500 could be relevant for a seven-year-old, but the now teenager required greater spending.

Prima facie dilemma: the court must decide whether to award higher alimony for the minor, Jola, realising that the status of her father's other children's situation would thence deteriorate.

Standard solution: in the Polish legal system, the court adjudicating alimony takes into account the needs of the minor as well as earning capacity of the obliged person. Therefore, in this case the court will have to consider both the costs necessary for the benefit of Jola, and Jan K.'s earning capacity.

Meta-ethical perspective: in this description, the father does not refrain from paying alimony for his daughter but is not able to pay more without harming the new family, notably the two new daughters. Irrespective of the legal side, in which – as it was indicated – the court considers the child's needs but also the earning capacity of the father, the court, in the ethical sphere, will have to face the dilemma: awarding higher alimony, even justified, for Jola, will cause a deterioration in the situation of the new children of the obliged.

7.3.4. Financial penalty for failing in duties

Facts: a motion has been submitted to the family court, to award the father of a minor PLN 8 000 against the mother, due to her impeding contact between father and daughter. In the course of proceedings, it was revealed that the mother did not work and maintained the family only from alimony from the child's father. Simultaneously, it turned out that indeed from the divorce, despite the contact order mandating visitation between daughter and father twice a week from 15:00 to 20:00, the mother did not release the child. In fact whenever the father came to pick up Anna, she did not want to go with him, screamed and did not want to let her mother go. To the disadvantage of the defendant was the fact that by no means did she explain to the child the necessity of meetings with her father: just the contrary – she spoke negatively about him.

Prima facie dilemma: the court has to decide whether to accept the father's claim, and indicate that the mother, through her passive stance, impeded his contact with the child.

Standard solution: the court, after evidentiary proceedings, will determine whether the mother's conduct indeed led to the lack or limitation of contact between father and child. Nevertheless, the court must consider all circumstances related to the father's coming for the child, as well as the amount demanded by him.

Meta-ethical perspective: in the ethical perspective, the problem concerns mainly the long-term effects for the child should the court grant the father the demanded amount. In fact, it was indicated that the mother would pay it from the money she got from the father, as she does not have any other earnings. Therefore, it would deprive the child of alimony. The paradox of the situation is that, by his claim, the father would do harm to the child.

7.3.5. Granting contact with a child after interruption

Facts: Jan K. applied to a district court for a contact order with his son, Adam M., who had been staying with a foster family for five years. Six years before, Adam's parents were deprived of parental authority due to alcohol problems. Since then, Jan K. stopped drinking, found work and would like to restabilise contact with his son. However, as a result of psychological examination, it was determined that 12-year-old Adam did not want the contact, had fears related to it, and that the relations in the foster family were so good that they replaced his own family for him. Despite these circumstances, Jan K. applied for an order granting him contact rights, in order to re-establish paternal relations.

Prima facie dilemma: the court must decide whether to undermine Adam's current world, which was created during his life with the foster family, hoping that, in the long term, relations with his father will reappear, or to dismiss the motion – as groundless or premature, e.g. due to lack of certainty as to whether the petitioner's stance is firm.

Standard solution: the family court, under Polish family law, may restore parental authority. Naturally, such a situation can happen if, as a result of proceedings, the petitioner proves that such an order will take into account the child's welfare.

Meta-ethical perspective: the court will have to determine what is the greater good for the child. The dilemma weighs the father's rights and the child's rights.

7.4. Dilemmas of the counsels in cases concerning the establishment of paternity, parental authority, custody of a child and alimony

7.4.1. Summoning children as witnesses

Facts: lawyer Jan K. is counsel in the divorce case of Janina J., who filed for divorce on the grounds of the exclusive fault of her husband Andrzej J. Due to the necessity of preparing evidence, the lawyer asked the client who could be witness in this case, and with regard to her demand for citing the exclusive fault of her husband, who could confirm the claimant's words and thus support the report of his negative conduct, including starting arguments, verbal and physical aggression at home. Janina K. could not indicate any witness apart from her children. Unfortunately, due to their young age (11 and 15 years) and their poor mental condition, the guidance counsellor advised against summoning them as witnesses in the case.

Prima facie dilemma: counsel's dilemma is to consider the possibility of calling minors as witnesses in divorce proceedings. The problem can be reduced to the fact of whether, with no other evidence apart from the claimant's testimony, he will be able to convince the court to issue a divorce decree based exclusively on the fault of the defendant.

Standard solution: counsel, in a divorce case, together with the client, must work out a strategy of representation so that the claims made are proven before court. In a case of demanding divorce due to the exclusive fault of the opposing party, counsel must present very good evidence that would prove that the other

spouse is solely responsible for the breakdown of the marriage. One such proof may be provided by the testimony of witnesses, including children.

Meta-ethical perspective: counsel's dilemma manifests through the problem: which evidentiary measures should be used to prove the client's husband's fault. Counsel has no grounds to disbelieve the wife's account that it was the husband who destroyed the marriage, yet he knows that, to the court, this testimony alone may not be sufficient. Therefore, on the ethical level, counsel will have to face the decision of whether to risk a request for hearing the children, which could be harmful for their mental constitution, or bear the risk of losing the case.

7.4.2. Hearing children as witnesses

Facts: Marta S. filed for divorce based exclusively on her husband's fault. As evidence, she gave his betrayal with a much younger woman (18 years old). In the course of the proceedings, due to the husband's counter-petition, the court called their children for a hearing pertaining to a claim of equal fault for the breakdown of the marriage. From the psychologists' opinions, however, it followed that the 14-year-old daughter was taking her parents' divorce very badly. Moreover, she did not accept the issue of the betrayal her father committed with an 18-year-old. During the hearing, the defendant instructs his attorney to be more pushy towards his daughter as witness, so that she, in despair and terrified with the situation, testified to the detriment of her mother, simultaneously justifying her father's conduct.

Prima facie dilemma: the defence lawyer must decide how far can they can go when interviewing the daughter about delicate moral issues related to sex, knowing that this will very negatively affect the mental condition of a 14-year-old witness.

Standard solution: counsel will ask questions that will put their client in the best light. It is the court that maintains order during hearings, and, if it decides that counsel has gone too far, may disallow a question.

Meta-ethical perspective: counsel is bound not only by norms of universally binding law, but also by ethical principles. Their dilemma concerns the situation in which they must consider the client's benefit in trial, in collision with the ethical dimension of oppressing the witness. Moreover, in the described case the witness is the person closest to the client. Even if the party is overtaken by emotions and wants to win using all possible means, counsel should show restraint in this regard.

7.4.3. Problem with a false witness

Facts: lawyer Jan K. is the claimant's counsel in the divorce case of Andrzej and Anna K. The client demands divorce due to the exclusive fault of the wife. The decisive circumstance for such a suit was her alleged betrayal with their long-standing friend – Adam J. When asked about proofs, the client suggested calling the friend as witness. However, when the attorney asked if Andrzej K. was sure about the betrayal in the physical sense, and convinced that Adam K. would admit intercourse with the claimant's wife, Andrzej K. answered negatively, but ascertained that he would persuade him to testify.

Prima facie dilemma: the attorney must decide if he should participate in evidentiary proceedings in which the client will most probably instruct the witness to give appropriate testimony.

Standard solution: counsel may by no means encourage anyone to provide false testimony. Neither can he participate in such instruction of a witness. In a situation when he knows that the client commits this offence, counsel should persuade him to stop.

Meta-ethical perspective: in this case, counsel does not get a clear answer from the client about whether he will encourage the witness to commit perjury. On the other hand, the attorney, surely even without the client's avowal, may deduce from experience that this will be the case. Hence the dilemma: is counsel's behaviour, namely participating in a rigged hearing, even if not being directly involved in preparing the witness, admissible?

7.4.4. Presenting an unreliable witness

Facts: lawyer Jan K. is counsel of Marek J. in a divorce case in which the claimant demanded a decree based on the exclusive fault of his wife, Anna J. As endorsing circumstances, he indicated her unwilling attitude to him, her propensity to start arguments, and even acts of physical violence. To the question about witnesses for his words, Marek J. indicated his mother. It seemed that, due to the fact of cohabitation, the mother would be the perfect witness, as she constantly resided with the couple. After a brief talk with the mother, the attorney discovered that she was very nervous, practically unable to give testimony, and confused facts about the couple's life. Additionally, she sometimes gave inconsistent answers as regards the initiator of the domestic rows.

Prima facie dilemma: counsel, in this case, faces a dilemma connected with possibly calling the client's mother as witness, for he knows that her testimony may help secure the verdict of the exclusive fault of the defendant, but due to her

personality there is risk that in the hearing under stressful conditions, she will damage the claimant's hopes.

Standard solution: counsel in a divorce trial, especially when the client demands a decree of exclusive fault, must present evidence that will convince the court to rule accordingly. Apart from documents, there is the evidence of witness testimony. Surely, the most reliable witnesses are people who participated in the circumstances endorsing the claimant's motions. However, despite this advantage, counsel will not risk calling a witness who may get his client in trouble.

Meta-ethical perspective: in the example, counsel's dilemma is not moral in the strict sense, as he only has to weigh the risk linked to requesting hearing uncertain personal evidence. In this sense, the dilemma is about weighing the chances of winning or losing.

7.4.5. Combining divorce with partition of joint property

Facts: lawyer Jan K. is counsel in Maria J.'s divorce suit, in which the claimant demands dissolution of marriage. Even before the first hearing, the opposing counsel asked for the simultaneous and mutually agreed partition of property administered by Antoni J., the husband. This would allow Maria J. to obtain some cash from her husband with the divorce decree, without the need to make another legal claim for marital property partition after termination of the joint property of spouses. However, in this case, the opposing party's counsel offered an amount 30% lesser than could follow from property valuation based on documentation. In negotiation, the lawyer argued that, due to the quick settlement of the case, their client expected to keep the greater part of the property, and that refusal could prolong partition proceedings for years, delaying Maria J.'s receipt of the money.

Prima facie dilemma: lawyer Jan K. Must decide how to advise the client about this proposed marital property settlement agreement. He realises that the proceedings may take several years, during which she will have no access to marital property. On the other hand, after this time she will most probably be granted a much greater amount than that on offer now.

Standard solution: in Polish law, if parties agree to the partition of marital property acquired during their marriage, the court will, during divorce proceedings, most probably set out the division accordingly. Otherwise, when parties cannot agree, the divorce decree will not contain a ruling about the marital property. Thence, the parties may take separate legal action before other court for the partition of the joint property.

Meta-ethical perspective: it is hard to accept that in this case there is a moral dilemma in the strict sense. Looking at it from the ethical perspective, we have to focus on the problem of counsel – their difficulty of what to advise the client. On one hand, it is possible to obtain a lesser amount quickly, on the other – there will be longer proceedings but with higher stakes. It is also worth remembering that the latter option involves risk. Counsel has no conflict of obligations, as their advice does not concern the choice itself but only help in making it.

7.4.6. Settling out of court about property

Facts: lawyer Marian K. is Anna J.'s counsel in a divorce case, where the claimant demanded dissolution of the marriage due to her husband Arkadiusz J.'s exclusive fault. To endorse the claim, she filed with the suit some hard evidence of his betrayal with his confidentiality, including love letters, photos of travel together, and film material documenting sexual intercourse. Even before the first hearing, the attorney of Anna J.'s husband requested that the claimant withdraw the request for divorce based on the exclusive fault of the defendant, offering a no-fault divorce. In exchange, their client would be ready to settle and divide the property on the wife's terms together with the divorce decree. Such a settlement would limit the time and costs spent on property division in the future. The lawyer warned that, otherwise, both the divorce case and the division case would take years.

Prima facie dilemma: the problem of the claimant's attorney can be reduced to proper counselling of the client, as the lawyer must decide whether it is more beneficial for Anna J. to obtain a decree of divorce due to husband's exclusive fault, or quick satisfaction in financial terms.

Standard solution: parties' negotiations before and during the proceedings are frequent elements of every trial. By this means, the parties may reach agreement more quickly in some crucial issues of litigation, thanks to which the proceedings before court will be much shorter. One has only to remember that some levels of discussion shall not be mixed.

Meta-ethical perspective: evaluating the question of ethical dilemma, it is worth remarking that counsel, when advising his client, operates on two different levels. The first concerns the emotional sphere, connected with the causes of marriage breakdown. The second relates to the financial sphere, settlements between spouses regarding, which must be reached after termination of joint marital property rights. In this regard, one should consider the legal and ethical admissibility of negotiation.

7.4.7. Combination of criminal proceedings with a divorce case

Facts: Adam Z. asked lawyer Jan M. for help with a divorce case. His wife filed for divorce due to his exclusive fault, and at the same time filed two reports of crime with the police: physical and mental abuse, and theft of things from the marital property by Adam Z. From the talks and determinations of the lawyer, it clearly followed that the allegations were unfounded and the alleged crimes had never taken place. Moreover, talks with the client revealed that it was she who was aggressive and opportunistic as she drained him financially. The lawyer knew from his experience, and he informed his client accordingly, that the crime report was only made to strengthen the claim of the husband's exclusive fault. In light of the above, Adam Z. asked the lawyer to notify the police of crime by his wife, in respect of stealing joint property and abusing him.

Prima facie dilemma: counsel must decide whether to help the client prepare police notifications based on suspicion of the wife having committed a crime, or to dissuade the client from this course of action.

Standard solution: law enforcement authorities are very sensitive to all kinds of notifications about suspicion of committing a crime in situations of divorce proceedings, for it happens that the parties knowingly, or unknowingly – not understanding certain types of prohibited acts – file mutual notifications. Obviously, law enforcement agencies must also determine the cases in which such notifications are true, and then initiate proceedings against the perpetrator.

Meta-ethical perspective: counsel, irrespective of whether they are a lawyer or legal advisor, cannot help in reporting false crime notifications, therefore counsel cannot have any dilemma about his choice in this respect.

7.4.8. Refusal of legal help by a lawyer

Facts: lawyer Jan K. is divorced. Despite the great love he had for his wife, she was unfaithful with his best friend. This circumstance was the only and sufficient condition for a divorce decree to be issued due to her exclusive fault. Only three months after these painful proceedings, a woman visited his law firm to ask him to conduct her divorce case. From the potential client's account, it followed that the husband had proofs of her betrayal. In the lawyer's office, she admitted betrayal. However, she expects him to deny these facts and obtain the most favourable verdict.

Prima facie dilemma: can a lawyer who recently went through a painful divorce refuse to accept a case whose circumstances resemble his own?

Standard solution: in the discussed case, under Polish law regulating the rules of practising as a lawyer, legal help may be refused only for important reasons. In the respect, it is assumed that personal situation may be grounds for refusal.

Meta-ethical perspective: the lawyer's problem concerns his emotional predisposition to conduct the case. Admittedly he may refuse legal help under provisions, but due to certain professional ethics he may want to cope with this challenge.

7.4.9. Counsel in respect of divulging a crime committed by the husband in divorce proceedings

Facts: lawyer Jan K. represents Joanna J in divorce proceedings. Her husband, despite having evidence of her betrayal, filed for a no-fault divorce. In exchange for this, in a private talk with her, he demanded that she did not press any criminal charges relating to the many years of physical and mental abuse to which he subjected her. Moreover, he secured a recording and pictures proving her intercourse with another man. Therefore, Joanna J. asked the attorney for counsel: should she agree to her husband's offer, especially as he promised to move out right after the divorce?

Prima facie dilemma: the lawyer must decide how to advise his client – should the wife refrain from filing a notification about crime by her husband in exchange for a no-fault divorce?

Standard solution: counsel should revise all the possible solutions with the client. He cannot decide for her, especially in respect of filing a notification on suspicion of her husband having committed a crime.

Meta-ethical perspective: counsel's problem is not an ethical dilemma in the strict sense. He cannot, in this situation evaluate any of the positive or negative outcomes, as he will not make the ultimate decision. His fundamental duty is to present the client with all the possible consequences of her decisions.

7.5. Dilemmas of the counsels in cases other than divorce but concerning the establishment of paternity, parental authority, custody of a child, alimony, etc.

7.5.1. Counsel presenting facts in court

Facts: 16-year-old Marek M. filed for establishing paternity with Jan K. The court, at the party's request, decided to admit expert evidence in respect of genetic analysis. The opinion stated that Jan K. was Marek M.'s father with 99.7% certainty. This result, despite no 100% formulation, is conclusive from the medical point of view. The defendant objected to the opinions twice, and the court ordered another from a different centre. The new opinion confirmed the previous results. In a hearing, the court presented the conclusions of the opinion and asked Jan K.'s attorney to take a stance on it. At this moment, Jan K. asked for a short break, during which he informed his counsel to refuse to acknowledge the credibility of all three opinions, and to continue denying the paternity in summation.

Prima facie dilemma: the lawyer's problem concerns his stance in the face of basically unequivocal expert opinions. In the eristic sphere, the issue can be reduced to the question of how counsel is to formulate their closing argument to satisfy the client but at the same time not make fool of themselves in view of clear, unequivocal opinions.

Standard solution: the party that is dissatisfied with expert opinion may contest it, demanding that it should be supplemented, or calling for the appointment of another expert or group of experts to issue a new opinion. In this case, counsel will probably try again to question the opinion. If they do not receive the favour of the court, they will have to reformulate their summation so that it either skips this evidence or coats it with more general wording.

Meta-ethical perspective: there is no ethical dilemma in the strict sense in this example. Counsel, upon presenting a closing argument, will have to formulate their speech in order to avoid harming their client while simultaneously not denying obvious facts, which could undermine their authority.

7.5.2. Pedagogical considerations in juvenile proceedings

Facts: proceedings on the liability of 14-year-old Jakub for beating his peer Marek at school break are pending in family court. The mother of the defendant asked lawyer Jan K. for help. After talks with the victim's parents and determinations made by the lawyer, he informed the mother that the court would not be very severe with her son, and everything would be fine, especially as the aggrieved's family did not seek any revenge. Upon this, Jakub's mother, in tears, revealed that her son was a drug addict, and she asked the lawyer to lie to him and state that, unless he started treatment and presented a relevant certificate, the case would not end in his favour. Simultaneously, she asked the lawyer to request a more severe penalty on principle, in the form of community work at a hospital or other centre, which would will allow him to realise how real life looks.

Prima facie dilemma: the attorney must decide upon his role in this case. Is he to break his duty as defence lawyer by petitioning for a higher penalty than that which would probably be administered?

Standard solution: it is hard in this case to give a standard answer, as it concerns the freedom of action of a given counsel because, fundamentally, only he can decide about his move.

Meta-ethical perspective: the outlined problem is closer to a conflict of conscience than to ethical one. Counsel will have to decide but, the dimensions are different. On one hand, there is breach of some defence relationship (specific in the case of juvenile proceedings), while on the other some higher good may be gained in the form of the future life of the young man.

7.5.3. Counsel accepting case

Facts: Adam J.'s parents ask lawyer, Jan K., to take the case of their son. The proceedings concern the teenager's demoralising behaviour at school. According to the parents, their 14-year-old son behaved at school worse than reprehensibly, breaking the rules, beating his classmates, and bullying two younger students. The prosecution filed to the family court because, due to the young age of Adam J., he was not yet liable for criminal proceedings. The parents did not know that the lawyer had a similar problem with his own son, who also faces allegations of demoralising behaviour at school.

Prima facie dilemma: the attorney's problem in this case does not concern the possibility of refusing legal help, for under Polish Law of the Bar, a lawyer may refuse legal help for important reasons. In this situation, the lawyer does not want to apply this, but wishes to undertake the teenager's defence.

Standard solution: as indicated above, if the attorney decides that there is no important reason, he may undertake the case.

Meta-ethical perspective: in the description, there is no ethical dilemma in the strict sense. The lawyer, by undertaking defence of the 14-year-old, does not choose between conflicting options. The fact of having pedagogical problems with his own child cannot prejudge the possible bad representation of a member of the public.

7.5.4. Action for an immoral client

Facts: Adam Z. asks lawyer Jan K. for legal help in a case of obtaining an order for contact with his son, Tomasz, who is a minor. In conversation, the potential client revealed that in fact he did not care about contacting the seven-year-old child, but wanted to make his former partner's life a misery by doing so. Moreover, he indicated that, up to that time, he had not requested contact, and even if granted he would not act upon it – at most he could leave the child in the custody of a hired guardian. By no means did he feel attached to Tomasz, as he started a new family.

Prima facie dilemma: the attorney must decide whether to accept the commission and approach it strictly professionally, not considering the child's welfare, to show empathy and convince the client to greater engagement, or to refuse to accept the case. Yet, in the latter case, the problem of providing grounds for the decision will emerge, so that the lawyer does not expose himself to liability for this.

Standard solution: Adam Z., the client, will commission the lawyer to conduct a case in family proceedings.

Meta-ethical perspective: in the description, there is no ethical dilemma, but one may consider whether counsel faces a choice that refers to two different matters of a legal nature. Despite the importance of the requirements of his client, who commissioned him to conduct a specific case, the child's welfare is also the central interest of law too. Naturally it begs question of whether the child's welfare should be secured by counsel himself, or by the court that will adjudicate in this case.

Chapter 8. Lawyers' and Judges' Dilemmas in Employment Law and Social Insolvency Law

Paweł Łabieniec

8.1. Preliminary remarks

Employment law, since its establishment, has regulated the legal terms of employment, within which hired workers provide work for employing entities. Originally, the role of employment law was only about the protection of elementary interests of workers as the weaker party to an employment relationship. In the foreground was then the protective function of this branch of law. Nowadays, this function is understood more broadly: it is about protection of the economic interests of the employee, but also their other rights, primarily dignity. Over recent years, anti-discrimination regulations have been introduced in employment law. At present, the role of employment law is perceived differently: it must secure the interests of both sides, and the organisational function comes into prominence. Particular significance in this law is given to dialogue between an employer and their employees, which is to provide for the creation of optimal conditions for the protection of the interests of both parties. In the doctrine of employment law, this role is called the irenic function. This branch of law is also ascribed the special task of distribution of goods and financial means (the distributive function). Realising these fundamental principles, employment law becomes a field of various conflicts of values and norms.

Some kinds of dilemmas that occur in employment law also appear in other spheres of law, but on the grounds of employment relationships they gain special significance. An example of such dilemmas may be those relating to loyalty that an employee is due to render his employer. If the employer is a natural person, it is clear who is the subject of loyalty, but if the worker is employed by an organisational entity made of several natural persons, or a legal entity

managed by several individuals, there is possibility for conflict of loyalty, at least in a situation when there is dissonance between partners. The conflict of loyalty can also be between the employer on one hand and other people important for the employee (family members, people the employee depends on, is grateful to, etc.).

The requirement of loyalty to an employer may also conflict with other values or norms: it is possible to have conflict between loyalty to an employer and sense of responsibility for the health and safety of consumers and clients using services of the employer.

A specific for employment law norm generating dilemmas taking the form of conflict of norms is the provision expressed in Art. 100 § 1 of the Employment Code, imposing on an employee the obligation to implement the orders of their superiors. This prescription does contain a safety valve: the reservation that the superior's instructions are binding only if they concern work, and do not breach law or a work contract. However, this safety catch does not always prevent dilemmas.

The obligation to fulfil a superior's order may conflict with:

- the significant interests of the employee,
- an ethical (or professional-ethical) obligation of particular loyalty to certain people,
- a legal advisor's duty (professional-ethical, but also legal) to protect their independence,
- religious norms or moral norms the employee feels bound to.

Another source of dilemmas in employment law are the conflicts of provisions protecting worker's rights with the economic interests of the employer.

A relatively new phenomenon in Polish employment law can be seen in the elaborate regulations to prevent discrimination in industrial relationships. Application of provisions that serve this role may sometimes create reverse discrimination, which causes specific dilemmas.

Finally, a kind of dilemma that is more frequent in employment relationships than in other legal relationships is whether in the application of the law it is better to give primacy to formal requirements or to an intuitively understood sense of propriety.

The functions of social security law primarily concern social function. The financial means collected and redistributed under the regulations of social security law are to secure the basic needs of the insured in cases of random events that could impede or make it impossible for them to earn a living on their own. The most common dilemma related to this discipline of law has its source in the conflict between two philosophies of applying social security law:

the first assumes strict application of regulations that prevents the provision of allowances to too large a group of people. This attitude protects the insurance fund from bankruptcy, yet leads to denying aid in respect of social insurance to those people who in many cases are in precarious life situations. The second attitude implies that, since the basic function of social security law is protection from poverty for the insured who fall – for reasons not of their own making – into hardship, the regulations should be applied flexibly and not rigorously. In this view on the rules of the functioning of social insurance institutions, excessive rigour makes it impossible for social security law to realise its fundamental function. In many cases, the necessity to choose between these two approaches to the application of social security law presents grounds for dilemmas of an officer in the Social Insurance Institution or a judge of the Employment and Social Security Court.

8.2. Court of Labour dilemmas

8.2.1. Assessment of compliance with law of dismissal on disciplinary grounds vs the primacy of substantive precondition over formal conditions

Facts: Zenon L., director of Longinus Manufacturing, Trade and Service Company, terminated without notice, pursuant to Art. 52 item 1 of the Employment Code, the employment relationship with Bogdan S., a worker in a protected employment relationship (member of a trade union work council, authorised to represent the union individually before the employer). The employer did not ask the work council for permission for dismissal. Gross dereliction of duty is evident: Bogdan S., with no excuse, was absent for three days. This circumstance was indicated by the employer as the reason for dismissal on disciplinary grounds. In appealing termination of contract without notice, the employee claimed non-performance of a formal duty related to disciplinary dismissal, and demanded reinstatement. The employer, in a petition, put forward the argument of abuse of rights (Art. 8 LC) by the employee.

Prima facie dilemma: the Court of Labour faces a dilemma of whether to consider the employee's claim taking into account the undisputed fact of non-performance of the formal duty to ask work council for permission to end the contract, or to dismiss the appeal due to the undeniable circumstance of gross dereliction of fundamental duties by the worker.

Standard solution: a general clause of subjective rights abuse expressed in Art. 8 LC is helpful in solving the dilemma. The Supreme Court points to the possibility to apply the general clause of the principle of community life contained in this provision (decision of 17.11.1999, Ref. No. I PKN 366/99). The employee cannot pursue their claims (in this case demand reinstatement) if they significantly breach their duties. The community co-existence clause mitigates the collision between formal requirements of law and the sense of justice.

Meta-ethical perspective: the court has a conflict of conscience as – according to the legality principle – it is obliged to observe the requirements of law. Hence, in the examined case – due to the fact of breaching formal requirements by the employer when dismissing an employee on disciplinary grounds – the court should rule favourably in the appeal and reinstate the worker. However, such decision would contradict the sense of justice. The specific buffer provided by the clause helps reduce the conflict of conscience and indicates a way out of the situation that satisfies both the demands of law and a sense of justice.

8.2.2. Dismissal of a distinguished worker on disciplinary grounds

Facts: Filip P. was employed as turner at Machinery Industry Plant in Ł. for 30 years. Over this time, he was of good repute, many times awarded by his employer. In December 2015, he quarreled at work with other employee and slapped him on the face. Political preferences sparked the argument. Filip P. explained his behaviour to the company director, citing nervous exhaustion as his wife had left him, and that he had his old and invalid mother in his care. He expresses regret for his act. The employer decided to dismiss him on disciplinary grounds. Filip P. appealed to the Court of Labour. In justification, he invoked his many years of irreproachable work at the plant.

Prima facie dilemma: the court's dilemma: can one reproachable incident wipe out the many years of a worker's good work? On one hand, Filip P's conduct, slapping the face of a colleague, is unquestionably a gross breach of the fundamental obligations of an employee, which satisfies a precondition for disciplinary dismissal under Art. 52 LC. On the other, dismissal on disciplinary grounds in this case – considering the employee's difficult personal situation and long-term excellent work – seems unjust as too severe.

Standard solution: the clause of community co-existence expressed in Art. 8 LC may help solve the dilemma. Applying the general clause allows it to be stated that, although the employer has grounds to claim that the worker

committed a gross breach of the basic duties of an employee, in view of exceptional circumstances (a long-term impeccable work record and difficult personal situation), exercising the employer's right to dismiss disciplinarily would breach the principles of social life principles, and hence it is inadmissible not only on moral but also legal grounds.

Meta-ethical perspective: there is conflict of legal and moral rights. Though the employer is not bound by law to disciplinarily dismiss an employee who committed a gross violation of their fundamental employee duties, they are – in principle – is entitled to act so under Art. 52 Par. 1 LC. However, using this right raises moral objections due to the previous merits of the employee. Hence, it may be considered that there was no dilemma for the employer. However, if they decided to use the right to dismiss without notice, the Court of Labour examining the appeal must decide whether to give primacy to legal or moral reasons. For the court, it will be a case requiring the application of the general clause.

8.2.3. Referring employees to training raising their qualifications vs the no discrimination rule

Facts: in 2014, Alfred M. – owner of Alfred Manufacturing, Trade and Service Company specialising in transfer print – referred three of his 15 workers to training in the service of the latest generation of printing machines. The workers who took first places in a bag race during an integration weekend organised by the owner were referred. All employees at the firm were of similar age and were hired in the same year. They also have comparable qualifications. The employer explained to the excluded workers that he could not afford for the time being to train more than three people, but that in the future he wanted to train them as well. In 2015, however, he did not refer anyone to training, citing the deteriorating economic situation of the company. The workers trained in 2014 started service of the newly-purchased machine and got rises of PLN 400 gross. The workers omitted from training took action before the Court of Labour against the employer under Art. 18^{3d} LC, claiming compensation for discrimination consisting in arbitrary omission when choosing people referred for training.

Prima facie dilemma: the dilemma before the court is about the necessity to decide whether, in a situation when the choice of employees to be trained cannot be made on grounds of rational criteria, the employer is allowed to decide on any criteria? On one hand, Art. 18 (3b) § 1 item 3) LC states *expressis verbis* that not being chosen to participate in training organised to improve

professional qualifications is a violation of the principle of equal treatment, on the other, the Code does not provide criteria that the employer should use when selecting employees to be trained, nor does it say what an employer should do in a concrete case when selection is from among workers with similar situations as regards all relative criteria (although admittedly such situations are rare). The applied criterion was completely arbitrary, and naturally is not one mentioned in Art. 18 (3b) § 2 and 3 LC among criteria justifying differentiation of the situation of workers. This circumstance would give grounds for awarding compensation in favour of the employees. On the other hand, if court ruled that the employer's action was discriminatory, then if any employer cannot base their choice of employees for training on criteria allowed by law, they should refrain from sending any workers for training until they have the means to pay for this for all workers in relatively similar situations. This consequence seems unacceptable.

Standard solution: the formulation of LC provisions forbidding unequal treatment of employees, especially enumerative listing of criteria justifying differentiating employees' situations, does not leave much freedom for the Court of Labour in choosing how to rule on the case. The law requires that the court awards compensation in favour of the employees, though this is at odds with a sense of fairness and common sense.

Meta-ethical perspective: this is a case of conflict of conscience. The Court of Labour, due to its ascribed role, is obliged to apply (defective) law, and this leads to issuing a decision regarded as unjust.

8.2.4. Employer's failing in their duty to pay remuneration on time vs the employee's duty of loyalty to the employer

Facts: LC, an employer falls behind three months with payment of remuneration to their employees. The reason is a many-month delay in receivables from the main counter-party. Andrzej N. did not conclude a separate contract containing a non-competition clause with the employer. Having no means for living and supporting his family, Andrzej N. started work under contract of mandate for a company in competition with his own employer. Upon learning this, the employer dismissed Andrzej N. without notice, stating as justification a gross breach of fundamental employee duties by taking up employment with a competing business. Is the employer responsible for breaching the order to protect the good of the company and ban competitive

action against it? Can this conduct be regarded by the Court of Labour as grounds for dismissal on disciplinary grounds?

Prima facie dilemma: the answer to the first question is clear: Andrzej N. acts to the detriment of the employer. The more important question is: is that conduct justified by the employer's failing in a fundamental obligation towards their employee? Does the employer's conduct justify lack of loyalty towards it? This is the core of the dilemma the Court of Labour must decide.

Standard solution: it is hard to acknowledge that an employee's disloyalty could be justified as admissible retaliation for a breach of their rights. The employee has legal means at his disposal to secure his right to remuneration, and should use them. The court, in compliance with the law, should dismiss the employee's appeal.

Meta-ethical perspective: the conflict is between legal and moral reasons. From the legal perspective, the employee's conduct gives grounds for dismissal without notice, yet moral reasons suggest that an employee towards whom the employer does not fulfil fundamental duties, is morally entitled to act disloyally towards the employer and undertake employment with the competition in order to secure means to support himself and his family. However, the existence of such moral rationales raises serious doubts.

8.2.5. Employer demanding from candidate for work a certificate stating she is not pregnant vs discrimination due to sex

Facts: Józef K. runs a casino in a seaside resort. Considerable income is generated only in the summer time (July and August) when holidaymakers flood in, while otherwise the income is minimal, not always covering business costs. Józef K. employs hostesses on employment agreements. In the summer season of 2014, four out of seven of these women presented medical certificates saying they were in the first trimester of pregnancy. As per Art. 178 § 1 and 178 (1) he released them from reporting for duty, simultaneously bearing costs of their employment. This situation caused that, in the 2014 season, he only obtained 65% of the expected income from the casino (the income was predicted on the basis of average income over the previous five seasons). Seeking employees for the 2015 season, he demanded from female candidates medical certificates stating they are not pregnant. Milena S. presented such a certificate and was hired under a contract of employment for a specified period of three months. After termination of the contract, Milena S. filed in the Court of Labour for compensation against Józef K in the amount of PLN 5000, under Art. 18 (3d)

for discrimination against a female worker due to her sex. She claimed the discrimination consisted of the employer demanding presentation of a medical certificate confirming she was not pregnant. In response to the suit, Józef K. claimed that the demand for the certificate was to protect him against losses such as he had suffered in the previous season. He also remarked that it would be difficult to demand such certificates from men seeking employment at his casino just for the sake of avoiding a discrimination charge.

Prima facie dilemma: the essence of the dilemma is the conflict between the economic interests of the employer and respect for the dignity of female workers. The court must decide whether Józef K. could secure his interests while at the same time not humiliating the worker. previous adjudications of employment tribunals in such cases clearly show that courts protect the interests of female workers.

Standard solution: the dominant respective jurisdiction approach shows that the court should acknowledge the primacy of the worker's protection over discrimination, and should award compensation against employer.

Meta-ethical perspective: one of the conflicting values, the female worker's dignity, is strongly protected by employment law. This values collides with the employer's economic interests, hence it is a conflict of values.

8.2.6. Hazardous work conditions vs the duty of an employee to fulfil their supervisor's orders

Facts: Andrzej B. is employed as crane operator. He performs his work in a cabin suspended 30m above ground. In peak workload times at the construction site, Andrzej B. stopped performing employee duties a couple of times because of strong wind, and left his workplace, informing the foreman of the risk of the crane falling over. The head remarked that the wind was not strong enough to be hazardous for the crane operator, and besides that, it was only the site manager who could decide if weather conditions allowed for construction works, possibly also company's OHS inspector, and not a crane operator. The third time the situation happened, the site manager dismissed the worker without notice. Andrzej B. appealed to the Court of Labour.

Prima facie dilemma: the Court of Labour must decide on the primacy of the employer's interests, who wants no delay in construction obligations, or in favour of the worker's safety. The settlement of the dilemma depends on the accuracy of factual determinations that the court must carry out. It is crucial to determine whether atmospheric conditions were objectively dangerous for the health and life of the operator, or whether the risk was only subjective. It is

also important to find out whether it was possible to assess the situation at the operator's workplace on grounds of reliable measurement data, especially if it was possible to measure the strength of the wind. If there was no such possibility of measuring wind, it can be recognised that the worker could refuse work under Art. 210 LC if he himself decided that the conditions were dangerous for life and health.

Standard solution: the Court of Labour should order expert opinion to indicate whether risk was real. If it turns out that the weather conditions indeed posed a work safety hazard, the court should rule in favour of the worker's appeal.

Meta-ethical perspective: the dilemma before court could be classified as epistemic.

8.2.7. Dismissing a lawyer on disciplinary grounds for their allowing a conflict of interest

Facts: Bartosz G. runs a legal practice under a partner company, and within this, in 2009, he provided legal advice to Haj LLC., which operates in L. and several other places shops selling substances known as designer drugs. Bartosz G. also acted as counsel for Haj in administrative proceedings aimed at forcing the business to stop selling such drugs. The legal advice proved so effective that the company and its successors continued to trade over the next five years in L. and neighbouring towns. In 2013, Bartosz G. was hired under employment agreement for unspecified period as director of in-house counsel for L. Town Hall. The lawyer modified his attorney registration for passive registration and suspended legal practice, although he remained a partner in the law firm. As head of the legal office at Town Hall he acted impeccably. In 2015, the Town Hall in L. endeavoured to force all designer drug shops in its jurisdiction to close. The workers employed in the legal department were ordered by the municipality to find legal means of achieving this goal, the realisation of which was coordinated by Bartosz G. He did not personally write or sign court letters prepared by municipal lawyers for this case. Bartosz G., in private conversation, boasted to one of town councillors that as a lawyer he had advised companies trading in designer drugs in the town, and that it was he who invented "the ironclad system." The councillor informed the media, who publicised the case. Councillors opposing the city authorities in L. demanded the dismissal of Bartosz G. when the story hit the national press and internet sites, and the authorities of L. decided to terminate his contract, upon which he appealed to the employment tribunal.

Prima facie dilemma: formally it is hard to accuse Bartosz G. of acting in conditions of conflict of interests, as he did not conduct on behalf of the town any case against his ex-clients. Yet an outside observer can have justified doubts as to whether he, as head of the lawyers employed by the town authorities, really had no factual influence on choosing the ways in which the actions aimed at eliminating the designer drug trade in the town are carried out. The fact that the lawyer who advised those traders on how to avoid liquidation effectively later changed sides may raise doubts as to whether he is indeed interested in the effective realisation of the task conferred upon the town lawyers.

Standard solution: the case is non-standard. Since local authorities hire an experienced lawyer (and it is hard to expect that this position could be filled by a novice) there is great chance that there may be cases involving ex-clients of this lawyer. It may only be expected from the lawyer that he will refrain from participating, settling and reviewing cases that relate to former clients. If in this case, Bartosz G. refrained from direct involvement in settling cases concerning Haj, so it is hard to charge him with allowing a conflict of interest situation to arise. However, greater objections are raised by Bartosz G.'s conduct consisting in his boasting about past successes in settling affairs for the company in proceedings pending on the initiative of the Town Hall. It seems that this circumstance may be grounds for the termination of the employment agreement with the lawyer.

Meta-ethical perspective: the dilemma may be qualified as a problem of the application of law. The court must assess whether the employee's conduct – as legal advisor – gives grounds for terminating the contract.

8.2.8. Refusal to grant the right to benefit in respect of an accident at work to a priest providing religious service beyond the structures of religious associations

Facts: Father Antoni B. Was parish priest in the Roman Catholic parish in Z. Due to conflict with the Church authorities he was suspended from the right to perform religious activities. Despite the penalty, Antoni B. continued to officiate in a chapel that was the private property of a worshipper. Services were attended by a group of churchgoers – proponents of the priest. Antoni B. paid insurance premiums to the Social Insurance Institution against industrial injury. One Sunday, Antoni B., just after ending a service, when leaving the chancel, tripped and fell on the altar steps, as a result of which he broke his femur. The injury prevented him from providing pastoral service and he did not regain motor skills – leaving him wheelchair-bound. Antoni B. Did not inform the Bishop's

Curia of the accident, and hence no incident record was prepared. The priest lives by modest donations of the faithful. He petitioned the Social Insurance Institution for a disability pension, but was refused on the grounds that, when the accident happened, he was not performing religious activities as defined in Art. 3 Section 3 item 10 of the Act On Social Security Against Work Accidents and the Insurance Against Occupational Illnesses of 30.10.2002 (Journal of Laws No. 199, item 1673), as he was at the time suspended and the building where he celebrated mass was not religious building. The insurer referred in the justification to a letter from the Curia, in which these two circumstances were put forward. Moreover, the insurer indicated that the refusal to grant benefits was justified by the failure to present the incident record (Art. 22 Section 1 item 1) of the Act). Antoni B. appealed to court against the decision of the Social Insurance Institution.

Prima facie dilemma: first, the dilemma was faced by the Social Insurance Institution (and in fact an officer issuing the decision), and not the Court of Labour and Social Insolvency. At the root of the problem is the principle of the strict application of provisions on social insurance, which leads to situations where failing to meet at least one formal requirement deprives the insured from rights to benefits. Such a situation sometimes seems unjust due to circumstances in which the person applying for the benefit finds themselves. In the described case, there are two formal impediments to the awarded of an industrial injury benefit: lack of incident record and doubt about whether the insured party sustained the injury while performing religious activities. In favour of granting the benefit to the priest are the requirements of justice: the fact that he paid premiums for injury insurance, that by his activities he satisfied the religious needs of a group of people, although he did it beyond structures of a religious association, and finally, his difficult material situation.

Standard solution: it seems that the decisive argument in favour of the clergyman is the fact that he paid the insurance premiums even while suspended. If the case circumstances raise no doubts, the court should allow the appeal.

Meta-ethical perspective: the collision of a principle of social insurance law, namely of the strict application of provisions with the principle of justness. Hence, it is both a problem of the application and of its interpretation.

8.2.9. Reverse discrimination in staff-cuts

Facts: Jerzy W., employed as a trader by Kuwaka LLC, proved in Court of Labour proceedings that his employer was guilty of pay discrimination by paying him unjustifiably less than others holding equivalent positions. The

court awarded him PLN 10 000 compensation, to be paid by the company. Several months later, the board of Kuwaka decided to reduce the number of employees due to the deteriorating economic situation of the company. The board dismissed Czesław S., employed as trader, although he was five years before retirement and his period of employment at Kuwaka was one of the longest. Czesław S. appealed to the Court of Labour. In justification, he raised the fact that Jerzy W. had the shortest employment period among traders, and that in the past three years their results had been comparable. In response to the suit, the employer indicated that dismissal of Jerzy W. was impossible due to Art. 18 (3e) LC.

Prima facie dilemma: at this stage, the Court of Labour faces a dilemma. It must choose to acknowledge that the protection against contract termination following from Art. 18 (3e) § 1 LC of an employee who has exercised his rights due to a violation of the principle of equal treatment in employment has primacy over all other criteria that an employer could consider when selecting employees for redundancy on economic grounds, or decide that other criteria may be more significant in this case. The special protection against dismissal resulting from the provision leads to inequity for an employee that is not given this privilege (reverse discrimination).

Standard solution: there is no standard solution in the case of this dilemma. The Court of Labour, if applying the law strictly, should refuse the appeal, which would thus approve discrimination of the dismissed employee.

Meta-ethical perspective: it is a collision of legal reasons (the proscription of dismissing an employee against whom an employer committed pay discrimination) with ethical reasons (of justice), which results in a specific conflict of values.

8.2.10. Dismissal from work of a doctor who exercised the conscience clause

Facts: Joanna S. is a gynaecologist employed for three years under an open-ended employment agreement at Placebo Medical Centre run by the general partnership of Jędrzej S. and Miłosz Cz. When she was hired, Joanna S. declared in a talk with the unit's director, Radosław P., that due to her convictions she would not perform abortions nor prescribe contraceptives. The patients rate her medical skills as a doctor highly. She has twice as many patients as other doctors. In 2015, however, the directors of the unit were notified of complaints by three patients of the doctor's refusal to prescribe hormonal contraceptives and emergency contraception. After the complaints, Radosław P. had

a conversation with Joanna S., in which he informed her that inasmuch as her refusal to perform abortion could be admissible for the management, denying contraceptives would no longer be acceptable, as interest in this form of medical help was increasing among patients and Placebo Medical Centre would not allow their loss to competing units. A week after this talk, another complaint about Joanna S. followed, as she did not want to prescribe the morning after pill for a 17-year-old patient. In this situation, Radosław P. terminated the contract with Joanna S., justifying it by citing her incompatibility with the full performance of her duties as an employee and her failure to fulfil her supervisor's orders. Joanna S. appealed against dismissal at the Court of Labour.

Prima facie dilemma: the Court of Labour has to solve the dilemma of primacy between the employer's interests – the partnership running the medical centre employing the doctor, the interests of which her conduct infringes, and the doctor's right to refrain from participation in conduct inconsistent with her moral principles, as well as medical ethics. Of significant help in solving the dilemma may be Art. 39 of the Act of 5 December 1996 on professions of doctor and dentist (Journal of Laws of 2015, item 464, as amended), containing the conscience clause.

Standard solution: the conscience clause is a foundation for the doctor to exercise her subjective right, hence she is legally protected. Dismissal of the doctor thus deprives the employee of her rights. The court should allow the appeal and reinstate the doctor.

Meta-ethical perspective: the dilemma concerns the conflict between moral and legal reasons on one hand, and economic ones on the other. In the background there also appears the conflict between freedom of conscience (protected by the conscience clause), and patient's rights to receive medical services guaranteed by the law.

8.2.11. Refusal by an employee to perform orders that contradict their moral and religious convictions

Facts: Jasmina F. fled her native war-torn Syria in 2014 and reached Poland, where she was granted asylum and permanent residence. She is Muslim. In 2015, she was hired under an employment agreement at Jadwiga A.'s company, which provides advertising services in respect of large-format printing and production of lightboxes, displays and roll-ups. In July 2016, Jasmina F. Was alone at the office since all other employees were on holidays. A commission came by email from the heads of the Polish National-Social Party for five roll-ups to be used in their coming party congress. The rollups were to contain slogans expressing

opposition to the influx of immigrants from Muslim countries to Europe. The works also received a commission from a LGBTQ organisation advertising the reunion of this organisation. Jasmina F. sent the two organisations email responses informing that the commissions would be refused in line with the firm's policy of not supporting extremist organisations. After returning to the office, Jadwiga A. learned of the correspondence sent in the company's name, and dismissed Jasmine F. without notice (under Art. 52 LC). As grounds for dismissal she indicated gross breach of fundamental employee duties, consisting in unjustified refusal to undertake two commissions. Jasmina F. appealed to the Court of Labour, claiming that the refusal was justified by her convictions: propagating stances that are xenophobic and hostile to exiles and Muslims was irreconcilable with the fact that she herself was Muslim and an exile. She stated that her refusal to produce a poster for a LGBTQ organisation was motivated by the fact that Islam views homosexuality as an unacceptable perversion which cannot be endorsed by adherents of the faith.

Prima facie dilemma: the Court of Labour faces a dilemma: on one hand, the principle of the employment law obliges the worker to fulfil their supervisor's orders and carry out activities bringing profit to the employer, while on the other there are moral and religious principles professed by the employee that prohibit supporting actions evaluated as immoral. It is to be determined whether the Court of Labour is authorised to assess whether the employee was right to be guided by her moral and religious convictions at that moment, especially as the refusal to undertake commissions could be interpreted as manifestation of discrimination on grounds of political convictions and sexual orientation. However, accepting that the worker was justly dismissed could also be regarded as manifestation of discrimination due to professed religion.

Standard solution: in Polish judicature, there are no decisions that concern this kind of dilemmas. Without doubt, the solution of the dilemma inevitably entails the choice of a certain worldview and political attitude.

Meta-ethical perspective: the court has to evaluate legal and moral values. The problem has no traits of a moral dilemma in the strict sense.

8.3. Dilemmas of a legal advisor

8.3.1. Problem of loyalty towards an employer in a situation of conflict between partners in the partnership employing a lawyer

Facts: Nikodem F. is a lawyer hired under an employment agreement who provides legal services for an employer that is an organisational unit without legal personality (a civil law partnership of three partners). Nikodem F. learned that one of the partners uses the software created in the partnership for his work at a company in competition with his own. Should Nikodem F. inform the other partners of this fact?

Prima facie dilemma: the root of the dilemma before the lawyer is the circumstance that, between the partners hiring him, there is no unity. Until they cooperate there is no conflict of loyalty. Their undertaking actions against the other partners makes every conduct by the lawyer (both informing and not informing the other partners) potentially disloyal towards some of the employers. Additionally, the legal advisor has to question whether the information he obtained is subject to the professional confidentiality of lawyer, and if that is the case, he is obliged to keep it from the other partners.

Standard solution: the dilemma is one of those that have no good solution. A crucial hint for the advisor to help him justify his choice is the categorical imperative of the Code of Ethics of Legal Advisers (Art. 15 Section 1) to keep all information about the client and their affairs the legal advisor learned from the client or through their performance of some professional duties in professional confidentiality. This regulation makes it easier for the legal advisor to justify his silence rather than divulging the information to other partners in the partnership that hires him.

Meta-ethical perspective: the legal advisor's issue qualifies as a moral dilemma in the strict sense. The lawyer is forced to choose between two conducts: either to inform the employers of the improper conduct of their partner or to refrain from it. *Tertium non datur*. The choice of any of the options entails harm of similar kind: the lawyer exposes himself to a charge of disloyalty to some of the employers. The dilemma may be classified as a moral dilemma provided that the duty of loyalty to the employer is understood not only as a legal obligation but also as a moral one.

8.3.2. Dismissal of an employee shortly before the start of the termination protection period

Facts: Marian S., running Apacz LLC, terminated an open-ended employment agreement with Aleksy Ś. He justified the dismissal by citing the need to reduce the number of employees as a result of the difficult economic situation of the company. The employee, at the time of termination, was only four years and one month from retirement, and had an employment period sufficient to be eligible for pension upon reaching retirement age. Legal advisor Ireneusz R. is to represent the employer in proceedings for reinstatement at the Court of Labour.

Prima facie dilemma: the legal advisor is to represent the employer at court and defend the dismissal. Formally, everything was correct as the employee was not under the protection period due to nearing retiring age when dismissed, but the very short time before the start of this protection, one month, begs the question as to whether the dismissal was just. For indeed, *ratio legis* of protection against dismissal resulting from Art. 39 LC (there is practically no work for a man before retirement) does not disappear if notice of termination of contract is given one month before the protection period starts.

Standard solution: if the legal advisor does not want to quit his professional role (and surely lose his job), he should fulfil the employer's order and defend his interests before the tribunal by claiming there that the termination occurred one month before the protection period began and was therefore legal.

Meta-ethical perspective: this is a conflict of professional role with moral reasons. The employer demands from the employee to represent his interests before court as a legal advisor. The objections are raised by moral assessment of the employer's conduct. Choosing moral reasons leads to infringement of the professional role requirements of a legal advisor.

8.3.3. Employer's order to a legal advisor, being the employee to represent the employer, in proceedings against a lawyer to whom the advisor owes special gratitude

Facts: legal advisor Antoni C. was patron of legal advisor Krzysztof N. After 10 years, both were hired under an employment agreement by the Town Hall in E., where Antoni C. became head of legal department of the office. In 2015, there was conflict between Antoni C. and the mayor, who accused Antoni C. of purposely and against the interests of municipality E. omitting to appeal in

the case to which the municipality was party, thus incurring damages of PLN 1 500 000. To represent the municipality in court proceedings against Antoni C., the mayor authorised Krzysztof N, to whom he warranted the power of attorney, although Krzysztof N. filed objections regarding taking the action against his former patron.

Prima facie dilemma: Krzysztof N. is in a situation of conflict between the principle of employment law mandating the requirement to fulfil orders of supervisors, and the principle of professional ethics, requiring from a legal advisor special loyalty towards a former patron.

Standard solution: it can be expected that the legal advisor abides by the requirements of professional ethics (and also universal ethics), even at the cost of losing his job.

Meta-ethical perspective: the conflict is between legal duty (fulfilling an employer's orders) with ethical-professional duty (loyalty towards an ex-patron).

8.3.4. Fulfilling the employer's orders leads a legal advisor into a conflict of interests

Facts: a legal advisor employer hired by a company under an employment agreement represents the employer on their order in negotiations with representatives of employees concerning new terms of employment and remuneration. Some of the conditions (including allowances from the employee benefit fund) concern all employees including the legal advisor.

Prima facie dilemma: in fulfilling the supervisor's order of representation in negotiations with the staff, the legal advisor falls into conflict with the ethical-professional rule requiring legal advisors to avoid conflicts of interest. The dilemma is about the necessity of making a choice between fulfilling the boss's order and abiding by the principles of professional ethics.

Standard solution: the legal advisor should refuse to participate in negotiating those conditions that may concern him as an employee.

Meta-ethical perspective: the dilemma may be classified as a conflict of legal duty (fulfilling the employer's order) with ethical-professional duty (avoiding conflicts of interest).

8.3.5. Obligation to maintain professional confidentiality vs defence against unjustified termination of employment agreement

Facts: legal advisor Karol D. was hired by a company under an employment contract. In the course of performing his duties, he learned that the employer had committed a number of tax offences (including issuing false invoices to receive VAT reimbursement). When the employer realised the lawyer knew about the offences, he terminated the contract with him. He gave false justification – redundancy – for the dismissal. The legal advisor appealed to the employment tribunal. When preparing justification, he considered indicating the true cause of his dismissal.

Prima facie dilemma: the legal advisor's dilemma is that, in order to defend himself against groundless dismissal, he must breach ethical-professional principles (and legal norms) demanding professional confidentiality. Divulging a professional secret gives him a real chance for winning the case before the Court of Labour.

Standard solution: protection of confidentiality should win over Karol D.'s interests as an employee. He should not disclose circumstances he learned about when providing legal service to the employer, even if he risked losing the dispute before the court.

Meta-ethical perspective: the legal advisor faces a conflict of interests: his own (effective protection against dismissal) and the employer's (keeping illegal actions secret), and also a conflict of values: maintaining professional confidentiality vs defence against dismissal. Hence, it is a conflict of ethical-professional obligation with a non-ethical value.

8.3.6. A legal advisor faced with being positioned within a company in a manner not compliant with the Act

Facts: Mieczysław O., president of Iskra LLC, informed Wojciech M., the legal advisor hired on an employment contract, that his position within the internal structure of Iskra is in sales department and hence the direct supervisor of the lawyer is the director of the department, Feliks Sz. The legal advisor pointed out to the employer that, according to the Act on Legal Advisors, he should only report to the director of the unit of which he is employed, namely the president of the company, but he received the answer that the director of the department has full authorisation to act on the owner's behalf.

Prima facie dilemma: the legal advisor is in difficult position: Feliks Sz. is convinced he may give him orders, but for the lawyer to accept the orders would be a violation of the provisions of the Act on Legal Advisors.

Standard solution: subjection of a legal advisor hired within the terms of an employment contract directly to the director of the organisational unit is not a personal privilege of the advisor, but serves to protect his independence. The lawyer should explain the situation to the president of the company, and if he remains unconvinced about the legal advisor's correct position within the company, Wojciech M. should tender his resignation.

Meta-ethical perspective: this is a collision of the employee's duty – fulfilling an employer's orders (in this case his positioning within the company structure) with the legal and ethical-professional duty protecting a legal advisor's independence.

8.4. Dilemmas of an employer

8.4.1. Dismissing an employee who is an HIV carrier on demand of the majority of the staff

Facts: the headquarters of PayBank hired 15 IT specialists under employment contracts, to form a team operating the bank computer system. The system was tailor-made for PayBank, which meant that every newly hired worker needed an introductory period of several weeks to three months to learn it, and hence the IT staff, although consisting of relatively young people, remained stable. Ariel Z., one of the IT specialist, learned that he was an HIV carrier. He told this to two colleagues. Within days, the news spread among the whole team. Ten of them made a written demand addressed to the directors of the bank that Ariel Z. be dismissed from work, otherwise they would tender their resignations. The authors of the letter claimed their right to work in safe conditions.

Prima facie dilemma: the dilemma before the employer is that allowing the postulate of the team may expose the employer to accusation of discrimination against Ariel Z. and lack of respect for his dignity (Art. 11 (1) and 11 (3) LC), and consequently the employer may be obliged to pay compensation to the employee. Not allowing the group's request may lead to mass resignation and temporary paralysis of the bank computer system, which will entail serious losses. The case is inspired by a landmark suit examined by the European Court of Human Rights (sentence 552/10 I.B. v. Greece of 3.10.2013).

Standard solution: in the ruling, the court decided that the employer, by dismissing an employee shortly after learning about his health problems, had behaved in a discriminatory manner, and therefore it should be accepted that in this case the employer should have refrained from dismissing the employee to avoid violating the law. Choosing this option naturally does not protect them from the economic consequences of the announced group resignation.

Meta-ethical perspective: from the perspective of employer, it is a case of conflict between legal reasons (and also moral) and economic ones. If we assume that the workers' fears about contracting the virus from their colleague are taken seriously by the employer, we may consider that the employer experiences a conflict of two moral reasons: on one hand, there is a duty to refrain from discrimination of the employee with HIV, while on the other there is an obligation to act in a way that will provide safety to other workers.

8.4.2. Protection against dismissal of a pregnant worker vs the requirement for a catechist to have *Missio Canonica*

Facts: Jolanta K. was employed for 15 years as catechist at a lower-secondary school in D. The head teacher had no objections to her work. The employee actively participated in various school activities, and was well-liked by the students. Jolanta K. divorced, and since that time was in an informal relationship with Kamil U. When she got pregnant the local bishop withdrew her *missio canonica* to teach religion, and requested the head teacher to dismiss Jolanta K. from work as catechist.

Prima facie dilemma: the dilemma before the head teacher is that, on one hand, the condition for hiring a catechist is their having *missio canonica* to teach religion, and its lack results in losing the right to do so, while on the other hand, the years of Joanna K.'s impeccable work, the high evaluation of her achievements and her pregnancy speak against her dismissal.

Standard solution: of crucial significance when solving the dilemma is Art. 183b § 4 LC, which provides that the principle of equal treatment is not violated where churches and other religious societies deter access to employment on the grounds of requiring from the employed loyalty towards the ethics of the organisation. This provision allows the head teacher to justify dismissing the catechist who lost her *missio canonica*. On the other hand, the problem of protected employment for pregnant women remains. Employment law only exceptionally allows for the termination of an employment contract with a female worker in such conditions.

Meta-ethical perspective: this is a conflict of values of high rank. The adjudication in this case gives primacy to churches and religious associations to select people on whom they confer the mission of teaching religion. In this choice, of crucial importance may be the assessment of the lifestyle of the person upon whom the role of catechist is conferred, on the grounds of ethics professed by the church (or religious association).

8.4.3. Replacement of an employment agreement with a civil law agreement

Facts: due to the difficult situation of his company, Norbert T. offered to continue to employ his staff, but under a civil law agreement, though the scope of their obligations, their work organisation, and the time and place of their work would not change. The employees would only lose such rights as holiday leave and the benefit fund. Remuneration would be paid according to less favourable rules. The employer ordered the company's legal advisor, Adam C., to prepare an agreement to terminate employment contracts and issue new civil law contracts for the workers.

Prima facie dilemma: the dilemma concerns the employer as well as the legal advisor. The employer faces a hard choice between obeying the law (Art. 22 LC) and providing for the improvement of the economic situation of his company (which serves not only the entrepreneur's interest but also those of his employees). The legal advisor's dilemma is the conflict between the principle of respect for law (being an important rule in a legal advisor's ethics) and the obligation to meet the employer's orders. From the employer's perspective, obeying the requirements of employment law leads (or may lead) to bankruptcy and lay-offs, whereas adopting the flexible (but illegal) form of employment exposes him to negative consequences in the eyes of the law. For the legal advisor, the dilemma is that, if he executes the employer's order, he will contribute to a violation of employee rights; if he refuses, he will be exposed to negative consequences as employee.

Standard solution: the legal perspective on this dilemma has only one solution: conforming to the law irrespective of the economic consequences of such decision.

Meta-ethical perspective: the legal advisor's situation may be qualified as a legal dilemma. Executing the employer's order would entail breaking employment law, but not fulfilling the order may have grave consequences for the lawyer's situation.

8.4.4. Ban on disclosing an employee's wages vs prohibition of wage discrimination

Facts: Marek S., as president of the management board at Kuwaka LLC, introduced a policy under which employees were forbidden to disclose their salary amounts to colleagues. The instruction was justified by the president as “care for maintaining good relations between workers and an attempt to eradicate jealousy and resentment.” The salary amounts were individually negotiated with each worker. Jerzy W., hired as a trader, demanded from the accountant information on remuneration paid to all traders employed by Kuwaka. He justified the request for salary disclosure that it was to check that there was no pay discrimination as defined in Art. 18 (3c) LC.

Prima facie dilemma: the employer faces a dilemma (if we accept that he introduced the instruction in good faith), as he wanted to provide a good atmosphere in the company, trying to eliminate jealousy and unhealthy rivalry. The president's provision, however, seriously impedes – or even precludes – the employees' right to equal treatment in terms of remuneration.

Standard solution: it seems that the employer chose an improper way of protecting a value – elimination of conflicts between employees. The law grants them the right to obtain information about salaries paid in the company, hence the employer should give this information to the employee.

Meta-ethical perspective: the problem may be qualified as a subjectively hard choice. Among conducts from which the employer may choose, only one is subject to legal obligation, therefore the dilemma is superficial (subjective).

8.4.5. Dismissal on disciplinary grounds of an outstanding specialist doctor who sexually harassed colleagues

Facts: Roman N. is a vascular surgeon employed as head of a teaching hospital department in L.G. for 15 years. He is esteemed by the hospital management for creating from scratch the vascular surgery department, and created a highly-qualified team. The department carries out pioneering operations, including life-saving ones. The contracts with National Health Fund for operations in the department run by Roman N. have brought high income to the hospital for over 10 years. The hospital director received complaints from three nurses and two female interns about Roman N. The nurses' letter accused the clinical director of harassment as defined in Art. 18 (3a) § 6 LC on many occasions over the last five years, especially making sexual offers, touching them

intimately without their consent, and offering pay rises in exchange for sex. The interns alleged that he suggested that the condition of their permanent contract was sexual intercourse with him. The preliminary investigation by the director confirmed the charges. The aggrieved also filed a complaint to the prosecutor and criminal proceedings are pending. The women declared to the director that they cannot imagine continuing work with Roman N.

Prima facie dilemma: the hospital director's dilemma is the necessity to choose whether to dismiss Roman N. without notice under Art. 52 § 1 item 1) and 2), or, due to his role in the functioning of the department, to delay a decision until the conclusion of criminal proceedings. The former choice satisfies the sense of justice in respect to the aggrieved women, and protects them from being exposed to repeats of the same behaviour or to being browbeaten by the clinical director. However, the price for this decision would be the loss of a precious worker and depriving patients of highly effective medical care protecting their health and life. The hospital director, a doctor too, feels professional solidarity with Roman N. and does not want to end his career. Choosing the second option allows avoidance, for the time being – of the negative consequences related to the immediate dismissal of the doctor. Yet the negative effects of this decision are mainly the risk of exposing the hospital to compensation claims of the aggrieved women, loss of good image, and risk that the aggrieved women – esteemed workers – will quit, which will entail at least a temporary worsening of medical services at the hospital. It seems optimal (not perfect) to suspend Roman N. from executing work duties until the end of pre-trial proceedings. If he is charged by the prosecutor, it would be easier for the hospital director to dismiss him on disciplinary grounds.

Standard solution: the director should send the doctor on leave until the prosecutor decides to charge him or discontinue the proceedings. after the decision, he should – according to its content – either dismiss the doctor without notice or reinstate him.

Meta-ethical perspective: the core of the dilemma: is reprehensible behaviour towards some people balanced (redeemed) by many years of doing good to others? This is a moral dilemma in the strict sense.

8.5. Dilemmas of an employee

8.5.1. The limits of an employee's loyalty to their employer

Facts: Grzegorz W., sales representative in Flash LLC, a company producing angling equipment, learns that the employer concluded a secret price-fixing agreement with four other producers in the same industry. The members of the deal arranged to sell products at the same prices and refrain from competing between themselves by lowering prices on their own products. The employee considers notifying the Office for Competition and Consumer Protection of this collusion.

Prima facie dilemma: the employee who learned about violation of antitrust laws at his workplace faces a dilemma. The pricing agreement concluded by the employer is prohibited unfair competition against the client's interest. On the other hand, with such an agreement comes the chance for the employer to multiply profits. Notifying the OCCP surely serves social interests, but infringes the employer's interests and is a breach of loyalty (Art. 100 § 1 item 4 LC).

Standard solution: if the employee decides to report the illegal practices, there would be no grounds to claim that Grzegorz W. violated employment law, as filing such notice is not only his right but his civic duty.

Meta-ethical perspective: it is a collision of legal and moral rationales, and at the moral level the two values disagree: loyalty to an employer and protection of social interests are here mutually exclusive. It is also – in one respect – a moral dilemma.

8.5.2. The limits of an employee's loyalty to their employer

Facts: Bartłomiej B., a worker at C. supermarket chain, notified the State Sanitary Inspectorate of the practice at the shop he works at of repacking food (meat, cold cuts, and fish) past the sell-by date. An inspection confirmed the information and the shop manager was fined by the inspectorate. The information on the irregularities spread to the media. The sales of food products in this shop fell by 30%. An anonymous informer told the manager who tipped off the inspectorate.

Prima facie dilemma: from the worker's perspective, the situation is analogous to case No.23. he faces a dilemma: protecting the health of consumers (namely of social interest) or loyalty to his employer. In the

described case, the shop manager also faces a dilemma: whether to punish the employee in any way for whistle-blowing, or to accept that he will get away with it. Naturally, this kind of dilemma is only a consequence of the dysfunction present in the shop.

Standard solution: the solution is quite simple: social interest should override the particular interest of the company. The behaviour of the supermarket's director not only violates the law but also deserves moral condemnation, therefore the worker was right to inform the inspectorate. The manager should not punish him.

Meta-ethical perspective: a dilemma occurs both at the legal and moral level.

8.5.3. An employee informing an employer about colleagues in exchange for a promise of not being dismissed

Facts: in Henryk J.'s bakery in A. the employer announced lay-offs due to economic reasons. The demand for bread had dropped by 20%. Among the ten-strong staff, people became tense and apprehensive. A. is a small town where the bakery is the biggest among few work places. In the range of 60 km there are no other bakeries. Henryk J., before selecting people for dismissal, called Daniel P. the youngest employee, with the shortest work period at the bakery, for a one-to-one talk. Daniel P. grew up in local authority care, and has a three-month-old child to support whose mother is unemployed. He lives with the family in a rented flat in A. Henryk J. told Daniel P. that, because of his short work period, he can expect to be the first to be dismissed. However, he would like to keep the worker provided that he agrees to inform him which of the employees takes flour from the bakery and does not object to make bread from ingredients that do not meet sanitary standards (e.g. road salt) but bought at bargain price by Henryk J.

Prima facie dilemma: the employer, in deciding whom to lay off due to economic reasons, faces not one but a number of dilemmas. The choice cannot be arbitrary. Typical criteria taken into account in such a situation are work period, other sources of income, social insurance contributions made by the employer on the employee's behalf, and family situation. It often turns out that different criteria lead to the selection of different groups of workers. Dilemmas appear as early as at the stage of choosing the criterion for dismissal, and they are faced by the employer. In this factual state, we also have the dilemma of the worker threatened with dismissal and who is in hardship. The employer's

behaviour, a form of blackmail, forces the worker to choose between loyalty to colleagues (not becoming an informer) and loyalty to his partner and baby (he will do everything to avoid losing his job, as this will expose his closest ones to penury).

Standard solution: the employer's conduct is not only illegal but is also ethically reprehensible blackmail. It seems that, even if the employee won in an Court of Labour and secured the post, it would not be for long. Hence, he cannot but agree to the employer's deal if he wants to fulfil his role as father and partner of the child's mother. Nevertheless, it is difficult to recognise this choice as legally as well as morally acceptable.

Meta-ethical perspective: the worker suffers from a conflict of roles: loyal employee – father to a young baby.

8.5.4. Executing an employer's orders vs sticking to the rules of professed religion

Facts: Jan G. is hired as an IT specialist in a bank responsible for the maintenance of software realising wire transfers, and also troubleshooting. As Jan G. is member of the Seventh Day Adventist Church, Saturday is his day off when he cannot undertake paid work. This rule is rigorously observed with no compromises. Under Art. 11 section 3 of the Act of 30 June 1995 on Relations of the State to the Seventh Day Adventist Church (Journal of Laws of 2014, No. 1889), on Jan G.'s request the company arranged him an individual schedule with free Saturdays (no work and duty), but he works on most Sundays. The bank employs three other IT specialists. On Friday night, a failure of the bank's computer system occurred. The bank director called Jan G. to summon him to appear at the bank immediately to resolve the problem. Jan G. refused, invoking the individual work schedule and his religious principles. He appeared only on Saturday after sunset. The bank management calculated that every hour of the system failure had cost PLN 450 000. Are there grounds to apply disciplinary sanction or dismiss without notice?

Prima facie dilemma: first, the employee faced a dilemma, as he had to decide whether to perform the work duty by appearing, despite it being a day off, in order to resolve the emergency, or to follow religious principle (understood by him also as a moral norm) to refrain from work on a holy day. The choice was in some sense facilitated by the radical understanding of the commandment to celebrate Saturday in the Seventh Day Adventist Church. Also, the employer faces a dilemma: should the employee be punished for evident disobedience or should his reason for non-attendance be accepted? Although employment law

does not contain norms prescribing disciplinary penalties (the employer only has a right to do so), not applying even a symbolic disciplinary sanction could be regarded by other employees as encouragement to ignore their employer's orders.

Standard solution: from the worker's perspective, the choice of conduct depends on his attachment to professing a religion. From the employer's perspective, only refraining from punishment can comply with the principle of respecting freedom of creed of the worker.

Meta-ethical perspective: this is a conflict of legal duty (executing the employer's orders) with religious duty, and hence it is a conflict of conscience.

8.6. Dilemmas of an inspector of the National Employment Inspectorate

8.6.1. Employer's liability for failing to execute salary payment on time in a situation of lack of sufficient financial means for covering liabilities to all creditors

Facts: Piotr S. runs a small fruit and vegetable processing plant employing a dozen or so workers under an employment contract. Under a family court decision, he is obliged to pay PLN 2000 per month as alimony in favour of his three children who are minors. In 2014, the plant suffered losses due to a market downturn. In this period, there were arrears for utilities, pre-products and social security contributions for the employer and employees. At this time, Piotr S. paid the alimony only partly. For several months, he paid the salaries with significant delay. These irregularities were discovered during an inspection by the National Employment Inspectorate, following a plant visit upon notification by some employees. Are there grounds to punish Piotr S. for misdemeanour under Art. 282 § 1 item 1) LC? Piotr S. provided the inspector with explanations that he had to choose how to dispose of sparse financial means. Thanks to delaying salary payment, he could at least partially meet his alimony and tax obligations.

Prima facie dilemma: from the objective perspective, the inspector should have no doubt: Piotr S. did not execute his duty to pay remuneration in full, and so committed a petty offence for which he should be punished. However, if the subjective aspect is considered, then doubts about Piotr S.'s culpability arise – since the advance payments towards remuneration due may prove his will to meet the employer's obligation. can the National Employment Inspectorate

punish the employer for payment difficulties and lack of financial solvency through no fault of his own?

Standard solution: the NLI Inspector – in line with the established practice – should fine Piotr S. for delay in salary payment, assuming that the punished may appeal the decision.

Meta-ethical perspective: the inspector faces a situation which basically is a problem of the application of law. There are objective grounds for punishing the employer, and the inspector should assess whether the employer is to be blamed for delay in salary payment.

8.6.2. Depriving an employer of sickness benefit for the whole period of incapacity to work as a sanction for performing at that time some administrative activities related to the functioning of their business

Facts: entrepreneur Antoni P., in a time of incapacity for work due to illness, performed some administrative activities connected with the business he ran: he calculated the amount of due taxes and social security contributions, and wired the payments to the accounts of the tax office and the Social Insurance Institution. He signed salary certificates for employees applying for bank loans, gave his employees orders via phone and email, and issued two invoices. The insurer denied payment of sickness benefit for the whole period Antoni P. was on sick leave.

Prima facie dilemma: doubts arise on the grounds of application of Art. 17 Section 1, of the Act of 25 June 1999 On Financial Benefits from Social Security in Case of Sickness and Maternity (Journal of Laws of 2014, No. 159, as amended), which denies the right to the benefit for the whole period of sick leave to the insured who did not work during that leave (or conducted business activity). Strict application of this provision leads to decisions of denying the benefit even in incidental activity forced by circumstances, which is hard to accept from the point of view of justice.

Standard solution: the Supreme Court seems to see the solution in the flexible application of Art. 17 Section 1 of the said act (S.C. decision of 25 April 2013, Ref. no. I UK 606/12; decision of 9 October 2006, Ref. no. II UK 44/06, OSNP 2007/19–20/295; decision of 4 April 2012, Ref. no. II UK 186/11; decision of 6 May 2009, Ref. no. II UK 359/08, OSNP 2011/1–2/16). However, the activities carried out by Antoni P. in the period for which he claimed sick benefit significantly exceeded the activity carried out by the entrepreneur in the

Supreme Court's ruling referred to, hence there are doubts about whether the thesis of the cited ruling may be applied in this case.

Meta-ethical perspective: this is a problem of the application of the law. The Social Insurance Institution inspector must choose between strict and flexible application of the law on social security insurance.

8.6.3. Fictive employment of close people in order to fraudulently claim maternity benefit

Facts: Małgorzata W. is in an informal relationship with Bogdan Z., who runs a business under sole proprietorship. Previously, Małgorzata W. was neither employed nor conducted business activities. In the beginning of 2015, she got pregnant. In June 2015, Bogdan Z. hired her under an open-ended employment contract on a full-time basis as marketing consultant with a salary of PLN 5 000. Małgorzata W. gave birth to a baby and applied to the Social Insurance Institution for maternity benefit in the amount of 100% of the monthly salary she had received from June to October 2015.

Prima facie dilemma: the dilemma of the Social Insurance Institution (and more precisely of the clerk issuing the decision) stems from doubt as to whether the move to hire Małgorzata W. was not deceptive and had the sole purpose of securing benefits from social insurance. The solution of the dilemma depends greatly on thoroughly checking the case circumstances and determining whether Małgorzata W. indeed provided work in the employment period (Art. 31 Section 1 of the Act of 25.06.1999 On Financial Benefits from Social Security in Case of Sickness and Maternity).

Standard solution: Evidence that Małgorzata W. factually provided work corresponding to the position should be examined.

Meta-ethical perspective: this is an epistemic dilemma, which may be solved through detailed insight into the factual state.

8.7. Dilemmas of a court enforcement officer

8.7.1. Protection of remuneration for work in execution proceedings vs attachment of a bank account

Facts: The bailiff collects debt under an enforcement decision issued against debtor Jan S. by obtaining income arising from the latter's employment contract. Financial means are wired to his bank account by employer. The bailiff, in the

course of proceedings, attached the debtor's bank account, but is unsure if the financial means from remuneration of work there are protected from collection under Art. 87 (1) LC, as they had not been formally separated.

Prima facie dilemma: although the dilemma directly concerns the provisions of executionary proceedings, the limitation of collection discussed in this case results from the employment code (Art. 87 (1) LC). The problem is that no provision in the Code of Civil Procedure provides for limitation of bank account attachment, therefore it may be claimed that all money deposited in the account from work remuneration may be attached in full. On the other hand, adoption of this stance leads to a paradox: work remuneration is partly exempt from court-ordered collection, as provided by Art. 87 (1) LC, as long as it does not physically credit the debtor's account. When we realise that many employers force their employees to accept salary payment by wire to their bank accounts, it turns out that the dilemma has great practical importance for a vast number of workers. The lack of clear regulations in this matter in the Code of Civil Procedure is a serious gap requiring urgent legal remedy. It is hard to imagine that limitations of execution should not cover remuneration for work in debtor's account.

Standard solution: there is established practice that, if debtor proves to the bailiff what amount the employer wired to his account, then – though the amount is not separated in the account – the officer will apply legal limitation pertaining to the execution of remuneration for work. This solution satisfies the sense of justice, though is not clearly grounded in provisions of law.

Meta-ethical perspective: this is a problem of interpretation. The choice of any of the possible interpretations of the Code of Civil Procedure's and Employment Code's provisions has consequences both for the creditor, who is interested in making the execution of his dues most effective, as well as for debtor, who is interested in securing from attachment the highest amount of remuneration for work credited to his bank account.

Chapter 9. Lawyers' and Judges' Dilemmas in Constitutional Law

Krzysztof J. Kaleta

9.1. Preliminary remarks

The presentation of constitutional ethical dilemmas requires prior explanation that constitutional law – understood as the discipline of law concerning mainly the matters of political system, freedom and human rights – has its pronounced specificity in comparison to other branches of law.

First, as regards constitutional issues, it is hard to clearly delineate the boundaries of their sole subject. This kind of institutional and axiological decisions determine the foundations and limits of the activity of every public authority agency as well as the content of all norms of the legal system. Hence, they set the foundations of relations not only between particular branches of authority, but primarily between an individual and the state, and also between individuals when the so-called horizontal effect of constitutional norms is considered. Due to the position of the constitution in the system of sources of law, and the precept of its direct application, the constitutional values and principles must be considered in the activities of all agencies of public authority and in every phase of making and application of law. As a result, constitutional problems make an important and inseparable context for analysing legal dilemmas, including dilemmas from the scope of criminal, civil and administrative law.

Second, the specificity of constitutional law stems from its close ties with axiology and human rights. The constitution expresses the axiological foundations of legal order; hence, constitutional discourse primarily concentrates on principles that constitute the normative expression of values. These principles are inherently vague so they always require interpretation. While in settling most cases of dilemmas occurring in penal, civil or administrative law it is possible to refer to the balancing of values carried out by

the democratically authorised legislator, in the case of constitutional law often it is the legislator that is assessed from the perspective of higher order values which require independent balancing.

All constitutional disputes concern at their core the optimalisation and hierarchisation of constitutional principles, mainly through settling the collisions of fundamental rights. Situations that are connected with the necessity to settle a conflict of fundamental rights are therefore considered to be paradigmatic constitutional dilemmas. According to Lorenzo Zucca, a distinctive feature of a constitutional dilemma is the fact that the decision-maker faces the necessity to choose one of the competing rights and simultaneously the choice entails sacrificing one of these rights, which is regarded as a fundamental loss. In other words, any of the possible solutions of a constitutional dilemma is connected with doing lesser or greater evil, for it necessitates the sacrifice of some fundamental values.¹ This is due to the fact that the colliding rights are either incommensurable or symmetrical. The dilemmas may follow from the clashes between different fundamental rights or the collision within one category of rights. Thus understood dilemmas are a practical consequence of the pluralism of values in contemporary democratic communities.

Zucca distinguishes genuine dilemmas as described above from hard cases which can be solved using the technique of balancing that results in the “practical concordance” of relevant rights in a given case.² A distinctive feature of a dilemma in the strict sense is that the law does not offer any rational guidance about how to solve it. The source of the dilemma is the lack of rational (in legal terms) and moral (in the ethical sense) justification for the adopted solution, which means that it is hard to conclude that a given adopted solution was more rational than the alternative one. Zucca remarks that in practice there are few real dilemmas, but they play a significant role as they show the limits of legal reasoning. However, this does not mean that dilemmas cannot be solved. This only means the necessity to reach for deeper philosophical assumptions of legal-political order.

The third specific feature of constitutional matters is their political nature. However, it is not a question of plain political nature of constitutional disputes that results e.g. from the political character of parties involved in constitutional discourse, but a question of immanent quality of constitutional matters. At the core of constitutional decisions there are always some concrete assumptions of political philosophy which must therefore determine also the direction of

¹ Lorenzo Zucca, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007), pp. 3–4.

² *Ibidem*, pp. 84–90.

settling ethical dilemmas typical for this sphere. It seems that it is crucial to establish how the principia of the democratic system are understood in a given political community. For example it is crucial to determine whether the essence of democracy is defined uniquely by the source of power (the formal view) or also by values that this power should foster (the substantive view). This issue relates closely to the question of how and to what extent the majority rule legitimises the current legislation. The above issues decide on the character and scope of the legitimacy of particular segments of public authority, e.g. identifying the limits of discretionary power of the constitutional review and determining whether the constitutional court adjudicates on the same terms as other judicial authorities or whether its decisions are in some respect the decisions of a political body entitled to co-create the content of the law. Of key importance here is identifying the legal and political components of the principle of constitutionalism. It is also crucial to determine the ontology and epistemology of fundamental rights, namely to answer the question of whether the content of fundamental rights is constructed by community in public discourse (constructivism) or exists objectively and is only discovered by lawyers (realism).

The above problems remain closely related to the issues of interpretation of the constitution. In particular they are related to the question whether the interpretation of the constitution has declaratory or constitutive character, and hence whether a judge's role is only to reconstruct the objectively cognisable meaning of constitutional provisions, or also to – even partly – create their meaning. It is no accident that the concept of constitutional dilemma is sometimes used to describe situations where the adopted method of interpretation leads to unacceptable results.³ In this context, it needs to be emphasised that for many years the problem of constitutional interpretation has not been given due attention in Polish legal doctrine,⁴ nor has it caused lively discussions in legal practice. As a result, jurisprudence could provide only scant means of support in solving constitutional dilemmas of an interpretational nature.

Fourth, it is necessary to emphasise the specificity of the catalogue of sources of constitutional law. Constitutional law *sensu largo* in contemporary liberal democracies covers not only constitutions and other positive sources of law, but also constitutional jurisdiction (*acquis constitutionnel*), as well as constitutional

³ Jack M. Balkin, "The Meaning of Constitutional Tragedy," in William N. Eskridge, Sanford Levinson, *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998), p. 121.

⁴ Tomasz Stawiecki, "Autonomous Constitutional Interpretation," *International Journal for the Semiotics of Law* 2012, vol. 25, No. 4.

tradition. In the era of multi-level constitutionalism, also sources of international law (mainly in the scope of standards of human rights protection) gain the rank of constitutional sources of law. Relatively low level of dogmatisation of constitutional matters and a multitude of sources of constitutional law makes constitutional practice outstandingly argumentative by nature, which is clearly conducive to the appearance of dilemmas, at least the *prima facie* ones.

Finally, it is worth pointing out that, unlike professions of public trust within private law (legal advisers, attorneys at law and notaries) or public law (judges and prosecutors), in the sphere of constitutional players' activity there are no codified rules of ethics or professional deontology. It seems that scepticism in the formulation of such principles stems from fear that potential regulations could infringe such values of constitutional authorities as independence (e.g. of constitutional judges who are subject only to the constitution as regards their decisions) or freedom of action – resulting from constitutional authorities' direct democratic legitimacy (e.g. of MPs or of the head of state elected in direct elections). Constitutional law is also marked by a relatively small number of procedural rules, which are the primary form of relieving or mitigating ethical dilemmas in other branches of law. Regulatory function in this area of constitutional law is carried out by the already-mentioned general axiological or legal-philosophical assumptions, constitutional tradition and legal doctrine, namely everything that constitutes the broadly understood legal culture of a given political community.

The following review of selected ethical dilemmas is structured according to the criterion of entity concerned. Central place is given to dilemmas connected with performing the function of a constitutional judge. In a liberal democracy with a constitutional review, all the above listed distinctive traits of adjudication in the sphere of constitutional matters, in particular the tension between the idea of democracy and constitutionalism, focus in constitutional case-law. Then, the dilemmas of central public authorities are presented. Their special position in the legal system may be the source of problems concerning competences, the solution to which may be marked by high ambivalence. As already mentioned, constitutional dilemmas may also surface in the work of common and administrative court judges; therefore they are described as a separate category. They primarily concern the lively discussion conducted within continental legal culture on the issue of direct application of a constitution by judges. The proposed structure of the following review concludes with legal experts' dilemmas, mainly the representatives of jurisprudence who act as advisers or office holders in the public sector. But again, it needs to be emphasised that constitutional dilemmas are not solely the problem of public authorities (officials), but a challenge that accompanies the activity of all participants of

constitutional discourse, including those who represent the private (social) sphere.

The vast majority of the dilemmas presented below reflect standard problems of constitutional liberal democracies, however they also consider the specificity of Polish legal order and challenges related to its systemic transformation after 1989. Undeniably, some of them are unique as they are consequence of the constitutional crisis ongoing since 2015. The crisis brought with it some new constitutional legal problems, as well as exposed problems previously unperceived by doctrine and practice, as it confronted public office holders with hard choices bearing the traits of dilemmas. The general nature of this review does not allow for broader discussion of the sources and the comprehensive legal context of the mentioned constitutional crisis, and selected specific problems can be only touched upon. Undeniably, due to their systemic gravity and complex nature they deserve a separate and comprehensive study.⁵

9.2. Judges of the constitutional court

9.2.1. Deciding on a clash of fundamental rights

Facts: After a series of terrorist attacks numerous legislative initiatives were taken on European and national level to secure air traffic against further attacks and using planes as weapons against human life. One such initiative was air safety law which provided that, in extreme situations (of hijacking a plane in order to cause it to crash) the minister of defence was authorised to order the aircraft to be shot down, even if there were passengers and staff on board. The law was referred to a constitutional court.

Prima facie dilemma: The court faced a dilemma of the admissibility of shooting down a plane as ultimate security means. The judges had to assess whether and to what extent the adopted solution conformed to the right to life and the right to human dignity, and if it was a proportional reaction to using a hijacked plane as a weapon against the life of a third-party. From the ethical perspective, the dilemma can be reduced to the choice between consequentialist (utilitarian) and deontological ethics. By claiming unconstitutionality of the provision that allowed for a passenger plane to be shot down, the judges agree there may be a situation in which a potential terrorist attempt would take much

⁵ For more detailed analysis of genesis and nature of legal issues related to the constitutional crisis, see: Piotr Radziejewicz, Piotr Tuleja, eds., *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego czerwiec 2015–marzec 2016* (Warszawa: Wolters Kluwer, 2017).

more lives than in the case of downing the aircraft. However, adoption of the procedure of preventive shooting down makes the passengers and staff subject of the actions not only of the terrorists, but of the state, with the latter treating them as means in the rescue operation aimed at saving the lives of others.

Standard solution: The traditional instrument of solving the clash of fundamental rights in continental legal culture is the principle of proportionality. Every case of a law-maker's interference in an individual's rights must meet the requirements of utility, necessity and proportionality in the strict sense, which means that the extent of onerosness of a given regulation should be in appropriate proportion to the value of the good that is protected (which is conducting the *in concerto* balancing of goods). Such a legal construct is valid only under the assumption that constitutional values are commensurate, so it is possible to compare and optimise them. An important element of the proportionality test is that it precludes a situation in which the adopted solution would lead to infringement of the essence of a constitutional right.

Meta-ethical perspective: The necessity to solve the above clash of fundamental rights may be interpreted as a source of conflict of conscience with traits of dilemma in the strict sense, since there is a conflict of symmetrical rights both enrooted in the same constitutional provision. This does not mean that the conflict is unsolvable and the evil resulting from alternative solutions is symmetrical. The right to life protects the human existence, from its beginning to its end, from state interference irrespective of the life circumstances and physical or mental condition of a given individual. Moreover, every human life is equally valuable, hence the state is obliged to protect every human life. This duty mandates the state and its agencies to protect every human life from the interference of the authority itself, as well as from that of a third party. This kind of axiological foundation corresponds with the assumptions of deontological ethics which dictate, in the discussed case, to acknowledge the contradiction of the examined regulation with the principle of human dignity and the constitutional imperative to protect life.

9.2.2. The necessity to balance private and public interest

Facts: A constitutional court examined a constitutional complaint lodged by W. The plaintiff questioned the conformity to the constitution of the regulations depriving him of real estate seized for building a public road in exchange for compensation clearly lower than the market value of the land. The majority of judges found the contested provisions unconstitutional.

The Minister of Finance on behalf of the Council of Ministers pointed out that the potential verdict striking down that law would entail considerable costs for the national budget related to compensation for the already seized real estate. Such expenditures were not planned in the budget, therefore the representative of parliament petitioned for the court – in the event of a ruling of unconstitutionality – to take advantage of its competency to adjourn the invalidation of provisions for the maximum 18-month period.

Prima facie dilemma: According to art. 190 section 3 of the Constitution of the Republic of Poland: “A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.”⁶ Adjournment of the invalidation of a provision ruled unconstitutional may give rise to a dilemma for judges resulting from the necessity to choose between protecting private (the property rights of the plaintiff) and public (stability of public finances) interests. Adjournment of loss of the binding force means maintaining the unconstitutional provision in the legal system, and hence allows further unconstitutional state interventions in the property rights of other entities. A constitutional complaint is admissible exclusively after exhaustion of court procedure which means that at the moment of examining the constitutional complaint, the enforcement proceedings are already pending. Only the Constitutional Tribunal’s judgment on the nonconformity to the constitution of a normative act on the basis of which a legally effective judgment of a court or final administrative decision has been issued can be a basis for re-opening of the proceedings or quashing of the decision. So if the constitutional court adjourns the loss of the binding force of the regulation, in the deferment period it will not be possible to re-open the proceedings which would allow for suspension of the enforcement proceedings and protection of the plaintiff’s property. Therefore, the constitutional court may either adjourn the invalidation of a provision and accept that the plaintiff’s goal (protection of private property) will be violated by the effects of the ruling, or abandon such an adjournment and risk that the decision will bring serious negative consequences for the state budget.

⁶ English translation of the provisions of the Constitution of Poland and The Standing Orders of the Sejm of the Republic of Poland used in the text come from the website of Sejm of the Republic of Poland (www.sejm.gov.pl).

Standard solution: Judicial practice has noticed the dilemma resulting from adjournment of loss of the binding force of a regulation judged unconstitutional – the instrument provided by the constitution. In order to alleviate the negative effects (to the plaintiff) of applying this mechanism, a new instrument called the “benefit privilege” has been introduced. It has not become formally included in legal provisions but only created by the Constitutional Tribunal. Within this instrument, the constitutional court gives the plaintiff (only the plaintiff) the possibility to challenge the legally binding verdict or the final decision in the adjournment period, and to obtain a decision acknowledging the effects of the unconstitutionality of the provision applied in the case. It is hence a kind of bonus for activity to the plaintiff who leads to stating the unconstitutionality of a defective normative act which is acting also in the public interest. That practice is not free of controversy and may breed further dilemmas. The preference of the private interests of only one party (from all the addresses of an unconstitutional rule) that results from the “benefit privilege” exposes the constitutional court to accusations of infringement of equality clause.

Meta-ethical perspective: The situation is not a dilemma in the strict sense, but it requires balancing of values, i.e. protecting private and public interests. Although, as shown above, the constitutional court has worked out instruments of mitigating possible negative effects of adjournment of the loss of the binding force of an unconstitutional provision, this mechanism also needs appropriate balancing of values: equality versus state security (which covers also its financial stability). The situation may also have traits of epistemic dilemma, since the judges often lack instruments to verify economic analysis presented by the executive branch.

9.2.3. The necessity to consider factual circumstances in adjudication

Facts: Parliament passed a bill changing the rules of pension revaluation and superseded the percentage with an amount value. In effect, all pensioners received a rise of PLN 50. The change was therefore unfavourable for those receiving high pensions while the poorest benefited. The act was appealed to the constitutional court with reference to violation of the principles of social justice and equality. The government maintained that such incidental change of rules was necessary due to the need to balance public finances, mainly to curb the rocketing public debt and budget deficit.

Prima facie dilemma: The judge’s dilemma is the necessity to decide the extent to which the factual circumstances (public finances) may determine the

content of the constitutional court's verdict. If the judge's role is to guard the constitutionality of the law, can / should he take into account also economic concerns and – as a result – accept interference in an individual's rights motivated by such concerns?

Standard solution: In the European model of constitutional review it is acknowledged that a constitutional court is a court of the law and not of facts. This means that it should conduct comparison of constitutional norms with the statutory norm *in abstracto*. However, in practice the factual context of examined legal problems is significant for the final result. Such elements as the stability of public finances or the requirement to balance the budget have been identified in adjudication as a part of constitutional axiology that should be considered in the process of balancing constitutional values. Economic consequences are also among the aspects taken into account when considering the effects of decisions, e.g. in the course of functional (consequentialist) interpretation when the court deliberates on the social effects (acceptable or not) to which a certain interpretation will lead.

Meta-ethical perspective: It is not an ethical dilemma in the strict sense. Considering factual circumstances does not, in principle, lead to doing harm. It may also contribute to a better and deeper balancing of constitutional values within a broader social context. Hence, it is a problem of the application of law that requires evaluation. Yet, it may lead to an epistemic dilemma when the social and economic consequences of certain solutions are hard to determine with certainty, or when the judge lacks sufficient knowledge (e.g. economic) to examine the real significance of relevant facts.

9.2.4. Capacity to decide on the legal basis of own actions

Facts: The constitutional court had to examine the constitutionality of an act amending the act on the constitutional court. The amendment introduced a number of essential changes concerning the proceedings before the constitutional court, including the rules of preparing trials and in camera sessions, appointing adjudication panels, the order of examining cases and also the status of the judges.

Prima facie dilemma: The constitutional court judges' dilemma results from the necessity to decide on the provisions regulating the rules of their own actions, i.a. jurisdiction provisions regulating the scope of their discretionary power. From a formal point of view, the judges cannot refuse to issue a decision because of the matter of the act under scrutiny. However, when they exercise

control over the legislator's freedom through interpreting general and succinct provisions of the constitution referring to the status of judges and the procedure before the constitutional court, they expose themselves to the accusation of adjudication in their own case.

Standard solution: Pursuant to art. 197 of the Constitution of the Republic of Poland, the organisation of the Constitutional Tribunal and the procedure before it is determined by an act of parliament. Hence, the legislator has considerable margin of discretion in law-making within this domain. Simultaneously, none of the constitutional provisions excludes the regulations on the procedure before the constitutional court from jurisdiction of the Constitutional Tribunal. The lack of specific solutions in this regard (e.g. giving power of scrutiny of acts regulating the procedure before the Constitutional Tribunal and the status of its judges to the jurisdiction of some other agency e.g. the Supreme Court) suggests that the legislator of the constitutional system did not consider these issues to be special matters, therefore there are no reasons to treat such cases before the constitutional court in a different way. The adopted solution may be interpreted as an expression of the separation of powers, in particular of the checks and balances mechanism.

Meta-ethical perspective: It is not an ethical dilemma in the strict sense, as the judge is obliged to adjudge which *per se* does not entail harm. It is rather a problem of the application of law which may be subjectively hard. Nevertheless, there are means to alleviate the problem e.g. by referring to the doctrine of judicial restraint and accepting the assumption that the legislator has considerable margin of discretion in the domain of functioning of the constitutional court, and therefore any decisions on unconstitutionality of provisions concerning this issue must be endorsed by very strong arguments.

9.2.5. Constitutional law versus European law – the limits of pro-European interpretation of the constitution

Facts: The common court referred a question to the constitutional court. The question concerned the conformity to the constitution of one of the provisions of the Code of Criminal Proceedings. The provision provided for surrender of a Polish citizen to a European Union Member State within the framework of the European Arrest Warrant (EAW). The questioned regulation was incorporated into the Code of Criminal Proceedings in relation to Polish accession to the EU, as part of harmonisation of the national legal order with the European legal order, and precisely with the Council framework decision of 13 June 2002 on

the European Arrest Warrant and the surrender procedures between Member States 2002/584. The framework decision originated as an expression of the Member States' will to introduce a new institution (superseding the institution of extradition) into the European legal order. The new institution was based on the principle of mutual recognition of court decisions and mutual trust between Member States regarding respect for human rights. But the applicant contended that the new institution is inconsistent with the constitution.

Prima facie dilemma: The obligation to implement EU framework decisions is a constitutional requirement following from art. 9 of the Polish Constitution, whereby "The Republic of Poland shall respect international law binding upon it." Simultaneously, art. 55 section 1 of the Constitution explicitly prohibits the extradition of a Polish citizen. At the same time the EAW enables the arrest of a person suspected of, charged with or convicted of a crime, as well as the surrender of that person to the country where he shall be brought to trial or to serve a sentence already handed down. Contrary to extradition, the EAW basically breaks with the principle of double criminality – it suffices that an act is punishable in the country that issued the warrant. Hence, firstly the constitutional judges must decide on the parallel (or lack thereof) between extradition and the EAW, and in doing so they must consider the relations between European and domestic legal orders. On one hand, according to the principle of the primacy of European law, no national law norms, including constitutional norms, can be an obstacle in the effective application of European law in a Member State. On the other hand, the Constitution – as it declares in art. 8 – shall be the supreme law of the Republic of Poland.

Standard solution: The case was decided by the Constitutional Tribunal.⁷ When answering the question of whether surrender of a Polish citizen to the EU Member State, by virtue of the EAW, was a form of extradition, the Constitutional Tribunal stressed that the means and direction of interpretation of a lower rank act should be determined by the Constitution. Therefore definitions formulated in lower rank acts are not binding or decisive on the interpretation of constitutional notions. Constitutional notions have autonomous meaning towards statutory notions which is the consequence of the constitution's supremacy in the system of law sources. The Constitutional Tribunal noticed the difference between the EAW and traditional extradition procedures, but stipulated that surrendering a requested person by virtue of the EAW could be regarded as different from extradition referred to in art. 55 section 1 of the Polish Constitution only if it had a different essence – which did not occur in the analysed case. The Tribunal decided that the purpose (the essence) of extradition

⁷ The judgment of Polish Constitutional Tribunal of 27 April 2005 (Ref. No. P 1/05).

is the surrender of a person to another country on request of the latter, in order that the person in question may face criminal proceedings or complete a sentence previously handed down. Transfer conducted by virtue of EAW has the same purpose, therefore must be regarded as a special form of extradition. In effect, the Constitutional Tribunal ruled that the questioned provision of Code of Criminal Proceedings, in the scope that allows for the transfer of a Polish citizen to an EU Member State by virtue of an EAW, was not compliant with art. 55 section 1 of the Constitution. At the same time, the Constitutional Tribunal decided to adjourn its loss of binding force for 18 months. It remarked that, in the analysed case the immediate effect resulting from the sentence was not sufficient to provide constitutionality. The purpose may be attained only by intervention of the legislator. According to the Constitutional Tribunal, a change of law was necessary to complete implementation of the framework decision in compliance with the Constitution. The Constitutional Tribunal admitted that to accomplish that task the possibility of amendment of art. 55 of the Constitution should not be excluded. In such case, harmonisation of domestic and European laws would require reinstatement of the provisions on the EAW, which were deleted from the legal order as unconstitutional in effect of the Constitutional Tribunal's ruling. The Constitutional Tribunal therefore acknowledged the primacy of the Constitution over the sources of European law, but simultaneously pointed to the need to adjust both legal orders through actions of the domestic legislator.⁸

Meta-ethical perspective: The problem is not a dilemma in the strict sense, but a classical problem of interpretation due to the necessity of making unobvious interpretational determinations. Solving the problem requires

⁸ In effect of the ruling, the Parliament enacted the first ever amendment to the Polish Constitution. At present art. 55 of the Polish Constitution has following wording: 1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3. 2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request. 3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body. 4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens. 5. The courts shall adjudicate on the admissibility of extradition.

previous balancing of values, namely the duty to discharge international obligations (grounded in the constitution) and the duty to respect the primacy of the constitution as the supreme source of domestic law.

9.2.6. Deciding on the accessibility of legal protection before constitutional court

Facts: Proceedings before the constitutional court may be initiated i.a. by an individual complaint. Assume that normative acts regulating the proceedings before the constitutional court provide for a mechanism of preliminary control of the admissibility of examining a complaint. The mechanism is based on the requirement of meeting certain preconditions of formal or material nature. One of the preconditions of admissibility for the examination of a complaint might be the requirement that violation of rights and freedoms the plaintiff refers to, was simultaneously connected with a significant legal issue. If the complaint fails to formulate a significant legal issue, the constitutional court might discontinue the proceedings.

Prima facie dilemma: In connection with such a regulation, a constitutional judge may face the dilemma of whether to interpret the precondition of “significant legal issue” liberally within preliminary examination (which would provide broader access to this legal remedy but in the longer term may lead to blocking effective adjudication by the constitutional court and cause inefficiency of the legal protection system guaranteed by the constitution), or to choose only the most grave issues in the judge’s opinion (which would result in a situation where “less important” cases would never be examined by the constitutional court, at the same time guaranteeing that accepted cases would be tackled swiftly and efficiently and the constitutional court would maintain its organisational capacity to rule, including in socially important cases, in particular examining questions of law referred by courts).

Standard solution: Introduction of formal restrictions in the process of examining individual complaints is a common legislative practice in procedural law. The nature and scope of restrictions are the result of axiological and pragmatic decisions of the legislator. They usually are vague and have evaluative dimension. Their application is an element of judicial discretionary power within which the judges enjoy independence and autonomy. By using the acknowledged canons of legal interpretation, the judges may carry out extensive or restrictive interpretation of provisions that formulate such restrictions.

Meta-ethical perspective: This is not a dilemma in the strict sense, but a challenge for judges which requires hierarchisation and optimisation of values

in the process of the application of law. Liberal interpretation of the restrictions favours realisation of the right of recourse to court in respect of its common accessibility. In the longer term, though, it may threaten the effectiveness of this legal remedy, leading to – for organisational reasons – the failure of the constitutional court to examine a considerable number of cases initiated in this manner. The described restrictions also have the nature of a general clause – which may give rise to interpretational problems in specific cases. Uncertainty about the effects of the formulated evaluations and eligibility of the specific cases may also lead to an epistemic dilemma.

9.2.7. Independence of the judiciary versus personal opinions of a judge

Facts: Parliament passed – with a clear majority of votes – an act on pregnancy termination conditions which provided for abortion in three cases: 1) the woman's health is endangered or the foetus' development is impaired; 2) it is suspected that the pregnancy is a result of rape or incest; 3) it is justified by the socio-economic conditions of the pregnant woman. The latter precondition is stated upon declaration of the pregnant woman. The act was referred to the constitutional court which was asked to rule it unconstitutional. The basic charge was the violation of the right to life of a conceived child. One of the constitutional court's judges, before appointment to judicial office, was a member of a non-governmental organization (NGO) aiming for a complete ban on abortion.

Prima facie dilemma: The dilemma concerns the constitutional judge who must decide in the analysed case whether the legislator correctly balanced the values at the core of the clash of basic rights, i.e. the imperative to protect the mother's life and health as well as to respect her private life, and the rights of the conceived child (*nasciturus*). The further dilemma concerns the question whether the personal convictions of a judge may influence the content of the decisions in this respect. In public discourse, there is dispute between the supporters of "full protection of life" (from conception to natural death) and the representatives of the pro-choice movements that approve of pregnancy termination and acknowledge that the freedom of decision in this respect is a manifestation of a woman's right to privacy.

Standard solution: The judge is fully independent in the sphere of adjudication. Jurisprudence distinguishes between the external independence of a judge (the unique subjection to the law in the process of adjudicating and the freedom from all external pressure) and the internal independence of a judge

(the ability to distance oneself from personal opinions and preferences in adjudication). It is expected that the judges can at least distance themselves from subjective evaluations when examining cases of great axiological prominence, and they should aim to reconstruct constitutional axiology grounded in the constitution and public morality. The ways of reconstructing the latter, however, are disputable in legal philosophy.

Meta-ethical perspective: It is not a dilemma in the strict sense, though it may cause a serious conflict of conscience in a judge with deeply rooted moral convictions. The challenge may be summarised as the choice between adherence to own conscience and the requirement to maintain impartiality and internal independence. Hence, in the event of a judge declaiming his conviction about complete protection of life, there may be doubts about whether he should proceed with balancing the contending rights in order to reach a compromise expressing the consensus preserved in the public morality. The duties following from a judge's professional role – mainly the obligation to maintain the internal independence – should prevail. The judge should aim for possibly objective reconstruction of constitutional axiology in order to base decisions on it. In some cases, it may lead to pangs of conscience. The situation may also have traits of an epistemic dilemma for those judges who do not have so strongly rooted convictions about abortion as for them the very moment at which the obligation to protect life starts is disputable.

9.2.8. Impartiality and recusal of a judge

Facts: The constitutional court had to examine the lustration law which provided i.a. for screening persons in public trust professions and imposing a ban on performing public functions for ex-secret service collaborators of the communist security intelligence who kept the fact of their collaboration back. During the proceedings, the media revealed that according to documents in the archive of the Institute of National Remembrance, one of the judges' wife – also a renowned lawyer – was a collaborator of the secret service during the communist regime. The information roused the public opinion. Some participants of public debate assessed that the adjudication in case concerning the lustration law by a judge whose wife was suspected of collaboration with communist secret service undermined credibility of the future verdict, so the judge should be recused from ruling in that case.

Prima facie dilemma: The dilemma concerns a judge against whom expectation of recusal from ruling was formed publically. On one hand, the judge may have a deep personal conviction that the charges against his spouse

will not affect his legal assessment of the questioned act. On the other hand, the judge should realise that the situation influences the public perception of the court's impartiality in a negative way.

Standard solution: The act on the proceedings before the Constitutional Tribunal in Poland defines the conditions of recusal of a constitutional judge from adjudication. The recusal of a judge is conducted *ex officio*, on demand of this judge or at the reasoned request of a participant to the proceedings. The premises for recusal of a judge include objective ones – e.g. past participation in issuing the normative act under current control or being the attorney of a participant to the proceedings, and a more general one – when the circumstances of the case may raise doubts about the impartiality of the judge. Each constitutional judge and the adjudication panel must assess themselves whether – in case of a request for recusal – the circumstances vital for the case have been reasonably substantiated and the arguments undermining the judge's impartiality sufficiently justified.

Meta-ethical perspective: The situation is not a dilemma in the strict sense, but rather a subjectively hard choice for a judge. None of the possible solutions in the described case is the subject of duty, but both may lead to negative consequences. Recusal of a judge in response to public pressure despite that judge's strong personal conviction about remaining impartial in the case, as well as the decision to participate in adjudication despite publically expressed objections, may bring negative consequences. In the first case, there may be breach of independence and autonomy of the judge under external pressure of public opinion or participants in the proceedings. In the second case, there is the risk of undermining the impartiality of the constitutional court in public opinion, and in consequence the risk of challenging the legitimacy of the verdict itself. The negative consequences can be eliminated or alleviated, as the judge may petition for recusal from adjudicating in the case. The motion will be subject to evaluation by other judges which may free the judge from accusations of breaching the rule *nemo iudex in causa sua* and neutralise negative consequences in social perception of the court's authority.

9.2.9. Attaching a dissenting opinion

Facts: The constitutional court examined a complicated and bulky case concerning the assessment of the constitutionality of an act causing significant public controversy. After a long meeting of judges, they reached a compromise. Judge L. had serious objections about one of the examined issues but was outvoted in the deliberation.

Prima facie dilemma: In such circumstances, the judge may experience a dilemma about whether to express publically his separate opinion on constitutionality of an examined act by attaching a dissenting opinion, or whether to be directed by solidarity with other members of the adjudicating panel and refrain from *votum separatum* in order to protect the court's authority and enhance the acceptance of the compromise solution.

Standard solution: The judge is free to choose whether to attach a dissenting opinion or not. This possibility is an expression of the judge's independence. His decision in this regard depends on how he perceives the process of building of the court's authority. There are two possible perceptions. First, the court's authority can be perceived as built on the unity of opinions, which means refraining from revealing differences beyond the final deliberation of the judges and accentuating the declarative nature of adjudication (the task of which is only to discover objective meaning of the constitution's provisions). Second, it can also be perceived as built on manifestation of the plurality of views and discourse within the court itself, which leads to accentuating the argumentative nature of constitutional disputes and the interpretative nature of the constitution's provisions.

Meta-ethical perspective: It is not a dilemma in the strict sense. Neither attaching a dissenting opinion nor refraining from doing so does not any harm. Attaching a dissenting opinion is a right, not an obligation; therefore it lies within the judge's discretionary power. Publicising the judge's dissent may in some cases be a subjectively hard choice that requires the balancing of relevant values.

9.2.10. Participation of a judge in public debate. Criticism of other authorities

Facts: A constitutional crisis has been ongoing for several months. The parliament passed a bill that significantly modified the procedures before the constitutional court. According to some representatives of jurisprudence, this could lead to paralysis of the constitutional court's functioning. The bill was referred by the opposition MPs to the constitutional court which ruled it unconstitutional. A high governmental official responsible for publication of the constitutional court's rulings refused to publish the verdict, claiming that it was issued in violation of law and declaring that the hearing was "a coffee shop session of judges." A prominent politician commented on the verdict and accused the judges of political bias (favouring the political opposition). He also

called the judges “a pack of buddies who defend the status quo of the former government.”

Prima facie dilemma: The situation may cause a dilemma concerning admissibility of the judges’ polemic about described accusations formulated publicly but beyond the courtroom. Engaging in polemics in regard to such statements in mass media or criticism of other authorities beyond procedural means (i.e. beyond verbal justification of the verdict or reasons for the judgment) may undermine the impartiality of judges in public opinion. At the same time lack of denial of untrue statements and unjust assessments may be taken by public opinion as a sign of the judges’ weakness and lack of counter-arguments, which can undermine trust in the court and raise questions about the external image of its independence and the judges’ autonomy. This is particularly important in extraordinary, complicated and crisis situations.

Standard solution: The dilemma concerns the extent to which judges may use freedom of speech beyond the courtroom. This issue is subject to general regulations of judicial ethics. In Poland, pursuant to § 10 of the Set of Professional Conduct Principles for Judges: “The judge shall not act in a way that could undermine confidence in his independence and impartiality.” Moreover, “The judge should not voice his opinion in public on proceedings that are pending or are to be pending.” This means that all public statements of judges should be only factual, restrained and delivered with due tact and moderation.

Meta-ethical perspective: It is not a dilemma in the strict sense. Debate participation is not a duty. Although refraining from public reply may negatively affect the image of the court in the public opinion, such a stance may not be qualified as a form of doing harm. Subjection to the rules of deontology may give rise to pangs of conscience in some judges due to the lack of their adequate reaction. The discomfort may be alleviated by conducting educational or informative actions that are not directly opposed to the politicians’ statements. The press service of the court is obliged to refute untrue information and resolve doubts that arise in public discourse.

9.2.11. The limits of institutional self-defence in relation to extra-legal means of action

Facts: The outgoing parliament, just before the general election, elected five constitutional court’s judges on the basis of transitional provisions included in the new Constitutional Tribunal Act. According to the *post factum* Constitutional

Tribunal's judgment, two of those judges were elected in a legally defective way – with violation of powers of the next parliament. After the general election the new majority in parliament refilled all judicial positions. To achieve this goal the parliament adopted five separate resolutions on the illegality of the previous appointments. The parliament claimed – even before issuing the Constitutional Tribunal's judgment mentioned above – that the previous parliament's action was illegal due to the substantive procedural defects of the appointment procedure. A motion to examine the constitutionality of five resolutions of the new parliament on “declaring illegality” and five resolutions on the election of new judges has been referred to the Constitutional Tribunal.⁹

Prima facie dilemma: The constitutional court judges' dilemma stems from the unprecedented nature of the case that requires a solution about the court's very cognisance of controlling over such acts – which is not provided explicitly in constitutional provisions. The judges must decide whether, despite prevalent opinions of legal scholars and the judges' previous decisions, to undertake the examination of constitutionality of such resolutions, or to acknowledge lack of cognisance in this scope, thus *de facto* to accept the effects of questionable appointments to judicial positions.

Standard solution: Pursuant to the Polish Constitution, the Constitutional Tribunal decides on the hierarchical conformity of normative acts that have general and abstract nature. The Constitutional Tribunal assumes in its *acquis constitutionnel* that the general nature of a norm means it is addressed to a certain class of addressees distinguished for some common traits of theirs, while the abstract nature of a norm means it constitutes some repetitive patterns of behaviour. Thus, executive orders (including all individual resolutions on appointments to office) have been excluded from the Constitutional Tribunal's jurisdiction. Neither can the constitutional court scrutinise acts that do not have normative character (e.g. political declarations). Such an understanding of the normativity of legal acts has never been questioned among legal scholars but in analysed case the parliament used extra-legal means which exceed any previous experiences.

Meta-ethical perspective: The precedential situation before the judges may be interpreted as a subjectively hard choice or conflict of conscience with traits of dilemma in the strict sense. Both passive and active realisation of the constitutional court's own competences may entail negative long-term consequences. The constitutional court may qualify the resolutions only as a political declaration of non-normative and legally non-binding character

⁹This dilemma was prepared on canvas of the real case ruling by the Polish Constitutional Tribunal in decision of January 6, 2016 (Ref. No. U 8/15).

which the parliament is formally entitled to pass. This, however, would give the resolutions a meaning different from both their exact wording and the intention of the draft's proponents revealed in the justification of the draft. More significantly, such interpretation would ignore the real impact which these resolutions (on the basis of which the constitutional court has unauthorized members) made within the legal order, and hence their influence on the legitimate appointment of judicial offices which would directly affect the court's capability to adjudicate in the future.¹⁰ Yet, adopting the alternative solution – aiming to counteract the resolutions' real effects in the legal system – would require acknowledging the constitutive nature of parliamentary resolutions, and in consequence redefining the universally accepted criteria of the normativity of a legal act for the sake of analysed individual case. This would mean breaking with previous *acquis constitutionnel* and the dominant opinion of legal scholars. Such proceedings expose judges to accusations of acting *contra legem* and of the instrumental treatment of jurisprudence and legal doctrine's *acquis*. Each choice is therefore related to some detriment of correct exercise of power in accordance with the constitution. However, it seems that adherence to limits of the constitutional court's cognisance as determined by the constitution should prevail, and the judges refraining from scrutiny of legal acts excluded from their formal cognisance should not take ethical responsibility for possible negative political consequences that their decisions may cause (which cannot in any case be fully envisaged).

9.2.12. The limits of institutional self-defence versus subjection of a constitutional judge to a statute

Facts: An amendment to the act regulating proceedings before the constitutional court was referred to the Constitutional Tribunal itself. The legislator did not provide for *vacatio legis* for the amendment so the regulations entered into force on the day of its publication. One of the provisions stipulated that, in a significant group of examined cases, the court is entitled to issue a ruling by majority of votes which is defined by the amendment as at least thirteen judges. In the wider context of some legal and factual circumstances, such solution means paralysis of the adjudicating activity of the court, since several judges were not authorised to rule due to the lack of required legal action of the President. In one of its previous judgments, the Constitutional Tribunal ruled that two of the five judges elected by the previous parliament were not

¹⁰ See: Piotr Radziewicz, "Kontrola konstytucyjności uchwał Sejmu (uwagi na marginesie postanowienia TK w sprawie U 8/15)," *Państwo i Prawo* 2016, No. 7, pp. 62–64.

elected effectively as the legal grounds for their election were unconstitutional, while the three other judges elected on the same day (whose election validity was not questioned by the Constitutional Tribunal), have not taken their oath before the President. The President assessed the legality of their election differently than the Constitutional Tribunal and refused to hear their oath. As a result, at the moment of the motion's submission the full panel included twelve judges, i.e. all who might adjudicate. Moreover, pursuant to the amendment, starting from the day the act comes into force, the dates of hearings in which motions are examined must be scheduled according to the date of submission of a case to the court. This meant that, even in the event of a full panel that satisfied the requirements of the amendment, scrutiny of the controversial act would be significantly adjourned (even for several years in view of the large number of cases waiting for examination).¹¹

Prima facie dilemma: The dilemma of the constitutional judges results from the untypical procedural situation formed in this case. A situation when the provisions that are the subject of examination before the constitutional court are at the same time the legal basis for adjudicating is a source of specific paradox.¹² The judges' dilemma is grounded in the decision about whether the constitutional court can judge a case outside the formal order of examining cases that was established by the amendment, and in a panel of judges that differs from the one required by the amendment. Such a decision would mean refusal to apply the binding regulations. But at the same time applying the binding act would mean *de facto* abstaining from issuing a verdict due to the impossibility of completing full panel in the understating of the amendment, or at least considerable adjournment of adjudication on the controversial act. The court's decision on the unconstitutionality of the challenged provisions on which it would base its ruling in the future would lead to undermining the very process of adjudication (e.g. if the court claimed the act's unconstitutionality due to the breach of legislative process), and in effect also of its result – the verdict which may be seen as having been reached on unconstitutional grounds. In that way the court would undermine the legality of its own judgment.

Standard solution: The case is precedential and has not been considered in previous adjudication or legal doctrine. The complicated procedural situation gives rise to a conflict of fundamental values at the core of constitutional

¹¹ This dilemma was prepared on canvas of the real case ruling by the Polish Constitutional Tribunal in judgment of March 9, 2016 (Ref. No. K 47/15).

¹² For more comprehensive legal context of the case, see: Piotr Radziejewicz, "Refusal of the Polish Constitutional Tribunal to apply the act stipulating the constitutional review procedure," *Review of Comparative Law* 2017, Vol. XXVIII.

review. On one hand, from a formal point of view, the strutinised act has been passed and officially published. Hence it is binding and its conformity with the constitution is presumed. This presumption has crucial importance as it determines the burden of proof in proceedings before the constitutional court. On the other hand, it may be argued that it is necessary to examine a case directly on the grounds of the constitution, separately from the changes in law caused by the entering of the amendment into force, as the court should fulfill its constitutional competences, irrespective of the validity of acts which impede its effective and appropriate action. But proceedings before the constitutional court are regulated by the constitution only in a succinct and laconic way. The constitutional court's active self-defence would require reaching for non-standard means. Refraining from applying the act may violate the legality principle but at the same time a strictly legalistic action may paradoxically lead to the unintentional undermining of the constitutional court's own adjudication's legality.

Meta-ethical perspective: Although grounded in a complex problem of the application of law, the situation may be interpreted as a subjectively hard choice or a conflict of conscience with traits of dilemma in the strict sense. Each of the possible solutions presented above exposes the judges to breaching of certain values which should be respected in their work as they are of fundamental importance for maintaining constitutional order. Constitutional judges are independent, and within adjudication are subject only to the constitution but this concerns only the evaluation of the constitutionality of legislation and not the matter of obligation to respect binding provisions to which the Constitutional Tribunal must adhere by virtue of i.a. the constitutional principle of the legality of public authorities' actions. Hence, failing to apply the provisions filled for scrutiny may be interpreted as a *contra legem* action that breaches the legality principle and breaks with the presumption of legislation's conformity with the constitution which plays a fundamental role in the process of constitutional review, which in consequence may lead to violation of the principle of separation of powers. Yet, failure to scrutinise and subjection to new regulations may be taken as approving the negation of the important role of the constitutional court in constitutional democracy and also lead to violation of the principle of separation of powers. The dilemma concerns the limits of constitutional institutions' self-defence against actions of other public authorities which may be seen as attempts at undermining their constitutional role. This does not mean that the conflict of the involved values must be regarded as symmetrical and insoluble. The dilemma can be regarded also as the problem of the application of law – resolvable by means of interpretative guidelines developed

in the legal culture.¹³ The solution of the dilemma depends significantly on defining the role of constitutional court in the political system and structure of public authorities' bodies, the nature of its legitimacy, and its importance for guaranteeing democratic order.

9.3. Judges of common and administrative courts

9.3.1. A judge's conscience versus subjection to statute

Facts: A common court judge examines the case of M. – accused of possessing cannabis. The applicable criminal code provided for imprisonment for possessing any amount of such drugs. During the trial M. explained that he used cannabis only for medical purposes as he suffered from multiple sclerosis and the drug alleviated its symptoms. The judge believes that in the circumstances of the case imprisonment would be unjust.

Prima facie dilemma: The dilemma follows from the fact that the binding statute contradicts the moral convictions of the judge. He must choose between obligation of obedience to the law (that he sees as unjust in the circumstances of the case) and potential adjudication *contra legem*, denial of adjudication (which would be a violation of judicial duties) or some form of subversion of law (manipulation of interpretation of the applicable provisions or factual circumstances in order to hide the real motives for the decision).

Standard solution: Pursuant to art. 178 of the Polish Constitution, the judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. The continental model of exercising judicial power assumes that judges are the authority applying the law, i.e. their task is only to apply the law, in other words to qualify particular facts in the light of abstract-general norms of the law. In principle, they should refrain from moral assessment of the content of formally binding regulations. And if they have doubts about conformity of a given statute with the constitution, they should refer a question of law to the constitutional court. This does not pertain only to situations of unbearable injustice of law. In the latter case, validity of the law may be denied by a judge (Radbruch's formula).

Meta-ethical perspective: Although applying a norm that is subjectively regarded as unjust by the judge may cause strong pangs of conscience, in general it is accepted that in a democratic state of law with effective judicial control of constitutionality, the application of such a norm does not cause harm. The

¹³ See: Piotr Radziejewicz, "Refusal of the Polish Constitutional Tribunal ...," pp. 29–32.

problem is the conflict of the judge's conscience with the binding law perceived as unjust.

9.3.2. Applying unconstitutional law by a judge of an administrative court

Facts: The constitutional court ruled the unconstitutionality of the act that significantly raised the public levy on entities running a certain kind of business. The reason for stating the unconstitutionality of the tax law was the violation of social justice and the principles of proper legislation. Simultaneously, due to the fact that immediate loss of the binding force of the unconstitutional statute would entail serious negative financial effects for state budget (it could destabilise public finances), the constitutional court exercised its right vested in it by the Constitution¹⁴ and adjourned loss of the binding force of the provision. In the period after the constitutional court's judgment but before the end of the period of adjournment, the administrative court was given a case of a businessman obliged by revenue authorities to pay tax in the amount set by the mentioned act.

Prima facie dilemma: The dilemma concerns administrative court judges who, contrary to constitutional judges, are subject not only to the constitution but also statutes.¹⁵ This means that common and administrative courts must apply provisions that are part of the binding legal system, also considering the adjournment of loss of the binding force of the statute ruled unconstitutional by the constitutional court. In other words, in such situations the judges of common and administrative courts face a dilemma of whether to apply unconstitutional law or not, if it is still formally binding.

Standard solution: If a statute meets the criteria of formal validity, the judges cannot independently refuse its application due to their own assessment of its unconstitutionality. In case of doubt they are obliged to refer a question of law to the constitutional court whose ruling may have a universal derogation effect. But in the analysed case the situation is more complicated as the constitutional court gave its opinion on the merits of the act by declaring it unconstitutional. It may be hence said that with the publication of the verdict the presumption of the act's constitutionality was rebutted. Nonetheless, the constitutional court also

¹⁴ According to art. 190 sec. 3 of the Polish Constitution: "A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act."

¹⁵ According to art. 178 of the Polish Constitution: "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes."

considered the value of stability of budget and state finances, and adjourned the moment of loss of the act's binding force. The possibility of such adjournment was allowed by the constitutional legislator by providing the constitutional court with such competence. Hence, the constitutional legislator decided that there may be justified grounds for maintaining temporary validity of a statute which does not meet constitutional standards. Moreover, pursuant to the constitution, all judgments of the constitutional court, including the ones that provide for the discussed adjournment, are universally binding and final. What is also worth noticing is that in the context of the pending proceedings the administrative court is obliged to examine the legality of public authorities' actions – hence it controls only whether the organs of public authority function on the basis of and within the limits of law.

Meta-ethical perspective: This situation is not a dilemma in the strict sense. By applying the unconstitutional statute during the adjournment of loss of its binding force the judge submits to the legal mechanism directly prescribed by the constitution. The adjournment was provided for by the constitutional law-maker who simultaneously decided that all judgments of the constitutional court are universally binding and final. Surely the supreme duty of respecting the constitutional court's verdicts may raise pangs of conscience of the judge who regards such a solution as unjust. Hence, the situation is close to a conflict of conscience or of values, subjectively perceived as hard. The personal convictions of the judge about the justness of the decision (integrity of the judge) clash with the duty to comply with the legality principle which obliges the judge to apply the provisions of acts until they are formally revoked.

9.3.3. Independence of the judiciary versus interpretative judgments of the constitutional court

Facts: A common court judge examining a case decided that a certain statutory provision might be the legal basis of a decision but only if its pro-constitutional interpretation was made. In the judge's opinion, in the analysed case interpretation of the provision in compliance with the constitution meant giving it the meaning that corresponded to its literal wording (i.e. from many meanings obtained by different interpretational directives the correct one should be the one settled through linguistic directives). However, the provision had already been scrutinised by the constitutional court which issued an interpretative judgment. It decided that the scrutinised provision was constitutional provided that restrictive interpretation was carried out (i.e. interpretation narrower than the linguistic one was chosen from various

possible scopes of understanding a legal provision obtained through extra-linguistic directives). In the examined case, this would mean that the provision could not be applied in that case.

Prima facie dilemma: The dilemma concerns a judge of a common court before whom proceedings are pending. When adjudicating the case *in concreto*, the judge must decide whether to follow the constitutional court's interpretation and refuse to apply the relevant provision as a legal basis for decision or to apply the controversial provision by adopting his own interpretation.

Standard solution: The problem concerns the interpretative judgments issued by the constitutional court. The issue of legal basis for using such formula by the constitutional court and the legal effects of such interpretative judgments in the process of application of law is a disputable matter both in doctrine and case-law of common and administrative courts.¹⁶ In principle, the constitutional court revokes provisions when it finds that their content should be regarded as unconstitutional. But in some cases the constitutional court does not decide on the non-conformity of the provision itself but on the non-conformity of a specific norm which may be inferred from this provision by interpretation. This way the constitutional court precludes a law enforcement authority (e.g. a common court) from giving a certain meaning to the provision in question. The consequence of the interpretative judgments is therefore not elimination of a particular provision from the legal order but presentation of its "correct" and "binding" interpretation. The formula of interpretative judgments is not directly rooted in the Polish Constitution; it was formed in the judicial practice of the constitutional court. However, this formula is criticised by common court judiciary. It is pointed out that imposing a binding interpretation of provisions infringes judicial autonomy in adjudication – an unalienable element of the independence of the judiciary which is manifested by the judges' freedom to interpret the legal basis of a decision *in concreto*. Therefore, the effects of such judgments are not always accepted by common and administrative courts in judicial practice. This leads to situations in which the same provisions are interpreted differently by different courts. This phenomenon is sometimes described as an internal dimension of the multicentrism of legal system *vel* pluralism of law interpretation centres.

Meta-ethical perspective: It is not a dilemma in the strict sense, but a problem of the application of law within the sphere of the discretionary power of a judge. It may also be seen as an infringement of competence. To solve it

¹⁶ More about interpretative judgments of the Polish Constitutional Tribunal: Marcin Dąbrowski, "The Dispute between the Constitutional Tribunal and the Supreme Court over Interpretative Verdicts in the Republic of Poland," *International and Comparative Law Review* 2017, Vol. 17, issue 1.

the judge must decide whether to accept the interpretation determined by an interpretational judgment in order to maintain coherence of legal system (consistent interpretation of statutes) and thus respect the constitutional court's authority as regards determination of the meaning of constitutional values, or whether to follow the judge's own interpretation and thus emphasise independence in adjudication.

9.3.4. Transfer of a common court judge to executive branch versus separation of powers

Facts: The law on the system of common courts provides that a judge may be transferred to the Ministry of Justice in order to perform certain activities. A proposal of such transfer was made to K., a common court judge with many years' experience. He was offered to be the undersecretary of state responsible for the reform of the administrative control over courts exercised on behalf of the Ministry of Justice.

Prima facie dilemma: Accepting the transfer can trigger the following dilemmas. First, the transfer equals disrupting the adjudicating activity of the judge. He must decide whether he should accept the transfer if he is in the course of several lingering and arduous proceedings whose completion would be significantly postponed or whose deadline for prosecution might expire due to the judge's transfer. In other words, it needs to be determined if the gain resulting from the judge's potential engagement in the Ministry's works would exceed the possible detriment to the judiciary's good and authority. The second dilemma concerns the judge's potential return to adjudication. There is the question whether performing a political function (certainly under harsh political criticism) would undermine the judge's impartiality and the external image of his independence to the extent that it would preclude effective future adjudication. Finally, performing duties within the transfer may give rise to the dilemma of whether the judge should remain primarily loyal to the executive power (diligently realising its political goals within the limits of law) or whether he should above all care for the good of the judiciary, its independence and the dignity of judges, holding these values above the ones that may be preferred by executive power.

Standard solution: The transfer of judges to perform duties in the Ministry of Justice is a well-established practice of the Polish judiciary dating back to the Second Republic of Poland. The Minister of Justice may transfer a judge – with the judge's consent – to perform duties in the Ministry or in other subjected or controlled organisational unit. The transfer may be for a specified or indefinite

period of time. Judges who are transferred for an indefinite period of time may be excused from the transfer by the minister of justice or may resign on their own. The practice of appointing judges to the Ministry is non-formalised (there is no competition procedure required) – unlike in case of filling positions in the civil service. The transfer to the Ministry of Justice means disrupting of the judge's adjudicating activity which is a result of the constitutional court's decision that precludes combining duties at the Ministry with adjudication. The constitutional court noticed that combining such functions would violate the principle of separation of powers and the independence and autonomy of the judiciary. It decided this would also significantly weaken the constitutional right to court.¹⁷

Meta-ethical perspective: None of the indicated *prima facie* dilemmas is a dilemma in the strict sense. They rather represent situations that require the judge to balance competitive values and choose which to favour within his public service. This will be determined by the way the good of the judiciary is understood. The judge must consider whether the benefit of cooperation with Ministry (contributing his knowledge and experience in solving the problems of the judiciary) will balance the damage related to lengthiness of proceedings resulting from his transfer, as well as, the possible loss of public trust in the court's political neutrality. The performance of duties after the transfer may give rise to a conflict of roles at the core of which is the political character of functions within the executive branch. While carrying out such functions the judge may face the necessity of choosing between loyalty to the minister as his direct superior or to the judiciary which the judge is part of.

9.3.5. Admissibility of judicial review

Facts: In the course of proceedings before a common court, one of the participants alleged the unconstitutionality of the provision that should be applied in his case. The judge also has serious doubts about the constitutionality of the applicable provisions so he considers referring a question of law to the constitutional court. However, the constitutional crisis continues and in the view of most legal scholars and of the judge himself, some judges' positions have been filled invalidly due to the actions of the parliamentary majority.

Prima facie dilemma: The dilemma concerns the judge who conducts proceedings in a common court. The constitution provides that judges within adjudication are subject only to the constitution and statutes. According to the opinion established in previous judicial decisions, a judge cannot refuse to apply

¹⁷ The judgment of the Constitutional Tribunal of 15 January 2009 (Ref. No. K 45/07).

a provision due to his personal evaluation of equity and constitutionality of a particular norm. In the examined case, the circumstances suggest referring a question of law to the constitutional court. However, the judge thinks that in effect of the unconstitutional activities of parliament some judges of the constitutional court were chosen illegally which may cause further faulty actions when referring a question of law. The judge also fears that referring a question of law to the constitutional court in the situation of constitutional crisis may be regarded as a sign of validation of an invalidly filled court.

Standard solution: Pursuant to art. 193 of the Polish Constitution, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute if the answer to such question of law will determine an issue currently before such court. In jurisprudence and legal doctrine this provision has been interpreted as meaning that it is a duty of the judge to formulate a question of law to the constitutional court if the judge's doubts about the constitutionality of certain provisions cannot be eliminated – e.g. through interpreting them in a way that they conform to the constitution (pro-constitutional interpretation). According to the prevailing part of the doctrine and the constitutional court's ruling practice, the mentioned provision does not authorise common and administrative court judges to independently refuse to apply a statutory provisions on the grounds of their own assessment on the conformity to the constitution of such a provisions.

Meta-ethical perspective: The situation may be interpreted as a subjectively hard choice, with traits of dilemma in the strict sense. The judge cannot independently refuse to apply a statutory provision; in case of doubts his duty is to refer a question of law to the constitutional court. But in the described context, fulfilling that duty paradoxically may contribute to approval of a situation that is perceived by the judge as a breach of standards of the rule of law. However, it seems that the constitutional position of a judge should be decisive, and the constitution determines that a judge is subject to statutes. Moreover, the political consequences of legal actions of a judge, which are hard to envisage, cannot be interpreted as doing evil (e.g. a question of law referred by the judge does not have to be adjudicated by the invalidity filled judicial panel). But it needs to be remarked that contemporary jurisprudence emphasises that the mentioned subjection has its limits. It is not only admissible but also necessary for a judge to abandon the application of the unbearably unjust law. Moreover, there are opinions in legal doctrine that exceptional circumstances related to the constitutional crisis authorise common courts to carry out dispersed control of constitutionality.

9.4. Central government

9.4.1. Repeal of the constitutional court's judgment by parliament

Facts: Under the previous constitution, parliament had the competence to repeal a judgment of the constitutional court by a resolution adopted by a majority of two-thirds of the votes. In that legal framework, parliament passed an act on taxes imposing a high duty on those whose income exceeded three times the national average wage. As it was indicated in the justification of the draft, the act was motivated by the necessity to secure the state budget against risks of loss of financial liquidity. The act was challenged to the constitutional court which ruled its unconstitutionality due to simultaneous breaches of the principle of equality and social justice and violation of standards of decent legislation for the reason of insufficient clarity of the provisions imposing tax obligations.

Prima facie dilemma: The dilemma concerns a member of parliament taking part in voting on the act – after the constitutional court's judgement. The procedural solution providing for the return of an act negatively verified by the constitutional court to parliament and the possibility of its re-enactment despite the constitutional court's assessment forces the MP to choose between reasons of political nature (e.g. conviction of purposefulness of the solutions adopted in the act) and arguments of legal nature (the constitutional court's assessment of unconstitutionality).

Standard solution: The solution depends on how the legitimacy of constitutional review is perceived in democracy. The answer to the question of whether MPs in a democratic state of law are authorised to place their own judgments referring to the interpretation of constitutional principles over the constitutional judges' assessments depends on the identification of the essence of democracy and its relation to the principle of constitutionalism. In most liberal democracies, the constitutional court's decisions are final, therefore departing from opinions expressed by the constitutional court in the judgment may be reached only through a relevant change of the constitution. In other words, the judgments of the constitutional court may be overridden only by the constitutional legislator's will (constituent power) through a formal change in the constitution pertaining to the matter on which the constitutional court had ruled. This means that the constitutional review guarantees the constitution's supremacy over current legislation. Simultaneously, in common law legal systems with weak constitutional review it is the parliament which, in principle,

has the final word about understanding constitutional provisions and their realisation in current legislation.

Meta-ethical perspective: The choice does not have traits of ethical dilemma in the strict sense. It is rather an example of conflict of values which can be solved by the MP through hierarchisation of such values guided by his own understanding of democracy and the role that constitutional review should play in it.

9.4.2. President as the guardian of the Constitution

Facts: After a series of murders by offenders leaving prison after long time in prison for previous murders, parliament passed the act on procedures for dealing with persons with mental disorders who posed a threat to the lives, health or sexual freedom of others. As it was indicated by proponents of the draft, its aim was to enable the detention of dangerous criminals through introducing of post-sentence therapeutic measures and preventive isolation of those offenders who – due to their disturbed psyche – may commit another serious crimes against the life, health, general safety or sexual freedom of others. According to the proponents of the draft, this would better protect society from the most brutal crimes. The need for introducing such instruments was supported by 3/4 of respondents of public polls. But the act raised serious doubts among lawyers and human rights activists about its constitutionality. They indicated that the act was in conflict with constitutional provisions on criminal liability, in particular with the *nullum crimen sine lege* principle. It was pointed out that the act allowed for deeming a person, who had not yet committed a crime, a criminal by public authorities through coercion and freedom deprivation. According to lawyers and human rights activists, the act led to double penalty for the same act and violated the *lex retro non agit* rule. The act was referred to the President to sign. He knew the experts' opinions and had his own doubts. On the other hand, he was aware that there was a clear expectation from citizens that the mentioned solution would be adopted.

Prima facie dilemma: The dilemma concerns the President and follows from his special constitutional position. Let us assume that the President is deeply convinced that the presented solutions have wide acclaim as they meet important social needs and realise constitutional values (public order and protection of human life and health). The President faces the dilemma of whether to sign the act about which he has constitutional doubts, to veto it, or to refer it to the constitutional court's, thus postpone or even preclude its entering into force, which in his opinion may also entail infringement of constitutionally

protected values such as the life and health of other people at risk of becoming victims of the potential criminals.

Standard solution: In accordance with the Constitution of Poland, the President is elected by direct election as the supreme representative of the Republic of Poland and the guarantor of the continuity of the State authority. Therefore, he is undeniably democratically legitimised to evaluate the legislation's expediency. It has to be remembered, though, that pursuant to art. 126 section 2 of the Constitution of Poland, the President shall ensure observance of the Constitution which means he is obliged to refuse to sign the act, or at least refer it to judicial scrutiny for examination of its constitutionality, whenever he has doubts about the constitutionality of its provisions.

Meta-ethical perspective: It is not a dilemma in the strict sense, but the situation requires a choice which may be subjectively hard. It stems from the conflict of roles of politician and public authority obliged to safeguard the Constitution. The latter duty should prevail, though its fulfilment may bring pangs of conscience resulting from opposing to the will of majority of citizens who the President represents.

9.4.3. Using presidential prerogatives in the domain of judiciary branch

Facts: Pursuant to art. 179 of the Constitution of Poland, judges shall be appointed for an indefinite period by the President of the Republic of Poland on the motion of the National Council of the Judiciary (NCJ). Similar procedure concerns the promotion of judges to higher judicial positions. On the grounds of the mentioned constitutional provision the practice has been formed that the President does not evaluate the Council's motions on his own. But the President had doubts about the qualifications and impartiality of several judges presented by the NCJ for promotion.

Prima facie dilemma: The President may have a dilemma about how to exercise his competence in this particular domain where spheres of two branches (executive and judiciary) overlap. The first possibility is to appoint the judges despite his objections – in the name of separation of powers and respect for the judiciary's independence – and thus exercise restraint in using his constitutional competences which are his prerogatives. The second possibility would be to break the constitutional tradition and expose himself to accusations of interfering with the judiciary's independence by exercising executive authority through refusing to appoint the judges for the reasons of his own idea of the good of judiciary and political responsibility for it. Undeniably, the practice

of refusal to appoint the judges affects their sense of professional stability. It is also of crucial importance for protecting the principle of independence and the judiciary's position. Refusal to promote the judges to higher offices may undermine their independence in public opinion. However, under art. 126 of the Constitution of Poland, the President is obliged to ensure the observance of the Constitution in all spheres of public authority. The solution to the dilemma requires answering the question of whether, due to his special position in the structure of public authority, the President, driven by care for the good of the judiciary and by his own understanding of the requirement for the judiciary's impartiality, may at this stage of the procedure interfere in this independence, thus accepting that these actions may expose the judiciary to loss of autonomy in public opinion.

Standard solution: Pursuant to art. 179 of the Constitution of Poland, the procedure of appointing judges is two-stage, as they are appointed by the President upon the motion of the NCJ. The NCJ is a constitutional state body formed of representatives of the judiciary, executive power, legislative body and the President. The Council adopts its resolutions concerning candidates for judges pursuant to its assessment of the candidates' competence, considering the candidates' professional experience, supervisors' opinions, recommendations, publications and other documents attached to application forms, as well as the relevant court board's opinion and the relevant general assembly of judges' assessment. Such legal construct requires cooperation between the mentioned bodies, especially when the importance of judicial nomination for correct functioning of the rule of law is considered. Both judicial and executive power's participation in the nomination process is to strengthen the position of the judges who issue verdicts on the behalf of the Republic of Poland, but also to implement the principle of separation and balance of powers expressed in art. 10 section 1 of the Polish Constitution. When using his prerogative to appoint the judges, the President should act with respect to the Constitution and refuse to appoint a candidate presented by the Council only in exceptional and particularly justified cases. Such refusal cannot be arbitrary but must be based on substantive and transparent grounds exposed in a relevant decision. Non-disclosure of motives for refusal to appoint a judge may undermine trust in the judiciary.

Meta-ethical perspective: It is not a dilemma in the strict sense. However, the special position of the President may give rise to a conflict within his professional duties. On one hand, he benefits from strong political legitimacy to act in any sphere of the functioning of the state, while on the other he is bound by the Constitution to particular restraint in interfering with the judicial power. This case may be described as an interpretational problem that requires

balancing and optimisation of values: the independence and separation of the judiciary, the judicial autonomy, the right to access the civil service on equal terms, as well as values related to the President's role of the guardian of the Constitution and the highest representative of the state elected by direct universal suffrage, and thus in charge of democratic control over the judiciary in the name of the sovereign.

9.4.4. Status of the prosecutor in a democratic state of law and participation of a prosecutor in proceedings before the constitutional court

Facts: The constitutional court examined an act amending the law on the system of common courts. The draft amendment was a governmental initiative, namely it was prepared by the Minister of Justice (the Attorney General) responsible for preparing a set of acts reforming the judiciary. The challenged statute decidedly strengthened the Minister of Justice's position within the sphere of internal administrative control over the courts (i.a. in the scope of controlling the efficiency of court proceedings and the access to court files). The applicants challenged the act arguing that the presented solution violates judicial independence in the scope of the courts' adjudicating and the citizens' information autonomy (as the Minister would get access to their court files). Pursuant to law, the Attorney General mandatorily participates in proceedings before the constitutional court. Therefore, one of the prosecutors of the Attorney General's Office was ordered to prepare a draft position on the case concerning the challenged provisions and to participate in proceedings before the constitutional court. The prosecutor also had doubts about the constitutionality of the challenged act.

Prima facie dilemma: The dilemma concerns the prosecutor as a participant of proceedings before the constitutional court. The dilemma is escalated by the specific status of the Prosecutor's Office in the political system resulting from the connection between that office and the executive power. The Attorney General is the supreme body of the prosecution service. By virtue of law, the office of Attorney General is held by the Minister of Justice. In effect, the Minister of Justice directs the Prosecutor's Office i.a. by issuing regulations, guidelines and instructions. Hence, the prosecutor faces a dilemma about whether he can present before the constitutional court his own opinion on the constitutionality of the scrutinised provisions, or whether he should represent a position consistent with the Minister's guidelines.

Standard solution: The Polish Constitution does not contain resolutions directly referring to the constitutional position of the Prosecutor's Office. The Constitution only names the Attorney General and provides this office with certain competences. This means that the constitutional legislator left considerable margin of discretion as regards defining the constitutional position, role and tasks of the Prosecutor's Office. The status of this office in the system of public authorities is disputable. On one hand, it is postulated that the office should be connected with executive power branches, including the Minister of Justice's influence on this office. On the other hand, it is indicated that independence of this institution from executive power should be maintained. Over the last two decades, both mentioned models functioned in practice. The first one situated the Prosecutor's Office in the segment of executive power. The justification of the unification of the roles of Attorney General and Minister of Justice in one person was that the Council of Ministers provides internal security and public order, hence the government should have influence on criminal policy of the state. In the second model, the office of Attorney General was defined as an independent body in order to ensure its non-political character. The current legal solutions correspond with the first model. The Prosecutor's Office prosecutes offences crimes and guards the rule of law. Although each prosecutor is independent in his actions as defined in statutes, he is simultaneously obliged to execute the regulations, guidelines and instructions of a superior prosecutor. The instruction concerning procedural activity should be given by a superior prosecutor in writing and – on the prosecutor's demand – with justification. If the prosecutor does not agree with the instruction concerning his legal actions, he may demand that the order is changed or that he is excluded from performing the action or from participation in the case. The possible exclusion is eventually decided by the prosecutor immediately superior to the one who issued the instruction.

Meta-ethical perspective: The problem of the prosecutor is not a dilemma in the strict sense. However, it is a subjectively hard situation that may, in some cases, lead to a conflict of conscience when the prosecutor's personal legal assessment differs radically from his supervisor's, especially the Attorney General's assessment. This case may be also classified as a conflict of loyalty. As a guardian of the rule of law, every prosecutor is an advocate of public interest who assesses cases independently. This means that every prosecutor is obliged to act in order to protect the rights guaranteed by the Constitution (e.g. the right to privacy or the autonomy of citizens regarding information disclosure). But simultaneously, the adopted statutory solutions provide that prosecutors should also maintain loyalty towards the Minister of Justice and the Attorney General by subjecting themselves to their official instructions and orders.

9.5. Civil Servants

9.5.1. Refusal to execute an official order regarded as illegal

Facts: J. was the head of the Government Legislation Centre – an institution subject to the Prime Minister and in charge of publication in official journals of normative acts and constitutional court judgments. Relevant regulations and settled practice concerning J.'s office provide that the documents are published according to the date they are referred for print by the authorised body (e.g. signed by the President of the Republic of Poland or the President of the Constitutional Tribunal). One day J. was given an order from the Chancellery of the Prime Minister to stop the publication of the Constitutional Tribunal's judgment, as it allegedly did not have the status of verdict because it was issued in violation of the statute concerning proceeding before the constitutional court. In J.'s opinion the order was illegal – no provision entitles any government official to assess the legality of the constitutional court's verdict and withhold its publication in official journals.

Prima facie dilemma: The dilemma is about the necessity to decide whether J., as a public officer in civil service, may refuse to execute a superior's order because he considers it to be illegal. The question is whether J. can rely on his own legal opinion on the interpretation that appears unequivocal.

Standard solution: According to the constitutional system of law sources all official orders, instructions and other internal regulations in civil service should conform with the binding law. The situations of potential conflict that may arise in this context are regulated in relevant official practices, i.e. provisions regulating the rights and duties of officials, as well as rules of professional conduct. They provide that the officials shall duly carry out official orders of superiors. However, if they regard the order as illegal, detrimental to the public interest or erroneous, the officials should present their objections to their superior. In case of a written order they should execute it, immediately notifying the office's director about their reservations, and if the order was given by the office's director, notifying to an agency higher than the office. If in the course of the proceedings it turns out that the reservations were justified, the superior who issued the order is liable for it. Notwithstanding the above, the officials may not carry out orders whose execution would be a crime or which could bring irreparable loss.

Meta-ethical perspective: It is not an ethical dilemma in the strict sense. It is rather a legal dilemma – as the situation requires the execution of

a decision which is illegal in the public official's opinion. Refusal to execute the order does not cause harm. Execution of the order after notifying the official's reservations to the superior, in principle, does not entail the official's legal or moral responsibility. An additional source of the problem may be the conflict of loyalty of the official who is obliged to respect the binding law – which may be perceived as an obligation to remain loyal to the society on whose behalf the law is created. However, the official is expected to be loyal also towards his superiors which is realised i.a. through executing their orders.

9.5.2. Moral convictions of an official versus religious neutrality of the state

Facts: L. is an official of long standing in the registry office. Due to her religious convictions she regards homosexual relations as contrary to natural law and god's will, so she cannot support such relations in any way. After the introduction of the institution of civil partnerships, including between homosexual couples, L. refused to carry out ceremonies for such couples because of her religious convictions. But due to a manpower shortage, the office where L. worked designated all employees to carry out such ceremonies. L. did not change her position and demanded from local authorities that the registry office should be organised in a manner allowing her to act in accordance with her convictions.

Prima facie dilemma: The dilemma concerns a civil servant and the answer to the question of whether conflict of conscience entitles the civil servant to refuse to execute duties envisaged by the law. The dilemma is based on the conflict of the individual interest (the precept to respect L.'s freedom of conscience and religion) with the public interest whose basic rules / principles are, at least *prima facie*, expressed by the binding law.

Standard solution: In the light of public officials' practices, refusal to execute official's duties may lead to disciplinary action. To prevent such situations so-called "conscience clauses" (special regulations allowing representatives of some professions to refuse to perform certain actions due to their personal moral or religious convictions) were introduced. However, they concern mainly medical and bioethical professions (e.g. doctors) and are not applied in the civil service.

Meta-ethical perspective: It is not a dilemma in the strict sense but a classic example of a conflict of conscience. Duties resulting from performing public functions must prevail if the binding law does not provide for the possibility to invoke a conscience clause. However, the execution of duties

may give rise to pangs of conscience due to the official's moral and religious convictions.

9.6. Legal experts in relations with public authorities

9.6.1. Assessment of bills in the legislative process

Facts: An expert – member of the parliamentary legal service – was asked by the chairman of the Legislative Committee in the Parliament for a legal opinion as to “consistency with law” of a bill (submitted by members of the opposition). The bill concerned the registered partnerships including also of homosexual couples. The commission was connected with the Legislative Committee's competence provided in art. 34 section 8 of the Standing Orders of the Sejm of the Republic of Poland. The provision stipulates that: “The Marshal of the Sejm, after seeking the opinion of the Presidium of the Sejm, may refer any bills or draft resolutions which raise doubts as to their consistency with law, including European Union law or basic principles of legislative technique, to the Legislative Committee for its opinion. The Committee may, by a three-fifths majority of votes in the presence of at least half of the members of the Committee, find the bill (draft resolution) inadmissible. The Marshal of the Sejm shall be free not to initiate the proceedings in relation to any bill (draft resolution) which has been found inadmissible.” The expert is convinced that registered partnerships contradict the Constitution which specifies that marriage, as union of man and woman, is under the protection and care of the Republic of Poland. However, he is aware that legal doctrine also formulates other opinions.

Prima facie dilemma: The dilemma results from the legal expert's involvement in the legislative process at its special stage. Law-making is a highly significant competence determining the identity of the legislative power. However, the experts take no public responsibility for it, unlike the political decision-makers. But in the described circumstances, the expert should realise that his opinion may be used to shift the responsibility for admission or rejection of the bill onto him. Although the Committee expresses a political opinion, it is to some extent justified by arguments referring to legal reasoning. The expert opinion is therefore quintessential and particularly prone to instrumentalisation. Hence, there is the risk (definitely higher than at other stages of the proceedings) of instrumental use of the expert opinion and the authority of jurisprudence (legal doctrine) which the expert represents, in order to confirm the standpoint of public authority. The dilemma is made

more serious by the fact that the Constitution contains many general clauses with ambiguous meaning (that must be interpreted within the broader axiological foundations of the legal system). Some of these general clauses have been disambiguated by the constitutional court. Hence, the question arises whether the expert may (or should) base the content of his opinion on his own understanding of constitutional values – different from those included in *acquis constitutionnel*. The dilemma is whether the expert should issue such an opinion, and if the answer is positive, to what extent he should show restraint in the formulation of his assessment. There is also a question whether he should consider the special political context in which his opinion will be used or whether he may ignore it.

Standard solution: The possibility to submit bills is one of the major rights of MPs, especially important with regard to the opposition. Such bills can initiate a parliamentary debate and lead to compromise solutions. On the other hand, the Legislative Committee's opinion may be interpreted as one of the elements of self-control, particularly in the scope of constitutionality and systemic consistency of the proposed legislation, which encourages a rigorous attitude as to the execution of the expert's duties. It seems that in the analysed case the expert should maintain adequate restraint towards the subject matter of the bill, especially as concerns evaluations and assessments, and restrict himself to indicating the provisions that are undeniably impermissible in the light of the Constitution. He should be aware that constitutional provisions are vague and argumentative by nature and their content – in a democratic state of law – is determined as a result of political compromise. If possible, the submitted opinion should comprise (apart from the expert's assessments) the positions of all public authorities, including courts.

Meta-ethical perspective: It is not a dilemma in the strict sense. Formulating the expert opinion in a restrained or principled manner does no harm. The final decision is made by the MPs and the speaker of the parliament. However, the situation forces the expert to make a choice which is subjectively difficult. The early stage of legislative procedure and its strong political entanglement puts the expert, who is obliged to prepare an opinion on the constitutionality of the legal act, in a situation that requires balancing of constitutional values.

9.6.2. The role of a legal expert in reaching political compromise within the process of law-making

Facts: MPs working in a parliamentary committee negotiate the content of a tax law imposing a new levy on the turnover generated by large-format retail stores. Ensuring a majority to pass the bill requires a concession to other fraction which demands that the provision is re-formulated, so it is more general and can be applied to a much broader scope of entities. The members of the committee are ready to accept such modified wording if this secures the majority of votes necessary to enact the whole bill. In informal way they argue that problematic provisions may be clarified in the process of the application of law without detriment to the essential purpose of the act.

Prima facie dilemma: The dilemma concerns the legal expert – a specialist of the parliament's legal service responsible for professional legal support in drafting normative acts. The expert must decide whether he may participate in drafting regulations that favour a political compromise in order to successfully finish the law-making process, though at the expense of the legislative correctness of the adopted act. The legal expert's dilemma is based on the question of whether, in such situations, an expert should remain loyal to the mandator (the parliament) at the expense of his professionalism, or if the mentioned canons of the legislative correctness should be the objective limits of his professional support for the mandator, irrespective of the mandator's will or political interest.

Standard solution: Although ethical and deontological principles of the legal experts in legislation have not been formally regulated in Polish legal system, the principles of legislative technique have.¹⁸ The regulation is a result of a certain consensus among legal doctrine representatives on the requirements to be met in drafting legal acts. The regulation strongly emphasises the requirement to create provisions in a clear, unambiguous and communicative way.

Meta-ethical perspective: It is not a dilemma in the strict sense. It is rather a subjectively hard choice which in some cases may be aggravated by a conflict of roles assigned to the legal expert who is: on one hand – an advisor of public authority and an official obliged to perform instructions and orders (i.e. to translate political majority's decisions into the language of law), on the other hand – an independent expert obliged to respect praxeological and deontological principles corresponding to the established canons of legal culture.

¹⁸ In the form of the attachment to the Regulation of President of the Council of Ministers of 20 June 2002 on Principles of Legislative Technique.

9.6.3. Academic activity of an expert versus working for public authorities and the right to criticize them

Facts: P. is an assistant to a constitutional judge, and also a professor of law at a university. His duties at the constitutional court include general support of the judge, primarily preparing draft judgments according to the judge's indications, as well as their justification according to the guidelines of the adjudication panel. In one of the cases, P. prepared a draft judgment on the judge – rapporteur's instruction. The draft was not accepted by the majority of the adjudication panel. In effect, the constitutional court issued a verdict that was different from the judge – rapporteur's intention and the draft prepared by the assistant. Nevertheless, pursuant to his obligation, the judge – rapporteur formulated the reasons for the issued judgment. He also did not decide to submit a dissenting opinion in which he would express his different view on the case. Meanwhile, P. was invited by the editorial team of a legal journal to write a gloss to the judgment.

Prima facie dilemma: The assistant's dilemma stems from combining academic work and public service. It requires to determine whether a public servant in the constitutional court may comment on the court's decision, if he had participated indirectly in its preparation. There is also a question of whether such a person has the right to carry out a fundamental criticism of the judgment.

Standard solution: It is a frequent practice to combine an academic career in the field of law with public service. Legal services of central agencies of law-making and high courts are often strengthened with academics who are experts in specific fields of law. The prevailing opinion is that this brings bilateral benefits: the authorities obtain professional legal support and the scholars gain practical experience valuable also in their academic research. However, such situations may raise doubts following from the understanding of the expert's loyalty towards the institution that he works for. It seems possible to separate both spheres of activity, as working for a public authority agency does not preclude *a limine* the scholars' right to present criticism on the effects of their work – in forms appropriate for academic work. Nevertheless, it is unacceptable to use for the purposes of academic work any classified or confidential information obtained in relation to work at the agency. Therefore, the scholars' participation in public debate (including other than academic forms of debate e.g. interviews with mass media) must be subject to some restrictions. Otherwise, such participation might be regarded as abusing the authority of academia.

Meta-ethical perspective: It is not a dilemma in the strict sense. It is rather a situation subjectively assessed as difficult due to the conflict between two professional roles (an academic scholar and an expert/advisor of public authority). Such a combination of roles may in some cases lead to the confrontation of two imperatives: a scholar's fidelity to his own academic opinions (scholar's integrity) and an official's loyalty towards the institution that he works for – a specific public agency.

9.6.4. Limits of a lawyer's engagement in strategic litigation

Facts: A. has had health problems for many years. When she became pregnant for the third time doctors suggested that another birth might cause serious health problems. A. asked for a medical certificate allowing her to have a legal abortion at a public medical health centre, due to the risk to her health. According to the binding law, an abortion may be legally carried out (until the foetus is able to survive independently outside the woman's body) i.a. if giving birth represents a danger for the life or health of the woman. A. obtained such a certificate and went to a public clinic where she was denied an abortion on the grounds that the risk to her health was insufficient to justify the procedure. The situation repeated at another hospital. A.'s third baby was delivered through C-section. As a result of the delivery her health seriously deteriorated. After she exhausted all legal remedies in Poland, A. submitted a complaint to the European Court of Human Rights. She applied for relevant compensation, referring to violation of a number of provisions of the European Convention on Human Rights (ECHR). Her complaint was endorsed by a non-governmental organisation (NGO) supporting liberalisation of the conditions for termination of pregnancy. The mentioned NGO included her case in the precedent cases programme as it assessed that the case was a perfect chance for strategic litigation. The Chamber of the ECHR examined the case and acknowledged some of the applicant's claims – but not unanimously. She was granted compensation, though in the amount lower than she requested. The court decided that legislative power in the applicant's country did not provide effective procedures to ensure that the decision to perform or deny termination of pregnancy could be made appropriately quickly. In its verdict the court did not refer to the issue of whether the Convention guarantees the right to legal abortion.

Prima facie dilemma: The ethical dilemma concerns the NGO's lawyers providing help to the applicant. A. went to the court outraged by the way she

was treated by her doctors and to receive compensation for costs of necessary treatment. The court's verdict was satisfying for her. But the goal of the NGO conducting strategic litigation was to make the court recognise in its adjudication the right to abortion as a so-called reproductive right of a woman. From this perspective, the verdict in A.'s case did not become precedent and failed to bring about the effect expected by the organisation. On the other hand, A. feared media interest in her family, especially stigmatisation of her children in due to the proceedings. Therefore, the dilemma arises from the situation where the subjectively perceived private interest of the applicant diverges from the image of the public interest perceived from the perspective of lawyers behind the litigation. Realisation of the latter would require persuading the applicant to lodge an appeal to the Grand Chamber – despite her own reluctance to do so.

Standard solution: Strategic litigation should be conducted with respect to the autonomy of the party to proceedings. Professional counsel endorsing the party should clearly formulate the motives of the organisation's engagement in a particular case and inform about any risks related to the proceedings and possible legal remedies to reduce them. The lawyers providing legal support for the party should also avoid a paternalistic approach and instrumental treatment of the party. Private interest defined by the clients themselves should have priority over public interest as seen by the lawyers providing legal support for their clients.

Meta-ethical perspective: It is not a dilemma in the strict sense. The lawyers' participation in strategic litigation may lead to a conflict of roles. On one hand, the lawyer acts as his client's attorney obliged to realise the client's private interest. But at the same time, in the analysed case the lawyer acts also as a social activist, for whom the court proceedings represent a means of articulation and realisation of a certain public interest. Such public interest may be unnoticed, unshared or even refused by the client interested mainly in protection of his private interest.

9.6.5. Transfer of an expert from public to private sector – “the revolving door problem”

Facts: Z. was a professor of financial and tax law. The Ministry of Finance asked him to write a draft law on excise tax aimed at sealing up the fiscal system in that area. The draft was adopted by parliament. Then Z. filled the post of Secretary of State at the Ministry of Finance in order to enact a package of further acts and executive regulations and to implement the reform at the

Revenue Administration. After finishing that task he resigned from the position. After a while, a prestigious law firm offered him a post in which Z. would be engaged in tasks related to tax optimisation as regards the excise tax.

Prima facie dilemma: The dilemma concerns an expert who leaves public service and has to decide whether the previous role allows him for the employment in the private sector, especially as regards participation in proceedings where knowledge gained in the public sector could be used for the purpose of possible litigation against the state. He must consider whether the transfer harms his credibility and impartiality as a lawyer and an academic. He should also weigh whether a constraint on his professional career as a lawyer must be the price for his public service. There is the question whether his personal feelings (sense of appropriateness and honesty) are the only factor that matters in this situation or whether he should also consider the social reception of his actions (the possibility of depreciating his authority as a lawyer and an academic).

Standard solution: The case concerns the so-called problem of the revolving door – a situation in which a public official goes to the private sector where his contacts and experience may help significantly enhance the situation of the new employer. This issue has been regulated only in some codes of legal professions, and only partly. E.g. a legal adviser or an advocate cannot provide legal help if they participated in a case as the public authorities' representatives or as counsel of someone who was in public office (cf. art. 27 of the Code of Ethics for Legal Advisers and § 22 Code of Ethics for Advocates). In general, a lawyer should not represent a client in a case in whose settlement he was engaged while performing public service. However, the academic activity of a lawyer is a different matter. Academics often support the public sector as experts, and in some cases they even become decision-makers when accepting certain posts within public authorities. In the latter case, they should endeavour to maintain maximum autonomy and avoid any actions that could undermine in public opinion their independence as experts and academics, even after leaving the service.

Meta-ethical perspective: It is not a dilemma in the strict sense. It is rather a conflict of roles of: an autonomous expert, a government adviser, a political decision-maker and a client's attorney. The conflict requires finding a balance between imperatives related to these roles: the public interest (loyalty to the previous employer), the client's interest (protection of the current employer's interests), and the lawyer's own benefit (possibility of personal development in legal practice). Therefore, it is primarily the problem of a lawyer's identity – the problem of determining which of the roles is the most important for him.

9.6.6. Transfer of an expert from the private to public sector

Facts: H. is a well-known human rights activist and the head of a conservative NGO acting for a complete ban on abortion. After several years of activity H. was elected the Commissioner for Human Rights (the Ombudsman) by parliamentary majority. Then, the NGO he headed for many years appealed to the Ombudsman and asked for support of a legislative initiative aimed at tightening the act on conditions for termination of pregnancy. The initiative was formally presented to the parliament by one of the political parties. According to the petitioners, the act breached the right to life of the conceived child by allowing the termination of pregnancy resulting from a crime (rape). However, several years earlier the act had been challenged by pro-choice movements and the constitutional court had decided that it was constitutional. According to that judgment, the act balanced relevant constitutional values in a proper way.

Prima facie dilemma: The dilemma results from the conflict of the lawyer's personal convictions expressed in his social work, with the requirements related to holding a public office. H. believes that there is no room for compromise as regards legal protection of human life because life should be fully legally protected from the moment of its conception until natural death. But H.'s opinions must be tempered by the limitations presented by the public nature and legal framework of his role as the Commissioner for Human Rights. Endorsement of the proposed draft may expose H. to accusations of partiality and involvement in a political dispute.

Standard solution: Before taking office, the person elected Commissioner for Human Rights takes an oath: "I solemnly do swear that in performing the duties entrusted to me as the Commissioner for Human Rights I shall keep faith with the Constitution of the Republic of Poland, safeguard the liberties and rights of the human being and the citizen, being guided by the Law and the principles of community life and social justice. I pledge to perform the duties entrusted to me impartially, with the greatest diligence and care, to safeguard the dignity of the office and to keep the legally protected matters in strict confidence." Therefore, the Ombudsman is obliged to safeguard the constitution and respect the constitutional court's case law. Nevertheless, it is impossible to abandon one's personal convictions in important social matters even upon taking the public office of the Ombudsman. Moreover, personal opinions and beliefs of a candidate for the Ombudsman's office in crucial legal disputes should be known to the public and to the political decision-makers at the moment of the election. However, upon taking office the Ombudsman should strive for objectivity and neutrality in reconstructing constitutional axiology

while undertaking official activities. He should also exercise great restraint about involvement in the current process of law-making.

Meta-ethical perspective: It is not a dilemma in the strict sense. Due to the public character of the performed function, the obligation to present neutrality must prevail. Yet, this may cause remorse in a lawyer who does not express his moral convictions which he considers right.

9.6.7. The ethics of a legal adviser in the public sector

Facts: D., a renowned expert on international law and human rights, has been approached by the Minister of the Interior for an expert opinion about whether certain operational and intelligence practices applied to the prisoners conform to the constitution and acts of international law, with the stipulation that the opinion will be confidential and will not be disclosed to the public in any form. The lawyer undertook the task but after becoming familiar with the details of the commission, including information classified as confidential, he realised that his expert opinion might be used to exonerate some intelligence services' actions that might have traits of torture and inhumane treatment of persons accused of terrorist activity.

Prima facie dilemma: The lawyer is confronted by a dilemma about whether to provide an expert opinion if there is a risk of instrumental abuse of his opinion which may be used to exonerate certain controversial actions of the state rather than to eliminate such actions. The dilemma also relates to whether the lawyer should inform the public about his suspicions concerning the intelligence services' actions which may result in violation of state secrecy.

Standard solution: The issue of ethical aspects of counselling for public authorities has not been subject to codification. Most legal scholars argue that expert opinions prepared for public authorities should be not only substantive and comprehensive, but should also take into consideration the opinion of all branches of power, as well as the meaning of analysed concepts and legal institutions established in legal culture. Also the requirement of transparency of such opinions is emphasized. Moreover, it is indicated that such opinions should not serve to exonerate activities that have been already conducted by the authorities; the expert opinions should be formulated before undertaking such activities.

Meta-ethical perspective: Accepting or refusing to issue an opinion is not an ethical dilemma in the strict sense, although it may be a tough choice for an expert as it bears the risk of instrumental manipulation of the results of his work.

Uncertainty about the intentions of the ordering agency may be qualified as an epistemic dilemma. But revealing legally protected secrets learned by the expert in connection with the commission may be seen as a hard choice with traits of dilemma. Disclosing secrets, apart from violation of statutory law on their protection, would also be a breach of loyalty towards the ordering agency or a threat to national security. On the other hand, concealment of information on inadmissible practices of public authorities may be considered to be related to doing harm – consisting in potential breaching the dignity and other fundamental rights of persons who are subject to the mentioned inadmissible practices.

Bibliography

- Alexy, Robert. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002.
- Apel, Karl-Otto. *Diskurs und Verantwortung, Das Problem des Übergangs zur post-konventionellen Moral*. Frankfurt am Main: Suhrkamp Verlag, 1988.
- Apel, Karl-Otto. "Etyka dyskursu jako etyka odpowiedzialności – postmetafizyczna transformacja etyki Kanta." Trans. T. Mańko, *Principia V* (1992).
- Apel, Karl-Otto. "Uniwersalistyczna etyka odpowiedzialności." Trans. Z. Zwoliński, *Etyka* 29 (1996).
- Apel, Karl-Otto. "How to Ground a Universalistic Ethics of Co-responsibility for the Effects of Collective Actions and Activities." <http://www.philosophica.ugent.be/fulltexts/52-2.pdf>, accessed at 13 August 2018.
- Arendt, Hannah. *Korzenie totalitaryzmu*. Trans. part I and III D. Grinberg, part II M. Szawiel. Warszawa: Wydawnictwa Akademickie i Profesjonalne, 2008.
- Arendt, Hannah. *The Origins of Totalitarianism*. Cleveland-New York: Meridian Books, 1958.
- Aristotle. *Nicomachean Ethics*. Oxford: Oxford University Press, 2002.
- Balkin, Jack M. "The Meaning of Constitutional Tragedy." *Constitutional Stupidities, Constitutional Tragedies*. W.N. Eskridge. S. Levinson. New York: New York University Press, 1998.
- Bańkowski, Zenon. "W przestrzeni sądenia: sędzia i niepokój spotkania." *Z zagadnień teorii i filozofii prawa. Lokalny a uniwersalny charakter interpretacji prawniczej*. Trans. M. Pichlak. Ed. P. Kaczmarek. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009.
- Barankiewicz, Tomasz. *W poszukiwaniu modelu standardów etycznych w administracji publicznej w Polsce*. Lublin: Wydawnictwo Katolickiego Uniwersytetu Lubelskiego, 2013.
- Bator, Andrzej. "Wspólnota kulturowa jako element integracji prawa." *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*. Ed. A. Sulikowski. Wrocław: Uniwersytet Wrocławski, 2006.
- Bauman, Zygmunt. *Etyka ponowoczesna*. Trans. J. Bauman, J. Tokarska-Bakir, translation revised by Z. Bauman. Warszawa: PWN, 1996.
- Bauman, Zygmunt. *Postmodern ethics*. Blackwell, 1993.
- Berns, Sandra. "Judicial Decision and Moral Responsibility." *Adelaide Law Review* 13/119 (1991).
- Biernat, Tadeusz. *Legislacja. Analiza procesu*. Kraków: Wydawnictwo Oficyna Wydawnicza AFM, 2016.
- Błachut, Michał; Gromski, Włodzimierz; Kaczor, Jacek. *Technika prawodawcza*. Warszawa: C.H.Beck, 2008.

- Bogucka, Iwona. "System odpowiedzialności urzędnika." *Etyka urzędnicza i etyka służby publicznej*, vol. 13. Eds. R. Hauser, Z. Niewiadomski, A. Wróbel. Warszawa: Wydawnictwo C.H.Beck, 2016.
- Bogucka, Iwona; Pietrzykowski, Tomasz. *Etyka w administracji publicznej*. Warszawa: LexisNexis, 2009.
- Bovens, Mark. *The Quest for Responsibility. Accountability and Citizenship in Complex Organisations*. Cambridge: Cambridge University Press, 1998.
- Camus, Albert. *The Human Crisis* (1946). <https://pl.scribd.com/document/341261228/The-Human-Crisis-Albert-Camus-Lecture#>, accessed at 13th August 2018.
- Cane, Peter. *Responsibility in Law and Morality*. Oxford-Portland Oregon: Hart Publishing, 2002.
- Cavanaugh, Thomas A. *Double-Effect Reasoning: Doing Good and Avoiding Evil*. Oxford-New York: Oxford University Press, 2006.
- Cern, Karolina M.; Wojciechowski, Bartosz. "O związkach między dyskursem prawnym a moralnym." *Principia* LIV-LV, 2011.
- Chyrowicz, Barbara. *O sytuacjach bez wyjścia w etyce. Dylematy moralne: ich natura, rodzaj i sposoby rozstrzygnięcia*. Kraków: Znak, 2008.
- Chyrowicz, Barbara. *Zamiar i skutki: filozoficzna analiza zasady podwójnego skutku*. Lublin: Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, 1997.
- Cochran Jr., Robert F.; Rhode, Deborah L.; Tremblay, Paul R.; Shaffer, Thomas L. "Symposium: Client Counseling and Moral Responsibility." *Pepperdine Law Review* 30 (2003).
- Compton, Frederick. *History of Philosophy Volume 1: Greece and Rome*. London-New York: Continuum, 2003.
- Czyżewski, Marek. "Wprowadzenie do wydania polskiego." Habermas, Jürgen. *Strukturalne przeobrażenie sfery publicznej*. Trans. W. Lipnik, M. Łukaszewicz. Warszawa: PWN, 2007.
- Dąbrowski, Marcin. "The Dispute between the Constitutional Tribunal and the Supreme Court over Interpretative Verdicts in the Republic of Poland." *International and Comparative Law Review* 17/1 (2017).
- Dunn, Timothy J. *Moral Dilemmas and Moral Luck*. Dissertation at Rice University, 2001, <https://scholarship.rice.edu/handle/1911/17957>, accessed at 13th August 2018.
- Dworkin, Ronald. *Taking Rights Seriously*. London: Bloomsbury, 2013.
- Dybowski, Maciej. "Ronalda Dworkina koncepcja zasad prawa." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* LXIII — vol. 3 (2001).
- Dynarowicz, Ewa. "Komisja Prawdy i Pojednania w kulturowym repertuarze nowej RPA: Południowoafrykański dramat po apartheidzie (1996–2002)." *Kalejdoskop Afrykański. Problematyka tożsamości w literaturach Afryki przelomu XX-XXI wieku*. Eds. R. Diaz-Smidt, M. Szupejko. Warszawa: Oficyna Wydawnicza ASPRA-JR, 2012.
- Dziemidok, Bohdan. "Aksjologia Władysława Tatarkiewicza." *Teoretyczne i praktyczne kłopoty z wartościami i wartościowaniem. Szkice z aksjologii stosowanej*. Ed. Bohdan Dziemidok. Gdańsk: Wydawnictwo Słowo/obraz terytoria, 2013.
- Ehrlich, Eugen. *Grundlegung der Soziologie des Rechts*, Vierte Auflage. Berlin: Duncker Humboldt, 1989.

- Filek, Jacek. "Odpowiedzialność jako podstawowe pojęcie filozofii przyszłości." *Życie, etyka, inni. Scherza i eseje filozoficzno-etyczne*. Kraków: Wydawnictwo Homini, 2010.
- Filek, Jacek. Ed. *Filozofia odpowiedzialności XX wieku*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2003.
- Filek, Jacek. *Ontologizacja odpowiedzialności. Analityczne i historyczne wprowadzenie w problematykę*. Kraków: Baran i Suszczyński, 1996.
- Folkierska, Andrea. *Sergiusz Hessen – pedagog odpowiedzialny*. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2005.
- Foot, Philippa. "The Problem of Abortion and the Doctrine of the Double Effect." *Oxford Review* 5 (1967).
- Foot, Philippa. *Virtues and Vices and Other Essays in Moral Philosophy*. Oxford: Clarendon Press, 2002.
- Fornet-Betancourt, Raul. ed. *Ethik und Befreiung*. Aachen: Augustinus Buchhandlung, 1990.
- Frings, Manfred S. *Max Scheler – A Concise Introduction into the World of Great Thinker*. Louvain: Duquesne University Press, 1965.
- Fuller, Lon L. "The Case of the Speluncean Explorers." *Harvard Law Review* 62.4 (1949).
- Fuller, Lon L. *The Morality of Law*. New Haven and London: Yale University Press, 1969.
- Galarowicz, Jan. *Fenomenologiczna etyka wartości*. Kraków: Wydawnictwo Naukowe Papieskiej Akademii Teologicznej w Krakowie, 1997.
- Gilbert, Helen. *Postcolonial Plays: An Anthology*. New York: Routledge, 2013.
- Gilligan, Carol. *In a Different Voice. Psychological Theory and Women's Development*. Cambridge MA-London: Harvard University Press, 2003.
- Gowans, Christopher W. "The Debate on Moral Dilemmas." *Moral Dilemmas*. Ed. C.W. Gowans. New York-Oxford: Oxford University Press, 1987.
- Gowans, Christopher W. *Innocence Lost. An Examination of Inescapable Moral Wrongdoing*. New York-Oxford: Oxford University Press, 1994.
- Habermas, Jürgen. *Posłowie, Faktyczność i obowiązywanie. Teoria dyskursu wobec zagadnień prawa i demokratycznego państwa prawnego*. Trans. A. Romaniuk, R. Marszałek. Warszawa: Scholar, 2005.
- Habermas, Jürgen. *Teoria działania komunikacyjnego, vol 2. Przyczynek do krytyki rozumu funkcjonalnego*. Trans. A.M. Kaniowski, trans. revised by M.J. Siemek. Warszawa: PWN, 2002.
- Hart, Herbert L.A. *Punishment and Responsibility. Essays in the Philosophy of Law*. Oxford: Clarendon Press, 1968.
- Hart, Herbert L.A. *The Concept of Law*. Oxford: Oxford University Press, 2012.
- Hartmann, Nicolai. "Specyfika intuicyjnego poznania wartości." *Wypisy z „Etyki”*. Ed. N. Hartmann. Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika, 1999.
- Hartmann, Nicolai. *Ethik*. Berlin: Walter de Gruyter, 1962.
- Hartmann, Nicolai. *Mysł filozoficzna i jej historia. Systematyczna autoprezentacja*. Toruń: Wydawnictwo Comer, 1994.
- Hołówka, Jacek. "Dylematy moralne w zawodach prawniczych." *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*. Ed. E. Łojko. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2006.

- Hutchinson, Allan C. "A Loss of Faith: Law, Justice and Legal Ethics, Book Review of Lawyers and Fidelity to Law by W. Bradley Wendel." *International Journal of Legal Profession* (2014).
- Hutchinson, Allan C. *Legal Ethics and Professional Responsibility*. Toronto: Irwin Law Inc., 2006.
- Ingarden, Roman. "Czego nie wiemy o wartościach." *Przeżycie – dzieło – wartość*. Kraków: Wydawnictwo Literackie, 1968.
- Ingarden, Roman. *Wykłady z etyki*. Warszawa: PWN, 1989.
- Jarvis Thomson, Judith. "Killing, Letting Die, and the Trolley Problem," *Monist* 59 (1976).
- Jarvis Thomson, Judith. "The Trolley Problem," *The Yale Law Journal* 94 (1985).
- Jaworski, Czesław. "Etyka adwokatów." *Etyka prawnicza. Etyka nauczyciela zawodu prawniczego*. Warszawa: Wydawnictwa UW, 2002.
- Jonas, Hans. *Zasada odpowiedzialności. Etyka dla cywilizacji technologicznej*. Trans. M. Klimowicz. Kraków: Platan, 1996.
- Kaczmarek, Przemysław. "Etyka prawnicza Davida J. Lubana: moralna ocena czynów, podmiotowość, odpowiedzialność." *Archiwum Filozofii Prawa i Filozofii Społecznej* 1 (2018).
- Kaczmarek, Przemysław. "Model prawnika w kontekście ontologizacji odpowiedzialności." *Z zagadnień teorii i filozofii prawa. Lokalny a uniwersalny charakter interpretacji prawniczej*. Ed. P. Kaczmarek. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2009.
- Kaczmarek, Przemysław. *Tożsamość prawnika jako wykonawcy roli zawodowej*. Warszawa: Lexis Nexis, 2014.
- Kagan, Shelly. *The Limits of Morality*. Oxford: Clarendon Press, 1989.
- Kamm, Frances M. *The Trolley Problem Mysteries*. Oxford–New York: Oxford University Press, 2015.
- Kaniowski, Andrzej M. "Postawa krytyczna a etyka. Problem uniwersalizacji." *Racjonalność współczesności. Między filozofią a socjologią*. Eds. H. Kozakiewicz, E. Mokrzycki, M.J. Siemek. Warszawa: Wydawnictwo PWN, 1992.
- Kasprzyk, Leszek; Węgrzecki, Adam. *Wprowadzenie do filozofii*. Warszawa: PWN, 1981.
- Kiełbasa, Jan. "Wciąż więcej pytań." *Znak* 10 (1995).
- Kobylińska, Ewa. "Etyka w wieku nauki (o transcendentально-pragmatycznej etyce dyskursu K.-O. Apla)." *Kultura Współczesna* 1 (1993).
- Koczur, Sebastian. *Aksjologia odpowiedzialności materialnej pracownika*. Warszawa: C.H.Beck, 2016.
- Kohlberg, Lawrence. "The Development of Children's Orientations toward a Moral Order." *Vita Humana* 6 (1963).
- Kořakowski, Leszek. *Czy diabeł może być zbawiony*. London: Wydawnictwo Aneks, 1984.
- Kopaliński, Władysław. *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem*. Warszawa: Oficyna Wydawnicza RYTM, 2006.
- Kordela, Marzena. "Zasady prawa jako normatywna postać wartości." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* LXVIII, vol. 1 (2006).
- Kordela, Marzena. *Zasady prawa. Studium teoretycznoprawne*. Poznań: Wydawnictwo Naukowe UAM, 2012.

- Kowalska, Małgorzata. "Pytanie o dialog. Habermas – Lévinas." *Levinas i inni*. Scientific eds. T. Gadacz, J. Migasiński. Warszawa: Wydział Filozofii i Socjologii UW, 2002.
- Kozak, Artur. "Kryzys podstawności prawa." *System prawny a porządek prawny*. Eds. O. Bogucki, S. Czepita. Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2008.
- Kozłowska, Magdalena. "Teoretyczne aspekty badań nad stereotypami zawodów prawniczych." *Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace z nauk Politycznych* 20 (1984).
- Krajewski, Radosław. *Leksykon instytucji wymiaru sprawiedliwości i ochrony prawa*. Warszawa: C.H. Beck, 2007.
- Krupiec, Paweł. *Problem odpowiedzialności w kontekście współczesnego sporu wokół moralności autonomicznej*. Kraków: Wydawnictwo Naukowe Papieskiej Akademii Teologicznej, 2005.
- Kudrycka, Barbara. *Dylematy urzędników administracji publicznej (zagadnienia administracyjno-prawne)*. Białystok: Temida 2, 1995.
- Kuryłowicz, Marek. "Notariat w europejskiej kulturze prawnej." *II Kongres Notariuszy Rzeczypospolitej Polskiej. Referaty i opracowania*. Ed. R. Szytk. Poznań-Kluczbork: Wydawnictwa Notariatu, 1999.
- Kutz, Christopher. *Complicity. Ethics and Law for a Collective Age*. Cambridge: Cambridge University Press, 2000.
- Łazarska, Aneta. *Rzetelny proces cywilny*. Warszawa: Wolters Kluwer, 2012.
- Lemmon, Edward J. "Moral Dilemmas." *The Philosophical Review* 2 (1962).
- Lévinas, Emmanuel. "Dialog: samowiedza i bliskość bliźniego." *O Bogu, który nawiedza myśl*. Lévinas, Emmanuel. Trans. M. Kowalska. Kraków: Wydawnictwo Homin, 2008.
- Lévinas, Emmanuel. *Całość i nieskończoność. Esej o zewnętrzności*. Trans. M. Kowalska. Warszawa: PWN, 1998.
- Lévinas, Emmanuel. *Imiona własne*. Trans. J. Margański. Warszawa: Wydawnictwo KR, 2000.
- Lévinas, Emmanuel. *Inaczej niż być lub ponad istotą*. Trans. P. Mrówczyński. Warszawa: Fundacja Aletheia, 2000.
- Levy, Neil. "The Responsibility of Lawyers and the Responsibility of Philosophers." *Australian Journal of Legal Philosophy* 29 (2004).
- Longschamps de Bèrier, Franciszek. *Nadużycie prawa w świetle rzymskiego prawa prywatnego*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2004.
- Lorenz, Andrzej. "Röd kontra Apel. Krytyka pragmatyki transcendentnej z pozycji problematycyzmu." *Przełom komunikacyjny a filozoficzna idea konsensusu*. Ed. B. Sierocka. Wrocław: Oficyna Wydawnicza, 2003.
- Luban, David. "Arendt on the Crime of Crimes." *Ratio Juris* 28.3 (2015).
- Luban, David. *Lawyers and Justice. An Ethical Study*. Princeton: Princeton University Press, 1988.
- Luban, David; Strudler, Alan; Wasserman, David. "Moral Responsibility in the Age of Bureaucracy." *Michigan Law Review* 90 (1992).
- Luban, David; Wendel, W. Bradley. "Philosophical Legal Ethics: An Affectionate History." *The Georgetown Journal of Legal Ethics* 30 (2017).

- MacIntyre, Alasdair. "Dylematy moralne." Trans. K. Liszka. *Etyka i polityka*. Scientific ed. A. Chmielewski. Warszawa: PWN, 2009.
- Mańko, Rafał. "'War of Courts' as a Clash of Legal Cultures: Rethinking the Conflict Between the Polish Constitutional Tribunal and the Supreme Court Over Interpretive Judgments," *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory*. Eds. M. Hein. A. Geisler. S. Hummel. Series: 'Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook', vol. 4. Frankfurt am Main: Peter Lang, 2014.
- Marcus, Ruth B. "Moral Dilemmas and Consistency." *The Journal of Philosophy* 3 (1980).
- Maroń, Grzegorz. "Zasady prawa jako składnik kultury prawnej." *Konwergencja czy dywergencja kultur i systemów prawnych?*. <http://arch.prawo.ug.edu.pl/teoria/uploads/zjazd/Maron.pdf>. (accessed on 03.01.2017).
- Maroń, Grzegorz. *Zasady prawa. Pojmowanie i typologie a rola w wykładni prawa i orzecznictwie konstytucyjnym*. Poznań: Wydawnictwo Ars boni et aequi, 2011.
- Martin, Heidegger. *Bycie i czas*. Trans. B. Baran. Warszawa: PWN, 2005.
- Matczak, Marcin. *Summa iniuria. O błędzie formalizmu w stosowaniu prawa*. Warszawa: Scholar, 2007.
- McConnell, Terrance C.. "Moral Residue and Dilemmas." in *Moral Dilemmas and Moral Theory*. Ed. H.E. Mason. New York-Oxford: Oxford University Press, 1996.
- Mill, John S. *Utilitarianism*. London: Parker, Son and Bourn, 1863.
- Moore, Michael. *Placing Blame: A General Theory of the Criminal Law*. Oxford: Oxford University Press, 1997.
- Morawski, Lech. *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*. Warszawa: LexisNexis, 2005.
- Morawski, Lech. *Podstawy filozofii prawa*. Toruń: Dom Organizatora, 2014.
- Nicolson, Donald. "Making Lawyers Moral? Ethical Codes and Moral Character." *Legal Studies* 25 (2005).
- Nowicka, Anna. *Odpowiedzialność: ujęcie deontologiczne. Status pozytywnej odpowiedzialności prospektywnej w filozofii Immanuela Kanta*. Dissertation at University of Poznań 2012, <https://repozytorium.amu.edu.pl/bitstream/10593/4171/1/Anna%20Nowicka-doktorat.pdf> (accessed on 13 August 2018).
- Ogrodnik, Bogdan. *Ingarden*. Warszawa: Wiedza Powszechna, 2000.
- Opalek, Kazimierz. Wróblewski, Jerzy. "Niemiecka szkoła historyczna w teorii prawa." *Przegląd Nauk Historycznych i Społecznych* V (1954).
- Pałecki, Krzysztof. "Aksjologia prawa." *Leksykon socjologii prawa*. Eds. A. Kociołek-Pęksa, M. Stępień. Warszawa: C.H. Beck, 2013.
- Pałecki, Krzysztof. "Zmiany w aksjologicznych podstawach prawa jako wskaźnik jego tranzycji." *Dynamika wartości w prawie*. Kraków: Księgarnia Akademicka, 1997.
- Pałecki, Krzysztof. Ed. *Dynamika wartości w prawie*. Kraków: Księgarnia Akademicka, 1997.
- Peno, Michał. "Prawna odpowiedzialność z tytułu pełnionej roli społecznej." *Acta Universitatis Lodzianensis. Folia Iuridica* 74 (2015).

- Picht, Georg. "Pojęcie odpowiedzialności." *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*. Trans. K. Michalski. Selection, translation, ed. J. Filek. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004.
- Piechowiak, Marek. "Arthura Kaufmanna próba przezwyciężenia pozytywizmu prawniczego." *Studia Prawnicze* 1.115 (1993).
- Pieniążek, Marcin. "Teoria etyki sytuacyjnej prawnika." *Leksykon etyki prawniczej: 100 podstawowych pojęć*. Eds. P. Skuczyński, S. Sykuna. Warszawa: C.H. Beck, 2013.
- Pieniążek, Marcin. "Teoria etyki komorniczej wobec założeń współczesnej etyki działalności gospodarczej." *Etyka zawodowa komornika sądowego*. Ed. A. Marciniak. Sopot: Currenda, 2016.
- Pieniążek, Marcin. *Etyka sytuacyjna prawnika*. Warszawa: LexisNexis, 2008.
- Pietrzykowski, Tomasz. "Czy TK powinien był umorzyć postępowanie w sprawie uchwał Sejmu? Krótki komentarz do postanowienia TK z 7 stycznia 2016 r." *Obserwator Konstytucyjny*, <http://niezniknelo.pl/OK2/artukul/czy-tk-powinien-był-umorzyc-postepowanie-w-sprawie-uchwal-sejmu-krotki-komentarz-do-postanowienia-tk-z-7-stycznia-2016-r/index.html> (accessed on 13 August 2018).
- Pietrzykowski, Tomasz. *Etyczne problemy prawa*. Katowice: Naukowa Oficyna Wydawnicza, 2005.
- Polanowska-Sygułska, Beata. *Pluralizm wartości i jego implikacje w filozofii prawa*. Kraków: Księgarnia Akademicka, 2008.
- Póltawski, Andrzej. "Wartości a ontologia Ingardena." *Roman Ingarden a filozofia naszego czasu*. Kraków: Polskie Towarzystwo Filozoficzne, 1995.
- Popkin, Richard H.; Stroll, Avrum. *Philosophy Made Simple*. London: Elsevier, 2014.
- Radbruch, Gustav. "Five Minutes of Legal Philosophy." *Oxford Journal of Legal Studies* 26.1 (2006).
- Radbruch, Gustav. "Statutory Lawlessness and Supra-Statutory Law." *Oxford Journal of Legal Studies* 26.1 (2006).
- Radbruch, Gustav. "Ustawowe bezprawie i ponadustawowe prawo." *Filozofia prawa*. Warszawa: PWN, 2009.
- Radzewicz, Piotr. "Kontrola konstytucyjności uchwał Sejmu (uwagi na marginesie postanowienia TK w sprawie U 8/15)." *Państwo i Prawo* 7 (2016).
- Radzewicz, Piotr. "Refusal of the Polish Constitutional Tribunal to apply the act stipulating the constitutional review procedure." *Review of Comparative Law* XXVIII (2017).
- Radzewicz, Piotr; Tuleja, Piotr. Eds. *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego czerwiec 2015 – marzec 2016*. Warszawa: Wolters Kluwer, 2017.
- Railton, Peter A. "The diversity of moral dilemma." *Moral Dilemmas and Moral Theory*. Ed. H.E. Mason. New York-Oxford: Oxford University Press, 1996.
- Rawls, John. *A Theory of Justice*. Cambridge MA: Harvard University Press, 2009.
- Raz, Joseph. *Autorytet prawa*. Trans. P. Maciejko. Intro. J. Kochanowski; N.E. Simmonds. Warszawa: Dom Wydawniczy ABC, 2000.
- Raz, Joseph. *Practical Reason and Norms*. Oxford–New York: Oxford University Press, 1990.
- Raz, Joseph. *The Morality of Freedom*. Oxford: Clarendon Press, 1986.

- Ricoeur, Paul. "Przedmowa. Zagadnienie bycia sobą." *O sobie samym jako innym*. Trans. B. Chelstowski. Warszawa: PWN, 2005.
- Ross, Alf. *On Law and Justice*. London: Stevens & Sons, 1958.
- Sarkowicz, Ryszard; Jerzy Stelmach, *Filozofia prawa XIX i XX wieku*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1998.
- Sarkowicz, Ryszard; Stelmach, Jerzy. *Teoria prawa*. Kraków: Wydawnictwo UJ, 1996.
- Sartre, Jean Paul. *Existentialism is a humanism*, including. New Haven–London: Yale University Press, 2007.
- Scheler, Max. *Der Formalismus in der Ethik und die materiale Wertethik: Neuer Versuch der Grundlegung eines ethischen Personalismus*. Leipzig: Meiner Verlag, 2014.
- Schwartländer, Johannes. "Odpowiedzialność jako podstawowe pojęcie filozoficzne." *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*, selection, translation, ed. J. Filek. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004.
- Selznick, Philip. *The Moral Commonwealth. Social Theory and the Promise of Community*. Berkeley: University of California Press, 1992.
- Siaja, Krzysztof. *Etyka normatywna. Między konsekwencjonalizmem a deontologią*. Kraków: Universitas, 2015.
- Sinnott-Armstrong, Walter. "Moral Dilemmas and Incomparability." *American Philosophical Quarterly* 4 (1985).
- Sinnott-Armstrong, Walter. *Moral Dilemmas (Philosophical Theory)*. Oxford: Basil Blackwell, 1988.
- Skuczynski, Paweł; Zirk-Sadowski, Marek. "Dwa wymiary etyki zawodowej sędziów." *Krajowa Rada Sądownictwa* 1 (2012).
- Skuczynski, Paweł. "Problem zakresu odpowiedzialności moralnej profesjonalistów i jego zastosowania w etyce prawniczej." *Acta Universitatis Lodziensis. Folia Iuridica* 74 (2015).
- Skuczynski, Paweł. *Status etyki prawniczej*. Warszawa: LexisNexis, 2010.
- Skuczynski, Paweł. *The Status of Legal Ethics*. Frankfurt am Main: Peter Lang, 2013.
- Ślipko, Tadeusz. *Zarys etyki ogólnej*. Kraków: Wydawnictwo WAM, 2004.
- Smith, Adam. *Wealth of Nations*. New York: Cosimo Classics, 2007.
- Sorensen, Roy A. "Moral Dilemmas, Thought Experiments, And Conflict Vagueness." *Philosophical Studies* 63 (1991).
- Stasiuk, Karina. *Krytyka kultury jako krytyka komunikacji. Pomiędzy działaniem komunikacyjnym, dyskursem a kulturą masową*. Wrocław: Uniwersytet Wrocławski, 2003.
- Statman, Daniel. Ed. *Moral Luck*. New York: State University of New York Press, 1993.
- Statman, Daniel. *Moral Dilemmas*. Amsterdam–Atlanta: Rodopi, 1995.
- Stawecki, Tomasz. "Autonomous Constitutional Interpretation." *International Journal for the Semiotics of Law* 25.4 (2012).
- Stawecki, Tomasz. "Zaufanie," *Leksykon etyki prawniczej: 100 podstawowych pojęć*, eds. P. Skuczynski, S. Sykuna. Warszawa: Wydawnictwo C.H. Beck, 2013.
- Stelmach, Jerzy. *Współczesna filozofia interpretacji prawniczej*. Kraków: Wydział Prawa i Administracji Uniwersytetu Jagiellońskiego, 1995.
- Styron, William. *Sophie's Choice*. New York: Rosetta Books, 2000.
- Szyszkowska, Maria. *Etyka*. Białystok: Kresowa Agencja Wydawnicza, 2010.

- Tatarkiewicz, Władysław. *Historia filozofii*, vol. I. Warszawa: Wydawnictwo PWN, 1998.
- Tatarkiewicz, Władysław. *Historia filozofii*, vol. I. Warszawa: Wydawnictwo Naukowe PWN, 2001.
- Tatarkiewicz, Władysław. *Historia filozofii*, vol. II. Warszawa: Wydawnictwo Naukowe PWN, 2001.
- Tatarkiewicz, Władysław. *Historia filozofii*, vol. III. Warszawa: Wydawnictwo Naukowe PWN, 2001.
- Tischner, Józef. "Etyka wartości i nadziei." *Wobec wartości*. von Hildebrand, Dietrich. Kłoczkowski, Jan Andrzej. Paściak, Józef. Tischner, Józef. Poznań: W drodze, 1982.
- Tischner, Józef. "Norma i wartość." *O człowieku. Wybór pism filozoficznych*. Wrocław: Zakład Narodowy im. Ossolińskich, 2013.
- Tischner, Józef. "Sztuka etyki." *O człowieku. Wybór pism filozoficznych*. Wrocław: Zakład Narodowy im. Ossolińskich, 2013.
- Tkacz, Sławomir. *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie (od dogmatyki do teorii)*. Toruń: Wydawnictwo Adam Marszałek, 2014.
- Trochimska-Kubacka, Beata. *Absolutyzm aksjologiczny. Rekonstrukcja oparta na aksjologii Ricketa, Schelera i Hartmanna*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1999.
- Vardy, Peter. Grosch, Paul. *The Puzzle of Ethics*. London–New York: Routledge 2016.
- Veitch, Scott. *Law and Irresponsibility: On the Legitimation of Human Suffering*. Routledge: Cavendish, 2007.
- Węgrzecki, Adam. *Scheler*. Warszawa: Wydawnictwo Wiedza Powszechna, 1975.
- Weischedel, Wilhelm "Istota odpowiedzialności." *Filozofia odpowiedzialności XX wieku. Teksty źródłowe*, selection, translation, ed. J. Filek. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2004), p. 85.
- Wendel, W. Bradley. "Impartiality in Judicial Ethics: A Jurisprudential Analysis." *Notre Dame Journal of Law, Ethics & Public Policy* 22 (2008).
- Wendel, W. Bradley. *Lawyers and Fidelity to Law*. Princeton: Princeton University Press, 2010.
- Wendel, W. Bradley. *Ethics and Law. An Introduction*. Cambridge: Cambridge University Press, 2014.
- Wojciechowski, Bartosz. *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych*. Toruń: Wydawnictwo Adam Marszałek, 2009.
- Wojtczak, Sylwia. *O niewspółmierności wartości i jej konsekwencjach dla stosowania prawa*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2010.
- Wolley, Alice; Wendel, W. Bradley. "Legal Ethics and Moral Character." *The Georgetown Journal of Legal Ethics* 20.38 (2010).
- Woodward, Paul A. Ed. *The Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle*. Notre Dame: University of Notre Dame Press, 2001.
- Wronkowska, Sławomira. Ed. *Z teorii i filozofii prawa Zygmunta Ziemińskiego*. Warszawa: Oficyna Wolters Kluwer business, 2007.
- Zajadło, Jerzy. "Nieposłuszeństwo sędziowskie." *Państwo i Prawo* 1 (2016).

- Zieliński, Maciej. "Zasady i wartości konstytucyjne." *Zasady naczelne Konstytucji RP z 2 kwietnia 1997 roku. Materiały 52. Ogólnopolskiego Zjazdu Katedr Prawa Konstytucyjnego w Międzyzdrojach (27–29 maja 2010 r.)*. Eds. A. Bałaban, P. Mijał. Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2011.
- Ziembiński, Zygmunt. *Wartości konstytucyjne*. Warszawa: Wydawnictwo Sejmowe, 1993.
- Ziembiński, Zygmunt. *Wstęp do aksjologii dla prawników*. Warszawa: Wydawnictwo Prawnicze, 1990.
- Zirk-Sadowski, Marek. "Uczestniczenie prawników w kulturze," *Państwo i Prawo* 9 (2002).
- Zirk-Sadowski, Marek. "Wykładnia prawa a wspólnoty sędziów." *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*. Eds. A. Choduń, S. Czepita. Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2010.
- Zirk-Sadowski, Marek. *Rozumienie ocen w języku prawnym*. Łódź: Uniwersytet Łódzki, 1984.
- Zucca, Lorenzo. *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA*. Oxford: Oxford University Press, 2007.