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-Armstrong[1] and D. Statman[2] 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 optimalisation, 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.

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