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

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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, unexpecting 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 rozstrzygania* (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 deontologism 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 studies[17] published in 1963, and later in C. Gilligan[18] 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.

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[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: preconventional, conventional and post-conventional morality. Each stage may further be divided into two phases. On the preconventional 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 lulled 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 he 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 sytuacjach*, 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 judical 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.