PRAVNI ZAPISI, God. XV, br. 2 (2024)
UDK 17.021.1:[340.134:342.41
DOI 10.5937/pravzap15-53803

ORIGINAL SCIENTIFIC ARTICLE

*Sara Azevedo**

THE ROLE OF DILEMMAS IN LAW

Abstract: *It is widely recognized that the application of legal norms can lead to normative conflicts. Alongside the notion of normative conflict, the concept of legal dilemma has gained prominence, although its use in legal discourse raises several questions. First, the concept of legal dilemma is a reproduction, mutatis mutandis, of the concept of dilemma developed in moral philosophy. Second, some legal scholars focus exclusively on constitutional dilemmas (i.e., legal dilemmas involving constitutional norms), seemingly assuming that this is a phenomenon limited to the application of constitutional norms. This paper examines how the concept of dilemma is defined in moral philosophy and discusses whether and to what extent the proposals developed in that field can be imported into the legal world. The aim of this paper is to clarify what is usually meant by legal and constitutional dilemmas, and to identify the advantages and inconveniences of using these concepts in legal discourse.*

Key words: Legal Dilemmas, Constitutional Dilemmas, Moral Dilemmas, Normative Conflicts.

1. Introduction

The concept of normative conflict has been extensively developed within the general theory of normative conflicts. Recently, a category of normative conflicts has received increasing attention: legal dilemmas and, specifically, constitutional dilemmas (*i.e.*, dilemmas involving constitutional norms). The aim of this paper is to clarify what is usually meant by legal and constitutional dilemmas and to identify the advantages and inconveniences of using these concepts in legal discourse.

To this end, the concepts of normative conflict and legal dilemma will be briefly defined. The latter is a reproduction, *mutatis mutandis*, of the

* Guest Lecturer, University of Lisbon, Lisbon Public Law Research Centre, Member of the Lisbon Legal Theory; e-mail: saraazevedo@fd.ulisboa.pt ORCID ID: 0000-0003-0177-8677. A previous version of this paper was published in the LPL Working Paper Series. I am grateful to the members of the Lisbon Legal Theory, in particular David Duarte and Pedro Moniz Lopes, for their support in the preparation of this paper. I am also grateful for the comments of the peer reviewers.

concept of dilemma developed in the field of moral philosophy. For this reason, two proposals for defining the concept of moral dilemma will be analyzed in order to determine whether and how they can be imported into the legal world. An attempt will be made to explain why only one of the definitions of dilemma, presented in the field of moral philosophy, is *prima facie* suitable in the legal context. Finally, we will reflect more generally on the advantages and disadvantages of using the concepts of legal dilemma and constitutional dilemma in the legal world.

2. From Normative Conflicts to Legal Dilemmas

Normative conflicts are a post-interpretative phenomenon.[1] After selecting the normative provisions potentially relevant to the resolution of a case, legal operators unpack the meaning of these provisions, extracting from them legal norms. Once the interpretative process is complete and the linguistic challenges involved have been overcome, it is up to legal operators to ask whether the conditions for the existence of a normative conflict have been met and, if so, to focus on its resolution.

It is commonly held that for a normative conflict to emerge, two conditions need to be fulfilled: there must be an overlap of antecedents and an incompatibility of the deontic effects.[2] According to Ross's widespread classification, there is an overlap whenever the antecedents of two (or more) norms are in a (i) total–total, (ii) total–partial, or (iii) partial–partial relationship.[3] Regarding the second condition, one must ascertain whether there is an incompatibility between the deontic operators or between the norms' deontic consequences.[4]

Alongside the notion of normative conflict, the concept of legal dilemma has gained prominence and is, not surprisingly, a controversial one. A legal dilemma can be defined as a type of normative conflict in which practical reasoning cannot rationally determine which alternative should prevail,

1 See Guastini, R., 1999, Antinomias y Lagunas. *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, No. 29, pp. 437–438; Navarro, P., Rodríguez, J. L., 2014, *Deontic Logic and Legal Systems*, Cambridge, Cambridge University Press, p. 180.

2 See Duarte, D., Normative Conditions of Balancing: Drawing up the Boundaries of Normative Conflicts that Lead to Balances, in: Sieckmann, J., (ed.), 2010, *Legal Reasoning: The Methods of Balancing*, Stuttgart, Franz Steiner Verlag, pp. 51ff.

3 See Ross, A., 2009, *On Law and Justice*, Clark, The Lawbook Exchange, pp. 128ff.

4 For the sake of discursive simplicity, the paradigm of plurinormativity will be assumed (*i.e.*, the idea that conflicts only occur between two or more norms). Thus, it will not be discussed whether conflicts stemming from a single norm can be correctly categorized as normative conflicts. On the topic, see note 40.

because there are no mechanisms for determining what the agent ought to do. Nevertheless, according to another approach, a legal dilemma is a case of normative conflict in which, regardless of the option taken by the agent, there is a loss or sacrifice, or they inevitably do something wrong.[5]

It is also possible to endorse a third view that encompasses the previous ones. Such is the view of Lorenzo Zucca, although the author focuses specifically on constitutional dilemmas. According to Zucca's definition, constitutional dilemmas entail a choice between two goods (protected by fundamental rights) that leads to a loss regardless of the decision taken. Moreover, according to the author, in these cases it is not possible to reach a rational decision.[6]

However, Zucca's proposal has a drawback. By combining two different positions, the author fails to clarify whether one element takes precedence over the other and whether there is a necessary connection between the lack of rational choice and the inevitable sacrifice or wrongdoing.[7] Furthermore, the author seems to imply that dilemmas occur only when constitutional norms are applied. This position, in turn, is justified by the unique nature of constitutional norms, which underlie a different way of identifying and solving constitutional conflicts. However, as will be seen further on, there is no exclusive feature of constitutional norms that would justify such a restriction. For these reasons, the proposed definition should not be accepted, and the following considerations will be limited to the remaining positions.

3. The Root of the Matter: The Notion of Dilemma in Moral Philosophy

The controversy over legal dilemmas sounds oddly familiar. In fact, the concept of legal dilemma is a reproduction, *mutatis mutandis*, of the highly controversial notion of moral dilemma. Not only do scholars disagree on the features of this phenomenon, but they also question the existence of genuine moral dilemmas.[8]

5 For a comparison of these two definitions, see Martínez Zorrilla, D., 2011, Constitutional Dilemmas and Balancing, *Ratio Juris*, Vol. 24, No. 3, pp. 349ff.; Alvarez, S., 2011, Constitutional Conflicts, Moral Dilemmas and Legal solutions, *Ratio Juris*, Vol. 24, No. 1, pp. 59ff.

6 See Zucca, L., Conflicts of Fundamental Rights as Constitutional Dilemmas in: Brems, E., (ed.), 2008, *Conflicts Between Fundamental Rights*, Antwerp, Intersentia, pp. 20ff. See also Zucca, L., 2007, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford, Oxford University Press.

7 Criticizing this aspect, see Martínez Zorrilla, D., 2011, pp. 350–353.

8 See Lemmon, E. J., Moral Dilemmas, 1962, *The Philosophical Review*, Vol. 71, No. 2, pp. 139ff.; MacIntyre, A., 1990, Moral Dilemmas, *Philosophy and Phenomenologi-*

Moral dilemmas are generally understood as a specific category of moral conflicts.[9] A moral conflict emerges when the agent is required to perform two actions that cannot be jointly performed.[10] Two views have developed regarding the features that a moral conflict must possess to qualify as a moral dilemma.

Some scholars focus on the idea of moral residue or moral failure. In this sense, a moral dilemma exists whenever, regardless of the choice made by the agent, there is a loss or sacrifice, or the agent inevitably does something wrong (an inevitable wrongdoing). In this sense, some authors employ the idea of guilt or remorse, emphasizing the psychological aspect, while others prefer the concepts of sacrifice and loss. For Lisa Tessman, a resolvable conflict may turn into a dilemma whenever the agent finds herself in a situation of moral failure, even if she makes the "right" decision, simply because she has neglected what the author calls a non-negotiable moral requirement.[11]

Alternatively, authors such as David Zorrilla and Silvina Alvarez point out the impossibility of reaching a rational decision as the true feature of moral dilemmas, since no justification can be found for preferring one duty over another.[12] Hence, according to this view, moral dilemmas occur whenever moral normative systems lack resources (criteria, scales,

cal Research, Vol. 50, pp. 367ff.; Donagan, A., Moral Dilemmas, Genuine and Spurious: A Comparative Anatomy, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 12ff.; and Sinnott-Armstrong, W., Moral Dilemmas and Rights, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 49 ff.

9 See Martínez Zorrilla, D., 2008, Dilemas morales y Derecho, *Discusiones*, No. 8, pp. 22–23.

10 The same goes for omission. Drawing attention to this aspect, see Tessman, L., 2015, *Moral Failure. On the Impossible Demands of Morality*, Oxford, Oxford University Press, p. 15 – in particular, note 8). It should be stressed that although the concepts of moral conflict and moral dilemma revolve around the notion of conflicting duty, normative ethics also deals with the problem of conflicts between rights. The two approaches do indeed overlap. See Finkelstein, C. O., 2001, Two Men and a Plank, *Legal Theory*, No. 7, pp. 279ff.

11 See Tessman, L., 2015, pp. 15–44. Also, in favor of this explanatory approach, emphasizing the idea of necessary evil and identifying five characteristics usually present in a dilemma, see Lariguet, G., 2008, Dilemas morales y Derecho. Una crítica a David Martínez, *Discusiones*, No. 8, pp. 80ff. Specific criticisms of this approach can be found in McConnell, T. C., Moral residue and dilemmas, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 36 ff.; and Foot, P., 2002, *Moral Dilemmas and Other Topics in Moral Philosophy*, Oxford, Oxford University Press, pp. 175ff.

12 On the topic, see Wallace, R. J., Practical Reason, in: Zalta, E. N., (ed.), 2020, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/spr2020/entries/practical-reason/, 23. 10. 2024).

procedures, etc.) to identify the definitive obligation among the different *prima facie* obligations in conflict.[13] Thus, for the aforementioned authors, the concepts of rationality and rational decision-making are understood as having and giving reasons for action. In this sense, not being able to reach a rational decision entails not having a reason to choose one course of action over another. But these are ambiguous terms. For instance, Manuel Atienza identifies four conditions for a decision to be rational: (i) that it follows the rules of deductive logic, (ii) that it follows the principles of practical reason (consistency, efficiency, coherence, generalization and sincerity), (iii) that it does not circumvent the use of binding sources of law, and (iv) that it does not take into account ethical, political and other criteria that are not specifically provided for in the legal system.[14]

Despite the disagreement that hangs over the issue, the following cases are usually perceived as moral dilemmas:

- the case of Sartre's student (torn between the duty to participate in the war and the duty to remain close to his family);
- Sophie's choice (who is given the choice of which of her two children to save, knowing that not choosing would result in the death of both);
- Plato's dilemma (in which the fulfillment of the duty to pay a debt implies the violation of the duty to protect others).[15]

The first way of defining the concept of moral dilemma is particularly popular among proponents of genuine moral dilemmas. It became known as the phenomenological argument because it focuses on how the agent experiences dilemmatic situations. Coined as experientialism, this view stresses the feeling of remorse or guilt that the agent experiences when forced to forgo one action in favor of another.[16]

13 See Martínez Zorrilla, D., 2011, pp. 349ff.; Alvarez, S., 2011, pp. 59ff. Arguing for a hybrid notion of moral dilemma, involving cases where the agent inevitably violates an undefeated moral demand without necessarily leaving a moral residue, see Sinnott-Armstrong, W., 1996, pp. 50ff. Of course, this approach has also been criticized, mainly focusing on the epistemic aspect of the problem – instead of there being no (rationally) "right" answer, the deadlock would be justified by the epistemic deficit the agent finds themselves in. Underlining this aspect, see MacIntyre, A., 1990, pp. 371ff.

14 See Atienza, M., 1987, Para una Razonable Definición de "Razonable", *Doxa. Cuadernos de Filosofia del Derecho*, No. 4, pp. 193–194.

15 See McConnell, T., Moral Dilemmas, in: Zalta, E. N., Nodelman, U., (eds.), 2024, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/fall2018/entries/moral-dilemmas/, 23. 10. 2024).

16 The use of the terms experientialism and rationalism here is due to Christopher Gowans (see Gowans, C., Moral Theory, Moral Dilemmas, and Moral Responsibili-

However, as mentioned, several authors deny the existence of genuine moral dilemmas. This approach, commonly known as rationalism, is based on a set of norms of deontic logic. It claims that the application of these norms is incompatible with the existence of genuine moral dilemmas, otherwise morality fails in its purpose of regulating human behavior.[17] In this context, it is argued that the alleged dilemmas are in fact irresolvable conflicts between *prima facie* non-defeated obligations, rather than between all things considered obligations. Thus, the only all things considered obligation in an irresolvable conflict is disjunctive, requiring the agent to fulfill one of the conflicting *prima facie* obligations.[18] Despite the success of this explanation – avoiding any paradoxical implications for normative ethics – it falls short of what many proponents of genuine moral dilemmas have argued for.[19]

In any case, the question of whether there are genuine moral dilemmas is far too complex to be addressed in depth in an article focused on legal dilemmas. In fact, as several of the protagonists in the controversy have acknowledged, the issue is influenced by deeper and broader questions of moral philosophy that will not be discussed here.[20]

---

ties, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 119ff.) who defends one of the versions of the first view. Favoring the existence of genuine moral dilemmas, among other references, see Williams, B., 1965, Ethical Consistency, *Proceedings of the Aristotelian Society*, Vol. 39, pp. 103ff.; Marcus, R., 1980, Moral Dilemmas and Consistency, *The Journal of Philosophy*, Vol. LXXVII, No. 3, pp. 126ff.; Tessman, L., 2015, pp. 24ff.

17 See Conee, E., 1982, Against Moral Dilemmas, *The Philosophical Review*, Vol. 91, No. 1, pp. 87ff.; McConnell, T., 1978, Moral Dilemmas and Consistency in Ethics, *Canadian Journal of Philosophy*, Vol. 8, No. 2, pp. 270ff. More recently, with the argument that denying moral dilemmas is a regulative ideal of practical reasoning, which allows us to explain the notion of moral residue and the belief of some agents that they have done something wrong, without this proving that real moral dilemmas exist, see Cholbi, M., 2016, The denial of moral dilemmas as a regulative ideal, *Canadian Journal of Philosophy*, Vol. 46. No. 2, pp. 2ff. For a description of the several ways of avoiding the problem of genuine moral dilemmas, see Finkelstein, C. O., 2001, pp. 293ff.

18 See Brink, D., Moral Conflict and Its Structure, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 113ff. Expressing skepticism about the existence of irresolvable moral conflicts, when defined as conflicts between conclusive oughts, see Schaber, P., Are there insolvable moral conflicts?, in: Baumann, P., Betzler, M., (eds.), 2004, *Practical Conflicts – New Philosophical Essays*, Cambridge, Cambridge University Press, pp. 279–294.

19 See Haan, J. de, 2001, The Definition of Moral Dilemmas: A Logical Problem, *Ethical Theory and Moral Practice*, No. 4, pp. 279ff.

20 See MacIntyre, A., 1990, pp. 381–382; Donagan, A., 1996, p. 11. On the opinion that linguistic issues pollute this debate, see Sinnott-Armstrong, W., 1996, p. 48.

4. The Concept of Dilemma in the Legal Realm

As noted above, the disputes surrounding the concept of a moral dilemma have been imported into the concept of a legal dilemma. In both cases, the question is whether the real feature of dilemmas is the tragic dimension or the irrationality of the choice. The purpose of this paper, however, is to define the concept of legal (and constitutional) dilemma and to determine its suitability in legal discourse. With this in mind, it will be determined which view is to be preferred in the legal field, regardless of the discussion carried out in the moral field.

The first sense of moral dilemma focuses on the idea of moral failure, materialized in a sacrifice or an inevitable wrongdoing. However, the notion of inevitable wrongdoing seems to be problematic in law. First, it is only tenable for (some) non-positivist views since it distinguishes normative conflicts and legal dilemmas based on a moral criterion (*i.e.*, the failure to comply with a moral parameter). From a positivist perspective, the fact that an agent inevitably does something wrong may be irrelevant. According to this view, the existence and content of law depends on social facts and not on its merits.[21]

Even from an anti-positivist perspective, this definition is difficult to uphold. For anti-positivists, what determines what law is are moral facts, not social facts. For example, in *Law's Empire*, Ronald Dworkin saw legal orders as sets of considerations that the courts of a given society are morally justified in applying, regardless of whether these considerations are determined by any source.[22] Within this view, it would not be problematic to define legal dilemmas as a type of normative conflict in which the agent inevitably does something wrong. The same applies to any stance that endorses the so-called "one-system" view (*i.e.*, the idea that legal norms are a subset of moral norms).[23] However, as said, not all non-positivists accept these ideas. This is the case with authors such as Lon Fuller, who argues that law cannot guide behavior unless it meets a minimum set of requirements (such as generality, clarity, stability, and consistency) – what Fuller called "the inner morality of law".[24] Even for this position, it would be

21 An in-depth description of positivism is inappropriate here. On the subject, see Leslie, G., Adams, T., Legal Positivism, in: Zalta, E. N., (ed.), 2019, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/entries/legal-positivism/, 23. 10. 2024).

22 See Dworkin, R., 1986, *Law's Empire*, Cambridge, Harvard University Press.

23 On the topic, see Dindjer, H., 2020, The new legal anti-positivism, *Legal Theory*, No. 26, p. 181ff.

24 See Fuller, L. L., 1964, *The Morality of Law*, New Haven, Yale University Press, pp. 33ff.; 41ff.; 46ff.

necessary to justify why the distinction between conflicts and legal dilemmas is based on a moral criterion.[25]

It follows that a taxonomy of normative conflicts based on this criterion is problematic or even inaccurate, depending on the theoretical framework adopted.

Turning to the notion of sacrifice, it is often used in the resolution of normative conflicts, especially in the context of balancing. What prevents it from becoming the decisive feature of legal dilemmas, however, is precisely its widespread use in legal discourse. In the resolution of a normative conflict, one norm is preferred to another and, to that extent, the satisfaction of one norm implies the sacrifice of another. If the idea of sacrifice is inherent in all normative conflicts, it can no longer be upheld as a distinguishing feature of legal dilemmas. All in all, the criterion in question does not really distinguish between conflicts and legal dilemmas and should therefore be rejected.

5. Dilemmas and the Absence of a Rational Decision

In light of the above, if the concept of legal dilemma were to be used in legal discourse, it could only be defined as a situation in which the agent is unable to reach a rational choice.

As mentioned above, in moral philosophy a dilemma is a case of normative conflict in which the moral normative system lacks resources (criteria, scales, procedures, etc.) to identify the definitive obligation among the different *prima facie* obligations in conflict.[26] It remains to be seen in which situations a moral normative system lacks the resources to determine which is the definitive obligation to be fulfilled by the agent. It has been suggested that this may occur in cases of equivalence between alternatives, also known as symmetrical conflicts, and in cases of incomparability between alternatives.[27]

25 This paper is not concerned with the distinction between positivist and anti-positivist views, nor does it express a preference for either. It simply seeks to highlight the difficulty of importing into the legal world one of the definitions of a moral dilemma typically presented in moral philosophy. It is understood that this difficulty arises whatever view is taken in the wider debate about the necessary conditions for the existence of law.

26 See Martínez Zorrilla, D., 2008, pp. 31–35. For a logical representation of the concept of a dilemma as a set of disjoint or alternative obligations, rather than inconsistent joint obligations, see Mendonca, D., 2008, Sobre el concepto de dilema moral, *Discusiones*, No. 8, pp. 117ff.

27 See Sinnott-Armstrong, W., 1996, pp. 52ff.; Brink, D., 1996, pp. 106ff. (although this author uses the concepts of equipollent and incommensurable alternatives); Finkel-

5.1. EQUIVALENCE BETWEEN ALTERNATIVES

The so-called symmetrical conflicts refer to situations where (i) the same moral principle or value is at stake and (ii) the alternatives are equivalent from all morally relevant perspectives. To illustrate, the existence of two incompatible promises and the resulting application of the same moral principle – that the promises must be kept – is not sufficient. Equivalence requires the absence of any morally relevant aspect that favors the fulfilment of one of the promises.

In another example, suppose a doctor has to help two patients who have suffered a heart attacks. Both need immediate care, but it is impossible to help them at the same time. From this fact alone, we cannot conclude that the alternatives are equivalent. For this to be the case, there would have to be no difference between the two patients (for example, they would have to have identical chances of survival and the identical clinical records).

The same applies to the well-known case of the conjoined twins Jodie and Mary, since only one of the sisters could survive after surgery, and failure to perform the medical procedure would mean that both would die in the very short term. Therefore, only if the two sisters' chances of survival were identical would there be a moral dilemma due to the equivalence of alternatives. Therefore, the phenomenon of equivalence between options is extremely rare.[28]

5.2. INCOMPARABILITY BETWEEN ALTERNATIVES

According to Ruth Chang, incomparability of alternatives occurs when it is impossible to establish a positive comparative relationship between two or more elements regarding a given covering value. Chang states that two objects are incomparable when it is not possible to establish a positive fundamental binary value relation between them in terms of a covering value. A value relation is positive if it represents how two objects relate to each other, and not the opposite – *i.e.*, the failure to establish a value relation. The set of value relations is basic if it exhausts the conceptual space of comparability between two objects in terms of a covering value. A value relation is binary if it relates two objects in terms of a covering value.[29]

---

stein, C. O., 2001, pp. 305ff. (referring to a choice between incommensurable alternatives); Martínez Zorrilla, D., 2008, pp. 31–35.

28 See Martínez Zorrilla, D., 2008, pp. 36–42.

29 See Chang, R., Introduction, in: Chang, R., (ed.), 1997, *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, pp. 1ff.; Chang, R., Value Incomparability and Incommensurability, in: Hirose, I., Olson, J., (eds.), 2015, *The Oxford Handbook of Value Theory*, Oxford, Oxford University Press, pp. 205ff.

Incomparability proves problematic in the field of practical reason. Although the issue is not entirely settled, it has been argued that justifying a choice requires comparing alternatives. From this perspective, known as comparativism, the presence of incomparable elements thwarts the rational choice that is presupposed by practical reason.[30]

Incomparability is not to be confused with incommensurability. Incommensurability occurs when it is impossible to evaluate two or more elements according to a cardinal scale. Although incommensurability prevents us from making some comparative judgments, it does not make judgments impossible altogether (for example, they can still be carried out using an ordinal scale).[31]

As mentioned above, all comparisons require the identification of a covering value. In the example given by Virgílio Afonso da Silva, if one has to choose between music composed by Bach and that composed by Madonna, the choice can be based on the comparative judgment that Bach has composed better music. In this case, the covering value is the "quality of music". But it could be replaced by another – for example, the "contribution to the Western music culture". The contestability of the comparative judgment (in this case, the lack of consensus about who is the better composer) does not make the two alternatives incomparable. Comparability is established by the possibility of making a comparative judgment – whether it is consensual or not. To be sure, the difficulties raised by the choice of the relevant covering value (due to its vagueness or to the fact that it is presented as a combination of different contributory values) should not be underestimated. Although these contingencies do not prevent comparison, they can make it considerably more difficult.[32]

30 See Chang, R., 1997, pp. 7ff.; Chang, R., 2015, pp. 216ff. Here, the concept of practical reason is used in the sense of the field of knowledge that deals with the deliberative process inherent to action. Thus, reason is labelled "practical" not only because its object is action, but also because the deliberative process leads to action. For further developments, see Wallace, R. J., 2020.

31 This means that the once widespread view that incommensurable objects were simultaneously incomparable is not followed. In fact, there is an implication only between incomparability and incommensurability (and not the other way around). See in this sense Raz, J., 1986, *The Morality of Freedom*, Oxford, Clarendon Press, pp. 322ff.; Raz, J., Incommensurability and Agency, in: Chang, R., (ed.), 1997, *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, pp. 110ff. Alongside this view, a distinction has been made between strong and weak incommensurability. See Waldron, J., 1994, Fake Incommensurability. A Response to Professor Schauer, *Hastings Law Journal*, Vol. 45, No. 4, pp. 815ff.; Silva, V. A. da, 2011, Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision, *Oxford Journal of Legal Studies*, Vol. 31, No. 2, pp. 283ff.

32 See Silva, V. A. da, 2011, pp. 282ff.; Chang, R., 1997, pp. 14ff. and 22ff.

This notion of incomparability leaves unanswered the question of what comparative evaluative relations can be established between objects, and it is precisely on this point that there is no consensus in the literature. One could say that two objects are comparable if and only if it is true that one of them is better than the other, or that both are of equal value. This is known as the trichotomy thesis, precisely because it argues that there are only three types of relationship between two objects: superiority, inferiority, and exact parity. Any instance that falls outside these possibilities would be a case of incomparability.[33]

The concept of transitivity and the so-called small improvement argument are usually relied upon to defend this view. The relationship between objects A, B, and C is said to be transitive if the following statement is true: if A and B have the same value, and if C is better than A, then C is better than B. If C is not better than B, then A, B, and C are incomparable, since the relationship between them is not transitive. On the other hand, according to the small improvement argument, if A is not better than B, and an improvement in one of them (*e.g.*, A+) does not make it better than the other (*e.g.*, B), then none of the above comparison relations occur, which determines the incomparability between A and B (since neither is better than the other, nor do they have exactly the same value). The strength of the argument therefore depends entirely on the acceptance of the trichotomy thesis.[34]

The trichotomy thesis has been the subject of much debate in the recent literature on the subject. Particularly noteworthy is the position developed by Ruth Chang. According to the author, this view rests on a questionable assumption: that the three identified relations exhaust the conceptual space of comparability. However, Chang argues that this assumption should not be part of the very notion of incomparability, and that there is a fourth value relation in addition to the three described: comparable alternatives can be "on a par". This fourth value relation allows us to overcome the small improvement argument: when two alternatives are "on a par", they are neither better nor worse, and a small improvement in one of them does not reveal a relationship of superiority or inferiority in terms of satisfying a covering value. Thus, by rejecting the trichotomy thesis, this argument loses its relevance, since it can no longer lead to a scenario of incomparability.[35]

33 See Chang, R., 2015, pp. 212ff.; Silva, V. A. da, 2011, pp. 293ff.

34 For a brief explanation of this position, see Chang, R., 2015, pp. 212ff. On the relation of the trichotomy thesis to transitivity and the small improvement argument, see Silva, V. A. da, 2011, pp. 293ff.

35 See Chang, R., 2002, The Possibility of Parity, *Ethics*, Vol., 112, No. 4, pp. 663ff.; Chang, R., 2015, pp. 212ff. On outlining the objections to the trichotomy thesis and

By properly distinguishing between incomparability and incommensurability, one concludes that the former phenomenon is rather uncommon (if it exists at all): it requires the complete absence of (or the inability to find) a covering value. Therefore, a dilemma based on incomparable alternatives is unlikely to arise.

5.3. THE SPECIFIC CASE OF LEGAL DILEMMAS

It remains to be determined whether and to what extent the notion of dilemma developed in moral philosophy can be adopted in the legal context.

From what has been said, one may claim that legal dilemmas occur whenever legal normative systems lack resources (*e.g.*, criteria, scales, procedures) to solve legal conflicts by identifying the ultimate alternative of action among the different *prima facie* prescriptions in conflict. For this to happen in the field of law, the conflict must not be solvable by so-called norms of conflicts.

Norms of conflicts are so named because they solve normative conflicts by establishing a criterion that determines the preference of one norm over another. Typically, there are three such norms in legal systems: *lex superior*, *lex posterior*, and *lex specialis* (according to which the superior, posterior, or special norm must prevail, respectively).[36]

Some normative conflicts cannot be solved by the application of norms of conflicts, either because they may not apply to the case, or because they may prescribe incompatible solutions when more than one norm of conflicts is applicable. This is the case with conflicts between constitutional norms, provided that they do not establish a relation of speciality *lato sensu*. It can also occur whenever more than one norm of conflicts is applicable to a given case, and they provide for incompatible solutions – for example, when a posterior general norm collides with a previous special norm. In this case, the so-called first-degree norms of conflicts collide and a second-degree norm of conflicts is required. However, legal systems may not include a second-degree norm of conflicts or may not include such a norm applicable to the case.[37]

---

the alternative proposals it has prompted, see Hsieh, N., Incommensurable Values, in: Zalta, E. N., (ed.), 2021, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/fall2021/entries/value-incommensurable/, 23. 10. 2024).

36 It should be noted that legal systems may include other norms of conflicts. This is contingent and therefore varies according to the legal system concerned. See Kelsen, H., Derogation, 1973, *Essays in Legal and Moral Philosophy*, Dordrecht/Boston, Reidel Publishing Company, p. 272.

37 The existence of meta-criteria for the resolution of conflicts created by norms of conflicts, commonly referred to as second-degree conflicts, will not be analyzed in

These conflicts are usually described as irresolvable. Although the expression is ambiguous, it highlights that the normative system does not contain a norm capable of solving the antinomy.[38] Some authors argue that if no norm of conflicts is applicable to the case or if that norm does not solve the conflict, the balancing method should be used.[39] Therefore, these conflicts can only be solved through balancing, which means that the decision-maker is left with a discretionary power.

Thus, if we adopt a definition of legal dilemmas inspired by the one developed in moral philosophy, legal dilemmas can only arise in the context of irresolvable normative conflicts. However, not all irresolvable conflicts result in legal dilemmas. For this reason, it is important to examine the two cases in which, in theory, a legal dilemma would arise. As moral dilemmas, this would occur in two scenarios: equivalence between alternatives and incomparability between alternatives.

As for legal dilemmas based on equivalent alternatives, they would occur when there is no legally relevant distinguishing factor between two alternatives. This symmetry between alternatives only takes place in conflicts that involve one norm – such as the one that opposes A's right to life and B's right to life.[40]

However, these conflicts, which can be called uninormative conflicts, may not always lead to symmetrical legal dilemmas, since the latter presupposes two conditions: (i) the application of a single norm (from which conflicting instantiations stem) and (ii) the absence of any other legally relevant distinguishing factor.

Going back to the example of the conjoined twins, the doctor would only be faced with an irrational decision (due to the absence of criteria,

depth. On this subject, see, among others, Bobbio, N., 1990, Sobre los criterios para resolver las antinomias, *Contribución a la teoría del derecho*, Madrid, Debate, pp. 350ff.; Guastini, R., 1999, pp. 442ff.

38 See Silva Sampaio, J., 2021, p. 52.

39 The reasoning underlying this conclusion (and which highlights the conditions on which the application of the balancing method depends) will not be developed further. In this respect, see Silva Sampaio, J., Brute Balancing, Proportionality and Meta-Weighing of Reasons, in: Sieckmann, J., (ed.), 2021, *Proportionality, Balancing, and Rights – Robert Alexy's Theory of Constitutional Rights*, Cham, Springer, pp. 51ff.

40 As stated, this study will not discuss conflicts arising from a single norm and whether they can be correctly categorized as normative conflicts. It is sufficient to note that, from the so-called pragmatic perspective, which focuses on the agent, even in these cases, the normative system fails to regulate behavior. On the topic, see Duarte, D., Structuring Addressees in Fundamental Right Norms: An Application, in: Himma, K. E., Spaić, B., (eds.), 2016, *Fundamental Rights: Justification and Interpretation*, The Hague, Eleven International Publishing, pp. 90–92; Navarro, P., Rodríguez, J. L., 2014, p. 183.

scales, procedures) if the sisters' chances of survival were identical. A legal dilemma based on equivalent alternatives is, therefore, unlikely to arise.

A similar conclusion can be drawn about legal dilemmas based on incomparable alternatives. As with moral dilemmas, there will rarely be a case where it is not possible to compare alternatives. As said above, the comparison is always made in terms of some covering value. The problem then lies not so much in the comparison itself, but in the choice of that value (its potential ambiguity or the existence of various contributing factors).

On the other hand, the rejection of the trichotomy thesis simplifies the role of legal actors. In some cases, the conclusion may be that there is no relation of superiority, inferiority, or equality between the alternatives. However, this does not mean they are incomparable, which is paramount in the context of balancing, because the measurements involved do not allow the kind of fine-grained analysis the trichotomy thesis requires.

Consider the following example: a normative authority issues a norm that requires alcoholic beverages to be labeled with a warning about the need for moderation in alcohol consumption. At the same time, it specifies that this warning must be of a certain size. This infra-constitutional norm amounts to an interference with the freedom of economic initiative (provided for in some constitutions). However, this interference is based on another constitutional norm, that of the right to health (also enshrined in most constitutions). From the outset, the assessment to be made, regarding the intensity of the interference with the fundamental right in question, would not change if the sign to be placed on the label were slightly larger. However, for a supporter of the trichotomy thesis and the associated notion of transitivity, the above example would be sufficient to support the incomparability of the alternatives at issue, which would prevent a rational decision from being reached by balancing them.[41]

It is in this context that Ruth Chang's position becomes relevant: as mentioned, the balancing method provides a rough measurement process that does not detect finer differences between degrees of interference. Therefore, balancing often results in a case where the alternatives are in a relation of rough equality or "on a par", rather than in a relation of exact parity. However, this does not mean that the decision made is not rational because of the incomparability of the alternatives.[42]

41 See Silva, V. A. da, 2011, pp. 294ff.

42 See Silva, V. A. da, 2011, pp. 286ff. This idea is an adaptation of the notable/nominal contrast developed by Chang to the field of balancing. According to the author, apparent cases of incomparability can be refuted when there is a contrast between a notable example and a merely nominal example. In this situation, the comparison is obvious because these examples are so clearly at the antipodes of the spectrum of

Finally, balancing considers concrete alternatives, not abstract values. In the case of a conflict between freedom of expression and the right to privacy, the aim is not to analyze the abstract values of privacy or freedom of expression but to compare the many ways of protecting and guaranteeing the rights granted by these norms in a specific situation.[43]

6. Final Remarks

Some conclusions follow from the foregoing. As said, the notions of legal and constitutional dilemmas are based on the concept of dilemma developed in moral philosophy. Nevertheless, certain definitions of moral dilemma cannot be employed in the legal sphere, at least according to a positivist approach. Furthermore, even from a non-positivist perspective, it would be difficult to endorse a taxonomy of normative conflicts based on a moral criterion. Thus, regardless of the debate in moral philosophy, one definition is more robust in law: the one that sees legal dilemmas as a type of normative conflict in which practical reasoning cannot rationally determine which alternative should prevail.

Before assessing the advantages and disadvantages of using these concepts in legal discourse, a clarification is in order. The literature on the subject tends to focus exclusively on constitutional dilemmas, seemingly assuming that legal dilemmas are limited to the application of constitutional norms. However, there is no reason for this assumption: given the definition adopted, dilemmas can stem from all types of norms, regardless of their hierarchy.

An example of this is the aforementioned case of the doctor who is faced with conflicting duties to assist two patients who have suffered heart attacks. In most legal systems, these duties derive either from codes of ethics or from the criminal offence of failure to render aid. It is therefore a conflict between instantiations of the same infra-constitutional norm.

This narrow approach may be explained by some misconceptions about constitutional norms. Some scholars still draw a distinction between

satisfaction of a particular value. However, since this spectrum functions as a continuum, it is not because there are several progressively better versions of the nominal example that one moves from a scenario of comparability to one of incomparability. See Chang, R., 1997, pp. 14ff.; Chang, R., 2002, pp. 673ff.

43 See Silva, V. A. da, 2011, pp. 286ff. From the perspective of practical reason, Ruth Chang also acknowledges that the comparability of values is more challenging than the comparability of alternative courses of action, although the author points out that in the first case it is possible to compare the instantiations of values in a given factual context. See Chang, R., 2015, pp. 209ff.

constitutional norms and lower-level norms, claiming that the former are applied differently or even have a different prescriptive force because of certain features. Such a view cannot be endorsed; even though constitutional provisions usually resort to ambiguous terms that lead to linguistic indeterminacy, and constitutional norms deal with issues that are morally (and not only legally) relevant, this does not mean that they are the only type of norms capable of creating legal dilemmas (although they may be more prone to this phenomenon).[44]

With this in mind, let us turn to the advantages and disadvantages of using the concept of legal dilemma in legal discourse.[45]

First, even in the context of a conceptual analysis, the explanatory power of these concepts is influenced by the likelihood of the empirical verification of the phenomena to which they refer. These concepts will be of little help in understanding and applying the law if legal actors are extremely unlikely to encounter such situations.

The probabilistic judgment underlying this criticism is even more pronounced in law (compared to the moral domain), given the peculiarities of most legal systems. For example, in the context of constitutional review, when applying the principle of proportionality, one must determine whether the means chosen by the legislator are appropriate, necessary and proportionate in the strict sense. To this end, alternative measures are considered, which, when compared, may render the chosen means unnecessary or disproportionate. In this case, the equivalence between the different alternatives (the one chosen by the legislator and the one(s) considered by the court) does not seem to be particularly problematic. This scenario – usually referred to as a "stalemate"[46] – only reveals the legislator's discretion to choose between one measure and another, with which the court is not allowed to interfere. Furthermore, in distinguishing between alternatives, the legislature has at its disposal an impressive array of legal factors – essentially all the reasons for the decision that each

44 By way of example, Alexy argues that (i) principles are connected to all fundamental rights norms, regardless of whether they take the form of principles or rules, and that (ii) conflicts between principles are solved through balancing. The author also argues for a necessary link between proportionality and fundamental rights. See Alexy, R., 2014, Constitutional Rights and Proportionality, *Revus*, No. 22, pp. 51–65 – in particular, pp. 60ff.

45 On the selection of legal concepts, which involves three options: employing established concepts, modifying them, and resorting to new concepts, see Kähler, L., The Influence of Normative Reasons on the Formation of Legal Concepts, in: Hage, J., Pfordten, D. von der, (eds.), 2009, *Concepts in Law*, Dordrecht, Springer, pp. 83ff.

46 See Alexy, R., 2003, On Balancing and Subsumption. A Structural Comparison, *Ratio Juris*, Vol. 16, No. 4, pp. 443 and 445.

legal system allows legal operators to consider. The variety and quantity of reasons to be taken into account gives the decision-maker a wide margin of discretion, which contributes to the rationality of the decision-making process.

On the other hand, the concept of legal dilemma in the proposed definition is strictly focused on the resolution process: it emphasizes the lack of resources to solve a normative conflict and reach a rational decision. However, the identification of normative conflicts is also fraught with varying degrees of difficulty. Recently, Alessio Sardo has suggested that the detection of certain normative conflicts is more cognitively demanding. According to Sardo, in these cases logic is not sufficient to identify normative conflicts, and must be complemented by semantics.[47] It remains to be seen, therefore, why the concept of legal dilemma, as thus defined, focuses exclusively on the resolution process, without considering the identification process.

Finally, the similarity between the concepts of moral and legal dilemmas may be misleading, since the occurrence of legal or constitutional dilemmas does not necessarily imply the occurrence of moral dilemmas (and *vice versa*). Moreover, moral and legal systems display different mechanisms to solve normative conflicts.

In light of all these drawbacks, it seems highly questionable whether the use of the concepts of legal and constitutional dilemmas can help us to better understand and apply the law.[48]

Bibliography

1. Alexy, R., 2003, On Balancing and Subsumption. A Structural Comparison, *Ratio Juris*, Vol. 16, No. 4, pp. 433–449.
2. Alexy, R., 2014, Constitutional Rights and Proportionality, *Revus*, No. 22, pp. 251–65.
3. Alvarez, S., 2011, Constitutional Conflicts, Moral Dilemmas and Legal solutions, *Ratio Juris*, Vol. 24, No. 1, pp. 59–74.
4. Atienza, M., 1987, Para una Razonable Definición de "Razonable", *Doxa. Cuadernos de Filosofia del Derecho*, No. 4, pp. 189–200.
5. Bobbio, N., 1990, Sobre los criterios para resolver las antinomias, *Contribución a la teoría del derecho*, Madrid, Debate, pp. 339–353.

47 See Sardo, A., 2018, Let's talk about antinomies. Normative systems reloaded, *Revus*, No. 36, pp. 12ff.

48 On how normative reasons and other factors (such as linguistic and operational constraints) influence the development of legal concepts, see Kähler, L., 2009, 81ff.

6. Brink, D., Moral Conflict and Its Structure, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 102–126.
7. Chang, R., Introduction, in: Chang, R., (ed.), 1997, *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, pp. 1–34.
8. Chang, R., 2002, The Possibility of Parity, *Ethics*, Vol. 112, No. 4, pp. 659–688.
9. Chang, R., Value Incomparability and Incommensurability, in: Hirose, I., Olson, J., (eds.), 2015, *The Oxford Handbook of Value Theory*, Oxford, Oxford University Press, pp. 205–224.
10. Cholbi, M., 2016, The denial of moral dilemmas as a regulative ideal, *Canadian Journal of Philosophy*, Vol. 46. No. 2, pp. 268–289.
11. Conee, E., 1982, Against Moral Dilemmas, *The Philosophical Review*, Vol. 91, No. 1, pp. 87–97.
12. Dindjer, H., 2020, The new legal anti-positivism, *Legal Theory*, No. 26, pp. 181–213.
13. Donagan, A., Moral Dilemmas, Genuine and Spurious: A Comparative Anatomy, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 11–22.
14. Duarte, D., Normative Conditions of Balancing: Drawing up the Boundaries of Normative Conflicts that Lead to Balances, in: Sieckmann, J., (ed.), 2010, *Legal Reasoning: The Methods of Balancing*, Stuttgart, Franz Steiner Verlag, pp. 51–62.
15. Duarte, D., Structuring Addressees in Fundamental Right Norms: An Application, in: Himma, K. E., Spaić, B., (eds.), 2016, *Fundamental Rights: Justification and Interpretation*, The Hague, Eleven International Publishing, pp. 83–92.
16. Dworkin, R., 1986, *Law's Empire*, Cambridge, Harvard University Press.
17. Finkelstein, C. O., 2001, Two Men and a Plank, *Legal Theory*, No. 7, pp. 279–306.
18. Foot, P., 2002. *Moral Dilemmas and Other Topics in Moral Philosophy*, Oxford, Oxford University Press.
19. Fuller, L. L., 1969, *The Morality of Law*, New Haven, Yale University Press.
20. Gowans, C., Moral Theory, Moral Dilemmas, and Moral Responsibilities, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 199–215.
21. Guastini, R., 1999, Antinomias y Lagunas. *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, No. 29, pp. 437–450.
22. Haan, J. de, 2001, The Definition of Moral Dilemmas: A Logical Problem, *Ethical Theory and Moral Practice*, No. 4, pp. 267–284.
23. Hsieh, N., Incommensurable Values, in: Zalta, E. N., (ed.), 2021, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/fall2021/entries/value-incommensurable/, 23. 10. 2024).
24. Kähler, L., The Influence of Normative Reasons on the Formation of Legal Concepts, in: Hage, J., Pfordten, D. von der, (eds.), 2009, *Concepts in Law*, Dordrecht, Springer, pp. 81–97.
25. Kelsen, H., Derogation, 1973, *Essays in Legal and Moral Philosophy*, Dordrecht–-Boston, Reidel Publishing Company.
26. Lariguet, G., 2008, Dilemas morales y Derecho. Una crítica a David Martínez, *Discusiones*, No. 8, pp. 55–105.

27. Lemmon, E. J., 1962, Moral Dilemmas, *The Philosophical Review*, Vol. 71, No. 2, pp. 139–158.
28. Leslie, G., Adams, T., Legal Positivism, in: Zalta, E. N., (ed.), 2019, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/entries/legal-positivism/, 23. 10. 2024).
29. MacIntyre, A., 1990, Moral Dilemmas, *Philosophy and Phenomenological Research*, Vol. 50, pp. 367–382.
30. Marcus, R., 1980, Moral Dilemmas and Consistency, *The Journal of Philosophy*, Vol. LXXVII, No. 3, pp. 121–136.
31. Martínez Zorrilla, D., 2011, Constitutional Dilemmas and Balancing, *Ratio Juris*, Vol. 24, No. 3, pp. 347–363.
32. Martínez Zorrilla, D., 2008, Dilemas morales y Derecho, *Discusiones*, No. 8, pp. 17–54.
33. McConnell, T., 1978, Moral Dilemmas and Consistency in Ethics, *Canadian Journal of Philosophy*, Vol. 8, No. 2, pp. 269–287.
34. McConnell, T. C., Moral residue and dilemmas, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 36–47.
35. McConnell, T., Moral Dilemmas, in: Zalta, E. N., Nodelman, U., (eds.), 2024, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/fall2018/entries/moral-dilemmas/, 23. 10. 2024).
36. Mendonca, D., 2008, Sobre el concepto de dilema moral, *Discusiones*, No. 8, pp. 117–127.
37. Navarro, P. E., Rodríguez, J. L., 2014, *Deontic Logic and Legal Systems*, Cambridge, Cambridge University Press.
38. Raz, J., 1986, *The Morality of Freedom*, Oxford, Clarendon Press.
39. Raz, J., Incommensurability and Agency, in: Chang, R., (ed.), 1997, *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, pp. 110–128.
40. Ross, A., 2009, *On Law and Justice*, Clark, The Lawbook Exchange.
41. Sardo, A., 2018, Let's talk about antinomies. Normative systems reloaded, *Revus*, No. 36, pp. 1–24.
42. Schaber, P., Are there insolvable moral conflicts?, in: Baumann, P., Betzler, M., (eds.), 2004, *Practical Conflicts – New Philosophical Essays*, Cambridge, Cambridge University Press, pp. 279–294.
43. Silva Sampaio, J., Brute Balancing, Proportionality and Meta-Weighing of Reasons, in: Sieckmann, J., (ed.), 2021, *Proportionality, Balancing, and Rights – Robert Alexy's Theory of Constitutional Rights*, Cham, Springer, pp. 49–84.
44. Silva, V. A. da, 2011, Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision, *Oxford Journal of Legal Studies*, Vol. 31, No. 2, pp. 273–301.
45. Sinnott-Armstrong, W., Moral Dilemmas and Rights, in: Mason, H. E., (ed.), 1996, *Moral Dilemmas and Moral Theory*, New York, Oxford University Press, pp. 48–65.

46. Tessman, L., 2015, *Moral Failure. On the Impossible Demands of Morality*, Oxford, Oxford University Press.
47. Waldron, J., 1994, Fake Incommensurability. A Response to Professor Schauer, *Hastings Law Journal*, Vol. 45, No. 4, pp. 813–824.
48. Wallace, R. J., Practical Reason, in: Zalta, E. N., (ed.), 2020, *The Stanford Encyclopedia of Philosophy*, (https://plato.stanford.edu/archives/spr2020/entries/practical-reason/, 23. 10. 2024).
49. Williams, B., 1965, Ethical Consistency, *Proceedings of the Aristotelian Society*, Vol. 39, pp. 103–138.
50. Zucca, L., 2007, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford, Oxford University Press.
51. Zucca, L., Conflicts of Fundamental Rights as Constitutional Dilemmas, in: Brems, E., (ed.), 2008, *Conflicts Between Fundamental Rights*, Antwerp, Intersentia, pp. 19–37.

ULOGA DILEMA U PRAVU

Sara Azevedo

APSTRAKT

Opšte je poznato da primena pravnih normi može dovesti do normativnih sukoba. Pored pojma normativnog sukoba, pojam pravne dileme dobija na značaju, iako njegova upotreba u pravnom diskursu postavlja nekoliko pitanja. Prvo, koncept pravne dileme je reprodukcija, *mutatis mutandis*, koncepta dileme koji je razvijen u moralnoj filozofiji. Drugo, neki pravni naučnici se fokusiraju isključivo na ustavne dileme (tj. pravne dileme koje uključuju ustavne norme), naizgled pretpostavljajući da je to pojava ograničena na primenu ustavnih normi. U ovom radu se ispituje kako je pojam dileme definisan u moralnoj filozofiji i razmatra se da li i u kojoj meri se predlozi razvijeni u toj oblasti mogu uvesti u pravni svet. Cilj ovog rada je da se razjasni šta se obično podrazumeva pod pravnim i ustavnim dilemama i da se identifikuju prednosti i neugodnosti upotrebe ovih pojmova u pravnom diskursu.

Ključne reči: pravne dileme, ustavne dileme, moralne dileme, normativni sukobi.

Article History
Received: 19 September 2024
Accepted: 25 November 2024