MAREK SMOLAK

IMITATIVE STATUTES*

I. In the following study, I would like to demonstrate that certain enactments in democratic countries where the rule of law is well established are nevertheless inadmissible in view of their imitative nature.[1] The term 'imitative statutes' is intended to denote such normative enactments of parliament which aim at an ostensible solution of a social issue; they are a surrogate, a substitute for a law which would in actual fact rectify a social, political or economic problem as opposed to merely feigning it. Ostensibility means absence of will on the part of the legislator to have their activity produce effects. The only thing in evidence is an intention to engender a conviction among the addressees of the norms that such an effect does arise.

A good example of an imitative statute may be found in the so-called remedial enactment of 22 December 2015, on the amendment of the Law of the Constitutional Tribunal (CT, Tribunal), whose Article 2(3) stipulates as follows: 'The dates of hearings or hearings in camera during which petitions are examined, shall be appointed following the chronological order in which cases have been filed and received by the Tribunal.'[2]

The inadmissibility of imitative statutes in democratic countries where the rule of law is well established may be demonstrated by means of three modes of argumentation, namely those suggested by Ronald Dworkin, Lon Fuller and Ofer Raban. In this study, I would like to suggest yet another argumentation, one relying on the conventional-institutional nature of the political community.

II. Characterisation of the argumentation suggested by Dworkin should begin with a description of the checkerboard statutes. In his *Law's Empire*, Dworkin poses the following questions:

> Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles but not on manufacturers of washing machines? Do the people of Alabama disagree about the morality of

* The paper was prepared under the research grant financed by the National Science Centre (OPUS 8 2014/15/B/HS5/00650). — Translation of the paper into English has been financed by the Minister of Science and Higher Education as part of agreement no. 541/P-DUN/2016. Translated by Szymon Nowak. (Editor's note.)

[1] It may be added that this analysis will not be concerned with imitativeness of statutes approached as economic, social, political or moral dysfunctionality. This is a matter for deliberation for sociologists of law and experts in economic analysis of law.

[2] Journal of Laws of the Republic of Poland 2015, item 2217. Many more instances of enacting imitative statutes may be easily found. Furthermore, they are passed regardless of which faction holds public power at the moment.

> racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants? Do the British divide on the morality of abortions? Why should Parliament not make abortions criminal for pregnant women who were born in even years but not for those born in odd ones?[3]

This latter question in particular conveys the essence of the 'checkerboard statutes'. A checkerboard statute sets out a criterion for differentiating between subjects in a manner modelled on the black-and-white arrangement of tiles on the board. Even more importantly, it provides for criteria such as even and odd years (the black or white colours on the board, respectively), which as Dworkin argues are unacceptable from a moral standpoint.[4] Dworkin noted that statues of this kind are enacted when it is impossible to reconcile two moral orders—where abortion is approved in one but not in the other. The adoption of the even/odd day of birth criterion which statutes adopt as a basis for rendering a person criminally liable for the felony of abortion, or for not deeming the act criminally liable, results from a legislative compromise which cannot be supported by any moral standards. In other words, the paradigm of even and odd numbers possesses no inherent reason which would justify such a solution.[5]

The above example of the checkerboard statues warrants the conclusion that imitative statutes, just as checkerboard laws, cannot be underpinned by any moral standards due to their ostensible nature.

If the above approach is assumed to be apt and correct, the question arises why ostensibility cannot be reconciled with any moral standard and thus with the idea of the rule of law.

In order to answer the question, one may take advantage of Dworkin's requirement for an integral conformity of law with one 'idea of justice', where that idea refers to the entire legal system. When this integrity requirement is adopted, it must be presumed that all the decisions of the legislator have to comply with the same idea of justice. Imitative statutes should be rejected because they violate the moral principles derived from that idea of justice. In a situation where judges note in the first place that statues do not concur with the moral standards of the political community and, secondly, discern their imitative nature, they should find a coherent system of principles governing rights and obligations as well as the best constructive interpretation of the

---

[3] R. Dworkin, *Law's Empire*, Cambridge, MA, 1986, 178. [Polish edition *Imperium prawa*, trans. J. Winczorek, preface M. Zirk-Sadowski, Warsaw, 2006, 180].

[4] Incidentally, checkerboard statutes follow a two-tier arrangement, where the first encompasses moral orders, i.e. consent to abortion and dissent to abortion, while the second stipulates the differentiation criterion, such as even/odd date of birth of the woman, which then becomes the statutory premise for treating abortion either as a criminally liable act or an act which is not recognised as felony.

[5] Naturally, checkerboard statutes are enacted very seldom, but it does not mean such laws are not passed at all. In his article O. Raban quotes the vivid example in Chinese legislation, which prescribes that nurses smile showing exactly eight teeth See O. Raban, Racjonalizacja polityki. O związku między a demokracją a rządami prawa, trans. A.M. Baziór, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 76(4), 2014, 26.

political structure and legal doctrine of a given political community in order to reject such statutes.[6]

Imitative statutes may be distinguished from non-imitative ones on the basis of moral standards to which a given political community subscribes. It is therefore possible to provide a moral rationale behind a norm which prescribes setting a hearing date while having regard for the systemic importance of cases. However, no moral rationale can be provided for a norm which imposes fixing dates for hearings depending on the even or odd number of the case file. Furthermore, a viable moral justification can be found for statutes which genuinely aim to resolve social issues, but we are incapable of providing a moral argument for those statutes which only purport to solve the problem. Naturally, the moral reason in favour of non-imitative statutes is recognising that the authenticity and equity of legal solutions represent a moral good shared by the political community. And conversely, all ostensible legislative actions, just as acts-in-the-law consisting in absolute simulation, are immoral (absolutely invalid). This is due to the fact that ostensibility and the simulation of resolving actual social, political or systemic issues does not entail a moral reason one could identify. For instance, it is believed that the ordering of adjudicated cases depending on their importance is dictated by a moral reason shared by the political community. Obviously, a justification of that kind does not have to be accepted. However, it has to be acknowledged that a statute which stipulates the order of examined cases in view of their significance for the state system harbours a 'core of moral common sense'. In the statute which stipulates that the order of cases examined by the CT be decided by the date on which they are received, the 'core of moral common sense' is absent. In other words, imitative statutes are inadmissible as they offer no moral rationale for their enactment due to the immoral content or their ostensible nature.

One could ask why the authenticity of actions of the legislature is a moral good desirable in the public sphere and complies with the rule of law, whereas the ostensibility of legislative actions is morally unacceptable, but given the tremendous number of pertinent publications (for instance those concerned with the idea of social contractarianism), I feel excused from having to provide broader argumentation to that effect.[7]

The Dworkinian idea, namely formulation of a prescription to seek one moral standard of a community when the so-called hard cases have to be resolved (while resolving whether a statute is imitative or not belongs, in my opinion, to the problematic ones), was received with multi-aspectual critique. There are three fundamental objections raised against the concept. First, one can hardly presume that there exists any political community based on certain common and shared ideas of justice, equity and reliable procedure. Sec-

[6] See R. Dworkin, *Imperium prawa*, 186–192.

[7] Indisputability of the above foundations of the rule of law leads to w situation where in order to reduce the risk of committing the error of *regressus ad infinitum* in argumentation, it must be assumed that the idea of the rule of law possesses an immutable axiological core (prohibition of imposing limitations on the essence of freedoms and rights) and a mutable axiological penumbra, which is subject to interpretation in view of the changing social, political or moral factors.

ondly, that mythical Dworkin's judge Hercules, gifted with superhuman abilities and skills which enable them to resolve hard cases, does not exist in case law. Finally, R. Dworkin derives those standards of political morality from the tradition and achievement of liberal thought, failing to note that political and legal thought is much more extensive than that.[8]

III. Since the above reservations can to a certain extent be recognised as valid, there is another argumentation to fall back upon, which circumvents the problems associated with adopting moral standards that a political community would have to share. What I have in mind is the purpose of law theory advanced by Fuller. According to Fuller, drawing on the moral standard may be misleading because the crux of the matter lies in the inadmissibility of the goal of the legislator, as opposed to the lack of moral dimension in the prescription itself. In other words, it is the appraisal of the goal of the legislator—aiming to streamline the working of the Tribunal—rather than evaluation of the means—the prescription to hear cases as they are filed—which has the decisive significance in the assessment of whether the decision of the legislator is admissible or not.[9]

In point of fact, an imitative statute is inadmissible in view of the imitative goal of the legislator. In itself, the aim of rendering the work of the Tribunal more efficient is acceptable, but the crucial element here is that the actual purpose of the legislator is unrelated to the prescribed behaviour. In the regulation which provides that 'dates of hearing shall be set while taking into consideration the date of their receipt,' the legislator does not aim to recognise that the cases which were received at the most recent date are the most important, nor do they intend to assert that the most current cases have a novelty value. The goal here is actually to reduce the efficiency of the Constitutional Tribunal. This is how we actually think about law: if laws lead towards accomplishing a goal, a goal which is inadmissible due to its ostensibility, it is unlikely that such statutes will be received with approval.

An inquisitive reader may ask the following question: On what grounds does one recognise that a given objective is inadmissible or cannot be admitted due to the concept of the rule of law? The above question is essentially concerned with the basis upon which our moral judgements are validated. Why is the efficiency and cohesion in the work of judicial bodies an asset worthy of constitutional protection? Again, as in the case of Dworkin's argumentation, I feel excused, for much the same reasons, from a broader argument in favour of recognising the efficiency and cohesion of the judicature as a desirable value deserving constitutional safeguards.[10]

---

[8] The critique of R. Dworkin's concepts addresses many of its aspects. A succinct outline may be found in M. Smolak, *Uzasadnianie sądowe jako argumentacja z moralności politycznej. O legitymizacji władzy sędziowskiej*, Cracow, 2003, Chapter III.

[9] Cf. L. L. Fuller, *Moralność prawa* [*The Morality of Law*], trans. A. Amsterdamski, preface A. Łopatka, Warsaw, 1978, 125 ff.

[10] Cf. A. Czarnota, M. Krygier, W. Sadurski (eds.), *Rethinking the Rule of Law after Communism*, CEU Press, Budapest and New York, 2005. Cf. J. Mikołajewicz, M. Smolak, Zasada demokratycznego państwa prawnego w aksjologii Konstytucji Rzeczypospolitej Polskiej, in:

Incidentally, Fuller was of the opinion that the formal requirements of law, such as public promulgation, sufficient generality and prospectiveness, to mention only a few, may substantially restrict the possibility of enacting imitative statutes. As we know, Fuller observed that under certain conditions the formal requirements of law inhibit taking legislative decisions which, apart from being irrational, do not conform to moral norms either.[11]

Ofer Raban suggested an interesting addendum to the concept advanced by Lon Fuller. Raban noted that while assessing the compliance of regulations with the idea of the rule of law, recourse to the rationality principle is also indispensable. Let us start a brief characterisation of his views with the following example. If a judge, in their appraisal of the systemic importance of a given case, considers the volume (number of sheets) of the case file (where those with 200 and more sheets are systematically important, while the unimportant ones contain less than 200 sheets), then such an importance criterion is considered irrational. The flaw of this approach consists in the absence of a link between the criterion of distinction (the number of sheets) and the importance of the examined cases. In other words, there is no rational connection which would warrant adopting the criterion of the number of sheets as a benchmark of the systemic importance of the case under judicial consideration.[12]

Knowledge about subjects in a given category (systemically important cases) may be obtained from various sources: the findings of political science, economics, sociology or religion. In the light of experience and knowledge, the number of sheets in the case file becomes a blatantly nonsensical criterion for finding a case to be systemically important. However, it might happen that in the future science will demonstrate that there is a correlation between a judge's date of birth—and thus their astrological sign—and their conclusions as to the systemic importance of cases. As I mentioned previously, the above solution, namely a distinction criterion based on a zodiac signs, is defective in that it lacks a rational connection between the adopted criterion (zodiac sign) and the characteristics of the subjects in a category to which the criterion applies (cases deemed systemically important). To recapitulate, Raban argues that there must be a rational, not only moral, relationship between a prescription formulated in law and the features of the category of subjects/objects to which the prescription pertains. As regards the example of the remedial enactment, a rational connection has to arise between the criterion for establishing the order of cases in the form of receipt date, and the characteristic of aiming to improve/correct the functioning of the Tribunal. It is evident that imitative statutes do not fulfil the condition of a rational connection being present.

Certain doubts arise nonetheless. Why should this rational connection be considered an indispensable element of the rule of law? Would it not suffice to state that such ostensible statutes are simply unreasonable? It should be

---

S. Wronkowska (ed.), *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warsaw, 2006, 90–101.

[11] Cf. L. L. Fuller, *Moralność prawa*, 77–80.

[12] O. Raban, *Racjonalizacja polityki*, 33–35.

noted here that the rationality requirement is vital where law and its regulations are concerned. After all, the criterion for getting a sweet in a children's counting game (whereby every second child receives one) is not considered absurd by anyone. However, the requirement to demonstrate a rational link, in addition to a moral one, between the adopted criterion determining the order of hearing cases and the characteristic attributes of subjects/object in a given category (improving the efficiency of the Constitutional Tribunal), is a prerequisite, since various institutions of authority are prohibited from taking arbitrary actions in the public sphere.

IV. The third mode of argumentation—which holds that certain decisions of the legislator, contained in statutes enacted in democratic countries where the rule of law is well-established, are permanently inadmissible due to their imitative nature—relies on the existence of a conventional-normative community based on the mutually shared conviction that a conventional-normative relationship occurs between the prescriptive provision and its purpose.[13] Let us recall yet again the norm contained in the remedial enactment: 'The dates of hearings or hearings in camera during which petitions are examined, shall be set following the chronological order in which cases have been filed and received by the Tribunal.' Assuming that the aim of the rule is to render the judicial activities of the Tribunal more efficient, the whole difficulty lies in determining the knowledge and the patterns of reasoning on the grounds of which it would be possible to justify the causal relationship between the above injunction and the aim asserted by the legislator. In order for a relationship to exist between a provision, stipulating that 'the dates of hearings or hearings in camera during which petitions are examined, shall be set following the chronological order in which cases have been filed and received by the Tribunal', and the purpose of the legislator, namely 'improvement/correction of the functioning of the Tribunal', a certain conventional-normative connection must occur. The connection derives from the fact that a relevant community respects a specific conventional social practice, a practice founded on the intentional, reciprocal expectations of the members of the community, anticipating certain and not other behaviours within the said community.

Let us illustrate the above conclusion using the following example. If a norm in force prescribes that 'dates of hearing or hearings in camera, during which petitions are examined, shall be set in regard to systemic importance of cases', then by virtue of collective intentionality we recognise that the legislator's aim behind the rule is to protect the systemic order of the state. The legislator knows that they will achieve that goal by enacting a rule formulated in that particular manner; both the interpreter and the legislator know that the other is aware of the particular aim of the rule, namely 'protection of the systemic order of state'. As may be seen, the above social practice is a kind of knowledge comprising information addressed to all the members of the com-

[13] Cf. M. Smolak, *Wykładnia celowościowa z perspektywy pragmatycznej*, Warsaw, 2012, 83–88.

munity: information on how one should proceed in particular situations so as to achieve particular results.

Consequently, implementation of the rule stating that: 'the criterion of systemic importance shall be adopted as the criterion determining the order of cases to be heard by the CT' will necessarily depend on the strength of mutual social expectations that 'protection of the systemic order of state' is in fact the goal of the regulation. Clearly, imitative statutes fail to meet that condition, because the mutual expectations of the members of a political community cannot effectively serve to demonstrate the conventional relationship between 'the dates of hearings or hearings in camera during which petitions are examined, shall be set following the chronological order in which cases have been filed and received by the Tribunal' and the aim of such a provision, namely 'improvement of the functioning of the Tribunal'. Naturally, these expectations may vary from individual to individual. However, as a rule, a reference to mutual beliefs, understood here as a reason for undertaking particular action, is made implicitly only when the interpreter belongs to the same community of social practice as the legislator (which is usually the case). The specificity of that conventional-narrative community lies therein that the effective achievement of a legislator's goals is necessarily contingent on respecting the community's reciprocal expectations as to the exact course of these actions. The aim can only be accomplished when other members of the conventional-normative community interpret those actions as serving to meet the objective of a given legal text, while relying on appropriate mutual intentional convictions that they and the subject in question respect.[14] This conventionalist approach is therefore founded on the notion that the general conformity of human behaviours with a social rule is not only indispensable for the rule to exist, but it also determines the rule's capacity to create a reason for action, which it supplies to everyone whose behaviour falls within the scope governed by the rule.[15]

To recapitulate the findings so far, the following has to be stated—imitative statutes are inadmissible in democratic countries where the rule of law is well established due to: the inconsistency of legal regulations enacted by the legislator with the moral standards of the political community (R. Dworkin); the imitative goal of the legislation, or absence of a connection between the prescribed/prohibited behaviour and the goal of the legislator, which in fact constitutes an ostensible goal (L. Fuller); the lack of a rational relationship between a behaviour prescribed by law and the features of a category of subjects/object to which the requirement applies (O. Raban); the absence of a conventional-normative link between the content of a prescriptive provision and its objective (M. Smolak).

V. In the light of the above deliberations, one arrives at an obvious and 'classic' question about which manner of argumentation, drawing on the foregoing reasons, should be adopted in order to convince the doubtful. Regardless

[14] M. Smolak, *Wykładnia celowościowa*, 138 ff.

[15] Cf. T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*, Warsaw, 2016, 343–344.

of the numerous difficulties, it seems that the most expedient solution is to invoke the public nature of those reasons. In this respect, the best alternative is the idea of public reason conceived by John Rawls. Two arguments are vital here. First, Rawls clearly delineates the boundary between public and non-public reasons. Secondly, one of the traits of public reason is the assumption that citizens of a liberal-democratic society are reasonable.[16]

Obviously, public reason is not necessarily shared by the entire community, not even the majority. Many other circumstances need to be allowed for; therefore it cannot constitute a common standard. On the other hand, there are such public reasons which are adopted almost universally. It is also true that these include some that are not adopted reasonably and rationally, for instance when such reasons are based on prejudice. Moreover, if the sources of knowledge about the moral convictions of the community's members lack credibility (being based on astrological signs, for example), then the consensus on invoking particular public reasons is exceedingly difficult to achieve.

How should one appeal to a public reason in order to persuade the doubtful about the inadmissible nature of imitative statutes? Ron den Otter put forward an interesting solution to the problem: public reasons are reasons which a reasonable sceptic could recognise as sufficiently convincing in a given argumentation.[17] These reasons would not pass the test in ideal circumstances of deliberation. Nor are they the kind of reasons which every reasonable person in specific conditions could find particularly strong or which would be suitable as a rationale. They are reasons which reasonable individuals could deem at least not unreasonable. To approach it from a different angle, argumentation relying on public reason should be conducted in such a fashion that a reasonable sceptic would be convinced. Hence the standard in invoking public reason would be as follows: public reason may constitute a fundament of argumentation when it is a reason that could not be rationally questioned or challenged by any reasonable sceptic, in which the latter would bear witness to their own responsibility for the community of citizens. Regardless of the objections they may have, the sceptic could accept that public reason as sufficiently convincing, or at least not unreasonable.[18]

Such a structure of public reason appears to be in line with the principles of liberal democracy, since it calls for providing reasons which no reasonable sceptic (who, let us add, is a member of a democratic-liberal community characterised by reasonable pluralism) could question. In other words, no reasonable sceptic could impugn the imitative and thus inadmissible nature of imitative statutes. A reasonable sceptic may of course prefer decisions whose substance is different, but they have to be prepared to recognise the decision irrespective of their dissent to its substance. Hence, appealing to public rea-

---

[16] Non-public reasons are those formulated by Churches, parties or universities. More on that issue see J. Rawls, *Liberalizm polityczny* [*Political Liberalism*], trans. A. Romaniuk, preface C. Porębski, Warsaw, 1998, 303–312.

[17] R. den Otter, Can a liberal take his own side in an argument? The case for John Rawls' idea of political liberalism, *Saint Louis Law Journal* 49, 2005, 336 ff.

[18] Ibidem, 356.

sons enables each citizen, including those who strongly contest the adopted decision, to accept it as theirs, in the sense that it represents a product of a certain decision-making process whereby reasons are stated in such a way that one cannot reasonably raise reservations or doubts.

As can be seen, the requirement imposed on subjects, in particular on judges, to validate public reasons by mean of a test of the reasonable sceptic is an interesting and promising suggestion. Moreover, is represents a response to all those who challenge the legitimacy of constitutional courts to adjudicate in the matters of protection of human rights and the limits of such protection.

Marek Smolak
Adam Mickiewicz University in Poznań
smolak@amu.edu.pl

IMITATIVE STATUTES

Summary

This paper seeks to demonstrate that certain enactments in democratic countries where the rule of law is well established are inadmissible in view of their imitative nature. Imitative statutes are normative enactments of parliament which aim at an ostensible solution to a social problem. Ostensibility thus comprehended is accompanied by the absence of will on the part of the legislator to achieve any effect of their activity, as their sole intention is to engender a conviction among the addressed of the norms that such an effect actually takes place. The author discusses four types of reasoning in support of rejecting imitative statutes. These are as follows: first, given non-compliance of legislation with the moral standards of the political community (Ronald Dworkin); second, in view of the imitative goal of the legislator, or absence of a link between a prescribed/prohibited behaviour and the ostensible nature of legislator's goal (Lon L. Fuller); third, the lack of a rational relationship between a legal prescription and the features of the class of subject/objects to which the prescription applies (Ofer Raban); fourth, the lack of a conventional-moral relationship between the substance of a prescriptive provision and the goal of the legislator (Marek Smolak). The author argues further that argumentation based on the above four reasons should presume that public reason is involved and, consequently, administer the test of the reasonable sceptic as suggested by Ron den Otter.