DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1992 n° 1—4 (93 — 96)
PL ISSN 0070-7325

Wojciech Sadurski, *Moral Pluralism and Legal Neutrality*, Dodrecht — Boston — London 1990, Kluwert Academie Publishers, 221 pages.

1. The title of the book points to the main thesis contained in it and saying that law must be neutral in spite of, or perhaps because of, the existence of different moralities. The book has been drawing on the experience of the societies living in the western and southern hemispheres where the political and legal systems are different from that of Poland. It happened, however, that the subject-matter discussed in the book has been a live problem in Poland too. The Polish reader can find in the book the theoretical considerations of problems he is faced with in every day life, in political disputes and decisions taken by the State organs. The examples used to prove the theses are problems of abortion, separation of religion from the State, freedom of the word, protection of the rights of minorities, pornography.

Moral pluralism does not exclude one prevailing morality termed by the author as "conventional morality". This is a morality of the prevailing social forces and as such presents some difficulties attracting a great deal of attention of the author. Sadurski discusses them while analyzing the work of the Supreme Court of the United States and the High Court of Australia. Both courts have the competences to assess the constitutionality of legislation because of the general character of the formulations of the Constitution. This offers an occasion to discuss the problems lying on the border of law and morality and particularly of the conventional morality.

Two views are vying here: on the one hand, the followers of one view claim that the court must appeal to the prevailing moral standards while reviewing the constitutionality of legislation, and on the other, there are some who believe that it would be inconsistent with the division of roles between the legislature and the Court. If a role of the Court is to protect minorities against possible reduction of their rights by the majority, then the Court cannot appeal to the morality adopted by the majority. This is because the Court reviews an act supported by the majority in the legislature which, in a democratic State, expresses the prevailing social standards (p. 27).

Supporting the second view the author remarks, at the same time, that the Court cannot — in a given social system — remain indifferent to values accepted by the dominant social forces. However, more frequent are the situations where the courts employ a "roundabout way" while justifying their decisions which are against the prevailing moral standards. This strategy consists in a declaring a full approval of conventional morality when, exceptionally, a decision departing from this morality is taken because of some important reasons.

The differentiation between the two types of appeal to conventional morality made by the author is very important. The first of them consists in an appeal to conventional morality in order to decide about the legal status of a particular practice. These are the decisions on the constitutionality of capital punishment, abortion, homosexuality, taken on the basis of dominant moral standards (p. 39). The second type includes the situations in which we appeal to moral standards in order to give content to some concepts like, for instance, the concept of pornography. The task here is easier, the author claims, since "it is not the matter of yes-or-no to the application of community values but rather of judgements of degree" (p. 39). On the contrary, there are some standards to be graded from which "a general average of community thinking" can be derived (p. 40).

2. In the discussed book, the author gives a very interesting presentation of problems connected with deciding about the conventional morality, and of a norm derived from it, which we want to employ to solve a given issue. There are many reasons behind the difficulties accompanying this process. A great deal of people do not express their opinion on moral issues at all. But if they do, there is often an inconsistency between views on particular issues and more general declarations about principles. There are also the cases where there is no concordant opinion on some important issues and the views are varying and incoherent.

In such a situation the courts are faced with two extreme solutions: a full negation of discovering of conventional morality and a presentation of their own moral standards as those of the community. The courts that appel to conventional morality differ in their concern about the moral ideals of the community. Most of them, the author says, apply to the varying views the sieve of rationality. An example here may be a suggestion of H.H. Wellington that the court "should examine the views the community expresses in calmer moments", in order to eliminate the passions an prejudices of the moment. Wojciech Sadurski speaks disapproving of this suggestion. If by calmer moments we mean the periods when a given problem does not raise a significant moral controversy then — he says — no majoritarian opinion on a problem can be voiced. If the case is examined by the court, it means that there is no calmer moment at that time. The only solution to this problem would be to consider the opinions expressed previously, that is, in calmer moments. However, this would mean that the court failed to give effect to the current conventional morality (p. 48).

However, this criticism is not convincing. It is enough to take the example of capital punishment. In sociological questionnaires the opinion of the majority on this issue in various periods is sought also when it does not arouse substantial moral controversies. Moreover, when the court investigates a case it does not mean that there is no calmer period. The calmer period is broken when the community is upset because some new grave crimes have been committed. A rejection of the opinion shaped by temporary agitation in order to accept the opinion prevailing for a longer period can certainly be called a rational approach.

Contrary to the author, I think that Perry's theory is quite useful. He makes a distinction between those moral views which define what is right and what is wrong and the ones which determine what immoral behaviour should be legally prohibited. The court should take account only of the latter opinions. According to Sadurski, who veryfies this concept taking the example of abortion, moral condemnation of abortion is in practice accompanied by a demand for a legal prohibition while those who condemn abortion as wrong do not demand legal sanctions. They view it as being wrong not on moral ground but because it is detrimental or risky to health (p. 51).

This reasoning lacks arguments. Taking the example quoted by Sadurski I think that his assumption saying that those condemning abortion but not demanding criminalization factually condemn it on other grounds than the moral ones, is quite arbitrary. His thesis that moral condemnation of abortion in practice does not mean a condemnation and including it into the sphere of private morality but just the contrary, it involves public morality and a demand for penalization, can be easily upset. Certainly this happens quite often (the proportion can be various in various societies) but it is not a rule. However, the value of the distinction between the two types of morality is not diminished, especially if we take another example instead of that of abortion (e.g. problems of penalization of sexual deviations or dissemination of pornography) and Perry's distinction is in practice grasped quite easily. Sadurski employing different terminology is very near Perry's concept. He emphasizes the importance of a radical separation of the right from the good and claims that only a radical separation of these two concepts can lead us to a conclusion that not everything that is morally good ought to be legally sanctioned and not everything that is morally bad ought to be legally prohibited (p. 90).

3. In his concept, Sadurski attaches a great importance to the principle of equal moral agency: everyone is equal to choose a morality except the one permitting harm to others or imposing one's own morality upon others. This is an analogy to the harm principle of J. St. Mill saying that law can prohibit only those deeds which inflict harm on other people. However, the principle of equal moral agency is not only a different wording of the harm principle. This is an amplification of Mill's thought in the manner which makes it desirably univocal since in Mill's approach it is not clear whether the very concept of harm is to be interpreted without appealing to the prevailing moral standards and conventional morality[1].

4. Chapter Six is devoted to the theory of punishment in the light of moral neutrality of law. Sadurski distinguishes perfectionism and antiperfectionism in thinking about crime and punishment. The latter as the one corresponding to the principle of neutrality, is adopted by the author as a point of departure of his considerations. He presents a variation of the principle of retributive justice from the point of view of criminal law and understood as an application of a broader principle regulating the distribution of benefits and burders in a society[1 2].

[1] *Cf.* W. Sadurski, *Neutralność moralna prawa [Moral Neutrality of Law]*, „Państwo i Prawo", 1990, No. 7, pp. 28 ff.

[2] More on this subject see: W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia [Theory of Justice. Fundamental Problems]*, Warszawa 1988; two reviews by W. Lang and L. Morawski, „Państwo i Prawo", 1989, No. 6, pp. 105 ff.

Sadurski claims that criminal law maintains a certain balance of benefits and burderns in a community, and particularly of those which consist in autonomy and unlimited freedom of action within a sphere which is beyond the interference by others. The enjoyment of this benefit by an individual is correlated with a burden of the remaining members of the society consisting in self-restrain in order not to overstep the limits of the freedom of action. The punishment of the offender is a redistribution of burdens and benefits, which takes place when the balance is disturbed by the criminal. Putting the burdens on the offender, which is the punishment, we restore the balance he upset by acquiring the benefits on the way of an offence. The benefit is understood here not in a common meaning but as the one derived from non-self-restrain and a freedom of action.

Sadurski admits that there are some difficulties in explaining, in the light of his theory of punishment, the reasons for lesser penalties for attempts and the offences perpetrated because of mistake of law. At the same time, he claims that this theory justifies non-punishment of an insane person. An insane person does not derive any benefits in the sphere of freedom of action by violating the criminal law, so there is no need to restore the upset balance. However, I have to admit that such a justification of the non-punishment of insane persons sounds strange for a lawyer specializing in criminal law.

The theory of punishment presented by Sadurski is certainly based on the liberal principle that the sphere of autonomic action, equal for all, is an essential value guarded by criminal law. Therefore intervention by criminal law based on paternalistic or moralistic grounds must be excluded since the whole concept of restoring the balance of burdens and benefits would be irrational.

The author is right in thinking that his theory has one important value: the ability to explain why some acts may be punished and other not. However, if this were a problem, it would be reduced to a certain important principle of the theory of punishment. And yet the theory of punishment must contain a wider plane for explanation and substantiation of various aspects of punishment. However, Sadurski does not present any arguments that his theory of punishment does possess this quality.

5. Chapter Seven, an extensive one, is devoted to problems of neutrality of law towards religion. This aspect of neutrality of law is, certainly, one of the most important and disputable. Sadurski distinguishes two principles regulating the relationship between the State and religion in modern secular States: the separation of the State and religion and the freedom of religion. These two principles can sometimes be conflicting since the principle of exercise of religion has a certain natural dynamics that threatens to undermine the disengagement of the State from religion. The author claims that in cases of such a conflict none of the principles should be given priority but one should appeal to a common higher ideal which is legal neutrality towards competing religious conception of the good. This principle means that no legal burden or privilege can be connected with a choice, change and pursuit of religious beliefs nor with a choice of non-religious morality.

Further considerations of the author show that, as usual, the essence of the problem consists in details. The very definition of religion presents a difficulty in cases of unclear situations. The greatest difficulty is encountered when we cannot define if the condition of legal neutrality towards religion has been fulfilled. The author discusses a few examples, like for instance: voluntary school prayer in state schools, State financial assistance to denominational schools, the content of school curricula, the military chaplaincy in the army and prisons, religion-based exemptions from some duties like military service. He thinks that the main point is to establish a certain baseline of action the departure from which leads to non-neutrality of law. Moreover, he attempts to define the baseline for the mentioned above situations and scrutinizes each case presenting the reasons of both parties. This chapter is the most interesting of all. It ends with a thesis that legal neutrality of the State can be preserved only by a full disentaglement from all religious-related functions and that the neutrality of law has to be a neutrality towards religion and anti-religion not towards religion and non-religion.

The leitmotif of the whole study is legal neutrality in pluralistic societies. However, Sadurski admits, in the final parts of the study, that the very doctrine of neutrality is by no means neutral. He appeals to such values like tolerance, respect for diverse moral beliefs and above all to individual self-determination about the sort of life one wishes to pursue.

The reviewed book has many values. It essentially enriches our knowledge of the discussed problems. By putting the clearly defined theses it makes us reconsider a great deal of problems and provides more arguments in the spirit of liberalism, which might be used in the disputes taking place in Poland at present. Its style renders it understandable to the readers from beyond the circle of theoreticians of law — a thing quite rare today. One can only regret that the European literature, the Polish literature including, and the awards of constitutional tribunals in western Europe have been neglected.

Lech Gardocki