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In Defence of International Law, or Szymon Rundstein's Idea of the Law of Nations

W obronie prawa międzynarodowego, czyli Szymona Rundsteina idea prawa narodów

ABSTRACT

The research purpose of the article is to present Szymon Rundstein's views on international law in the time of World War I, when a dispute was renewed about its essence and role among jurists. Rundstein unequivocally sided with the defenders of international law, arguing that its existence was based on the eternally existing idea of the law of nations. The research objective of the article is to formulate an answer to the question of what the idea of the law of nations was. These reflections can be considered not only from the perspective of the philosophy of law, analysing the concept of the idea of the law of nations, but also from the perspective of the history of political and legal thought, as a lawyer from Warsaw developed a doctrine concerning both the law and the ways of development of international politics.

Keywords: Szymon Rundstein; international law; idea of the law of nations; international politics; philosophy of law

INTRODUCTION

Politics is about power and money. International politics in particular is nothing but conquests and wars, aimed at expansion and exploitation. In debates on the nature of politics, the state, and the law, views of this kind have always been present. At the same time, contradictory positions have existed, which saw the realization of

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the common good or even universal values as the goal of politics. It was argued that it is not violence, but law that should regulate relations between states. Moreover, certain ideas were put forward suggesting the possibility of establishing eternal peace in the world. Faith in such ideals is usually destroyed by war, and so was the case with World War I. Not only among politicians, but also among jurists, at that time a dispute was renewed about the essence and the role of the law of nations. Some denied the legitimacy of international law altogether, arguing that violence and money, rather than law, were the only regulators of relations between states.

One of the lawyers who took part in this debate was Szymon Rundstein (1876–1942). He was born in Warsaw, where he also completed his legal studies. He received his doctorate in law in Heidelberg in 1900. He worked for 7 years at the University of Berlin and then decided to return to his home town. There, he combined academic work (his research concerned many fields of law, above all international law, civil and commercial law, and the philosophy of law) with the work of a lawyer practitioner. He was also actively involved in the work of the Polish delegation to the Versailles Peace Conference, and participated in the work related to the conclusion of a number of other treaties and international agreements. It should also be added that he was a lecturer at the Academy of International Law in the Hague and a judge at the Permanent Court of International Justice in the Hague. He was murdered in Treblinka in 1942.[1]

Rundstein unequivocally sided with the defenders of international law, arguing that its existence was based on the eternally existing idea of the law of nations. The research objective of the article is to seek answers to the question of what the idea of the law of nations was. Rundstein presented his views on this subject in *The Idea of the Law of Nations* (Pol. *Idea prawa narodów*) from 1917.[2] These reflections can be considered from the perspective of the philosophy of law, analysing the concept of the idea of the law of nations, but also from the perspective of the history of political and legal thought, as a lawyer from Warsaw developed a doctrine concerning both the law and the ways of development of international politics. Rundstein himself emphasized that precisely such moments in history, the bloody experiences of war, are a special impulse for the development of the law of nations. A wider reference to this phase of his work is missing from the academic literature. We have academic articles on Rundstein's contribution to legal theory[3] and on his later consideration and

[1] More on Rundestein's biography, see A. Redzik, *„Poczet Jurystów i Ekonomistów": Szymon Rundstein – patron „Głosu Prawa" 2020*, "Głos Prawa. Przegląd Prawniczy Allerhanda" 2020, vol. 3(1); K. Pol, *Szymon Rundstein*, [in:] idem, *Poczet prawników polskich XIX–XX w.*, Warszawa 2011, pp. 937–947; L. Babiński, *Szymon Rundstein*, "Państwo i Prawo" 1947, no. 10, pp. 38–42; Z. Borzymińska, *Rundstein Szymon*, [in:] *Polski słownik judaistyczny*, eds. Z. Borzymińska, R. Żebrowski, Warszawa 2003.

[2] S. Rundstein, *Idea prawa narodów*, Warszawa 1917.

[3] See S. Tkacz, *Teoria normy prawnej Szymona Rundsteina: założenia wyjściowe*, "Z Dziejów Prawa" 2018, no. 11, pp. 167–185.

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criticism of the law of totalitarian states.[4] There are also chapters in books about the influence of Immanuel Kant's philosophy on his views or the articles on the idea of law in general.[5] Meanwhile, the conception of the idea of law of nations constitute worthwhile material that will complement research in the field of legal theory and the history of legal political thought. It should also be underscored that Rundstein, through his activity in political and scientific life, shaped the legal discourse. His theory met with great interest and provoked a critical discussion among Polish legal theorists.[6]

SOME COMMENTS ON RUNDSTEIN'S METHODOLOGICAL ASSUMPTIONS

In *The Paths of the Law of Nations* (Pol. *Drogi prawa narodów*), Rundstein emphasized that, owing to the partitions and the time of war, he was deprived of the opportunity to consult the many works of the world legal literature devoted to issues of international law reform, which he regarded as a "visible defect" in his publications.[7] This does not mean, however, that his deliberations were not rooted in European tradition and contemporary legal discourse. He referred to the philosophy of Jean-Jacque Rousseau and, above all, Kant. It was the philosophy of Kant that greatly influenced the formation of various currents of legal thought, such as the positivism of John Austin, Rudolf von Ihering, Georg Jellinek, or the normativism of Hans Kelsen. Many Polish philosophers of law were also influenced by Kant's thought.[8] Naturally, this did not apply to everyone and the doctrine of the time faced a dispute between supporters of different currents of legal thought.[9] One should mention the psychological theory of law of Leon Petrażycki and his followers, who

[4] See M. Mohyluk, *Szymon Rundstein o prawie radzieckim*, "Miscellanea Historico-Iuridica" 2008, vol. 6, pp. 67–77; L. Górnicki, *Narodowosocjalistyczne prawo w poglądach Szymona Rundsteina*, "Studia nad Faszyzmem i Zbrodniami Hitlerowskimi" 2011, no. 33, pp. 47–77; M. Marszał, *Kilka uwag na temat prawa w państwach totalnych w poglądach Szymona Rundsteina (1876–1942)*, "Annales UMCS sectio G (Ius)" 2012, vol. 59, pp. 59–65.

[5] See K. Kuźmicz, *Immanuel Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918–1950*, Białystok 2009, pp. 132–140; M. Marszał, *„Idea prawa" w normatywistycznej teorii Szymona Rundsteina*, "Przegląd Sejmowy" 2020, no. 5, pp. 83–95.

[6] See S. Tkacz, *op. cit.*, pp. 167, 171–173.

[7] S. Rundstein, *Drogi prawa narodów*, Warszawa 1919, p. 5.

[8] Maria Szyszkowska (*Europejska filozofia prawa*, Warszawa 1993, p. 64) emphasized that hitherto there had been no philosophical-legal school which would be consistently based on all the main assumptions of Kant's philosophy. Karol Kuźmicz (*op. cit.*, p. 14) also pointed out that a given philosophical and legal conception is considered to be inspired by Kant's philosophy when it can be seen to contain any of the foundations of the thought of this philosopher.

[9] See S. Czepita, *Koncepcje teoretycznoprawne w Polsce międzywojennej*, "Czasopismo Prawno-Historyczne" 1980, no. 32, pp. 107–149.

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criticized the philosophy of Kant,[10] and also mention the sociological school of law concentrated around Bronisław Wróblewski, the supporters of the law of nature[11] and normativism, which, according to the researchers of the history of law, had few adherents in the interwar period.[12] Apart from these trends, Kazimierz Opałek and Władysław Wolter also pointed to thinkers who tried to create original theories.[13] Karol Kuźmicz pointed out that this type of classification is conventional, because the views of the mentioned thinkers were often not "pure views" belonging to one school only.[14] For example, Czesław Znamierowski is regarded as a positivist, as well as a follower of the sociological school of law, while he himself defined his position as "healthy realism".[15]

In the case of Rundstein, some scholars treat him as a consistent normativist because he articulated a normativist position in his 1924 book *Principles of Theory of Law* (Pol. *Zasady teorii prawa*).[16] However, Albert Moszerer stressed that, apart from *Principles of the Theory of Law*, in his other works Rundstein did not limit his method of research to normativism.[17] Referring to the two books analysed in this article, he stressed that Rundstein did not deny the principle of the sovereignty of states in them, as opposed to Kelsen's normativism. It should also be emphasized that he rejected Kelsen's concept of *Grundnorm* and replaced it with his own concept of the idea of law, which was an expression of a phenomenological approach to law.[18] Czesław Martyniak also argued that Rundstein's work is an independent discourse of

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[10] See K. Motyka, *Wpływ Leona Petrażyckiego na polską teorię i filozofię prawa*, Lublin 1993; M. Ossowska, *Norma prawna i norma moralna u Petrażyckiego*, [in:] *Księga pamiątkowa ku uczczeniu czterdziestolecia pracy nauczycielskiej w Uniwersytecie Warszawskim Profesora Tadeusza Kotarbińskiego*, ed. J. Kotarbińska, Warszawa 1959, pp. 75–85.

[11] In the version of St. Thomas Aquinas (e.g., Czesław Martyniak) and other legal-natural concepts (Edmund Krzemuski, Juliusz Makarewicz).

[12] Representatives of normativism include Szymon Rundstein, Stanisław Druks (Druszkowski), Maciej Starzewski, and in part Władysław Leopold Jaworski. See S. Tkacz, *op. cit.*, p. 169. "The common feature of Polish normativistic concepts was the recognition within these concepts that the theory of law is a theory of legal norms considered from the point of view of their structure and mutual relations between them" (S. Czepita, *op. cit.*, p. 131). More on normativism in Polish legal thought, see *Normatywizm Hansa Kelsena a współczesna nauka prawa*, ed. A. Bosiacki, Warszawa 2017. On the criticism of normativism in the Polish scientific discourse, see M. Łuszczyńska, *Polish Criticism of Hans Kelsen's Normativism*, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza" 2019, no. 108, pp. 106–119.

[13] K. Opałek, W. Wolter, *Nauka filozofii prawa i prawa karnego w Polsce*, Kraków 1948, pp. 16–17.

[14] K. Kuźmicz, *op. cit*., p. 37.

[15] S. Tkacz, *op. cit.*, p. 169.

[16] See J. Wróblewski, *Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena*, Warszawa 1955, p. 303.

[17] A. Moszerer, *O Szymonie Rundsteinie*, "Palestra" 1958, no. 6, p. 93.

[18] Rundstein was also inspired by phenomenological theories, in particular the views of Adolf Reinach. See S. Rundstein, *Zasady teorii prawa*, Warszawa 1924, pp. 7–8. More on this topic, see K. Opałek, *Początki teorii prawa w Polsce Odrodzonej*, "Czasopismo Prawno-Historyczne" 1992, no. 44, p. 109.

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thought by the author, and for the cognition of Kelsen's theory, it can be of indirect importance only.[19]

In fact, at no time can one treat this Warsaw lawyer as a consistent normativist, repeating only Kelsen's theses. In his work, he combined various concepts. One can, e.g., find much inspiration in his work from Petrażycki's theory of law.[20] On the other hand, he was consistently critical of certain schools of law, for instance, he considered sociological theories to be particularly inappropriate in the debate on international law, as they could at most explain to a certain extent the non-statutory evolution of national law, but were useless as a justification for the title of the binding force of law. He also stressed that at the dawn of the 20th century, the idea of natural law based on metaphysical premises had finally gone bankrupt, and he did not envisage a revival of these concepts.[21]

When addressing the question of the possibility of creating a definition of law that would adequately describe the "uncovered ocean of law", Rundstein stressed that this was an extremely difficult task, precisely because of the existence of fundamentally different definitions adopted by the various currents of legal thought.[22] However, he himself created the concept of the idea of law and consistently defined its meaning throughout his scholarly work. Rundstein did not merely repeat the theses of other jurists, but created his own original doctrine. According to Moszerer, his work is a "model of legal precision and subtlety" that has "an enduring value".[23]

THE IDEA OF THE LAW OF NATIONS – "THE PSYCHOLOGICAL MOMENT"

The reflections in *The Idea of the Law of Nations* were set in a specific historical context. There was a debate as to whether the law of nations could legitimately be claimed to exist. Rundstein opened *The Idea of the Law of Nations* by citing the pessimistic view, common during the war, that the war had destroyed not only individual interstate agreements, but also the very foundations of the law of nations. War contradicts the very idea of law, hence the conclusion that the law of nations

[19] See C. Martyniak, *Moc obowiązująca prawa a teoria Kelsena*, Lublin 1938.

[20] More on this topic, see S. Tkacz, *op. cit.*, pp. 181–183. Jerzy Lande also pointed this out, writing that Rundstein "makes a number of good remarks about theories which make the nature of norms dependent on various factual factors, such as their origin from someone, their operation in the psyche of a particular individual, etc." (J. Lande, *Norma prawna a zjawisko prawne. Rozważania nad podstawami teorii prawa na tle krytyki systemu Kelsena*, [in:] *Prace z dziedziny teorii prawa*, ed. W.L. Jaworski, Kraków 1925, p. 288).

[21] S. Rundstein, *Studia i szkice prawne*, Lwów 1904, p. 5.

[22] Idem, *Idea…*, p. 6.

[23] A. Moszerer, *op. cit*., p. 90.

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does not exist. It should be added that martial law cannot be equated with law, for these principles only limit arbitrariness, and their application in war is also arbitrary. Rundstein disagreed with these pessimistic views and explicitly stated that the law of nations does exist and the "bloody vapours of war"[24] only obscured its real shape. It must be remembered that wars are always only a temporary condition and not an end in themselves. Such an objective is to strive for a new balance of power and a peaceful order and this must be based on the law. He stressed that after the war, owing to its atrocities, law would acquire even greater importance, and so we cannot speak of the total annihilation of the idea of law by the Great War. The idea of law is the foundation necessary for the legal coexistence of states.

Rundstein posited as the objective of *The Idea of the Law of Nations* the presentation of what this idea is. He stressed that Gustav Radbruch's principle that "law is the regulation of the community"[25] cannot be accepted, as this definition does not explain the essence of the idea of law. He argued that it is necessary to establish a supreme and authoritative "moment of law" in the law of nations, to define the idea of the law of nations. This is not only a theoretical aspiration, but also a practical one, through which it will be possible to establish an "absolute guiding line" that excludes the factors of supremacy, arbitrariness, and lawlessness.[26] According to Rundstein, the authoritative "moment of law" in the law of nations is the "psychological moment", i.e. the teleological endeavour to shape the interstate order. Not only individuals, but also organizations, have a drive for self-preservation and seek to create impartial and secure guarantees for their positions in international relations. States without regulated interaction and competition will be exposed to negative consequences. In addition, development trends increasingly show that the interests of individual citizens of states reach far beyond the sphere of national law and must be legally regulated. The law of nations must also exist because the isolation of states runs counter to contemporary trends shaped by all-powerful economic factors. Capitalism inevitably seeks to expand its markets, so the need to regulate trade on an interstate basis becomes inevitable.

Moreover, Rundstein stressed the visible trend in theory to consider the law of nations as law, even if one accepts arguments that it fundamentally departs from the idea of law. "This fiction should therefore be scientifically legitimate, because it is a means leading to a definite and assessable end: and this end, in our case, is the development of such factors as could replace arbitrariness with certainty, the creation of such valuations as could eliminate the anarchy of brutal violence in favour of a fixed, unbroken and self-sufficient regulation".[27] In *The Paths of the Law*

[24] S. Rundstein, *Drogi*..., p. 8.
[25] G. Radbruch, *Grundzüge der Rechtsphilosophie*, Leipzig 1914, p. 42.
[26] S. Rundstein, *Idea*..., p. 8.
[27] *Ibidem*, p. 11.

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of Nations, he also stressed that the belief in the existence and power of international law in popular consciousness could not be underestimated. In times of war, these norms were regarded as instances capable of judging every act of the warring parties.

It would seem that the most obvious form of providing a guarantee of the position of the state and its citizens in the interstate arena is force. However, Rundstein vehemently asserted that the establishment of a lasting interstate order must be based on law. Every public order needs "indicators" of impartiality, equity and certainty, and such an "indicator" is nothing else but law. These "psychological moments" are part of the essence of the idea of the law of nations.

THE IDEA OF THE LAW OF NATIONS – THE COORDINATIVE CHARACTER

In his research on the idea of law, Rundstein adopted the theory of the existence of two types of law: subordinate and coordinative. Thus, he negated the opinions of the opponents of the law of nations, who considered its subordinate character to be the essence of law. According to them, the existence of law requires a supreme authority, which has law-making powers and the ability to dispose of sanctions for non-compliance with the law.[28] Meanwhile, Rundstein argued that law could also be a conventional arrangement, in other words, it could have a coordinative character. An agreement between equal superiors of different political entities is also a source of law. While in a state system the symbol of law is an order, an imperative of power, in an interstate system this role is played by a norm, which does not stem from an order of a superior, but is the result of a jointly recognized interest.

Opponents of the recognition of the law of nations argued that sanctions are only effective in a system of subordination because there is an organization that guarantees it. Rundstein pointed out that this necessity for violence to guarantee the execution of law stems from the psychological impossibility for most people to imagine law without lawlessness and reparation of that lawlessness through repression or restoration of equilibrium. Meanwhile, he himself stood by the position that coercion is neither the essence nor the symbol of the idea of law, but only an accompanying symptom. "Of course, the 'coercive' motivations that allow the unobstructed application of the norm play a serious role in the mechanism of that application; they are not, however, an exclusive factor".[29] He stressed that guarantees and sanctions of compliance with legal norms are also present in the coordinative system. They are of a specific nature,

[28] More on the phenomenon of subordination and equality in the context of political power, see W. Wołpiuk, *Z zagadnień związków władzy z podporządkowaniem i równością*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2020, vol. 12(4), pp. 7–31.

[29] S. Rundstein, *Idea*..., p. 35.

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but at times they are very serious. Most of them, however, is not based on coercion, but on the principle of reciprocity, which arises from common interests. It is self-help in international relations that has been the surrogate of coercion. At the same time, he pointed out that retaliation and war are also means of defending the law. They are not arbitrary or random means, nor are they perfect, but they do not contradict the idea of law. He added that, in principle, war is a hypothetical means of defence, because the awareness of solidarity of interests or the fear of risk that exists in times of peace are elements that inhibit the declaration of war. When war is fought, not in the name of defending the law, but in the name of particular interests, then it has an extra-legal character. Rundstein summed up these considerations by saying that the law of nations, although it has a specific genesis and a different dynamic revealed by a specific sanction, has all the qualities of law, has a coordinative character, which is an element of the essence of the idea of the law of nations.

THE IDEA OF THE LAW OF NATIONS – MORALITY

One of the arguments of the opponents of non-recognition of the law of nations concerned the relationship between law and morality. They believed that these two normative systems were inextricably linked, while they saw interstate relations as shaped solely by amoral violence. Rundstein stressed that if one were to accept this assumption of states as ruthless egoists guided only by force, then only a state of anarchy and not peace would be possible. He also pointed out an interesting paradox. The proponents of this view simultaneously sought to ethically justify violent action by pointing out that it should be seen as a necessary means to a higher end, namely the *raison d'état*, which they equated with the moral good. They referred to the theory of the coexistence of two different moral systems: one concerns actions in the private sphere, the other the political sphere. What seems immoral from the point of view of the first moral system can be a symbol of historical rightness in terms of values in the political sphere. "An ideal supported by force and realized by force represents a higher, better category in historical development. Thus a characteristic of rightness and entitlement will be proper to it, on account of an end which no individual judgment can coincide with; nor should the means leading to that end be subjected to such critical judgments".[30] In a coordination system, it is also more difficult to have a single system of values, since the *raisons d'état* of the various states never coincide on every point. Consequently, "the only just and equitable principle will be that which entitles one to act in accordance with one's actual ability to perform the act".[31] It follows that effectiveness in acting for the

[30] *Ibidem*, p. 19.
[31] *Ibidem*, p. 20.

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good of the international order is the criterion for moral evaluation in the interstate sphere. These arguments are largely reminiscent of the views of Niccolò Machiavelli, who regarded effective action on behalf of the *raison d'état* as a moral action that sanctifies the means undertaken to that end.[32] Rundstein concluded that even critics of the law of nations ultimately seek to justify interstate relations on legal and ethical grounds. As he stated, "this worldview, while directly excluding legal and ethical evaluations, indirectly reintroduces them, albeit in a modified form".[33]

Rundstein viewed international politics and the law of nations quite differently and did not separate them from morality with an impassable line of demarcation. He pointed out that in a state of peace, rational selfishness dictates that moral norms must be preserved in this sphere as well. "The basis of the principle of *pacta sunt servanda* is a moral imperative"[34] and this principle is essential for the coexistence of states and it is the foundation of the law of nations; hence the law of nations, which has a coordinating character, fulfills the criteria of the idea of law.

The issue of the relationship between law and morality had already been addressed by Rundstein in a work published in 1904 *On Ethically Indifferent Provisions of Law* (Pol. *O etycznie obojętnych przepisach prawa*).[35] Law and morality are not the same thing, but they are very closely connected: they can be compatible or not; and there also exist ethically indifferent legal norms. Rundstein gives the example of the legal principle *pacta sunt servanda*, which is at the same time an ethical principle, but which becomes "ethically indifferent" by virtue of the fact that the performance of obligations is linked in law to the formalism embodied in the rules.[36] The necessary formalism of law therefore in many cases renders legal rules ethically indifferent. "Legal norms do not differ from related norms in their essential purpose, but in their external character. They are, as Jellinek accurately puts it, rules regulating the external relations of people among themselves, determined by a recognized external authority and guaranteed by 'external powers'."[37] Law, unlike morality, does not deal with the motives of conduct, but only with the external effects of actions. In the article published in 1907, he stressed at the same time that the basic principle of the application of law is the valuation of norms.[38]

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[32] See M. Baranowska, *Cel uświęca środki, czyli Niccolò Machiavellego rozważania o władzy*, Toruń 2018, pp. 141–143.

[33] S. Rundstein, *Idea…*, p. 20.

[34] *Ibidem*, p. 18.

[35] Idem, *Studia…*, pp. 22–40.

[36] *Ibidem*, p. 34.

[37] *Ibidem*, p. 31.

[38] Idem, *Z nowych badań filozoficzno-prawnych*, "Gazeta Sądowa Warszawska" 1907, no. 15, p. 219.

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At this point, it should be emphasized that Rundstein distanced himself from Kelsen's theory in his views on the law-morality relationship.[39] Instead, one can see the influence of Petrażycki's theory of the bilateral character of legal rules. It is precisely this element that also distinguishes them from moral norms. "The objectivity and formalism of law are explained by the fact that legal norms, by their very nature, are bilateral (a legal claim corresponds to a legal obligation), that the 'separation of interests' cannot be guided by any subjective instance. Moral duties are strictly unilateral, because they do not correspond to a 'right' (in the subjective sense): my neighbor does not have the 'right' to demand that I love him as myself".[40]

In *The Idea of the Law of Nations*, Rundstein emphasized that the compatibility of the law of nations with the idea of law is conditioned by its being grounded in morality, although of course he did not equate the two normative systems. In the very idea of self-obligation that underpins the idea of the law of nations, factors of a moral nature need to manifest themselves, he wrote.[41] He strongly criticized those seeking to impose the discourse that international relations are a sphere of amoral violence. Instead, he regarded as too idealistic the emerging ideas formulated by Harold Laski that in future democracies it would be possible "to transform the processes of coercion into processes of consent".[42] According to Rundstein, it will not be possible in social life to replace legal norms with moral norms, a sense of internal and voluntary obligation[43].

THE IDEA OF THE LAW OF NATIONS – SELF-OBLIGATION AND THE RULE OF LAW

Analysing what is fundamental to the idea of the law of nations, Rundstein stated: "Such an idea is the concept of 'self-obligation' (*Selbstverpflichtung*)".[44] Self-obligation coordinates the life of citizens and is the expression of a jointly established order, not only in state law, but also in the law of nations. It encapsulates ethical valuation, i.e. we have the necessary link between law and morality at the level of the idea of the law of nations, as well as the concept of subjectivity in the application of laws and regulation rather than despotic arbitrariness. The complex of the will of states thus establishes rights and obligations, and is the source of the

[39] Artur Łuszczyński pointed out that "Kelsen saw and perhaps even valued morality, but not in the area of legal sciences" (A. Łuszczyński, *Value of Law in Political Thinking*, "Studia Iuridica Lublinensia" 2020, vol. 29(4), pp. 181).

[40] S. Rundstein, *Studia…*, p. 32.

[41] Idem, *Idea…*, p. 55.

[42] H. Laski, *Liberty in the Modern State*, London 1937, p. 47.

[43] S. Rundstein, *W poszukiwaniu prawa cywilnego*, Warszawa–Kraków 1939, p. 26.

[44] Idem, *Idea…*, p. 38.

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law of nations. Self-obligation does not then require the fiction of a supra-state community producing the illusion of subordinate organization, but the focus is on the subjects themselves. According to Rundstein, when norms of law are rooted in the idea of the law of nations, that is, in mutual obligation, respect for morality, and an awareness of their imperativeness (the "psychological moment"), they are quite durable. Where the norms of law derive their validity only from violence, they will remain in force only while the superior power maintains its preponderance by force. Such an order of subordination can thus be much more fragile. At the same time, Rundstein stressed that the permanence and certainty of regulation are not a direct result of the source of the normalization, but that the most important thing in this matter is the compatibility of legal norms with the necessities, needs, and expediency of social life at a particular historical moment. "For an independent state submits to a contractual norm only insofar as it willingly submits to this norm".[45]

The idea of self-obligation is not tantamount to the concept of immutability of the law. "The concept of the mutability of law is equivalent to the idea of law; the only thing at odds with this idea is the exclusion of confidence in the permanence and invulnerability of the norm as long as the norm exists and is in force".[46] States may change their will and responsibilities whether on a whim or from necessity, but they must abide by norms as long as they exist and even when they may be incompatible with their certain interests. According to Rundstein, the overriding interest of any state is to respect the rule of law, so the most important thing is to create a situation of certainty about the permanence and validity of legal norms. The legal nature of self-obligation is based on an independent legal principle requiring compliance with obligations. The state performs its obligations precisely because of this higher legal principle, and also reconciles its will with the previously adopted norms. It is also assumed that the enactment of new legal norms will be in accordance with the legal regulations established when the foundations of the community were laid. The essence of the idea of law is orderliness and inviolability.

In interpreting the relationship between self-obligation and the rule of law in Rundstein's theory, self-obligation is rooted much more in morality. According to Kant's philosophy, the moral value of an act is based on the awareness of fulfilling the assumed duty. Self-obligation is the foundation of the rule of law, which only applies to the sphere of the law, and although law and morality are intertwined, they are not identical.

Rundstein also pointed out that the rule of law in national laws is already seen as an indispensable principle, and at the international level the moment has come to regulate interstate relations in the same way. In *The Paths of the Law of Nations*, he added that in democratic countries the aspirations of the non-possessing classes to

[45] *Ibidem*, p. 42.
[46] *Ibidem*, p. 50.

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power and the realization of the idea of social justice are visible. He defined justice as law and *Zeitgeist*, thus according to the spirit of the times developments will also take place in the law of nations. A state that seeks to implement the idea of social justice must also do so on supra-state grounds. States respect the rule of law in domestic relations and will also do so in international politics for pragmatic reasons, treating "the idea of law as a practical necessity". The damage that any deviation from the established norm could cause would indeed undermine confidence in the state. Therefore, in order to prevent the public conviction of legal uncertainty from taking hold, states are able to give up a temporary advantage and recognize the legal bond that constrains them. This self-limitation also has positive sides, for one thing, it facilitates peaceful international relations. "Adherence to a self-imposed norm is therefore the result of well-understood egoism".[47] At the same time, Rundstein stressed that egoism cannot be regarded as the essential justification of self-interest and the very idea of law. "In addition to considerations of egoistic utility, factors of a moral nature, factors of good faith, of mutual trust, of solidarity of common interests, must manifest themselves".[48] He pointed out that it is precisely moral principles, good faith, trust and solidarity that are the elements creating a dam in the legal consciousness against the predominance of selfish interests. Of course, even if these factors are taken into account, the bonds of obligation will not have an absolute power.

The idea of the law of nations is based on self-obligation, for which it becomes necessary to restrain the egoism of states, which is not an easy challenge, even in theory. In his search for a possible solution to this dilemma, Rundstein referred to the considerations of Kant, who saw in the universal will a solution to the problem of contrasting human desires. Egoism leads to arbitrariness and destructiveness, but thanks to reason, man is able to understand that it is in his interest to restrain it and to create conditions for coexistence and possibly for real community with other people. The common will is that mechanism which, with the least expenditure of energy, brings divergent forces and aspirations to a common denominator. It is both an ethical as well as a strictly utilitarian principle. Rundstein emphasized that the lives of both people and states are a tangle of actions arising from practical reason and passion. Law regulates real life, so it should never be based on beliefs about the strictly rational and perfect nature of man. Here he also referred to Kant's concept of law, who saw it, not as a strictly *a priori* construction, but as taking into account the nature of man. It is not possible to mentally transform man into a completely rational being, free from passions, but, as Kant wrote, it is possible to make peace even with the people of the devils, as long as they have reason. Rundstein thus pointed out that the realization of the idea of the rule of law is always hindered by the fact that the aspirations of reason and instincts or will cannot be reconciled.

[47] *Ibidem*, p. 55.
[48] *Ibidem*.

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This leads to the conclusion that the mere awareness of the postulates of practical reason will not bring about the creation of strictly rational norms of interstate life.

Moreover, Rundstein referred to the argument of the opponents of recognition of the law of nations who claimed that the *rebus sic stantibus* clause in fact undermines the certainty of all interstate agreements and negates the fundamental legal principle of *pacta sunt servanda*. He countered this allegation by pointing out that this clause also functions under private law in many countries with no one questioning its validity or legitimacy. In addition, although the clause could lead to abuse, and he himself was not enthusiastic about it, as a remedy one could concretize the prerequisites entitling one to break a contract in the name of changed circumstances so that they were not merely the dictates of selfish interests.

When considering the questions related to the idea of change in the law and the rule of law, Rundstein also referred to the instance of a revolution that introduces a new system by violence, which is not compatible with the idea of law. However, in cases where revolutions are the result of a society's belief in the need for radical change, which has been shaped by the influence of economic and political factors, then the new legal order can be legitimized. Rundstein's thesis is that the law itself does not always involve the righteousness of its genesis. "The ethical valuations inherent in all intra-state upheavals, stemming from a change in the formation of social forces, empower the new order *ex opinione necessitatis*. This *opinio necessitates* is a powerful moral impulse which – albeit by violent means – crystallizes into more just, more equitable legal norms".[49] Referring to change, Rundstein stressed that in interstate relations it is not possible to speak of a common consciousness of universal moral principles, much less of the necessity of change. Therefore, radical upheavals in interstate life are the result of forces, the outcome of violence, and not part of a developmental process that would legitimize a new legal arrangement.

CONCLUSIONS

Szymon Rundstein opposed the view that international law does not exist and that politics between states is shaped by the law of force. He also rejected the view that international law was merely positive law norms designed to protect the selfish interests of individual states. The purpose of law is not limited to providing states with power and money in a world of international politics based on absolute violence. In his view, it is the idea of the law of nations that should determine the paths of international politics. He defined the idea of the law of nations as a bond that arises from a widespread realization ("psychological moment") of the necessity of regulating interstate relations, which, within the conventional community,

[49] *Ibidem*, p. 26.

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consists in self-obligation. This idea of law is the aspirations and ideals present in the consciousness of social groups, which constitute an "*a priori* index" for the evaluation of the law itself. The idea of law has no fixed content, but there is no place for arbitrariness or violence, instead its essence is certainty and self-sufficiency as well as the rule of law, which stems from the *pacta sunt servanda* principle. The idea of the law of nations has a utilitarian, practical, moral, and ideal value.

Rundstein concluded his *Idea of the Law of Nations* by stating that the end of the war would be the moment when the idea of law would be restored, and that "the monstrous liveliness of contemporary struggles will give these basic legal concepts a vital character by establishing guarantees hitherto completely unknown in international practice".[50] Already during the war, he projected the emergence of a new international organization that would guarantee the observance of the law on an unprecedented scale. He regarded such an international organization as "the noblest realization of the idea of law".[51]

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[50] *Ibidem*, p. 70.

[51] Idem, *Drogi…*, p. 4. More on this topic, see M. Baranowska, *International Organization as the Foundation of a Peaceful Order after the First World War in the Views of Szymon Rundstein*, "Journal on European History of Law" 2022, vol. 13(1).

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ABSTRAKT

Celem badawczym artykułu jest przedstawienie poglądów Szymona Rundsteina na temat prawa międzynarodowego w czasie I wojny światowej, kiedy żywy stał się spór między prawnikami o istotę i rolę tego prawa. Rundstein jednoznacznie opowiedział się po stronie obrońców prawa międzynarodowego, argumentując, że jego istnienie opiera się na odwiecznie istniejącej idei prawa narodów. Celem badawczym artykułu jest sformułowanie odpowiedzi na pytanie, czym była idea prawa narodów. Te rozważania Rundsteina można rozpatrywać nie tylko z perspektywy filozofii prawa, analizując samo pojęcie idei prawa narodów, lecz także z perspektywy historii myśli politycznej i prawnej, ponieważ wypracował on doktrynę dotyczącą zarówno prawa, jak i dróg rozwoju polityki międzynarodowej.

Słowa kluczowe: Szymon Rundstein; prawo międzynarodowe; idea prawa narodów; polityka międzynarodowa; filozofia prawa