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BETWEEN NORMATIVISM AND PHENOMENOLOGY: ON THE INFLUENCE OF ADOLF REINACH'S CONCEPT OF SOCIAL ACTS ON SZYMON RUNDSTEIN'S THEORY OF LAW

Abstract. This text is devoted to commemorating Professor Tomasz Bekrycht, who was an eminent expert in the phenomenology of law. His interests focused particularly on the analysis of the philosophical and legal views of Adolf Reinach. The undoubted achievement of Professor Tomasz Bekrycht is that he restored the works of Adolf Reinach to Polish theory and philosophy of law. This study focuses on the references to A. Reinach's concept of social acts in the indicated work by Szymon Rundstein, who does not ignore the concept of social acts in his considerations, but treats it as an interesting theoretical and legal suggestion. While analysing the influence of phenomenological concepts on Rundstein's theory, an important conclusion was made: as a normativist, Rundstein accepts the concept of the "basic norm" (*Grundnorm*), suggested by Hans Kelsen, which legitimises law (the validity of other legal norms within the system).

Keywords: Adolf Reinach, Szymon Rundstein, phenomenology, normativism, the concept of social acts

POMIĘDZY NORMATYWIZMEM A FENOMENOLOGIĄ – O WPŁYWIE KONCEPCJI AKTÓW SPOŁECZNYCH ADOLFA REINACHA NA TEORIĘ PRAWA SZYMONA RUNDSTEINA

Streszczenie. Szymon Runstein był czołowym polskim przedstawicielem normatywizmu okresu międzywojennego. Pozostawał on także pod wpływem koncepcji fenomenologicznej Adolfa Reinacha. Opracowanie zostało poświęcone problematyce wpływu koncepcji aktów społecznych Adolfa Reinacha na teorię prawa Szymona Rundsteina. W szczególności autorzy zadają pytanie, czy poglądy Adolfa Reinacha wpłynęły na pojmowanie przez Szymona Rundsteina kelsenowskiej „normy podstawowej" (*Grundnorm*). W toku badań okazało się również, że autorzy wywodzący się z różnej

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tradycji filozoficznoprawnej, poddając analizie właściwości prawa, wskazują na konieczny element komunikacji społecznej. Każe to zadać pytanie o możliwość uzasadnienia prawa, czy charakterystyki pewnych jego właściwości, bez odwołania się do praktyki aktów społecznych. Artykuł ma na celu przypomnienie często pomijanych we współczesnych pracach poglądów Szymona Rundsteina oraz Adolfa Reinacha. Tekst został przygotowany, dla upamiętnienia zmarłego Profesora Tomasza Bekrychta, który koncepcjom fenomenologicznym Adolfa Reinacha poświęcił swoje najważniejsze prace.

Słowa kluczowe: Adolf Reinach, Szymon Rundstein, fenomenologia, normatywizm, koncepcja aktów społecznych

1.

Professor Tomasz Bekrycht was an eminent expert in the phenomenology of law (Golecki 2021, 11). His interests focused particularly on the analysis of the philosophical and legal views of Adolf Reinach. He devoted his doctoral dissertation (Bekrycht 2009a) and many of his published articles to this subject matter (Bekrycht 2020, 63–73). In his habilitation treatise dedicated to the issue of validity and justification of the existence of law, there were also references to Adolf Reinach's views (Bekrycht 2015, 69, 70, 74). What should not be forgotten as well is the preparation by Tomasz Bekrycht of the Polish translation of A. Reinach's work titled *Die apriorischen Grundlagen des bürgerlichen Rechtes* (Reinach 2009). In the introduction to its Polish edition, Tomasz Bekrycht wrote that the views of this author were currently largely forgotten (Bekrycht 2009b, 7). Without a doubt, the publication of the Polish translation of this work enhanced Polish researchers' interest in the views of this outstanding representative of the phenomenological movement.

At this point, it should be indicated that the views of A. Reinach had a significant impact on the Polish theory and philosophy of law in the interwar period (Bekrycht 2009b, 7). One of the authors influenced by his concept was Szymon Rundstein. This is particularly evident in his monograph titled *Zasady teorji prawa* [*The Principles of the Theory of Law*] (Rundstein 1924), published in 1924, in which he presented his own vision of law and its legitimising. In this study, the focus will be on the references to A. Reinach's concept of social acts in the indicated work by Sz. Rundstein. What should be emphasised is that the considerations presented here are limited to the topic outlined in this way. A number of other problems concerning Sz. Rundstein's theoretical and legal views require further research in the future.

2.

Szymon Rundstein is considered to be a supporter of normativism. The role of normativism in the two interwar decades is assessed ambiguously (Opałek 1987, 17–25). Some authors express the view that normativistic concepts in interwar

Poland had relatively few supporters (Czepita 1980, 130–134). Others point to the uniqueness of Polish normativistic concepts and the interest they aroused among authors representing a different theoretical and legal standpoint (Tkacz 2018, 167–185).

Szymon Rundstein presented his normativist view in a monograph that appeared in 1924, entitled *Zasady teorji prawa* [*The Principles of the Theory of Law*] (Rundstein 1924). It should be highlighted, however, that this work is an independent lecture presenting thoughts of an author who accepts the fundamental assumptions of normativism rather than a repetition of Hans Kelsen's views (Martyniak 1938, note 21). For example, Stanisław Czepita directly writes that Sz. Rundstein's position consisted of his own original concept of legal norms (Czepita 1980, 130). Undoubtedly, Rundstein's concept modified the original normativist concepts, as the author was strongly influenced by the phenomenological theory of law (Opałek 1992, 109; Czepita 1980, 131). In this study, our focus will be on one problem of fundamental theoretical and legal significance in A. Reinach's concept, namely the problem of social acts ("*der soziale Akt*").

3.

Reinach's concept of social acts is compliant with his deliberations on the foundations of civil law comprised in the work titled *Die apriorischen Grundlagen des bürgerlichen Rechtes* (Zimmermann-Pepol, 1–16). Without a doubt, by presenting a proposal for the concept of social acts, Reinach made a significant contribution to the theoretical discourse on the legitimisation of law. At this point, the detailed analysis of Reinach's views carried out by T. Bekrycht will be omitted (Bekrycht 2009a; 2015; 2020). Those elements of his concept will be dealt with that are important from the standpoint of Sz. Rundstein's statements.

A. Reinach searches for an answer to the question about the source of law and its justification. This is aimed at finding an answer to the question of why law exists. Law can be legitimised in two ways. First, its existence may justify an appeal to some being which is above or possibly beyond the law (theories of natural laws). Second, law can be legitimised by a legislator (a human being), i.e. the sovereign who creates it, or by the law itself (positivist theories) (Bekrycht 2020, 64–73).

The concept of social acts is a separate suggestion for justifying the existence of law against legal positivism and the concept of natural laws. As T. Bekrycht writes, this concept is ambiguous in many points (Bekrycht 2015, 113). Without going into details, social acts can be of a different nature. In order for such an act to take place, its content must be communicated to the addressee (Bekrycht 2009a, 93). Among the acts, there are those that also require acknowledgment by the subject to whom the content was directed (Bekrycht 2009a, 93). Therefore,

apart from the intention of the creator of the act to fulfil it, its implementation requires the intention of the recipient (who fulfils the act) (Bekrycht 2009a, 96). A. Reinach includes requests or orders in this group (Zimmermann-Pepol, 9–13). He calls these acts social, not linguistic, because language is their possible but not necessary element (externalisation can not only have a linguistic dimension, but can be manifested in any other possible way – e.g. through gesture, facial expressions, or silence) (Bekrycht 2015, 113). Thus, a social act is of a functional character (Bekrycht 2015, 114). Its fulfilment is a source of communication owing to which it is possible to influence the behaviour of other people (Bekrycht 2015, 114). Therefore, these acts enable making changes in the social reality (Bekrycht 2015, 114).

The concept of social acts is used by A. Reinach to justify the existence of law (understood as a relationship between a right and an obligation). Reinach asks what conditions are necessary for the emergence of law, and mentions two necessary conditions. Firstly, for its creation there must be at least two entities that can communicate with each other (the entity that creates the law and the one to which it is directed). Secondly, a communication situation between them must take place (they must communicate with each other)[1]. By applying these assumptions, Reinach accepts the communicative vision of creating law, which was later developed by Jürgen Habermas (Bekrycht 2015, 112).

At this point in his deliberations, A. Reinach raises a fundamental question about the source of the legitimisation of the law which is defined as positive law (the legal norms with which the feature of being in force is associated). What justifies the validity of legal norms? The findings concerning the concept of social acts presented by the author can be related to the justification of positive law. According to Reinach, it is social acts that constitute positive law. As a result, a right arises on the part of the law creating entity and the obligation on the addressee's side. Yet, Reinach points out that in the case of positive law, some modifications should be made. A structure of positive law built only on a right and an obligation would be too weak (Bekrycht 2020, 70). In his opinion, positive law must contain effective tools enabling the enforcement of norms. Therefore, an element of coercion is indispensable, the effect of which is the introduction of sanctions[2]. This element is associated by A. Reinach with the act of normalisation

[1] Cf. Bekrycht (2020, 68): "Thereby, from the point of view of ontology we can speak about two sources i.e. the ontological bases of the existence of law. The first source is the occurrence of a communicative situation, the other source is that there is an entity, and more precisely entities, that can take part in the communication. What is important here is the fact that in the ontological analyses we have reached the possibility of setting conditions for the existence of law."

[2] Cf. Bekrycht (2020, 70): "The structure of positive law cannot be built on the grounds of a promise, i.e., on a claim and an obligation, since it is too weak. We must find something stronger. Why? Because a phenomenon of positive law should contain a potential element of coercion to enforce its norm and not a claim in the content of which there is such enforcement."

(*Bestimmugsakt*), which constitutes positive law, understood as a set of binding legal norms. Reinach's statements regarding the normalisation act can be interpreted in various ways (Bekrycht 2009a, 132–146). It seems that this act either coexists with a social act or is its special type. However, it undoubtedly has its source in the relationship between the speaker and the recipient of the statement. Thus, the former becomes a legislator. A separate issue is where the speaker derives the competence to establish binding legal norms. This problem will be discussed later.

4.

It is written in expert literature that Sz. Rundstein treats the assumptions of normativism extremely rigorously (Wróblewski 1955, 303). At the same time, in the monograph titled *Zasady teorji prawa* [*The Principles of the Theory of Law*], the author quotes the views of A. Reinach several times (Rundstein 1924, 5, 7–8, 9, 17–18, 35, 42–45). This proves his interest in the concepts of this author. Rundstein shares Reinach's view on the need to search for sources that legitimise positive law. Like Reinach, he rejects justifications that reach back to metaphysics. Remaining faithful to normativism, Rundstein tries to find a justification for positive law within the law itself, which has a hierarchical structure. There is a visible difference in comparison to the views of Reinach, who seeks justification for positive law in the context of relations that come into being as a result of social acts.

Sz. Rundstein does not ignore the concept of social acts in his considerations. He treats them as an interesting theoretical and legal suggestion (Rundstein 1924, 42–44). At the same time, the author, adopting the fundamental assumptions of normativism, criticises the fact that A. Reinach – in his opinion – mixes "what is" (*Sein*) with "what should be" (*Sollen*) (Rundstein 1924, 44). Sz. Rundstein asks the question whether it is really the case that the occurrence (fact) of a social act is a source of law? In his opinion, the facts of social acts are only the primary source. Therefore, the law is created not by social acts, but by a legislator with the competence to create norms, who expresses their opinions about these acts (within specific procedures). It is this legislator, not one of the subjects in the communicative situation, who transfers social acts into the normative sphere. It is the relation between the norm and the social act that is the source of the "secondary content" existing in the sphere of "what should be" (Rundstein 1924, 44–45). It needs to be mentioned that Sz. Runstein does not refer to the acts of normalisation (as they are understood by A. Reinach). Therefore, it is difficult to establish his theoretical and legal standpoint concerning this subject.

In our opinion, the different views of Sz. Rundstein and A. Reinach are manifested in whether the act of normalisation takes place within (inside) the

framework of a communicative situation (the legislator is the one who expresses themselves) or whether the legislator is an entity external to this situation. Another problem is where the legislator obtains their power to legislate. As regards Rundstein, the answer to this question seems simple. Law understood as a hierarchical system, guided by the constitution, authorises certain entities to regulate. Reinach's theoretical and legal position in this matter was not clearly formulated. Years later, T. Bekrycht, while analysing the views of A. Reinach, proves that the speaker has been given the authority to legislate (to an act of normalisation) by the addressee of legal norms (the subject to whom the statements are addressed). Therefore, law-making must be preceded by an act authorising to legislate it. This is a kind of surrender act (following the principle: yes, we agree that you set norms). Therefore, in order to give rise to law, there must be a sovereign who, having power, agrees to submit to law. It is this sovereign who, being the addressee of law, decides who is the legislator and with what competences. Thus, the addressee of the message that is a sovereign (nation, community, state) legitimises positive law, which determines its effectiveness (Bekrycht 2020, 70–71).

5.

While analysing the influence of phenomenological concepts on Sz. Runstein's theory, one more conclusion must be made. As a normativist, Rundstein accepts the concept of the "basic norm" (*Grundnorm*), suggested by Hans Kelsen, which legitimises law (the validity of other legal norms within the system) (Huk 2014, 204–214). According to Kelsen, the "basic norm" is a legal norm. Yet, Rundstein proves that the "basic norm" is an assumption of the system that does not require justification (Rundstein 1924, 343). Therefore, it cannot be normatively justified (it cannot be recognised in terms of law) (Rundstein 1924, 343–354). The fact is that the justification of the "basic norm" is the element of Rundstein's theory that raises the most doubts. However, it cannot be ruled out that when justifying the "basic norm," Rundstein – by departing from the assumptions of normativism – transfers his considerations on the "basic norm" (understood as a necessary assumption of the system) beyond the law (Tkacz 2018, 178–181). According to Rundstein, such an approach to the problem of the legitimacy of law will result in dismissing the accusations of scepticism and arbitrariness as regards the possibility of normative justification of the "basic norm." At this point, the question must be raised whether, in justifying the "basic norm," Rundstein does not depart from the assumptions of normativism by reaching for certain elements of phenomenology. This conclusion seems quite radical, but in the light of Rundstein's statement, it cannot be ruled out.

6.

When addressing the concept of social acts, it is impossible to ignore Leon Petrażycki's theory of law. It should be reminded that, by treating the law as a specific type of psychological experience, this author points to a bilateral nature of legal emotions (this is a criterion that distinguishes law from morality). According to Petrażycki, law is a class of psychological experiences which are sensed in relation to other people as embarrassment associated with them, and in which what is burdensome for one side belongs to the other side as its due (it has a bilateral character) (Petrażycki 2022, 8–128; 1959, 101–307). It should be noted that the author, starting from the psychological standpoints, also indicates the necessary element of communication between two subjects of law (in the sphere of psychological experiences). At the same time, L. Petrażycki pays little attention to the issues of legitimising the law. The characteristics of the "official law" proposed by him, as the applied law, supported by representatives of state authority, is extremely laconic (Petrażycki 1959, 307). It should be stressed that at this point Petrażycki introduces a criterion that is not psychological in the strict sense of this word. One of the authors explicitly points out that here Petrażycki's theory ceases to be a theory of psychological experiences and becomes a theory as real social practice [practice of social acts – A. W, S. T.] (Pietrzykowski 2012, 289–290). Sz. Rundstein as well, although he does not share Petrażycki's views on the possibility of describing law in terms of psychological experiences, recognises that this author accurately captures some of its properties (Rundstein 1924, 56). In particular, Rundstein accepts the thesis on the bilateral nature of legal norms (Rundstein 1904, 35). It seems significant that, in their analyses of the properties of law, three authors coming from different theoretical and legal traditions (A. Reinach – phenomenology, Sz. Rundstein – normativism, L. Petrażycki – the psychological concept) indicate a necessary element of social communication. This makes one ask a more general question about the possibility of justifying law or about the characteristics of some of its properties, without referring to the practice of social acts. In our opinion, the answer to this question still remains open.

7.

The presented comments require a few words of recapitulation. A. Reinach's concept of social acts is undoubtedly an interesting theoretical and legal proposition. This was pointed out by Sz. Rundstein. On the one hand, he tried to be faithful to the fundamental assumptions of normativism. On the other, the phenomenological vision of law was an original and inspiring suggestion for him. Therefore, some of its elements were accepted by him, which complemented the

normativist vision of the law he promoted. Obviously, there are also fundamental differences in the views of these authors. First of all, the differences pertain to whether the social act itself creates law, or whether it is determined by the norm of a social act, established by a competent entity external to the parties involved in the communicative situation. Normativism tells Runstein to distinguish the sphere of social acts (facts) from the platform of norms which determine that these acts become law.

It is worth noting that the concept of social acts presented by A. Reinach – from the historical point of view – is the first systematic analysis of communication activities (Bekrycht 2015, 112). The communicative nature of law (its properties) was more or less clearly emphasised by Sz. Rundstein and L. Petrażycki. This is particularly worth highlighting in the situation in which in the second half of the 20th century the theories of communication gained widespread recognition. Unfortunately, the views of both A. Reinach and Sz. Rundstein do not reach the common awareness today. Perhaps the reason is the sublime language of their works, which makes their analysis not an easy task. Therefore, the undoubted achievement of Professor Tomasz Bekrycht is that he restored the works of Adolf Reinach to Polish theory and philosophy of law. We can only hope that his efforts in this matter will be continued.

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