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## On the threats to democracy and the rule of law: The philosophy of total states in the views of Szymon Rundstein and Maciej Starzewski

### 1. Introductory remarks

One of the most important issues raised in recent times in expert literature is the issue of threats to democracy and the rule of law. This study discusses its multifaceted nature due to the susceptibility of democracy to various factors that may affect its stability.<sup>1</sup> It is indicated that the need to verify the role and tasks of the most important institutions of political life, including primarily the state, is determined by the nature and dynamics of changes taking place in the contemporary world.<sup>2</sup> In recent years, as part of the public

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<sup>1</sup> Cf. P. Wiatrowski, *Współczesne zagrożenia demokracji – aspekt prawny* [Eng. *Contemporary threats to democracy – the legal aspect*], "Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie" 2019, no. 2, pp. 7–8.

<sup>2</sup> M. Kiwior-Filo, „Brak” państwa czy jego „nadmiar” – wyzwania i zagrożenia współczesnej demokracji [Eng. *“Lack” or “excess” of the state – challenges and threats of contemporary democracy*], *Annales Universitatis Paedagogicae Cracoviensis*, Folia 282: “Studia Politologica” 2018, no. 21, p. 19.

debate on the constitutional crisis in Poland and the interpretation of the constitution, the current state of democracy in Poland has often been discussed.<sup>3</sup> What is directly indicated in theoretical legal works are – as the authors write – the “fires” with which the Polish state has been fighting in this field since 2015.<sup>4</sup> The problem of instrumentalization of the rule of law as a political ideal is also identified. One of the authors of *Goodbye rządy prawa?* refers to the concept developed by Ernst Fraenkel in the times of Nazi Germany and writes directly that “[a] new stage of legal dualism is the practice of authoritarian governments, which undermine the idea of the rule of law by means of law itself”.<sup>5</sup> In our opinion, in a period of declining trust in democracy and the rule of law crisis identified in the Polish sociopolitical order, referring to concepts justifying the understanding of threats related to the formation of totalitarian states is fully justified. More importantly, the observation that threats identified almost a hundred years ago are returning seems accurate. The threats to democracy and the rule of law crisis were repeatedly addressed in Polish works in the field of theoretical, legal and dogmatic studies written after 1926. Their authors frequently raised the issue of dangers related to the phenomenon referred to as “anti-constitutional tendencies”. These problems were addressed in the works of, among others, Antoni Peretiatkowicz<sup>6</sup>, Maciej Starzewski<sup>7</sup>, Stanisław Kutrzeba<sup>8</sup>, and

<sup>3</sup> Cf. e.g. J. Zajadło, *Constitution – hostile interpretation*, “Przegląd Konstytucyjny” 2018, no. 2, pp. 5–15; T. Pietrzykowski, *Polski kryzys konstytucyjny oczami pozytywisty prawniczego* [Eng. *The Polish constitutional crisis as seen by a legal positivist*], “Państwo i Prawo” 2022, no. 3, pp. 3–17.

<sup>4</sup> M. Pichlak, M. Wojtanowski, *Dawne i obecne poszukiwania nomosu prawa. Wprowadzenie* [Eng. *Old and new searches for the nomos of law. Introduction*], “Archiwum Filozofii Prawa i Filozofii Społecznej” 2024, no. 4, p. 14.

<sup>5</sup> P. Kaczmarek, *Goodbye rządy prawa? Diagnoza i perspektywa* [Eng. *Goodbye, rule of law? Diagnosis and prospects*], “Archiwum Filozofii Prawa i Filozofii Społecznej” 2024, no. 4, p. 58.

<sup>6</sup> A. Peretiatkowicz, *Kryzys parlamentaryzmu i Konstytucja Polska z 1935 r.* [Eng. *The crisis of parliamentarism and the Polish Constitution of 1935*] [in:] *idem*, *Studia prawnicze* [Eng. *Legal studies*], Księgarnia Św. Wojciecha, Poznań 1938, pp. 126–151; *idem*, *Machiavelli i państwo totalne* [Eng. *Macchiavelli and the total state*], “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1938, no. 4, pp. 361–373; *idem*, *Cezaryzm demokratyczny a Konstytucja Polska* [Eng. *Democratic Caesarism and the Polish constitution*], “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1929, no. 4, pp. 367–376.

<sup>7</sup> M. Starzewski, *Organizacja społeczeństwa na podstawie ekonomicznej w państwie faszystowskim* [Eng. *Societal organisation on an economic basis in a fascist state*], “Przegląd Współczesny” 1930, no. 104, pp. 410–453; *idem*, *Ze studiów nad ustrojem faszystowskim* [Eng. *From studies on the fascist system*], Krakowska Spółka Wydawnicza, Kraków 1931; *idem*, *Demokracja a totalizm: odczyt wygłoszony w klubie dyskusyjnym Związku Legionistów Polskich w Krakowie dnia 4 listopada 1937 r.* [Eng. *Democracy and totalism: an address given at discussion club of the Polish Legion Members in Krakow on 4 November 1937*], Wydawnictwo S.A. Krzyżanowski, Kraków 1937; *idem*, *Z rozważań nad przyczynami kryzysu demokracji* [Eng. *From reflections about the reasons for the crisis of democracy*] [in:] *Księga pamiątkowa na dziewięćdziesięciolecie dziennika „Czas”. 1848–1938* [Eng. *Festschrift for the nineteenth anniversary of Czas daily*], Drukarnia Polska, Kraków 1938, pp. 81–82, quoted in: *idem*, *Demokracja i totalizm. Wybór pism* [Eng. *Democracy and totalism. Selected writings*], Akademicka Kraków, Kraków 2015, pp. 289–294.

<sup>8</sup> Cf. S. Kutrzeba, *Państwa totalne – światła – cienie – przyszłość* [Eng. *Total states – lights – shadows – future*], Gebethner i Wolff, Kraków 1937; *idem*, *Państwa totalne. Odczyt* [Eng. *Total states. An address*], Gebethner i Wolff, Kraków 1937.

Szymon Rundstein.<sup>9</sup> The published studies concerned both internal threats and dangers related to the emergence of fascist states and the Soviet state. The findings made at that time are still extremely relevant. Therefore, it seems reasonable to recall, in the context of the challenges that legal practice and jurisprudence face today, the conclusions formulated almost a century ago.

Due to this study's space limitations, and at the same time the abundant research material, the area of the conducted analyses has been narrowed. Therefore, our considerations will be devoted to the views presented by two authors, Szymon Rundstein and Maciej Starzewski. There are a number of reasons for such a choice. The indicated authors are considered supporters of normativism, which had few supporters in the interwar period in Poland.<sup>10</sup> The concept put forward by Rundstein, who is described as the most important representative of normativism in Poland during the interwar period, was presented in a monograph entitled *Zasady teorii prawa*, published in 1924.<sup>11</sup> However, the scholar modified and creatively developed the views of Hans Kelsen, linking them with phenomenology and elements characteristic of psychological theories.<sup>12</sup> He was also strongly influenced by phenomenological theories<sup>13</sup> (mostly by the views of Adolf Reinach).<sup>14</sup> For this reason, for example, according to Czesław Martyniak, Rundstein's works constituted an independent concept.<sup>15</sup> Regardless of the above, Rundstein

<sup>9</sup> S. Rundstein, *O nowoczesnych tendencjach prawa konstytucyjnego* [Eng. *On modern tendencies in constitutional law*], "Palestra" 1931, no. 6–7, pp. 255–278; *idem*, *Narodowo-Socjalistyczna doktryna prawa narodów* [Eng. *National Socialist doctrine of the law of nations*], "Polityka Narodów" 1935, vol. 5, no. 6, pp. 700–714; *idem*, *W poszukiwaniu prawa cywilnego* [Eng. *In search of civil law*], Księgarnia Powszechna, Warszawa – Kraków 1939.

<sup>10</sup> Cf. S. Czepita, *Koncepcje teoretycznoprawne w Polsce międzywojennej* [Eng. *Theoretical concepts in interwar Poland*], "Czasopismo Prawno-Historyczne" 1980, vol. 32, no. 2, p. 130; S. Tkacz, "Narady nad teorią prawa" – problemy i polemiki [Eng. *Discussions on the theory of law – problems and polemics*] [in: *Prawo i czas. Księga jubileuszowa z okazji 80-lecia urodzin profesora Adama Lityńskiego*] [Eng. *Law and time. Jubilee book on the 80<sup>th</sup> birthday of Professor Adam Lityński*], eds. M. Borski, D. Fleszer, A. Pokora, A. Rogacka-Łukasik, Oficyna Wydawnicza „Humanitas”, Sosnowiec 2020, pp. 101–104.

<sup>11</sup> S. Rundstein, *Zasady teorii prawa* [Eng. *Principles of the theory of law*], Księgarnia F. Hoesicka, Warszawa 1924. Critically, see: C. Znamierowski, *Recenzja pracy Szymona Rundsteina: Zasady teorii prawa*, Warszawa 1924 [Eng. *Review of Szymon Rundstein's work: Principles of legal theory*], "Ruch Prawniczy i Ekonomiczny" 1924, no. 3, pp. 390–395.

<sup>12</sup> Cf. S. Tkacz, *Teoria normy prawnej Szymona Rundsteina – założenia wyjściowe* [Eng. *Szymon Rundstein's theory of legal norm – initial assumptions*], "Z dziejów Prawa" 2018, vol. 11 (19), part 2, pp. 173–174.

<sup>13</sup> This is focused on by K. Opalek, *Początki teorii prawa w Polsce Odrodzonej* [Eng. *The beginnings of the theory of law in the Reborn Poland*], "Czasopismo Prawno-Historyczne" 1992, vol. 44, no. 1–2, p. 109; as well as S. Czepita, *Koncepcje teoretycznoprawne...*, p. 131.

<sup>14</sup> Cf. S. Tkacz, A. Wentkowska, *Between Normativism and Phenomenology: on the Influence of Adolf Reinach's Concept of Social Acts on Szymon Rundstein's Theory of Law*, "Folia Iuridica" 2022, no. 100: *The Aprioristic and Transcendental Foundations of Law*, ed. M. Zirk-Sadowski, pp. 127–135.

<sup>15</sup> C. Martyniak, *Moc obowiązująca prawa a teoria Kelsena* [Eng. *Binding force of law in the context of Kelsen's theory*], Katolicki Uniwersytet Lubelski, Lublin 1938, note 21.

is considered a consistent Polish normativist.<sup>16</sup> According to Wróblewski, by treating the assumptions of the pure theory of law more rigorously than Kelsen, Rundstein was a more radical normativist than the creator of this concept himself.<sup>17</sup> In this aspect, comparing the views of two authors who accepted different varieties of normativism seems particularly interesting. In their lectures both Rundstein and Starzewski (despite supporting the April Constitution and sympathizing with the Sanation Movement) presented themselves as declared supporters of democracy, identifying the causes of its crisis and showing its importance for the existence of a strong state. In their works, they also identified threats related to the emergence of total states, which in their opinion constituted a denial of democracy and the rule of law. It should also be noted that these authors combined their scientific work with practice, but their activity was interrupted by the outbreak of World War II, caused by the total state which was the subject of their critical research. Maciej Starzewski was arrested as a part of *Sonderaktion Krakau* and then deported, together with other professors from Kraków universities, to the Sachsenhausen concentration camp, where he was kept until 8 February 1940.<sup>18</sup> The scholar died of tuberculosis on 4 December 1944. In August 1942, Rundstein, together with his wife, daughter and granddaughter, were deported to Treblinka extermination camp, where they were all killed in a gas chamber.<sup>19</sup> As Albert Meszorer wrote in 1958, this was how an outstanding, world-class scholar had ended his life, dying as a result of a monstrous violation of the principles of law by the total state, which had been the subject of his scientific research and legal practice.<sup>20</sup>

## 2. Terminology

The subject of this study requires preliminary terminological clarifications. In the title, we proposed a notion that was commonly accepted in Polish literature of the interwar period, namely *total state*. Both Rundstein and Starzewski used this term. As Kutrzeba wrote, the name *total state*, coined by Mussolini, was applied to describe the fascist systems of Italy, Nazi Germany and Bolshevik Russia.<sup>21</sup> It should be emphasized that authors who use this term are not consistent in this respect. For example,

<sup>16</sup> Cf. A. Bosiacki, *Wstęp* [Eng. *Introduction*] [in:] H. Kelsen, *Czysta teoria prawa* [Eng. *Pure theory of law*], trans. R. Szubert, ed. A. Bosiacki, LexisNexis, Warszawa 2014, p. 36.

<sup>17</sup> Cf. J. Wróblewski, *Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena* [Eng. *Critique of Hans Kelsen's normativist theory of the law and the state*], PWN, Warszawa 1955, p. 303.

<sup>18</sup> Cf. Ł. Jakubiak, *Maciej Starzewski (1891–1944)*, <https://ruj.uj.edu.pl/server/api/core/bitstreams/bc625f-65-c77c-4bab-be6e-800230458bc9/content> (accessed: 20.04.2025).

<sup>19</sup> Cf. M. Marszał, P. Szymaniec, *O pojmowaniu prawa przez Szymona Rundsteina* [Eng. *On Szymon Rundstein's understanding of law*] [in:] S. Rundstein, *Idea prawa. Wybór pism* [Eng. *The idea of law. Selected writings*], Ośrodek Myśli Politycznej, Kraków 2023, p. XIII.

<sup>20</sup> A. Meszorer, *O Szymonie Rundsteinie* [Eng. *On Szymon Rundstein*], "Palestra" 1958, no. 2, p. 90.

<sup>21</sup> S. Kutrzeba, *Państwa totalne – światła...*, p. 3.

one of the authors writes about the “phenomenon of fascism and totalism”, and then uses the term “fascist-totalitarian” in reference to the state.<sup>22</sup> It should be noted here that the term *total* was used to describe the state (a model of the state), while its system was described as *totalitarian*. The literature rightly points out that it is difficult to define *total states*.

Particular proposals that allow one to classify a system as *totalitarian* can only be deduced from the statements of individual authors.<sup>23</sup> Maciej Starzewski contrasted the totalitarian system with the system of democratic states, considering it to be the negation of democracy.<sup>24</sup> The author indicated the existence of two distant poles of *totalism*: communism and nationalism.<sup>25</sup> As he wrote, “[s]ince the total state takes on its shoulders the organization of the entire life of the nation and directs it according to its ideology, the unity of the party and the state also becomes the unity of the nation. The nation lives within the framework created by the state: its creativity, efforts, work are perfectly coordinated, develop according to a plan, in the directions determined by the ideology and the program based on it, serving goals common to all”.<sup>26</sup> According to Maciej Marszał, the author associated the genesis of “totalitarian” systems with the distortion of the functioning of parliamentarism after World War I, the surge of social conflicts and, the doubt in the values of liberal democracy.<sup>27</sup> Szymon Rundstein conducted an in-depth analysis of total states.<sup>28</sup> However, this author was not consistent in terms of the applied notional system – in particular, he wrote about “democratic, semi-authoritarian and total” states, but also about “authoritarian states”, “totalitarian-authoritarian” systems, or “authoritarian systems”.<sup>29</sup> Rundstein also uses the concept of “national totalism” (“national idea”, “national good”, “national state”, “national moment”), by which he means a state that restricts the rights of an individual in favour of the nation.<sup>30</sup> It seems that this author does not pay great attention to terminology, considering it a consequence of the adopted convention.

<sup>22</sup> J. Stachniuk, *Zagadnienie totalizmu* [Eng. *The problem of totalism*], Toporzeń, Wrocław 1990, pp. 6–11.

<sup>23</sup> L. Górnicki, *Narodowosocjalistyczne prawo w poglądach Szymona Rundsteina* [Eng. *National Socialist law in the opinions of Szymon Rundstein*], “Acta Universitatis Wratislaviensis” 2011, no. 3365: „Studia nad Faszyzmem i Zbrodniami Hitlerowskimi” vol. 33, p. 53.

<sup>24</sup> Cf. J. Srokosz, *Macieja Starzewskiego rozważania nad państwem totalnym* [Eng. *Maciej Starzewski's reflections on the total state*], “Acta Universitatis Wratislaviensis” 2011, no. 3365: „Studia nad Faszyzmem i Zbrodniami Hitlerowskimi” vol. 33, p. 228.

<sup>25</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 13.

<sup>26</sup> *Ibidem*, p. 15.

<sup>27</sup> M. Marszał, *Włoski faszyzm w polskiej myśli politycznej i prawnej 1922–1939* [Eng. *Italian fascism in Polish political and legal thought 1922–1939*], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2007, p. 52; cf. J. Srokosz, *Macieja Starzewskiego rozważania...*, p. 228.

<sup>28</sup> L. Górnicki, *Prawo Trzeciej Rzeszy w nauce i publicystyce prawniczej Polski międzywojennej (1933–1939)* [Eng. *The law of the Third Reich in legal scholarship and publications in interwar Poland (1933–1939)*], Wydawnictwo AS, Bielsko-Biała 1993, pp. 166–173; *idem*, *Narodowosocjalistyczne prawo...*, p. 58.

<sup>29</sup> S. Rundstein, *W poszukiwaniu prawa...*, p. 87, 62, 103, 116.

<sup>30</sup> *Ibidem*, chapter XIV.

The author's statements allow for distinguishing three concepts: *totalism*, *totalitarianism* and *authoritarianism*. There are some doubts in expert literature regarding the distinction between the terms *totalitarianism* and *authoritarianism*.<sup>31</sup> A totalitarian regime is associated with the rule of one party, subordinating the state apparatus to a person who introduces mental and physical terror against those who are considered enemies of the system, using coercive measures against them.<sup>32</sup> Authoritarianism is treated in terms of ideology, or (and) the practice of governments in which power is executed in a way that undermines democratic mechanisms.<sup>33</sup>

It seems that the issue of *totalitarianism* and *authoritarianism* is a problem for a separate monograph. It is worth noting, however, that according to one convention, every totalitarian state is also authoritarian (but not every authoritarian state is totalitarian) – yet, most scholars emphasize the need to distinguish between *authoritarianism* and *totalitarianism*.<sup>34</sup> There are some intuitive indications that the concepts of *totalitarianism* are most often associated with the state (totalitarian state), while *authoritarianism* – with the system of government (authoritarian system). Some authors point out that it seems that, according to Rundstein, the category of *authoritarianisms* includes *totalisms*. It seems that in Rundstein's works, two elements that he associates with the *total state* are of fundamental nature. The author associates his considerations on the *total state* with the idea of law, as he understands it.<sup>35</sup> According to Rundstein, the rejection of this idea led to the lawlessness that characterizes the total state.<sup>36</sup> Law in the *total state* is made in such a way as to implement the ideology imposed by political power,<sup>37</sup> which results in the rejection of equality and individual autonomy.<sup>38</sup> For this reason, as indicated in literature, "Rundstein believed that legal systems that denied the existence of the general idea of law were deprived of the foundations for their functioning",<sup>39</sup> which topic will be discussed later in this study.

Another concept that requires terminological clarification is *democracy*. It should be stressed that we are fully aware of the serious conceptual problems that arise when

<sup>31</sup> Cf. J. Tomaszewicz, *Naprawa czy zniszczenie demokracji? Tendencje autorytarne i profaszystowskie w polskiej myśli politycznej 1921–1935* [Eng. *Repairing or destroying democracy? Authoritarian and pro-fascist tendencies in Polish political thought 1921–1935*], Wydawnictwo Uniwersytetu Śląskiego, Katowice 2012, pp. 19–28.

<sup>32</sup> *Ibidem*, p. 19.

<sup>33</sup> *Ibidem*.

<sup>34</sup> *Ibidem*, p. 20.

<sup>35</sup> More extensively: M. Marszał, „Idea prawa” w normatywistycznej teorii Szymona Rundsteina [Eng. *The „idea of law” in Szymon Rundstein’s normativist theory*], „Przegląd Sejmowy” 2020, no. 5, pp. 83–89; cf. also: *idem*, *Kilka uwag na temat prawa w państwach totalnych w poglądach Szymona Rundsteina (1876–1942)* [Eng. *A few remarks about law in total states in Szymon Rundstein’s views*], „Annales UMCS” 2012, sectio G, vol. 59, no. 2, pp. 59–65.

<sup>36</sup> Cf. M. Marszał, *Włoski faszyzm...*, p. 116.

<sup>37</sup> S. Rundstein, *W poszukiwaniu prawa...*, p. 59.

<sup>38</sup> Cf. K. Kuźmicz, *Immanuel Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918–1950* [Eng. *Immanuel Kant as inspiration for Polish theory and philosophy of law in 1918–1950*], Temida 2, Białystok 2009, p. 137.

<sup>39</sup> M. Marszał, *Włoski faszyzm...*, p. 116.

one tries to define this term.<sup>40</sup> Some attempts to redefine democracy in the Polish thought during the interwar crisis of parliamentarism are worth noticing.<sup>41</sup> It seems right to state that Rundstein and Starzewski, as supporters of Kelsen's normativism, related their considerations on democracy to the findings he made at that time.<sup>42</sup> Hans Kelsen characterizes democracy as a method of creating a social order whose feature is the implementation of the "principle of parliamentary majority".<sup>43</sup> Maciej Starzewski referred to this definition, characterizing democracy as a type of political system in which universal elections legitimize the exercise of power.<sup>44</sup> It should be emphasized here that for Kelsen, the necessary condition for the functioning of democracy was the preservation of minority rights. The majority principle was to ensure equal rights of the majority and the minority within the system.<sup>45</sup> At the same time – according to Kelsen – a democracy that is maintained against the will of the majority, or even by force, ceases to be a democracy.<sup>46</sup> Saving democracy cannot be the justification for dictatorship.<sup>47</sup> Quoting a fragment of Rundstein's work, "in a democratic-parliamentary system, even bad rulers are better than the best dictator".<sup>48</sup> Hans Kelsen associates democracy with specific values, which – as he writes – the idea of democracy unites.<sup>49</sup> Maciej Starzewski understands these values in terms of the elements of democracy, which include freedom, equality and the rule of law.<sup>50</sup> As he writes, the ideal image of democracy grows "on the foundation of civic freedom and equality, based on universality".<sup>51</sup> An extremely interesting issue in this respect is the mutual tension between equality and freedom and the metamorphoses of the latter. In expert literature, it is aptly pointed out that Kelsen, by speaking of freedom and equality, understood them

<sup>40</sup> Cf. e.g. S. Łojek, *Kłopoty pojęciowe z demokracją. Ujęcie opisowe, semantyczne i normatywne* [Eng. *Conceptual problems with democracy. Descriptive, semantic and normative approaches*], "Politeja" 2013, vol. 10, no. 1, pp. 275–288.

<sup>41</sup> Cf. M. Wojtacki, *Redefinicje demokracji w dobie międzywojennego kryzysu parlamentaryzmu w polskiej myśli polityczno-prawnej – przyczynek do badań* [Eng. *Redefinitions of democracy in times of interwar parliamentary crisis in Polish political and legal thought*], "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45, no. 3, pp. 391–404.

<sup>42</sup> Cf. H. Kelsen, *O istocie i wartości demokracji* [Eng. *The essence and value of democracy*], trans. F. Turynowa, Księgarnia Powszechna, Warszawa 1939; see also: H. Kelsen, *Verteidigung der Demokratie Abhandlungen zur Demokratietheorie*, eds. M. Jestaedt, O. Lepsius, Mohr Siebeck, Tübingen 2006; cf. H. Dreier, *Hans Kelsen zur Einführung*, Junius Verlag, Hamburg 2023, pp. 143–168.

<sup>43</sup> H. Kelsen, *O istocie i wartości...*, chapter VI.

<sup>44</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 9.

<sup>45</sup> Cf. E. Czerwińska, „Vom Wesen und Wert der Demokratie”. *Teoria demokracji Hansa Kelsena* [Eng. „Vom Wesen und Wert der Demokratie”. *Hans Kelsen's theory of democracy*], "Principia" 2004, vol. 37–38, pp. 181–183.

<sup>46</sup> H. Kelsen, *Verteidigung der Demokratie (1932)* [in:] *idem, Verteidigung der Demokratie...*, pp. 229–237.

<sup>47</sup> More extensively: M. Pach, *Niemiecka koncepcja demokracji zdolnej do obrony (zarys problematyki)* [Eng. *The German concept of defensive democracy (an outline)*], "Przegląd Konstytucyjny" 2017, no. 2, pp. 55–86.

<sup>48</sup> S. Rundstein, *W poszukiwaniu prawa...*, p. 142.

<sup>49</sup> H. Kelsen, *O istocie i wartości...*, pp. 7 et seq.

<sup>50</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, pp. 9–10.

<sup>51</sup> *Ibidem*, p. 10.

as freedom and equality in the face of the law, with individual freedom being the goal and equality the means to achieving this goal.<sup>52</sup>

There is also an inseparable relation between democracy and the rule of law, not to say that democracy only makes sense in a rule of law state. At this point, it should be indicated that the literature convincingly justifies the thesis that the Polish terms *praworzędność* (lawfulness), *państwo prawa* (rule of law state) and *rządy prawa* (rule of law) define the same phenomenon, so that the state's relationship to law is not only restricted to the fact that the state exercises power with the help of law, but also that the state itself is subordinated to law.<sup>53</sup> In literature of the interwar period, the authors analysing the fascist system or that of the Soviet state used both the terms *lawfulness* and *rule of law state*.<sup>54</sup> Rundstein and Starzewski emphasize that, in order to talk about a state governed by the rule of law, law must exist at first. Power is, as Starzewski writes, a competence granted by law, subject to the conditions specified in it.<sup>55</sup> The author clearly indicates that "holders of power are responsible for its execution and both they themselves and their acts remain under the control established by law".<sup>56</sup> According to Rundstein, in order to speak of a rule of law state – the law itself must meet certain postulates both in the sphere of its establishment and application.<sup>57</sup> That is why the author devotes the most attention to the law itself.<sup>58</sup> He also draws attention to the need to maintain the guarantee of the rule of law in the practice of the political system.<sup>59</sup>

### 3. Crisis of democracy

The analyses presented above support the conclusion that the totalitarian system is opposed to the system of democratic states. Maciej Starzewski and Szymon Rundstein identify the phenomenon that they define as the crisis (decomposition) of democracy, which favours the emergence of total states. Szymon Rundstein writes about the crisis of democracy and the emergence of "anti-constitutional tendencies" in many countries (including Poland after the May 1926 coup), expressing his concern about the

<sup>52</sup> Cf. E. Czerwińska, „Vom Wesen und Wert der Demokratie”..., pp. 178–179.

<sup>53</sup> Cf. J. Nowacki, *Rządy prawa. Dwa problemy* [Eng. *The rule of law. Two problems*], Wydawnictwo Uniwersytetu Śląskiego, Katowice 1995, pp. 15–65.

<sup>54</sup> Cf. e.g. K. Grzybowski, *Ustrój Związku Socjalistycznych Sowieckich Republik. Doktryna i konstytucja* [Eng. *The system of the Union of Socialist Soviet Republics. Doctrine and constitution*], Krakowska Spółka Wydawnicza, Kraków 1929, pp. 22 et seq.; A. Peretiatkowicz, *Państwo faszystowskie – bilans rządów pięcioletnich* [Eng. *The fascist state: The bottom line of a five year rule*], „Przegląd Współczesny” 1927, no. 66, pp. 71–89.

<sup>55</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 10.

<sup>56</sup> *Ibidem*.

<sup>57</sup> Cf. M. Marszał, *Idea prawa...*, pp. 86 et seq.

<sup>58</sup> Cf. M. Mohyluk, *Sowieckie prawo sądowe w piśmiennictwie prawniczym II Rzeczypospolitej* [Eng. *Soviet case law in legal scholarship in the Second Polish Republic*], *Temida 2*, Białystok 2023, p. 49.

<sup>59</sup> S. Rundstein, *O nowoczesnych tendencjach...*, p. 263.

formation of totalitarian systems in states. He draws attention to the weaknesses of constitutional provisions, which, created by people who believe in the ideals of democracy, often constitute ornaments that are unreliable in the face of political disputes. This is manifested by the strengthening of the executive power, and even by the desire to ensure its absolute advantage in the system, with the consequent "party-oriented organization of the system". This may result in the introduction of government based on the authority of the leader and their closest collaborators, exercising power in a way that "crosses out" the provisions of the constitution<sup>60</sup>. Such people blame imaginary errors and flaws of democracy and those who ruled in the past for being responsible for the changes. Therefore, there is a danger that those who undermine democracy by putting party interests above the constitution, using the argument of "flaws of democracy", may arbitrarily restrict the rights guaranteed by the constitution.<sup>61</sup> Maciej Starzewski also indicates the dangers associated with the monopolization of power by one political group, which is usually called a "party".<sup>62</sup> The "party", whose members are designated from above to exercise power, is organized according to the principle of unconditional obedience to the will of the leader and the hierarchy, the individual levels of which are filled by top-down nominations.<sup>63</sup> The ideology that the party "implements" is a realization of imperatives which every citizen is obliged to obey if they do not want to be removed to the margins of the society.<sup>64</sup> The changeability of governments – an element of democracy – becomes an insurmountable obstacle for the "party" and its leader.<sup>65</sup>

The author distinguishes manifestations of the "decomposition of democracy", the effect of which may be the creation of a "total state". Among these manifestations, he includes: (1) the takeover of power by groups that adhere to radical slogans and doctrines, which "feed" on hatred towards those who do not share their ideological assumptions (the chosen enemies); (2) these groups' endeavours to permanently seize all power, excluding legal political competition, (even by force); (3) the group turning the state and its policies into a tool of party and personal benefit.<sup>66</sup> The group that holds power focuses on maintaining it and not losing the benefits of exercising power. It strives to destroy the mechanisms of democracy (or to maintain the appearance of democracy) and to replace them with mechanisms that characterize the systems of "totalitarian states". The legitimacy of such actions is to be the will of society ("the majority of society"). This mode of exercising power is aimed at enabling the realization (rebuilding, saving) of goods accepted by the community, including economic goods.

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<sup>60</sup> *Ibidem*, pp. 258–277.

<sup>61</sup> *Ibidem*, p. 277.

<sup>62</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 12.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Ibidem*, p. 13.

<sup>65</sup> *Ibidem*, p. 29.

<sup>66</sup> *Ibidem*, pp. 46–47.

The guarantee of this is seen to stem from the “genius of the leader” and their nearest collaborators, who, according to the rulers’ message, exercise power in the interest of the society.<sup>67</sup> The consequence of this state of affairs may be, as Rundstein writes, the emergence of the “cancers of political coexistence”, among which the author includes fascism and communism<sup>68</sup>.

#### 4. Crisis of the rule of law

According to Rundstein, one of the guarantees of democracy is respect for applicable legal norms<sup>69</sup>. Lawfulness requires that the law itself implements particular postulates. Yet, in “total states” both the concept of lawfulness and the very idea of law and its application are distorted. An example of the distortion of the concept of lawfulness is the introduction of the term “revolutionary lawfulness” by the Soviet doctrine, or the postulate of the Nazi doctrine of applying legal acts in accordance with “imperatives of the national spirit” and individualizing legal effects in particular situations depending on assessments taking into account this category.<sup>70</sup> “Total states” do not reject law, but treat it instrumentally. Law becomes just one of the tools used to achieve political goals.<sup>71</sup> It is reduced to a technical means that is entirely subordinated to the goals of those in power. In this way, law neither performs a regulating function nor constitutes a barrier that restrains rulers’ actions.<sup>72</sup> This is reflected in both public and private law. In the sphere of constitutional provisions, Rundstein draws attention to the need to provide citizens with a minimum set of rights in their relations with the state, which will guarantee them protection against arbitrary actions of the authorities. The author attributes particular importance to the existence of mechanisms within the system that guarantee the inviolability of civil rights and freedoms.<sup>73</sup> In accordance with Kelsen’s assumptions, he emphasizes the importance of constitutional courts, whose existence ensures that an impartial body can examine the constitutionality of laws introduced by the government of the day.<sup>74</sup>

Szymon Rundstein devotes separate arguments to private law. He draws attention to the need for a clear and transparent system of civil law<sup>75</sup>. The author critically assesses both the law of the Nazi state and the Soviet state. He assesses the pursuit of

<sup>67</sup> *Ibidem*, pp. 43–48.

<sup>68</sup> S. Rundstein, *O nowoczesnych tendencjach...*, p. 258.

<sup>69</sup> *Ibidem*, p. 261.

<sup>70</sup> S. Rundstein, *W poszukiwaniu prawa...*, pp. 113 et seq.

<sup>71</sup> *Ibidem*, chapter IV.

<sup>72</sup> S. Rundstein, *O nowoczesnych tendencjach...*, pp. 258–262.

<sup>73</sup> *Ibidem*, pp. 263 et seq.

<sup>74</sup> More extensively: H. Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit* [in:] *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, H. 5, W. de Gruyter, Berlin – Leipzig 1929, pp. 30–88.

<sup>75</sup> S. Rundstein, *W poszukiwaniu prawa...*, p. 150.

limiting (the Third Reich) or abolishing (the Soviet Union) property (or more broadly the private sphere) as a negation of the autonomy of the individual and personal initiative and reducing the economic system to “blind obedience”.<sup>76</sup> Law understood in this way is to be a tool for fulfilling the idea of justice (as understood by the “total state”).<sup>77</sup> The most important goal of civil law, according to Rundstein, should be respect for the rights and dignity of the individual.<sup>78</sup> The author expresses concern about the possibility of the emergence of new civil codifications implementing: “the ideology of universal, open and direct slavery of the masses in favour of the freedom of the chosen few”, which will lead to “unlimited subjection and unlimited power”.<sup>79</sup> He writes, “the intensification of inequality can lead to the realization of the most perfect slavery”.<sup>80</sup> As indicated in literature, these assumptions constitute the central elements of Rundstein’s criticism of the so-called revolutionary – both Nazi and Soviet – civil law.<sup>81</sup>

## 5. Ideology of “total states”

The features presented in the previous sections constitute the foundations of the “total state”. As indicated, the cult of the leader and their party is a feature of “totalisms”. As Rundstein writes, “Hitler becomes not only a *duce*, but also a *maestro*. (...) There is a strange convergence here with Moscow’s practice: the cult, quotes, scholasticism of the party program, references to the guidelines of Lenin and Stalin are not alien to Soviet science”.<sup>82</sup> There are also differences between Nazi and Soviet totalisms, which allow Starzewski, as he writes, to place them “on two distant poles” – nationalism (“nationalist totalism”) and communism (“communist totalism”).<sup>83</sup> All aspects of the functioning of the Third Reich are legitimized by the National Socialist ideology.<sup>84</sup> The philosophy of law of the Third Reich is based on the “myth of the nation” understood in terms of a racial community, to which the leader was “given”.<sup>85</sup> The concept of the “German nation”, which includes people of the “Nordic race” (“Germanic race”), simultaneously defines the “enemies”: other nations and human races, in particular the

<sup>76</sup> *Ibidem*, p. 25.

<sup>77</sup> *Ibidem*, pp. 45 et seq.

<sup>78</sup> *Ibidem*, pp. 60, 150.

<sup>79</sup> *Ibidem*, p. 150.

<sup>80</sup> *Ibidem*.

<sup>81</sup> Cf. M. Marszał, P. Szymaniec, *O pojmowaniu prawa...*, p. LVIII.

<sup>82</sup> S. Rundstein, *Narodowo-socjalistyczna doktryna...*, pp. 702–703.

<sup>83</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 13.

<sup>84</sup> S. Rundstein, *Narodowo-socjalistyczna doktryna...*, p. 702.

<sup>85</sup> S. Rundstein, *W poszukiwaniu prawa...*, chapter XIV; more extensively: T. Guz, *Filozofia prawa III Rzeszy Niemieckiej* [Eng. *The philosophy of law of the Third German Reich*], Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, Lublin 2022, pp. 17 et seq.

“Jewish nation”.<sup>86</sup> Any questioning of this dogma is not allowed.<sup>87</sup> In this way, the idea of the “leader’s” unrestrained will is fulfilled.

This is also reflected in the emergence of “total administration”. The division into the enactment and application of law is replaced by a specific *ad casum* and arbitrary reaction of the bodies, taking into account the accepted ideology. Thus, the discretion of an administrative body may not be subject to any regulations.<sup>88</sup> In international relations, the expression of the National Socialist doctrine of the law of nations is the imposition of one state’s authoritative will on other states (the representatives of the doctrine consider it to be absolutely peaceful). The goal is to restore the “prestige of the Reich”, and the *pacta sunt servanda* principle in international relations is recognized only if it fulfils this goal. For this reason, failure to comply with an international agreement that is considered unjust from a National Socialist perspective is permissible.<sup>89</sup> The interpretation of both domestic and international law is used instrumentally. Law is to be interpreted in compliance with the directives accepted by the National Socialist party.<sup>90</sup> As Rundstein writes, the Soviet doctrine expects the state authorities to act in accordance with the “precepts of the revolution”, combating “counter-revolutionary heresies”.<sup>91</sup> The “socialist society”, being an image of “true, classless, universal democracy”, where the “exploitation of a human by a human” is eliminated, is to create ideal conditions for the development of individuals.<sup>92</sup> “Socialist law”, as opposed to “bourgeois law”, is to fulfil the “goals of the proletariat’s dictatorship”. A judge of the Soviet state (as opposed to the National Socialist ideology) is supposed to strive for the objectivity of decisions, unconditionally “respecting” the laws that implement the above goals. According to the ideology of the Soviet state, it would be “a counter-revolutionary sin to assign a law-making role to a judge”.<sup>93</sup>

Szymon Rundstein denied any value to the “total states” characterized in this way.<sup>94</sup> As one of the authors rightly points out, the scholar was not an optimist, suggestively presenting the vision of states in which autonomy is abolished, and the apparatus of power, unlimited in its competences, acts in accordance with the ideology imposed on individuals.<sup>95</sup>

<sup>86</sup> T. Guz, *Filozofia prawa...*, p. 53 et seq.

<sup>87</sup> S. Rundstein, *Narodowo-socjalistyczna doktryna...*, p. 703.

<sup>88</sup> *Ibidem*, pp. 79–81.

<sup>89</sup> *Ibidem*, pp. 707 et seq.

<sup>90</sup> *Ibidem*, pp. 703 et seq.; S. Rundstein, *W poszukiwaniu prawa...*, pp. 81, 135.

<sup>91</sup> S. Rundstein, *W poszukiwaniu prawa...*, p. 102.

<sup>92</sup> *Ibidem*, pp. 44–46, 102 et seq.

<sup>93</sup> *Ibidem*, pp. 113 et seq.

<sup>94</sup> Cf. M. Mohyluk, *Szymon Rundstein o prawie radzieckim* [Eng. *Szymon Rundstein about Soviet Law*], “Miscelanea Historico-Iuridica” 2008, vol. 4, p. 77.

<sup>95</sup> L. Górnicki, *Narodowosocjalistyczne prawo...*, p. 63.

## 6. Final remarks. Why do the views of Rundstein and Starzewski deserve to be remembered?

In concluding the above analyses, it is worthwhile to note their relevance. The Polish legislator introduced the clause "democratic state ruled by law" into Article 2 of the Constitution, treating democracy and rule of law as a single concept. In case law, attention has been often drawn to the fact that it is democracy and rule of law which are the tools that should guarantee the individual protection against the emergence of totalitarian governments.<sup>96</sup> However, currently, when one adopts the perspective of an observer, one can easily see the emergence of tendencies that Rundstein and Starzewski identified almost 100 years ago. The party-oriented organization of the system, the implementation by parties and their leaders of the only accepted ideology, disregard for minority rights, lack of respect for the law, attempts by those in power to circumvent the principles established in the constitution by means of statutes are becoming everyday practice both in Poland and abroad.<sup>97</sup> Using Rundstein's terminology, states are becoming "total", "all-encompassing" formations controlling all the manifestations of life, including law and science. The scholar also pointed out that even a perfectly conceived system would not be a sufficient barrier against totalisms, if also the citizens, whom the law is to protect, do not understand the idea of democracy and do not respect the provisions of law.<sup>98</sup>

What makes totalitarian systems attractive? Maciej Starzewski points out that democracy requires a fairly advanced political culture and maturity of the entire society. Various factors, including historical conditions, the arrangement of political and social forces, internal (the looming civil war or anarchy) and external dangers, or the idea that an "imaginary" enemy must be fought, instilled in society by political forces, or the need to save fundamental collective goods, constitute the reasons for the emergence of total systems.<sup>99</sup> The concept of the "legal moment" identified by Rundstein is extremely important in view of the above findings.<sup>100</sup> This is a moment of breakthrough, when – as Starzewski writes – "the spirit of partyism kills the sense of unity and solidarity of the members of the nation, poisons the public life with egoism, private interests, lies and corruption (...), arouses hatred through demagoguery, stifles all construction work (...) by unleashing fruitless fights and creating unnecessary conflicts".<sup>101</sup> At such a moment, those in power can lead to the depletion of rights guaranteed by the constitution, which may be the initial stage of the formation of a total state. Lack of

<sup>96</sup> Cf. e.g. Constitutional Tribunal Judgment of 9 December, 2015, K 35/15, OTK-A 2015, no. 11, item 186.

<sup>97</sup> More extensively: R. Eatwell, *Faszyzm. Historia*, trans. T. Oljasz, Dom Wydawniczy Rebis, Poznań 1999; English edition: R. Eatwell, *Fascism: A history*, Pimlico, London 2003.

<sup>98</sup> S. Rundstein, *O nowoczesnych tendencjach...*, pp. 269, 272–273.

<sup>99</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 43.

<sup>100</sup> S. Rundstein, *O nowoczesnych tendencjach...*, pp. 259 *et seq.*

<sup>101</sup> M. Starzewski, *Demokracja a totalizm: odczyt...*, p. 18.

reaction, which is manifested by the consent at a specific “legal moment” for those in power to take actions aimed at introducing solutions into the system that are contrary to the ideals of democracy and rule of law, may ultimately lead to a situation in which the restoration of democratic rule in the future will be extremely difficult, or even impossible.<sup>102</sup> It seems that both Rundstein and Starzewski believe that the implementation of the “purity” of the concept of law, as understood by Kelsen, can, in the “legal moment” when democracy is threatened, defend it against the threats of totalisms. This requires the acceptance of the idea of law as a system independent of the political will of the sovereign and the acceptance of the basic norm as a commandment for those in power (whoever they are) to adhere to the constitution.<sup>103</sup> Supplementing this idea, Rundstein refers to Adolf Reinach’s concept of “social acts” (*der soziale Akt*), the foundation of which is the “promise” of those in power to the sovereign that they will obey the principles of democracy and submit to the law (we accept that you will make the law, but at the same time we oblige you to adhere to the constitution).<sup>104</sup>

History has shown that the views of scholars who accurately identified threats, as Rundstein wrote, “during political struggles and the chaos of power disputes”<sup>105</sup> did not find a strong enough social resonance in the 1930s. However, in the era of the rebirth of anti-democratic tendencies, the cruelty of Nazi and Soviet totalisms deserve a thorough re-reading. In our times, marked by multiple crises, totalism (which is currently gaining attractiveness) – despite its retouched terminology supported by modern terminology – reaches for arguments known from the 1930s, emphasizing lack of respect for democracy and law, and for the rights of minorities. There is no need to remind about the tragic consequences that the triumph of this ideology may entail.

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<sup>102</sup> S. Rundstein, *O nowoczesnych tendencjach...*, p. 259.

<sup>103</sup> More extensively: J. Stelmach, *Norma podstawowa* [Eng. *Fundamental norm*] [in:] *Studia z filozofii prawa* [Eng. *Studies in the philosophy of law*], eds. J. Stelmach, T. Gizbert-Studnicki, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2001, pp. 63–70.

<sup>104</sup> Cf. S. Tkacz, A. Wentkowska, *Between Normativism and Phenomenology...*, pp. 127–135.

<sup>105</sup> More extensively: S. Rundstein, *O nowoczesnych tendencjach...*, pp. 255 et seq.

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## Abstract

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### **On the threats to democracy and the rule of law: The philosophy of total states in the views of Szymon Rundstein and Maciej Starzewski**

One of the most important issues recently addressed in literature is the threats to democracy and the rule of law. It is pointed out that the need to verify the role and tasks of key political institutions, primarily the state, is determined by the nature and dynamics of changes in the modern world. The issue of threats to democracy and the crisis of the rule of law has frequently been discussed in Polish theoretical and doctrinal legal works produced after 1926. Authors such as Szymon Rundstein and Maciej Starzewski often raised concerns about the dangers associated with phenomena referred to as "anti-constitutional tendencies". The studies they published addressed both internal threats and the dangers arising from the formation of fascist states and the Soviet state. The findings made back then remain highly relevant in the present day. Therefore, in the context of the challenges faced by legal practice and legal science today, it seems justified to recall the conclusions formulated nearly 100 years ago.

**Keywords:** Fascism, democracy, rule of law, total state, authoritarianism, civil rights, Nazi and Soviet totalisms