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Editorial: *Juristische Grundlehre* 100

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At the end of 2017, a workshop was held in the Institute for Legal Studies, Centre for Social Sciences, Hungarian Academy of Sciences in Budapest to celebrate the 100th anniversary of the publication of Felix Somló's *Juristische Grundlehre*. This issue contains the written and highly reworked versions of the lectures of the workshop.

The *Grundlehre* is Somló's *magnum opus.* It has been labelled as a piece within the series of the general legal theories *(Allgemeine Rechtslehre)* – a genre that blossomed in German-speaking legal science at the end of the 19th century. *Grundlehre* is a special work from several points of view. It can be seen as the last in the *allgemeine Rechtslehre* genre, yet it is also the first continental book that is based on John Austin's command theory and is also the entrée of Neo-Kantianism into Hungarian legal philosophy. Moreover, Somló prepared an excerpt from his book, as a textbook and was the first Neo-Kantian jurisprudence university textbook in Hungary.

For Hungarians, Somló's *Grundlehre* is more than a piece of positivist, Neo-Kantian system from the beginning of the 20th century – it symbolises a period, within the Austro-Hungarian Empire when a chance emerged to gain on Western Europe and the standards of Western-European science. Somló, himself, was, for a long time, a leading figure of this progressive, pro-Western, democratic, liberal movement of the century-turn; a propagator of Herbert Spencer's philosophy and a great admirer of the modern sociological theories. For different reasons, at the end of the first decade of the 20th century, he made a Neo-Kantian turn and started to deal with 'pure' science: value philosophy, and general problems of legal philosophy. The *Grundlehre* is a 556 pages long summary of this period. After the publication of the book at *Meiner Verlag* in *Leipzig,* Somló practically stopped writing longer pieces. In 1918, the Austro-Hungarian Empire collapsed and in 1920 his home, Kolozsvár (more recently known as Cluj-Napoca) was cut from Hungary and given to the Romanian Kingdom. Shortly afterwards, he committed suicide in the cemetery of his hometown.

In the conference call the same question was posed that Péter Cserne, the reviewer of a recent book on Somló edited by *Andreas Funke* and *Péter Sólyom,* asked 'Does Somló belong entirely to the past or is there a possibility for a 21st century dialogue with his work?'[1] The authors of the workshop finally gave no straightforward and simple answer for this question as there are parts of the theory which are still worth for study, but there are parts which has proven to be wrong or became obsolete.

In the call, the contributors were asked to focus on three topics: 1. *Juristische Grundlehre* in the context of the legal philosophies of its age; 2. The picture of legal science in *Juristische Grundlehre and* the main concepts within *Grundlehre and* 3. The impact of *Juristische Grundlehre.* Although, not every paper is a complete fit to this concept, some

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[1] Cserne (2013) 444.

very valuable insights have been made, all of which complement the already existing, some respects, very distorted and one-sided Somló portrait.

The issue starts with a paper from **Andreas Funke**, one of the well-known expert of this field.[2] The paper is seeking the answer to the question 'What is left from the heritage of Somló?' His answer is that more exists than is commonly thought of or what is visible from the first glance. The innovation of Somló's theory, as stated by Funke, is that it is 'a kind of inquiry which only defines and unfolds a single concept, namely the concept of law'. A further important innovation is that it is grounded on the concept of norm. It is even more important that this theory is compressed into one book in a very concise manner. This is a pure theory which is serving as a blueprint, a 'radicalisation' and purification of Bierling's idea, which was packed with meta-juristical elements. Funke claims, that Somló left a significant footprint on German legal theory. Besides the explicit references, like Merkl's, Somló's distinction of 'legal form concepts' and 'concepts of the legal content' still has a significance – it has been used by Merkl but later on by Kelsen as well. It is still in use today. An even more important invention of Somló is the conceptualisation of the relationship between legal power and the subordinates as a 'legal relationship'. This was not used until World War II but soon became commonplace within the German administrative law after the war. In the 19th century, and in the beginning of the 20th, the science of administrative law in Germany used the different concepts of subordination, instead of legal relation. Funke reveals, that in the reception of the 'administrative legal relations' doctrine Heinrich Rupp played a central role in the '50s, and he explicitly refers to Somló in his work.

Zsolt Ződi's paper seeks to answer the question if the *Grundlehre* really a 'carbon-copy' of John *Austin*'s *Province of Jurisprudence Determined*[3] or it is really a substantial document. To obtain an answer, he analyses three general questions, 'building blocks', all playing a fundamental role in both theories: (1) The place, role, methodology, and use(fulness) of their theory, and the role of jurisprudence in general within the system of legal sciences; (2) The definition of norm in general, (as *genus proximum* of the law), the relationship between different norm-types and (3) The concept and the distinctive features of the law itself.

Ződi concludes, that Somló did not copy but rather adapted the Austinian theory. He used Austin's concepts of sovereign and command to conceptualize the law but developed this concept in many points and in important respects. Firstly, his theory was more intended to be a contribution to the legal science rathter than a manual for practitioners, like Austin's work. Secondly, he used Kantian and Neo-Kantian concepts and current German legal science ideas of the time in order to keep distance from Austin's empirical foundations. His method was also inspired or influenced by phenomenology. Thirdly, this new conceptual framework enabled him to explain the structure of modern law on a more profound way. Primarily, he developed the concept of promissory law, with which he can explain the theory of rights and duties, as well as constitutional law in a more proper way than Austin. His further important innovation was that he realized the systematic character of law. Applying this notion to international law, he could give a more sophisticated answer than Austin's 'positive morality'. With these innovations, he is an important forerunner of the twentieth century positivist legal theory.

[2] See Funke and Sólyom 2013.

[3] Austin (1873).

Miklós Szabó's article in the issue comprises two interconnected topics. The first is an interesting biographical parallel of Somló and Wesley Newcomb Hohfeld, who nearly lived at the same time and their life were striking similar. This gave the idea to Szabó to compare not just their lives, but also a problem which was central in both author's *oeuvre* – the concept of right and duty.

Szabó's starting point is, that '(f)or both Anglo-American and European Continental streams of positivism, the problem of rights culminated in the question of whether rights are possible without a foundation in positive law.' Both authors were reliant on Austin's framework, who created the basic structure of the theory of right. According to Austin, right and duty is the same notion considered from different aspects. Bierling, at the end of the 19th century went on with this concept, stating that *Rechtsanspruch* and *Rechtspflicht* (legal claim and legal obligation) are the two sides of the same coin. This starting point is accepted by both Hohfeld and Somló. While Hohfeld then extended this relationship to four types of right-duty relations in his theory with the state (sovereign) playing no role, Somló's theory of right and duty has the *Rechtsmacht* (Legal power, Sovereign) at the center. Introducing the category of promissory law, besides the command-law, Somló states that the right of the subordinates are not only correlations of the obligations of the opposing parties but the command and the promise of the sovereign generates both rights and duties for different parties within different legal relations, in different fields of law. Therefore, Szabó concludes that Somló and Hohfeld 'moved in two different lanes' but 'the bend of their lanes were parallel'. Hohfeld followed the common law path, which was private law centered while Somló cleaned up the concepts of rights and duties in a continental, public law centered way.

Péter Sólyom wrote an article on Somló's connection to the doctrinal school of public law of Hungary of the time and that how the debates of the time are reflected in the *Grundlehre*. His starting point is, that 'Somló takes position on a number of conceptual issues within the framework of his foundational legal doctrine, which were in the focus of contemporary debates on Hungarian public law.' Sólyom argues, that in 1867 a school of public lawyers emerged in Hungary, who, using Somló's terminology were all doing 'general theories of positive law'. This doctrinal movement cannot be regarded as a mere branch of German state-law positivism. Within the Hungarian context, the doctrinal approach counted as a progressive and consistently liberal movement, in contrast to the conservative historical school. Sólyom presents three points within the debates, (1) the theory of the public personhood of the state and its reception (2) the constitutional relationship between Hungary and Austria (3) the legal or non-legal nature of fundamental laws and the problem of constitutional identity.

Concerning the first point, Somló's theory is very modern and it 'goes beyond Jellinek and draws on Kelsen's early work and argues that will-based theories of public-law personality are inherently flawed. The personality of the state is but a legal construct, which can be best understood using the concept of imputation: 'The legal order is the content of state will, that is, the law is the will of the state.' Sólyom concludes that Somló's 'discussion of legal obligation and legal claims, in particular, could have served as the basis for a later doctrine of public-law rights, because Somló's book belongs to those works that tried to make the conceptual field of the law capable of accommodating liberty-extending views under the legal and political conditions of a constitutional monarchy, then considered as given.' However Sólyom also notes, that Somló's work still did not make any considerable impact on Hungarian public-law scholarship. 'The reason is due not only to his premature death but also to the interwar developments: Following a short consolidated period of

moderate autocracy, Hungarian public-law scholarship sacrificed its respectable traditions on the altar of reuniting the country.'

Péter Takács's paper analyses a rather neglected topic – Somló as a theorist of state. Takács claims, that though Somló 'never had published works exclusively on questions of the state', 'he actually had several theories of state during his lifetime': namely three. The first underpins his work from 1903, (State Intervention and Individualism), the second is in *Juristische Grundlehre* and the third remained in a scattered form. From this third, only two papers were published, the remaining part, a 500-page, long manuscript, was only published after his death.

The second point is the most interesting from the point of view of this issue. Takács states, that '(t)he *Juristische Grundlehre* deals extensively with issues of the theory of state in two instances: The main section analyses legal power *(Die Rechtsmacht)* in the framework of the concept of law while the second section the problems of the state *(Der Staat)* are discussed under the title 'elements and consequences of the concept of law.' Somló's theoretical standpoint is on one hand Kantian: 'no definition of the state can be created without including that of law', but he complements the other side of his theory, aying that 'there can be no definition of law that would not involve that of the state.'[4] This delicate relationship is reflected also in the fact, that Somló is using both empirical-factual and normative elements for defining the state. The empirical elements are mainly borrowed from Austin. Takács argues, that this two-sidedness causes certain tensions within the theory of Somló. For example according to Somló 'the state can commit infringements only if the legislative power had already tied itself *vis-à-vis* its subjects in the form of 'promissory law'.

The final paper by **Trevor Wedman** invites the reader to re-read Somló. Wedman's starting point is that contemporary versions of positivism rest on four presuppositions. '(i) the Kantian categorical imperative is an 'empty formula'; (ii) any attempt to objectify an ought results in subjecting to logic a category which is illogical; (iii) the only object of rational thought in the social realm are interests and conflicts of interest which can only be solved through ordering the interests one against the other and (iv) if there would already exist societal order on the basis of reason, then it would be foolish to develop a theory of legal positivism'. According to Wedman, both Hart and Kelsen, two representative figure of 20th century positivism, 'are united in their opposition to the possibility of validity actually inhering within a legal order' and 'are both the heroes of current mainstream legal theory […] and the main antagonists of (the following interpretation of) Somló's conception of law.'

According to Wedman, Somló is theorizing the sovereign in a more fruitful and consistent manner than Kelsen or Hart. 'Somló's definition of law quite clearly follows Austin's conception of law as the commands of a sovereign which enjoys a habit of obedience. However, whereas this Austinian framework is typically interpreted as 'imperial' or hierarchical in nature, Somló gives the Austinian frame a decidedly non-imperial, non-hierarchical flavour.' The reason why Somló's definition of Sovereign is more subtle, is that he is not postulating the sovereign as a kind of omnipotent God, but rather as one power within the world of different competing powers of human collectives also enacting rules of behaviour for their members.

Furthermore, Wedman says, that Somló's most important innovation was, that he 'insists that the 'generalized' quality of the law, i.e., a sovereign, and therefore also a legal system can only exist if it encompasses a sufficiently broad scope of human conduct, results

[4] Somló (1920) 70.

in the fact that no one legal norm can be understood or even conceptualized as an isolated entity.' This 'plural tantum that governs the relation between the individual and the collective.'

In referring to Somló's last work, the *Gedanken*[5]… Wedman claims that Somló has a theory of language, inspired by Bolzano. Somló is introducing the distinction between logical sentence (sentence of meaning) and grammatical sentence (sentence of speaking). 'What is interesting about this distinction for Somló is that it seems to lead him to a theory of legal norms quite unlike other theories held by his Neo-Kantian contemporaries and unlike any other legal theorists since, but which, at the same time, predicts a significant strand of the philosophy of language in the 20th century, […] best exemplified by Wittgenstein's treatment of language, use and meaning in the *Philosophical Investigations*.'

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