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Felix Somló and John Austin
Building Blocks of Two Analytical Theories

ZSOLT ZŐDI*

Abstract. The general picture about Somló's *Juristische Grundlehre* is, that it is the continental version of John Austin's *The Province of Jurisprudence Determined*, or even more harshly, the 'carbon-copy' of it. The paper attempts to show that this picture is misleading and oversimplified. Somló developed further his master's theory in important points, and in very creative ways. Three fields, or building blocks have been selected for illustrating this thesis. 1. The place, role, methodology, and use(fulness) of the jurisprudence in general, and its place within the system of legal sciences. 2. The definition of *norm* in general, (as genus proximum of the law), and the relationship between different norm-types. 3. The concept and the distinctive features of law.
Keywords: Felix Somló, John Austin, Juristische Grundlehre, Allgemeine Rechtslehre, nomology

1. INTRODUCTION

As it is widely known Somló built his 'Basic theory' *('Grundlehre'),*[1] to Austin's analytical jurisprudence,[2] and especially to his 'command theory'. Radbruch, already in 1936 denoted Somló as the only follower of Austin in the Continent.[3] Stanley Paulson, writing about Kelsen's 'two-fold classification' of the legal theorists, – where Kelsen identifies Somló as an 'empirico-positivist' – marks Somló as a 'continental carbon-copy' of John Austin.[4]

This paper aims to demonstrate, that the relationship between Somló's and Austin's theory is far more complex than these evaluations might suggest. In general, I agree with Funke and Sólyom who are talking about 'one-sided reception', 'controversial interpretations' and 'misunderstandings' concerning the *Grundlehre*.[5] My claim is, that Somló, in certain points developed further the Austinian theory in a very creative way; and in other points he entirely diverted from his master's framework. This paper therefore attempts to dig deeper into the two authors' intellectual relationship. The method I will be using that I selected three common topics, 'building blocks' of their theories, where I can demonstrate that Somló's book is a lot more than the simple 'carbon copy' of Austin.

These three building blocks are the following: 1. The place, role, methodology, and use(fulness) of *their theory,* and *jurisprudence* in general within the system of legal sciences. 2. The definition of *norm* in general, (as *genus proximum* of the law), and *the relationship between different norm-types.* 3. The concept and the distinctive features of the *law.*

I know, that many other fields would have been selected, (like the Sovereign – *Rechtsmacht* parallel, or the construction of basic rights, – see Szabó's article[6] in this issue, – or the theory of judicial interpretation, the role of judge-made law, and so on).

* Associate professor Corvinus University of Budapest Research fellow Legal Studies Institute Centre for Social Sciences Hungarian Academy of Sciences, Zodi.Zsolt@tk.mta.hu

[1] Somló (1917).
[2] Austin (1873).
[3] Radbruch (1936) 531.
[4] Paulson (1992) 316.
[5] Funke and Sólyom (2013) 66.
[6] Szabó (2018).

So, from a certain respect these three topics seem to be randomly selected. I have two simple explanations for dealing with these: the first is the boundaries of such an article. The second, that all of the tree is demonstrating their *basic attitude* towards the law. None of the fields will be explicated exhaustively – only some important similarities, and differences will be examined.

The two authors are divided by three generations, and their respective works by more than 80 years. In contrary to the parallel that has been drawn between Somló and Hohfeld[7] in this issue the life of Austin and Somló show few similarities. Austin was a practitioner, and had a propensity for the military. Somló was an academic, inclined towards sociology, humanities and abstract thinking. Austin was active on the peak of the Commonwealth, while Somló wrote his *magnum opus* during the World War, in a collapsing Europe and Habsburg Empire. Therefore I think the whole context of their theory – for example 'command', or 'habit of obedience' as a central category – is different. For Austin the 'Sovereign' was a strong gravitational point within the Commonwealth, while for Somló 'Rechtsmacht' was the only stable point in an uncertain world. From methodological point of view, Austin was a utilitarian, Somló was Neo-Kantian. Interestingly thought, besides the conceptual toolbox, there is one point which connects the two authors: for both of them the role model was the German jurisprudence. As it is known from his wife, Austin once sighed, that he wanted to be a 'german professor'. Somló's main intention was also to impress his German academic contemporaries.

The methodology of this paper is analytical. I will compare the texts, the concepts and reasoning within the texts, and – wherever it is needed – the meta-texts (i.e. the source texts, or texts that has been inspired by the works of Austin and Somló). So, except the paragraph above, I will not be dealing with the social and historical context of the two theories.

2. METHODOLOGY AND THE ROLE OF 'GENERAL LEGAL SCIENCE'

Both Austin and Somló developed a general theory of law ('philosophy of positive law', and *'Grundlehre'*). For a contemporary reader it could seem that these theories are somehow mixtures of the 'real' philosophy of law, and the doctrinal scholarship. For those who knew the theoretical scene of the mid 19th English, and early 20th century in Germany is obvious, that these theories were born both *against natural law,* and at the same time had an ambition to be the 'general part' of, or 'introductory exercise' to the study of legal sciences, and in a certain respect had also the ambition to be the *real,* or 'pure' legal science *itself.* The discipline, which – based on philosophical, and exact conceptual foundations – describes the 'anatomy' of modern law. But apart from this self-portrait, the two author's approach to the discipline is totally different, and not only because there is an 80 year, and a whole legal culture gap between them, but also because the *place of their system* within the broader picture, the *methodology* of this discipline, *the ultimate goal* and the *'target group'* of their effort is also radically different.

Austin does not have long methodological foundations in his book in the modern sense: he follow his master's, Bentham's path. As Crimmins notes Bentham argued that 'legal science ought to be built on the same immovable basis of sensation and experience as that of medicine' Bentham denotes in one of his manuscript that 'what the physician is to the natural body, the legislator is to the political: legislation is the art of medicine exercised

[7] Szabó (2018).

upon a grand scale.'[8] For Austin, the greater challenge was not methodological, rather finding the *subject* ('the province') of his study.

The only part, where Austin speaks about methodological questions, can be found in the Introduction, ('Outline of the Course of Lectures'), and interestingly, he later has a rather lengthy observation in the 3rd lecture, where he deals not with the method of *jurisprudence,* but with methodological questions of the nearest neighbouring field: *the science of legislation,* or the science of ethics, or deontology. Though this is a very interesting part, here I will not reflect on this.[9]

Austin states as a starting point that '"the philosophy of positive law" indicates the most significantly the subject and scope' of his course.[10] As a beginning he differentiates between two types of jurisprudences: *general* jurisprudence, (or *philosophy* of positive law) and *particular* jurisprudence, or the *science* of positive law.[11] Here Austin explicitly refers to Hugo, who was the founder of the *'historische Rechtsschule',*[12] as his role model, saying, that though Hugo uses to his own work the 'law of nature' term, this is not the 'ususal meaning', because it denotes the 'philosophy of positive law', which

> is concerned directly with principles and distinctions, which are common to various systems of particular and positive law, and which each of those various systems inevitably involves. […] [it] is concerned with law as it is necessarily *is,* rather than with law as it *ought to be*.

This definition separates the general jurisprudence from three other disciplines: on one hand it is distinguished from those, that are dealing with *particular* legal systems. General jurisprudence is dealing with law in general. Second, it should be separated from those speculative sciences, that are not based on – we now might say – 'empirical' facts: this jurisprudence is *not* a natural law theory. E.C. Clarke, who was the Regius Professor of Civil Law in Cambridge at the end of the 19th century, in an article written in 1885 interprets the project of Austin that '(t)he most important result of confining Jurisprudence to Positive or actual law is to exclude from its province all rules not gathered from observation *but deduced a priori from assumed first principles*.'[13] And thirdly, this science should be differentiated from those, that are dealing with what the law *ought to be*. This latter discipline is called by Austin the science of legislation, or ethics, (or deontology).

This discipline works through careful definition, explanation, *clarification, and systematization* of certain concepts: most of them can be traced back to some simple empirical notions. But what concerns its ultimate goal, I think Austin himself was not certain. On the one hand he surely had an ambition to follow the German professors, and

[8] Bentham Manuscripts at University College London, box xxxii, page 168. Cited by Crimmins (2017).

[9] Here he remarks, that these sciences are 'law and morality as they should be or ought to be', (Austin1873: 127) a kind of 'system of ideal law' and they rest upon observation and induction.

[10] It is worth mentioning that Hugo was considered to be not only a strong promoter of the legal science, and lawyers central role within law, but Hannover was at that time a place where imperial 'institutional constitutionalism' was flourishing. Imperial tradition will be an important motive both for Austin and Somló.

[11] Austin (1873) 32.

[12] Whitman (1990) 85.

[13] Clark (1885) 201., emphasis added.

build up a clear and nice scientific system. But he had another goal too: to educate, or at least influence the legal community, the practitioners. Firstly, the decision-makers, the politicians, pursuing the project of Austin's great master, Bentham, the codification. 'The study of general jurisprudence is a necessary […] preparative to the science of legislation […] the study of general jurisprudence might precede or accompany with advantage the study of particular systems of positive law.' – as Austin states in one point.[14] In this respect Austin followed the tradition of the great English jurists, like Blackstone, who primarily wanted to provide *practical help* to the practitioners. Blackstone believed, like Austin, that system helps lawyers to be better lawyers – though it is unclear, how.

And, while Austin proved to be, at least partly, successful – though not in his life – in reaching the first goal, and was later admired by the academia, – and also partly successful in the second,[15] he failed in the third. As it is well known Austin's lectures were discontinued in 1835 because of the slight attendance.[16]

Somló – as he said – was impressed by Austins's method, and accuracy and praises his 'sharpness and fineness of its dissection, its conscientiousness and strict consistency',[17] but in several points he is diverting from Austin both methodologically, both by his aim, and therefore – so to say – in genre of his book.

Austin's great advantage is – he says, that he '[…] is the first to make the meaningful distinction between such necessary principles, without which one legal system cannot be thought at all, and others that are not necessary, so that a system of legal norms can be conceived even without them', and without clarifying these concepts, any talk in law is uncertain. The problem is, as Somló puts it, that Austin himself was not consistent with this distinction, and often mixes necessary, unavoidable *(unvermeidlich)* concepts, like sovereign and right, with *simply general* (*bloß allgemeinen)* ones, like the distinction of obligations *ex contractu, ex delictu*, or possession and property. Austin's followers, the 'analytical school' (Holland, Clark, Hearn, Lightwood, Salmond) went on with that mistake. They all were inconsistent in bringing Austin's distinction further, though here and there in certain points they realized important things. For example Holland rightly recognized, that the principles of jurisprudence can be recognized from one legal system, and does not require necessarily a comparative method. He also mentions Lightwood's interesting distinction between 'pure jurisprudence' and 'general jurisprudence' where 'pure' would be something like Somló's theory, but Lightwood – he says – makes a different mistake: he 'stuffs' his 'pure' theory with evaluation questions. Somló also analyses Salmond, Markby, Amos and John Chipman Gray: their theories are all defective, he says. They either mix up 'necessary' and 'general',

[14] Austin (1873) 33.

[15] He served as a reference point or an authority, in different codification projects, see e.g. Diamond (1968) though sometimes in a very general context. See also: Wisdom (1939), Weiss (2000).

[16] Szabó (2018) Rumble (1996) Even John Stuart Mill, who was a great admirer of Austin remarked, that he 'might explain, what is meant by general jurisprudence: in what respect a course of jurisprudence differs from a course of lectures on the law of any particular country, & also from lectures on the science or art of legislation: the grounds of the opinion, that there really is a science of general jurisprudence, & that it is worth studying: proof of the perverting & confusing effect of the study of law as it is commonly pursued, without being accompanied by the study of jurisprudence: examples of the erroneous notions usually formed as to what jurisprudence is, & the silly talk of Blackstone, & others of our lawyers, when they erect the technical maxims of their own law into principles of jurisprudence' Mill (1963) cited by Rumble(1996) 28.

[17] Somló (1917) 35.

'necessary' and 'known by many legal systems' concepts, or factual descriptions with evaluative elements. 'Thus, from the point of view to be considered here, the analytic school has only the errors of Austin, not its advantages. The lack of a strict separation of the *necessary* and *purely general* concepts of law into two particular systems becomes disastrous for this school, and leads within it to the complete obscuration of Austin's conception and to the misrecognition of its real significance for jurisprudence.'[18]

Somló's starting point in building up his theory is not the 'general' vs 'particular', distinction, but those legal sciences that are dealing with the *content* of the law, versus those that are dealing with the *form.* (*Rechtsinhaltswissenschaften* versus *Wissenschaft von der Rechtsform*). He says, that while the material legal sciences are dealing with concepts that are describing the substance of the legal provisions, his theory is dealing with the *pure form.* While Austin's theory is dealing with 'principles and distinctions' that are *common* to various systems of […] positive law; and which each of those various systems inevitably involves',[19] his *Grundlehre* is based on the concepts that are in connection with the *form* of the law, *without which any legal system* (legal state – *Rechtszustand*) unimaginable *(undenkbar wäre)*. Now, jurisprudence – in the continental sense which is 'doctrinal, or dogmatical science' is exactly belonging to this group of 'content' sciences. We sometime call these sciences 'positive legal sciences' – *(positive Rechtswissenschaften).* They are dealing with a particular legal system or rather group of norms. Other legal content sciences are *legal politics,* and the science of *legal history.*

The secondary distinction Somló uses for differentiating his theory from other theories is based on the fact, that legal sciences are also belonging to the greater family of *normative sciences.* Normative sciences have two types. First, those, that are *creating* the norms – or rather 'bringing them into the light', like the ethics. These are the *nomothetic* sciences. Second, there are the types, that are *describing* the norms, and systematizing them. These are the *nomographic* sciences. Their primary goal is 'further processing' the given norm-material.[20]

> They do not have to find the norms, at least they do not have to do that exclusively, but always have to take what they have already given as their starting point, to interpret and systematize it.[21]

Somló, using these distinctions distinguishes his theory from the contemporary German legal theories: from Bergbohm's, from Bierling's from Kelsen's and from Reinach's theory. As Funke points out,[22] besides Austin, for Somló Bierling's *Juristische Prinzipienlehre* was the primary work he built his theory on. The distinction he makes from Kelsen and Reinach is quite interesting, but now for my purpose it is more important, how he differentiates his theory from the other general legal theories. The main argument goes like this: though it seems, that these theories are all provide a kind of general 'prerequisites' of all legal systems, the *method* how they reach it is ill, because they do this in an *inductive* way. They all observe the existing legal systems, and generalize these observations: concepts go back to more general concepts, and finally to some important principles. But a

[18] Somló (1917) 37.
[19] Austin (1873) 32.
[20] Somló (1917) 22.
[21] Somló (1917) 23.
[22] Funke and Sólyom (2013), Funke (2018).

concept in this way will always remain a 'legal-content' concept. For unveiling the concepts of the *legal form* requires another method: we have to find those ones, without which a legal system is unimaginable. For example without marriage or even contract and property a legal system can be construed theoretically, no matter how unreasonable it would be. But a legal system where there is no addressee of the norm, or issuer of a norm, or there is no obligation, would not be a legal system at all. While the general content-concepts of the law are called by Bergbohm the 'highest peaks' on the building of the law, Somló remarks, that the 'form-concepts' are rather the 'deepest foundations'.

For Somló the ultimate use of this Legal Form Science is, to give the definition of the law itself, which is a precondition, a prerequisite, a preliminary work, *(Vorarbeit)* for the positive legal sciences, without which they cannot even start developing their theories. 'The essence of law cannot be determined from the material of the positive law'– he remarks.

What *connects* the theory of Austin and Somló is the *overestimation* of the role of the theory, and especially the overestimation of the role of concept or definition of law. Time has not proven that the concept of law plays any role either in the 'science' of the positive law, or in the everyday functioning of the legislation or application of law. Law visibly needs no of these 'preliminary work' for an effective functioning.

Austin has three goals, and three target groups, (the academic community, the decision-makers, and the practitioners). Anglo-saxon general theories, starting from the Doctor and Student to Blackstone's Commentaries' are all systematizations of the scattered and vague English law, and intended to be *toolkits for the practitioners*. That is why they extensively dealing with 'content-concepts', like the marriage, the property, or the difference between property and possession. This determines their target group: Blackstone never thought that anyone else than the practitioners, could be his readers. Bentham was a political philosopher, and his program of codification aimed the political elite too, and in this respect Austin's theory is also aiming the politicians. 'Mr. Austin is an enthusiastic Benthamite. His associations have been altogether with codes and systems.' – notes George Sharshwood, the editor of the American edition of Blackstone's Commentaries.[23] Austin's personal tragedy that these practitioners had not found his theory practical enough in his life.

On the other side, – to put it very bluntly – the German theories, from Savigny through the *Allgemeine Rechtslehre*-s till Somló are rather *summaries of the legal science.* Therefore Somló has only one goal, and one target group. The *goal* is to make the preliminary work, on which basis the doctrinal legal sciences 'can start their work', and the *target group* is his peers, especially his German speaking fellow-professors of the time. Though he also prepared a summary of his book in Hungarian, and intended to use it as a textbook, the *Grundlehre* is still a preliminary work for the *cultivation of any legal science* and a relevant contribution to the *Allgemeine Rechtslehre* discourse of his time.

Gustav Radbruch developed a theory about the interconnection of the Continental and the English legal philosophy. In his 1936 article he states, that it is not only that the Continental legal theory had practically no effect on the English, but that its trend of development is just the opposite. 'Even the name given in England to that highest peak of juristic abstraction which corresponds to Continental legal philosophy is not in accordance with Continental terminology,'[24] since jurisprudence denotes in the Continent

[23] Sherswood (1893) xxi.

[24] Radbruch (1936) 530.

the totality of legal sciences, while in England more or less it is synonym with the legal theory. According to Radbruch Austin invented the *Allgemeine Rechtslehre* fifty years earlier than it formed in Germany. 'What the Continent achieved only after long byways through historical and philosophical systems of many kinds, was suddenly created by Austin fifty years earlier'.[25]

Radbruch himself is reluctant, how these two theories are linked. While he says on one point that the analytical jurisprudence, and the *Allgemeine Rechtslehre* is the same, on the other part of the text he states, that the Austinian theory had very superficial, or no effect on the latter. Though according to Sarah Austin, her husband once sighed, that he must have been a German professor, and Austin himself refers to Hugo's work as his greatest inspiration, *in reality* Austin's work was influenced mainly by Bentham. Somló is the only counterexample: '(i)t is only Somló's 'Juristic Principles" where the influence of Austin in the Continent made itself felt.'[26]

Radbruch is wrong entirely in the first point, and partly wrong in the second. He is wrong in the statement that the *Allgemeine Rechtslehre*-s are delayed continental versions of the Austinian theory. The analytical school has no real connection to the *Allgemeine Rechtslehre*-s, these two theoretical streams of thought developed separately. He is partly right, that Somló was the only continental theorist who was inspired by the Austinian theory, but this inspiration was not *methodological,* it rather affected some important *content (empirical) elements* or foundations of his theory: primarily the idea that law is a command of the sovereign, and that sovereign is based on empirical facts, like habit of obedience.

3. THEORY OF NORMS; THE ROLE OF LAW WITHIN ALL KIND OF OTHER NORMS

We should agree with Funke, stating that 'Somló and his followers conceived legal theory as a theory of legal norms'.[27] Both in the 'Province' and in the 'Grundlehre' a relatively long text is devoted to place the law in the family of norms, or rules, or laws (improperly so called). For Austin, we might say that this is the centre of his work: to make a clear distinction between law and other types of rules.

Though Austin uses the concept of 'ought' when he mentions it, he does it in special contexts, always mentioning the principle of utility – that law and morality has something to comply with. 'Ought' never mentioned as a feature of law *itself.* He starts his lectures, by the distinction already laid down by one of his master, John Locke[28] that there are 'real' laws, and laws, we call laws by the way of resemblance, 'properly' and 'improperly' so called,[29] as he puts it.[30] Laws properly so called are always *commands* of a superior to an inferior. Commands are acts of will, supported by sanction. There are two sub-categories within that. Within proper laws there are the laws of God, and the positive laws, set by human superiors to human inferiors.

[25] Radbruch (1936) 530.
[26] Radbruch (1936) 531. fn 3.
[27] Funke (2018).
[28] Austin (1873) 80.
[29] Austin (1873) 80.
[30] See also Rumble (1977) 80.

Laws improperly so called are *analogous* to law proper: they are metaphorical or figurative expressions, where the custom, or usage inappropriately extends the meaning of a word to another. If this extension results a close 'resemblance', the extension will be an analogy, if it results a remote resemblance it will be called 'figurative'. The previous is 'positive morality', the latter are the 'laws' of nature, like the physical causation. Positive morality is a very broad category, and comprises all kinds of norms, that are 'set and enforced by mere opinion',[31] like 'the law of honour', 'the laws set by fashion', and 'international law' as well.

In this respect already Somló's starting point is radically different: though he also distinguishes between the *normality* and the norm, and considers norms only in the latter sense, he makes explicit, that norm's distinctive feature is, that it is 'ought' *(Sollen)*

> If we now designate the concept of the norm as the generic concept of law, then this happens in the sense of an ought, that is to say in the so-called normative meaning of the word. Not the normal or the regular is meant to be designated in contrast to the abnormal, to the exceptional case, but the standard-compliant, the normative in contrast to the deviant.[32]

'Ought' is therefore the *genus proximum* of law. Before defining the law, Somló demonstrates this *genus proximum,* with elaborating a whole theory on norms which is called in *Grundlehre* 'nomology'.

The nomology is built on two distinctions, that are unknown for Austin, but which plays very important role in Somló's theory: the distinction of 'absolute and empirical' norms, and the distinction of 'autonomous and heteronomous' norms.

The first distinction has different meanings. First, absolute norms are the highest, self-evident, non-traceable *values* of ethics, logic, and aesthetics, like the 'nice' and 'good', and religious norms. Second, while these norms are *not* created *by human will,* and cannot be changed by will, the empirical norms are those *that are based on human will,* rules issued by someone, by a distinctive issuer. Third, these rules, because they are created by will, at the same time they are 'accidental', or 'random' as Somló puts it.

> Opposite them are the most random or empirical rules, rules which do not necessarily express the necessity of absolute values, and which are not called norms in the narrower sense of the word.[33]

These rules can be of many kinds. Customary rules, traditions, rules of conduct, the rules of games, the rules of the language (!) internal rules of companies and other organizations. It is important that purely based on the content of the norms they cannot be differentiated. It is only *the issuer* which makes the difference. Therefore in case of the law it is also the issuer – the *Rechtsmacht* – which will show, are we talking about law, or about other types of empirical rules.

Fourth Somló in other text-places identifies another separating criteria between absolute and empirical norms. Besides the 'accidental – eternal' and the 'based on issuer

[31] Austin (1873) 89.
[32] Somló (1917) 56.
[33] Somló (1917) 59.

(will) – not a will-based norm' distinctions, he introduces the Kantian category of 'autonomous-heteronomous' distinction stating, that 'absolute norms' are at the same time autonomous norms as well. This is the point where the two distinctions are connected to each other.

Originally, autonomous – heteronomous distinction is reflecting the Kantian idea, that there are rules that are requiring internal attitude, and norms that are requiring only an external alignment of actions – in the latter case we do not have to 'believe' in the rightness, we only have to follow the rule, for whatever reason. This, from a certain point of view is nothing else, but the distinction of 'ethical' and 'legal' norms.[34] Law requires no internal attitude, only the alignment to its rules. But Somló uses this distinction in a slightly different sense: to differentiate between 'external command' and 'internal promise' a will-expression coming *from outside,* and *an engagement* which is one's own will-expression, about her own future behaviour.

Though certain points these categories, and their different meanings sometimes cause internal tensions within the text, but in general it is a more sophisticated explanation, than Austin's.

Finally, there is a great difference between the Austinian and the Somló's theory in the use of the concept of *validity claim (Geltungsanspruch)* as a test to separate commands from other will-expressions.

Following his master Somló accepts, that legal norms are primarily commands. But there are other types of will expressions too: wishes, requests, etc. Sometimes these will-expressions are formulated in the same form: 'bring me a glass of water' can be a wish, ('…if you want'), but can be a command. And *it is not the sanction,* which makes the difference. Here, Somló is using the concept of 'validity claim' in an entirely different way than Stammler, from whom he is borrowing it. At Stammler's the validity claim, – the intention of the issuer – is primarily to distinguish *law from conventional norms.* Somló points out that Stammler is wrong in this respect. Validity claim is separating the *commands* from other will acts, and not the *law* from other norms. It separates the commands from wishes or requests. Command's validity claim comprises that the addressee cannot deviate from it, and therefore it aims to be received. The paradox is, that neither the addressee's consent, nor even their knowledge, nor the feasibility of the command is required for a valid command. A command is valid if it has a validity claim to be a command.

To sum up, in case of the type of norms, Somló *entirely deviates* from his master's theory of norms. He uses the Kantian dichotomies of absolute and empirical, and autonomous and heteronomous and introduces the category of Neo-Kantian validity claim into his system. With this, he is representing a kind of transition between an entirely empirical and purely non-empirical theory (like Kelsen's).

4. THE CONCEPT AND TYPES OF LAW

Austin's definition for the law is very simple. Laws (properly so called) are general commands, given or set by political superiors, or by the sovereign for the members of the independent political community, and in case of non-compliance supported by some evil,

[34] Here is the point where Somló introduces the 'nomology' term. We are informed, that he borrowed the term from Holland, (Elements of jurisprudence). 'Nomology […] may be defined as the science of the totality of the laws for which an *external* legislation is possible' – emphasis added Z. Zs).

which is sometimes called sanction. All of these elements have an importance, because if one is missing the norm will fall to another domain. For example, if the command in not *general* it will be an individual command. If the command is not set by a *political* superior, (like a master's command to the servant) it will be an 'improper' law, if it is not an explicit command it will be a sentiment, falling into the domain of positive morality, and so on. If no evil is connected, (as Austin puts it 'annexed') to the command, the norm will be for example the law of God. Moreover the sanction generates the duty, which on the other side generates the right.

Somló's norm-typology is a lot more sophisticated, as I showed in part 2. Somló introduced three new elements into the typology of norms, 1. 'Ought' as a distinctive feature of norms 2. the 'absolute – empirical' and the 'autonomous – heteronomous' distinction, and he used 3. the 'validity claim' *('Geltungsanspruch')* for differentiating between commands and other types of will-expressions.

This theoretical framework enables Somló to introduce three creative innovations to Austin's theory. 1. laws can be not only commands *but promises,* (based on the autonomous and heteronomous distinction), and therefore he introduces the idea of *promissory law,* 2. sanction is not *a necessary element* of the law, and therefore sanction is not a distinctive feature of law, because the different types of commands and promises are differentiated from other will-expressions by the *validity claim,* and not the sanction, and finally 3. law is *necessarily a system* of rules, regulating a relatively wide circle of life-relations. I will deal from these innovations with two in detail.

1. (Promissory law) According to Somló it is not only the command (a heteronomous will-expression), but the *promise* (an autonomous will-expression) of the sovereign can establish law. The idea, that promise can also be the basis of law is not Somló's 'invention'. The idea of 'own-obliged sovereign' was the integral part of the German legal science of the time. Somló extensively explicates the literature of promissory law, (§ 70: *'Zur Literatur des Begriffes des Versprechensrecht'*[35]). Here his concept lays on two foundations. The first is, that he relies on the rich German tradition in legal science: Jhering's 'one-sided binding', and 'two-sided binding norms', Bierling's 'contractual norms', and Jellinek's 'state bound by law', which either from private law point of view, or more frequently from public law point of view analyse promise's role in law. In private law it creates the basis of contracts, and generates the obligations, in public law the promises of the state have an 'assurance' function.

The second intellectual stream on which Somló's promissory law concept rests is Adolf Reinach's *Apriorische Grundlagen des bürgerlichen Rechts*. This theory is considered to be a kind of forerunner of the speech act theory. In this work Reinach states, that 'promising belongs to a special group of acts which create social realities that are as real as house or trees. […] [W]e can oblige ourselves and this obligation is not a mere feeling or convention, but a reality to which we can refer'.[36]

The promissory law enables Somló to explain in a very elegant way a whole range of concepts: the concept of constitutional law, the differences between branches of law, or the phenomenon of lex imperfecta. He further colours his system by introducing the concept of primary and secondary commands. Legal power can issue primary and secondary commands – he says. It can command to perform a duty towards itself, but it can command to perform

[35] Somló (1917) 208–13.

[36] Loidolt (2016) 50.

the duty towards a third party. And a promise can be issued to this third party that the state will enforce the command. Further, commands and promises can be issued independently, or in connection with one another. When two parties contract, the state implicitly commands the obligor to perform the duty for the obligee, but at the same time issues a promise towards the obligee, that the duty will be enforced. In the case of *lex imperfecta,* which is often said to be a sanctionless norm, – and in the constitutional law this is true, – in civil law it is a primary and a secondary command without a promise that it will be enforced.

2. (The law as a system) Somló's second important innovation is the idea, that law can be only postulated as a system of rules. This not only means, that law's rules are *interconnected,* and form a system, but that he law should comprise, regulate *a wide area of life relations.*

> Sovereign is not yet adequately characterized by the fact that it is a power that is usually able to enforce its norms in a particular group of people, and thus more successfully than other factors. The norms of a power which addressed only a very small number of norms to its subordinates did not become a legal power, even if it were able to enforce those norms in the same way as explained above. It also requires that it directs numerous norms to its subordinates and powerfully grasps a wide range of living conditions in positive regulation.[37]

This idea comes back in the book in several forms. Funke and Sólyom rightly recognized this peculiarity of Somló's theory as one of his main achievement.[38] The legal system, is a *'conceptual multum tantum'* as Somló puts it, devoting a whole part in his book to justify this statement. Here he says, that

> [T]he concept of legal power developed here implies that, a legal norm as an isolated entity, without at the same time belonging to a multitude of sisters, is not existing. The fact that a power must normatively take on a wide range of living conditions in order to become a legal power, already contains the realization that there can not be a legal norm for itself, but in reality these always only can appear as a conceptual plural or rather *multum tantum.*[39]

If there is no multiple laws ranging to a relatively wide scope of the subordinates' relations, *there is no sovereign (legal power) and there is no law.* This is a strange requirement, because it shows, that the systematic feature of law, (or at least a set of rules covering a wide area in life) is not only the conceptual element of law, but primarily *the precondition of the legal power.* Somló uses this idea not only to define the *Rechtsmacht,* but this element will be the basis of the explanation of the international law. *(Völkerrecht)* Somló says, that 'normally' the explanation is, (and this is Austin's explanation either) there is no higher power within the international community, and there are no subordinate states. This is not true, says Somló, following Lawrence,[40] because the primacy of the Great Powers in Europe, a body of representatives of Great Powers is a *de facto* sovereign within the international community, which can also impose sanctions on other states.

[37] Somló (1917) 97.
[38] Funke and Sólyom (2013) and Funke (2018).
[39] Somló (1917) 98.
[40] Lawrence (1895) 65.

So, international law from this viewpoint could be a law. The primary problem is with the scarcity *(Spärlichkeit)* of the rules:

> In relation to the immense field of state activity, it is only a relatively narrow circle in which the norms of international law are moving. They capture only a small portion of the living conditions of their addressees.[41]

and

> a large part of the so-called International law is not only non-legal norm, but no norms at all, but only possibilities for free action, dependent on the consent of the addressee, pious wishes, advice, etc.[42]

Two other problem is the weakness, the impermanence *(Unbeständigkeit)* of the legal power, and finally the insufficient following (compliance) *(unzureichende Befolgung)* of the international law. So international law is definitely not a positive morality, but not a law as well. It is something of its own, very close to the conventional norms.

For Somló all other distinctions, like, the ones enlisted in § 20[43] is (special and general, sanctioned and sanction less) are less important from this viewpoint. This is an important difference to Austin since for Austin,[44] referring to Bentham both, the generality and the sanction are distinctive features of the law. He says, that what distinguishes a particular command from a general one, is that it is generally obliging *group of persons,* and general that it is describing *classes of acts.* Also, legal norm's distinctive feature is that it is attached to an 'evil', a sanction. Here it is worth for remark, that Somló, in other places differentiated between primary and secondary norms. Funke, however points out that these distinction is not similar to Hart's, because Somló uses this these distinctions in the sense, that the first is set 'directly set by the highest power', while the secondary is 'set by the power of another, subordinate to it.'

This concept has a serious impact on the concept of the Sovereign as well. Namely, that it is not only the general obedience which is the precondition of the sovereign, (and the independent political community) but that the Sovereign should regulate via the law *a relatively wide circle of life-relations.*

5. SUMMARY

Somló did not copy, rather adapted the Austinian theory. He used Austin's concept of sovereign and command to conceptualize the law, but he developed this concept in many points. First, his theory was more intended to be a contribution *to the legal science,* than a manual for practitioners, as Austin's. Second, he used Kantian and Neo-Kantian concepts, and ideas of the contemporary German legal science in order to keep distance from Austin's empirical foundations. Third, this new conceptual framework enabled him to explain the structure of modern law on a more profound way. With the concept of promissory law, or the systematic character of law he is an important forerunner of the twentieth century legal theory.

41 Somló (1917) 160.
42 Somló (1917) 161.
43 Somló (1917) 64–65.
44 Austin (1873) 97.

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