

Foundations of Legal Doctrine – Somló's Constitutional Theory and the Hungarian Doctrinal School of Public Law

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Abstract. *Juristische Grundlehre* is the representative work of Felix Somló's oeuvre and is an early classic in the general theory of law. The book takes a clear position on the necessity of such a general theory. A scientific study of the law cannot be based on explanations of theories focusing on the content of positive law since these theories are necessarily particular.

The question is, however, how to explain the substance of general concepts: should one do so within the framework of a general theory, one that is independent of the content of positive law, as suggested by Somló, or by referring it explicitly to the explanation of that content? In contrast, theories of positive law, such as the doctrinal approach to public law, argue for the latter and regard the scientific study of the law as related to the explanation of its content. Thus, the development of general legal concepts would also be linked to that explanation.

It will be shown 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. It is for this reason that the present paper focuses on the chapters of Somló's book that make arguments similar to those of public-law theories. These considerations show closer links to the debates of contemporary public-law scholarship than what would follow from Somló's formalist theoretical aims as formulated in *Grundlehre*.

Keywords: general theory of law, doctrinal theory, the doctrinal school in Hungarian public law scholarship, doctrinal method, legal character of the constitution, legal obligation

1. INTRODUCTION – GENERAL OR DOCTRINAL THEORY

Juristische Grundlehre is the representative work of Felix Somló's oeuvre and is an early classic in the general theory of law.¹ The book takes a clear position on the necessity of such a general theory. Somló argues that it is only through the clarification of basic legal concepts that the scientific study of positive law becomes possible.² 'When speaking of legal order, one also has in mind certain obligations of certain persons. Legal obligation, however, is not a concept that can be taken from a given legal content. Rather, it is a basic legal concept and as such, one of the preconditions of any possible science of law.'³ According to Somló, the study of the basic legal concepts needs to be distinguished from

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¹ See Szabadfalvi (2007) 540–50; Funke (2012) 153–63; Funke (2004); Szabó (2015) 409–521; Zödi (1995) 63–141.

² 'Die vorliegende Untersuchung unternimmt eben den Nachweis, daß es Fragen gibt, deren Lösung für jede Jurisprudenz ganz unerlässlich ist, aber mit der speziellen juristischen Methode niemals erhofft werden kann, und versucht sodann eine systematische Behandlung aller hieher gehörigen Fragen zu liefern, also ein System zu entwerfen, dass auch als Prolegomena zu einer jeden künftigen Jurisprudenz bezeichnet werden könnte, wenn man eine solche Bezeichnung nicht zugleich als Anmaßung einer unfehlbar richtigen Lösung aller hier aufgeworfenen Fragen, sondern nur als nachdrückliche Betonung des richtigen Verhältnisses jener beiden Rechtslehren zu einander gelten lassen wollte.' Somló (1917) 2.

³ Somló (2017) 9–10.

those general doctrines of law whose general theses are based on the content of the law. Here, Somló refers to the theory of Bergbohm,⁴ who held that one needs to start from the content of the law and proceed through the various degrees of more general parts, to the desired preconditions of legal science.⁵ Somló disagrees stating that the basic doctrine of law aims at understanding the specific characteristics of law, yet has no direct links to either the study of positive law or its general theories, while still the basis of all kinds of legal studies. Regarding the question of whether the science of law is general or particular,⁶ Somló takes an equally clear position – it is general and that general legal science is the basic doctrine of law. Moreover, he makes an even stronger point and argues that the conceptual clarifications resulting from the basic doctrine of law make for the preconditions of the scientific study of positive law. Here, he links back to the theory of John Austin, who thought that the explanation of certain basic concepts is absolutely necessary for the particular study of law.⁷ Somló adopted the Austinian approach even though it was abandoned by post-Austinian British legal theory,⁸ where the justification of a general theory of law was thought to be possible without that argument.

A few decades later, HLA Hart also held the view that a theory of law is needed with a claim to a certain degree of universality. Hart also emphasised that law is general in nature and it is for a general theory of law to understand that generality. According to Hart, such a theory is 'general in the sense that it is not tied to any particular legal system or legal culture but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed, and in that sense 'normative', aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure though many misunderstandings and obscuring myths, calling for clarification, have clustered round it.⁹ This theory is descriptive and morally neutral and not meant to justify anything. Yet understanding the peculiar structure of the law is 'an important preliminary to any useful moral criticism of law.'¹⁰ This latter case does not deal with the conceptual preconditions of formulating theories about positive law but with the claim that any moral criticism of the law can be relevant only to the extent that it takes account of the structural characteristics of the law, explained by a general theory of law.

In Somló's conception, it is the legal scholar who manufactures the glasses through which lawyers experience, systematise and interpret positive law. A scientific study of the law cannot be based on explanations of theories focusing on the content of positive law since these theories are necessarily particular. The scientific study of the law is grounded in a foundational jurisprudence, i.e., a general theory, which is capable of explaining the peculiarities of the law independently of its content.

The need for general theories moving beyond the doctrine of positive law was clearly formulated in contemporary Hungarian legal scholarship. One of the most distinguished exponents of civil-law doctrine, Gusztáv Szász Schwarz argued for a general theory of law in the following way:

⁴ Bergbohm (1892).

⁵ Somló (2017) 12.

⁶ Twining (1997) 149–79.

⁷ Austin (1954) 367–69.

⁸ See Somló (2017) 35–37.

⁹ Hart (1994) 239–40.

¹⁰ Hart (1994) 240.

(W)ith the current division of the law, each one is playing but one instrument in the legal orchestra, with only a few playing the piece itself. We are suffering under the fragmented ness of law according to sub-fields. Public law, private law, commercial law, deposit law: everyone is speaking of laws, but no one about the law. They regard the law in the same way as a legal vagabond: whoever is roaming in ten places at the same time has no residence anywhere. [...] What the differences are between specific legal disciplines is, under the current fragmentedness of legal scholarship, more than sufficiently studied. Sometimes it is also useful to realise how much there is in common in all sorts of law.¹¹

The question is, however, how to explain the substance of general concepts: should one do so within the framework of a general theory, one that is independent of the content of positive law, as suggested by Austin and Somló, or by referring it explicitly to the explanation of that content? In contrast, theories of positive law, such as the doctrinal approach to public law, argue for the latter and regard the scientific study of the law as related to the explanation of its content. Thus, the development of general legal concepts would also be linked to that explanation. On that view, the study of law is something practical, with the aim of constructing doctrines that can have an impact on the behaviour of other people. That doctrinal approach is best summarised in Hungarian literature by the words of Viktor Jászi:

‘We fill the space between the lines of legal regulation with our knowledge of the doctrine of state. [...] [O]ur public law, as any regulation, operates through words, the meaning of which is determined by the current theory. The laws speak of executive power, popular representation, ministerial system, etc., but what these expressions mean is determined by the doctrine of the state.’¹² Thus, the concepts clarified by theory influence the self-interpretation of those participating in that practice, as well as the future expectations towards them. [...] Public-law scholarship lacking theoretical reflection cannot help orientation in debates concerning public law. According to Jászi, it would need ‘to dig deeper’ to achieve that.¹³ For the responsibility of the legal scholar working on public-law doctrines stems from the fact that “what is heralded today as doctrine may become action and living law tomorrow. [...] ‘Doctrines have always played a great role in the development of social phenomena. Indeed, one of the peculiarities of the humanities is that their doctrines and insights modify the very subject of the discipline.’¹⁴ In a public-law discourse without theoretical reflection, ‘our scholarship becomes a mere inventory of heaped-up views.’¹⁵

In fact, however, the explanation of general concepts may well have practical relevance and is thus explicitly related to the content of positive law. The question of how far one should take the practical implications of the use of concepts in developing one’s theory was answered differently by Somló at various stages of his career. In his early work, he advocated a more practical-minded position concerning the use and necessity of legal philosophy.

¹¹ Szászy Schwarz (1912) 446, 450.

¹² Jászi (1901) 113.

¹³ Jászi (1901) 114.

¹⁴ Jászi (1901) 116.

¹⁵ Jászi (1901) 119.

In the absence of a systematic knowledge of legal philosophy, lawyers will lack the knowledge of the factors that determine the law; they will have scanty knowledge of how the law develops; and they will have no scientifically verified measure for assessing the rightness or wrongness of legal rules. They will have no guidance in legislation. [...] A lawyer who is nothing but a lawyer, who only learns how to apply the articles of the law but knows little about the working of social factors, cannot even be a proper craftsman. [...] Whoever tries to heal while examining nothing else than the illness itself is called an ignorant quack nowadays. Whoever goes one step further and grasps the closest and most obvious link from the chain of causes is a half-educated empiricist. Whoever follows the chain of causes up to the limits of today's knowledge and tries to terminate the illness by eliminating the deepest of causes is a physician according to our scientific standards. But the one who goes even further and experiments between the walls of his laboratory to uncover the mysteries of biology, or researches the life of bacteria, is the scientist and possibly a benefactor of mankind. [...] [T]he abstract insights of science have immense practical impact.¹⁶

Somló had the opportunity to gather first-hand experience of the practical impact of abstract scientific truth in 1903 when he was nearly dismissed from his position at a law college because of a talk he gave at the Society for Social Studies.¹⁷

In the *Juristische Grundlehre*, these substantive and practical traits of the general theory are no longer emphasised and on the contrary, the formal and content-independent character of the theory is highlighted, guaranteeing its generality. This is particularly interesting as later Somló made a sharp distinction between the general theory of law and the substantive problems of positive legal studies. However, the question remains of how far the insights of the former can be useful for the various doctrinal conceptions related to positive law, if the empirical bases of the concept of law refer to the general empirical precondition of legal obligation, rather than the content of positive law. It will be shown 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. It is for this reason that the present paper focuses on the chapters of Somló's book that make arguments similar to those of public-law theories. These considerations show closer links to the debates of contemporary public-law scholarship than what would follow from Somló's formalist theoretical aims as formulated in *Grundlehre*. The specific substantive issues of Hungarian debates on public law have all left their mark on Somló's formalist theory, as formulated in that work and their specificities also set a limit to its claim to generality.

These links even allow for reading Somló's theoretical investigations concerning the state as a theory of public law dealing, among others, with the basic concepts of public law.¹⁸ It is for this reason that the clear distinction between foundational jurisprudence and doctrinal theories, made by Somló at the beginning of his book becomes important. In terms of the clarification of general legal concepts, the distinction suggests the inevitability and

¹⁶ Somló (1906) 21–23.

¹⁷ See Funke and Sólyom (2013) 53–55; Takács (2016) 10–11.

¹⁸ That doctrinal theories were not foreign to Somló is clearly proven by the second volume of his *Lectures on Legal Philosophy*, published at the beginning of his Kolozsvár years, which offers a clear and legible discussion of contemporary philosophical issues related to criminal law. Cf. Somló (1906).

autonomy of general theories of law. Yet, as will be shown, doctrinal theories also claim to clarify their general concepts and do not seem to need the groundwork made by general theories of law. Unlike Somló's theoretical claims, doctrinal studies are regarded as an obvious disciplinary framework for doing legal scholarship. That was reflected in Viktor Jászi's view and is also characteristic of the doctrinal approach to public law. In light of that, it is worthwhile to consider how Somló's theory of state relates to the theoretical reflections of (Hungarian) public law scholarship of the period.

2. THE DOCTRINAL SCHOOL IN HUNGARIAN PUBLIC LAW SCHOLARSHIP

Before 1848, the conditions for Hungarian public law scholarship were absent. There was no public law department at universities; professors lecturing on constitutional history were prohibited from teaching their own books and had to use textbooks published in Vienna instead.¹⁹ Partly due to that experience, Hungarian public law scholarship was mainly influenced by the Historical School, which regarded the protection of Hungarian constitutional tradition against the imperialist claims of the Habsburg dynasty as its chief mission. This tendency continued and even was strengthened during the absolutist regime that followed the defeat of the 1848 revolution. The 1867 reconciliation, however, brought about a constitutional compromise that made a public-law mentality focusing exclusively on maintaining the authentic Hungarian narrative of constitutional history obsolete. It also created a constitutional structure that could be interpreted as the legitimate continuation of Hungarian constitutional traditions. It was the positive legal issues of constitutional changes that became the basic questions of public law and the historicist approach was not capable of handling these anymore. There was an increasing demand for a modern public law scholarship, capable of dealing with the recent constitutional changes.

In Europe in the nineteenth century, the autonomy-seeking efforts of public law scholarship were directed at finding a place for a lawyerly interpretation of constitutional debates between a mere consideration of political power and naturalist thought. Such an approach was meant to clarify the conditions of legitimate use of public power, as well as peaceful changes of regime. The importance of these efforts was due to the idea of limited political power which had spread all over Europe. The principle of equality before the law, the institution of nation-state citizenship, the continuous expansion of suffrage and the working of state bureaucracy with its increasingly broad competences all contributed to the higher value of professional knowledge related to the public-law relations between the state and the individual and in general the clarification of questions concerning the use of public power. The birth of the Hungarian doctrinal school itself is due to these European developments in public-law thinking.

All public-law thinking since the second half of the 19th century had as its primary aim to fit the constitutional tradition to the modern constitutional situation. Developing a framework for interpreting modern constitutionalism has everywhere had some peculiar obstacles and it is those peculiarities that demarcate the different national currents.

It is an important formal feature of the Hungarian constitutional tradition that it was grounded in the historical rather than a chartal constitution. Thus, substantive issues of constitutionality were determined by the dialectics of continuity and constitutional reform.

¹⁹ Eckhart (1936) 291–92.

After 1867, achievements of the 1848 constitutional reform, such as the equality before the law, cabinet responsibility or popular representation had no immediate effect on the interpretation of the historical constitution or the teaching of constitutional law. Accordingly, the modernist program of abandoning feudalism did not leave a considerable trace on constitutional scholarship. Public and private-law relations, as well as those of the modern and the feudal state, were still mixed.²⁰ As a result, the network of various social privileges was difficult to contrast with the modern idea of a uniform legal community of equals.

The methodological question was how the interpretation of the historical constitution can escape the unfruitful historical narratives.²¹ Another challenge was due to the principle of the continuity of the constitutional tradition: how can the interpretation of the historical constitution be adjusted to the modern principles of constitutionality, while respecting continuity.²² Ernő Nagy was the first to use a consistent lawyerly method to describe Hungarian public law after 1867,²³ seeking to address both of the above problems in his textbook. The doctrinal approach to public law was therefore more than just one of the methodological schools – it also comprised a program of modernising Hungarian public law and constitutional thinking. A leading role here was played by Nagy's teacher, Gyula Schvarcz,²⁴ who truly believed in that program in which he made explicit in his early review of Nagy's book.²⁵ Soon a school emerged from Nagy's doctrinal approach to public law.²⁶ Other key exponents of the movement were Ödön Polner,²⁷ László Buza,²⁸ Gyula Joó²⁹ and later István Ereky,³⁰ together with Viktor Jászi, whose regrettably unfinished work of

²⁰ 'Our public life is in contrast with the feudal patrimonial state of the Middle Ages, the legal character of which was of partly public and partly private nature. The developed and unified structure of today's state leaves no opacity in terms of the relationship between the parts and the whole.' Nagy (1887) 43.

²¹ 'I think [...] I am not alone with the view that in discussing the law of the state, exclusively using the so-called historical method does not suffice any more. Life, as well as public-law scholarship, urge a doctrinal analysis.' Nagy (1887) 1.

²² Criticism against the historical approach was primarily based on the fact that the 1848 constitutional reform brought in certain changes that could not be traced back to earlier constitutional development (such as government responsibility or the doctrine of reserved powers). Moreover, some institutions in the earlier constitution were developed only in a primitive form (e.g. immunity), and could be not further developed through the historical approach. Thus, the introduction of some new constitutional concepts seemed inevitable. These included the legal concepts of state and province, state power and its subject, the legal relationship between state powers, acts of Parliament, cabinet decrees, the legal nature of international treaties, the relationship between customary law and acts of Parliament, the legal concepts of state territory and citizenship, and, with reference to these, the legal nature of the relationship between Hungary and Austria, as well as the state and the Croatian-Slavonic Territories, etc. Cf. See Nagy (1902) 215–17.

²³ Csekey (1926) 143.

²⁴ Gyula Schvarcz (1838–1900) was member of the Academy, and a true believer of modernisation and social mobility, which he thought called for radical constitutional changes. See Miru (1999) 86–111.

²⁵ Schvarcz (1887) 23–35.

²⁶ On the Hungarian tradition of the doctrinal approach to public law, see also Jakab (2015) 159–92, especially 164–66; Kovács (1958) 131–47; Takács (1958) 53–81.

²⁷ Polner (1891).

²⁸ Buza (1910).

²⁹ Joó (1908).

³⁰ Ereky (1928).

theoretical importance represented the doctrinal approach in a modernised form in the field of administrative law.³¹

From Somló's perspective, all the above scholars were doing general theories of positive law – doctrinal theories (jurisprudence). The textbook of Ernő Nagy, which appeared in several editions, became a classic,³² just as the early monographs of Polner and Buza on constitutional law and those of Ereky in the field of administrative law. The professional acknowledgement of Viktor Jászi was due to his textbook on administrative law, although it was not published any more after the tragically early death of the author.³³ Their work related to the doctrinal approach to public law, appeared, except for of Ereky's monograph, in the decades before the publication of Somló's book.

It is not very important, that Somló knew Nagy and Jászi (as well as Ereky) very well. In 1896, he spent his time in Heidelberg together with Viktor Jászi. They remained friends even afterwards, although Somló was much closer to Jászi's half-brother Oszkár later on.³⁴ It was in Kolozsvár that Somló got to know Ernő Nagy. When Somló applied for a post at Kolozsvár University, Nagy acted as one of the references and supported him with a positive opinion. In that report, Nagy emphasised Somló's devotion to the idea of objective science.³⁵ Somló eventually got the job in Kolozsvár.

The emergence of public law scholarship in Hungary is primarily due to the doctrinal school. The basic inspiration behind the school comes mainly from Gerber and Laband, both exponents of German state-law positivism, but was also influenced by contemporary French and especially English public-law thought. What distinguished the Hungarian doctrinal school from German state-law positivism was the particular importance it attributed to the principle of the separation of powers and the related work of Montesquieu. For that reason, the Hungarian school cannot be merely 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 hallmarked by the figure of Győző Concha. Concha had some serious public debates with Ernő Nagy and was influential enough to obstruct the academic career of the latter.³⁶ Due to its progressivism, the doctrinal school of public law never became dominant in Hungary and had no position similar to that of state-law positivism in Germany.

Ernő Nagy could not get a professorship in Budapest before his latter days, with his more fortunate pupils teaching at other universities, but more frequently only in law

³¹ According to the view of Lajos Szamel, author of a book that counted in the late 20th century as the standard work on the history of administrative-law scholarship, Jászi's *oeuvre* was interesting theoretically, yet unfinished, and therefore it received no considerable attention. See Szamel (1977) 85–91. On Viktor Jászi, see also Szabó (2014) 45–65.

³² Nagy (1887).

³³ Jászi (1907).

³⁴ Oszkár Jászi (1875–1957) was a publicist, social scientist and politician, one of the leading personalities of the Hungarian civic democratic movement. He was forced to leave the country after 1919, and lived in Vienna until 1925, then moved to the United States. They were close friends with Somló especially between 1899 and 1907.

³⁵ See *Véleményes jelentés Dr. Somló Bódog dolgozatáról* [Reviewers' report on the essay by Bódog Somló], by Mór Kiss Mór and Ernő Nagy, September 1903. Available at the Széchenyi National Library in Budapest.

³⁶ Due to heavy lobbying by Concha, Ernő Nagy was not elected corresponding member of the Hungarian Academy in 1891. He received the honour only four years later. See Kovács (1958) 8.

colleges. The example of the University of Debrecen well illustrates the situation of the doctrinal school in Hungary. In 1917, the university issued an open call for applications for a Professorship of Public Law. Among the applicants, László Buza and László Csekey, who did not lack a considerable scholarly track, were related to the doctrinal school. Another applicant, Kálmán Molnár, had no links to the school but had a considerably scholarly reputation despite his young age. Instead of the above, however, the faculty council of the Law Faculty decided to invite József Barabási Kun to take the professorship without having applied to the position. The formal criteria for appointing Barabási Kun were thus not met and the council motivated the decision with '(t)he strong conservative spirit, loyalty to Concha's school and respect for tradition and conventions, which is characteristic of all his work.'³⁷

2.1. The doctrinal method

Unlike the formalist views of German state-law positivism, the Hungarian doctrinal school did not seek to exclusively use the juristic method. Due to the continuity of the historical constitution, historical interpretation still held its leading role, together with the comparative method, with the latter resulting from the foreign influence on constitutional reforms. Thus, Hungarian public lawyers of the doctrinal school also quoted Mohl's view, according to which positive public law of a given country can be discussed from three perspectives, focusing on either doctrine, history or comparison.³⁸ Ernő Nagy states '(t)he method of discussing public law, its aim being to discover the legal truth hidden in the material of public law, cannot be but the juristic method, which comprehends the material from a legal perspective, examines the actual legal life of the state, explains its principles and concepts, determines a strict terminology, defines the legal substance of specific institutions and draws the conclusions.'³⁹

That sort of conceptualisation necessarily also has a critical function which is relevant not only in terms of the old Hungarian constitutional institutions, but also for assessing solutions taken earlier from foreign legal systems.⁴⁰

Another important feature of the juristic method in the Hungarian context was the special importance of scholarly literature, the 'canon' of the historical constitution being nothing else than a construct of scholarship. Here, debates had no such firm basis as those systems with a chartal constitution, where even the liveliest debates left the way open for returning to the constitutional provisions. In the case of a historical constitution, deeper disagreements in scholarship may even undermine belief in the constitution. According to Ernő Nagy, the neutral language of the juridical method would temper these debates and prevent public law scholarships from being exposed to conflicts of subjective values.⁴¹

³⁷ See Varga – P. Szabó (2014) 319–42, especially 320–21.

³⁸ Csekey (1926) 164–65.

³⁹ Nagy (1902) 199.

⁴⁰ 'That applies especially to theories received by our public-law literature from abroad, mainly from German scholarship, where these emerged from caesaristic reminiscences, or a feudal civil-law conception of patrimony. These doctrines were given up, even in their original homes, as soon as the knowledge of public law became more complete, since their untenable mistakes could be proved. To our legal situation these could never be actually applied.' Nagy (1902) 216.

⁴¹ Nagy (1902) 216.

One of the most important points of criticism formulated against the scholarly efforts of Ernő Nagy in the field of public law was that instead of achieving transparency and unity, the doctrinal method ‘has brought confusion to our basic legal concepts and the specific character of Hungarian public law fell victim to its discussions’.⁴² Yet, according to Nagy, the protection of the peculiarities of Hungarian public law cannot serve as an excuse for not meeting the standards of modern constitutionalism or the scholarly approach to public law. The aim of public-law scholarship is to ‘expose our domestic institutions to investigation, assessment and explanation with the most advanced knowledge available. And knowledge we should seek where it is to be found.’⁴³ On the other hand, there are basic concepts even in the field of state law e.g., the state, state power, its subject, that are international. Given that the content of these concepts link them to generality, there can be no specifically Hungarian constitutional scholarship on these. Special doctrines can only appear where there are specific national institutions, but even these need to be analysed at the current level of scholarship.⁴⁴ ‘There can be no reasons for declaring something to be true, the falsehood of which we are convinced of; nor for not seeking to make a fragile or hazy theory more solid. Uncertainty of scholarship is characteristic not of a historical constitution, but of a weaker knowledge of the law.’⁴⁵ A similar claim is made by Viktor Jászi in his extensive review of contemporary public-law scholarship – ‘The results our public-law scholarship has achieved thus far are modest. One may say that men of theory have only had the slightest of influence to our public law.’⁴⁶ According to Jászi, until the publication of Nagy’s work public lawyers ‘gave a more or less felicitously brief summary of relevant details from legal or constitutional history before discussing positive law, calling that the historical method.’⁴⁷ Jászi’s opinion is similar to that of Nagy would be necessary to have a reflective perspective on history. He states that ‘[w]ithout doubt, we have always been under great influence from Europe and without uncovering these roots for our ancient as well as new public-law institutions, our knowledge will remain deficient.’⁴⁸

Nagy’s ideas can be well contrasted with those of a textbook by Károly Kmety, who considered the historical method the only adequate approach to public law based on the historical constitution. Right at the beginning of the book, Kmety makes three postulates concerning:

- a) ‘thousand years of constitutionalism’,
- b) the ‘doctrine of the Holy Crown’,
- c) ‘thousand years of independent statehood’.

These postulates leave small scope for historical reflection as demanded by Nagy and Jászi, as the historical approach is primarily based on ideological tenets.⁴⁹

⁴² Concha (1891) 48.

⁴³ Nagy (1891) 439.

⁴⁴ Nagy (1891) 439.

⁴⁵ Nagy (1901) V.

⁴⁶ Jászi (1901) 111–12.

⁴⁷ Jászi (1901) 112.

⁴⁸ Jászi (1901) 113.

⁴⁹ See also the criticism of Gusztáv Szász Schwarz, an important civilist of the time, on Hungarian public-law scholarship: ‘Whoever opens our textbooks on public law will readily notice two of its features: first the mere description of positive law, and second patriotic declamation.’ Szász Schwarz (1912) 447.

The legal institutions of the Hungarian constitutions are the dearest achievements of the thousand-year long struggle of the Hungarian people and maintaining these is the safeguard of the survival of our State and Nation. [...] It is necessary, that the public-law or constitutional sense based on the knowledge of public law, as well as the consciousness and self-esteem, both commendable features of the ancient Hungarian nation of nobles, live on with all its strength in each layer of the Hungarian nation of citizens, with the fidelity and loyalty to Hungarian statehood getting stronger.⁵⁰

If an unconditional respect for Hungarian constitutional law is brought into the public life by the youth, then a united and strong nation, grounded in the millennial constitution, will be more successful in the fight against its enemies, both home and abroad.⁵¹ That ideological approach to the historical constitution became even stronger in the 1926 edition of Kmetz's book.⁵²

The specific methodology of the doctrinal theory took its most spectacular form in the monograph of László Buza on State Territory and Territorial Sovereignty (*Államterület és területi fenségjog*). Buza regarded his work as a contribution to general state law, meant to survey the similarities and parallels, rather than the specific and diverse traits in the constitutional law of different states.⁵³ A consequence is that his discussion of legal doctrines of state territory did not extend to the Hungarian 'doctrine of the Holy Crown'⁵⁴ – a quite daring methodological choice at the time.

3. DOCTRINAL DEBATES

In this section, three of the characteristic doctrinal debates of Hungarian constitutional scholarship are presented:

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.

3.1. The public personhood of the state

One of the most controversial achievements in the work of Ernő Nagy was the reception of the theory concerning the public-law personhood of the state into Hungarian constitutional law. In the German public-law tradition, this concept became popular because it succeeded to deliver a 'neutral' concept of state, independent from the heated justificatory debates of the period, for the peculiar lawyerly perspective of public law and to make it the basis of a uniform conceptual system. Here, Nagy basically followed Gerber's doctrine. On that view, the characteristics of the public-law personhood of the state follow from the features of sovereignty. State power means the right to rule (*Recht zu herrschen*), that is, the right to express the implementation of duties based on 'state aims' as the will of the people.

⁵⁰ Kmetz (1911) X–XXV.

⁵¹ Kmetz (1911) XXXI.

⁵² Kmetz (1926).

⁵³ Buza (1910) 4.

⁵⁴ On that doctrine, see Péter (2003) 421–510.

The state can have the power of will only as a person.⁵⁵ To be able to grasp the legal capacity of the state, based on the concept of the 'people', one needs to regard it as a person, attributing it a unitary and clearly identifiable capacity to act.

The reception of that conceptual framework was in the focus of the debate between Nagy and Concha. Concha was rightly worried that the above conception of state personhood would conform the interpretation of the Hungarian constitution to Austrian imperial claims. In his view, the relationship between the King of Hungary and the National Assembly does not match the German patterns.

[O]ne cannot say that [...] the king is the only holder of sovereign power, since supreme power in Hungary is shared with the citizens organised in the national assembly. Hence, if one uses the term 'holder' for whoever has the claim to sovereignty, then its holders are the monarch and the national assembly together.⁵⁶

Nagy eventually formulated the Hungarian version of the theory of the public-law personhood of the state as follows. The subject of state power is the state, with the crowned monarch as its holder and state sovereignty being exerted by the legislature as its trustee. The monarch is not the subject but the holder of state power. Even today, it is the king who grants assent to the laws, who is the head of the government and the source of justice. Yet the king cannot express the sovereignty inherent in state power: state sovereignty is a common function of the monarch and the national assembly.⁵⁷

By the turn of the century, public-law doctrine based on the public-law personhood of the state had lost its influence. Following Jellinek, Viktor Jászi described the character of state power through its empirical features. László Buza, who belonged to the younger generation of the doctrinal school also used Jellinek's work in the debate concerning the legal personhood of the state. In his view, the legal personhood of the state means the legal personality of a single legal subject that appears in both civil and public legal relations. 'The personhood of the state means that the state can be a legal subject, the holder of rights and duties.'⁵⁸

As formulated by the classical authors of state-law positivism, the peculiar nature of state power is due to the fact that it refers to a ruling will, issuing unconditional commands and enforcing its commands by its own power. In a modern state, only the power of the state is a ruling power; individuals or bodies can exert such power only if commissioned by the state.⁵⁹ It does not follow, however, that the public-law personality of the state should be separated from its civil-law one. Buza himself emphasised, following Jellinek, that

The power of the modern state is regulated by the law. Individuals are not unconditionally subject to state power. The state itself determines the limits beyond which it cannot interfere with the life of the individual. Hence, a field emerges in which the state cannot appear as the ruler, due to its self-imposed limits, but only as

⁵⁵ On Gerber's theory of public law, see Kremer (2008); Pauly (1993); Wilhelm (1958); Sólyom (2016) 45–80.

⁵⁶ Concha (1891) 58–59.

⁵⁷ Nagy (1891) 440–41.

⁵⁸ Buza (1910) 6.

⁵⁹ Buza (1910) 9.

equal of the individual, using the same means to achieve its aims as any private person.⁶⁰

That view clearly differs from Gerber's and Laband's classical positivist conceptions, which linked the concept of the state to the state apparatus dominated by the monarch, making the concept of the state refer to a monolithic power structure.

Somló, in turn, goes beyond Jellinek and draws on Kelsen's early work and argues that will-based theories of public-law personality are inherently flawed.⁶¹ 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.'⁶²

3.2. The law of state unions and the constitutional relation between Hungary and Austria

The law of state unions was one of the most controversial fields of public-law scholarship at the end of the 19th century. This is not unsurprising in a period of colonial empires, declining absolute monarchies and burgeoning national states. The question concerning the relationship between the empire and the constituent states, i.e., whether it belongs to the field of union law or is regulated by domestic public law, was subject of an especially lively debate in German scholarship. Similarly, the interpretation of the Austro-Hungarian reconciliation, i.e., whether it was an agreement between independent states or the creation of a new kind of union, was much disputed. Views formulated in public-law scholarship were of immense political importance.

The most generally respected monograph from the doctrinal school of Hungarian public law was Ödön Polner's book on the constitutional relationship of Austria and Hungary, was also devoted to that latter topic.⁶³ The popularity of Polner's work was due to its conclusions rather than the method it followed. He argued that the reconciliation happened through an international treaty between sovereign states, united by a personal union and that it brought about an international alliance for the mutual external protection of both states.⁶⁴ That conclusion was not the result of a careful survey of historical sources, which Polner actually carried out, as was expected, but the logical analysis of legal concepts.

According to Polner's analysis, interstate connections either belong to the field of international law, or constitutional law. In the former case, the states concerned are in equal positions, while in the latter their relationship is hierarchic. Yet there are hard cases with the relationship between Austria and Hungary being one of these. At what stage can it be said that the cooperation between two states has reached a degree where they cease to be sovereign states? Is it where they set up common institutions and organisations? If institutions brought about through the cooperation of several states do exert state power, it seems legitimate to raise the question of whether the states that have created these common powers now form a unitary state?⁶⁵ For this reason, it seems necessary to define

⁶⁰ Buza (1910) 11.

⁶¹ Somló (1917) 276.

⁶² Kelsen (1923) 183.

⁶³ Polner (1891).

⁶⁴ Polner (1891) 216–19.

⁶⁵ Polner (1891) 39.

when one can speak of a unitary state. Polner followed the view according to which a unitary state requires a uniform concept of citizenship and subjecthood. Without uniform citizenship, there is no state and no unitary state power. If the social organisations participating in the relationship concerned have separate citizenship then these organisations are independent states with independent state powers.⁶⁶ Thus, the mere existence of common institutions does not mean giving up state power. Rather, it is only exerted through the common organs, in case the societies forming separate states do not unite but maintain their independent state structures. The relationship between such states is an international one.⁶⁷ Confederations are international relationships; those of independent states, which may limit the exertion of their own state powers against one another, making these limitations part of their respective constitutions. An alliance, in turn, is a relationship where the states likewise limit the exertion of their state powers against one another, yet with that limitation remaining at the level of international obligations, with no impact on the internal structure of the state.⁶⁸ A clearly related problem is the public-law interpretation of a position where the two states have the same person as their monarch. At that stage, Polner distinguishes between personal unions and real unions. A personal union is no interstate relationship and the term only means that it is the same person who holds the state powers of several states. A real union is an actual relationship between states, a sub-class of confederations, where the state powers of the several states are held by the same individual.⁶⁹

This way, the picture is much clearer and the constitutional relationship is based on an international treaty of sovereign states, which happen to form a personal union. Polner's juristic method basically followed the Labandian model, fitting all legal problems into a logical order of previously determined concepts. It was against that method that Somló formulated his criticism, stating that 'it is not the task of the science of public law to force into the Procrustean bed of predefined categories the colourful variety of really existing relationships, but only to provide classifications that take into account the forms existing in reality'.⁷⁰ From his criticism against Polner's method, Somló does not draw the conclusion that, the conceptual clarifications of general doctrines of law may be the solution for the hard cases emerging from the law of interstate links.

The doctrine of state unions presupposes the basic concept of state and thereby those of sovereignty and the law. Without regarding these as given, Somló argues for phenomena that are called state unions in the particular legal systems.

The doctrine of the state can only be built upon the concept of the state. It is only on that basis that one can illuminate any positive-law concept regarding state unions, by referring it to those phenomena that serve as the basis of all such concepts.⁷¹

In these considerations, however, the general concepts of law and state do not necessarily yield any straightforward solution. 'For the fragmented character of the concept of law brings with itself a similarly fragmented concept of state unions.'⁷² In such cases, it

⁶⁶ Polner (1891) 39.

⁶⁷ Polner (1891) 44–45.

⁶⁸ Polner (1891) 47.

⁶⁹ Polner (1891) 49–52.

⁷⁰ Somló (1917) 292.

⁷¹ Somló (1917) 293.

⁷² Somló (1917) 293.

is more fruitful to start from the positive-law concepts of state unions as their limits can be seen quite clearly as they are concepts of positive law. Thus, the law of state unions is a real border zone and it is by no means obvious that it would belong to the field of general theory of law. Does that mean that the clarification of general legal concepts is no precondition for developing positive-law doctrines?

3.3. The legal character and identity of the constitution

If there are any constitutional questions where the basic concepts of law and state can be of key importance, then the problems of the legal validity and normativity of the constitution certainly belong to these. In the doctrinal debates of Hungarian public law, such questions were raised in a variety of contexts. Three of these questions will be addressed here:

1. the debates concerning the legal character of the constitution;
2. the problem of unjust law and related to the latter;
3. the link between the validity of law and the duty to obey the law.

These topics were subjects of both doctrinal theories and general theories of law, such as Somló's foundational jurisprudence.

It is not only the conditions of theoretical debates that are telling as to the peculiarities of Hungarian public-law scholarship, but also the controversies concerning legal nature of the constitution. That is of particular importance also because the primacy of the constitution among the sources of law could not be implemented due to the character of the historical constitution, even though protecting the identity of the constitution had always been a major factor in the development of the Hungarian constitutional tradition. The resulting contradictions are well illustrated by the different views on the legal nature of the 'fundamental laws'.⁷³ The term itself was generally used in constitutional scholarship to mark statutes of constitutional importance. Yet the question of whether such legal sources actually exist, as distinguished from ordinary statutes, generated some controversy. From a formal perspective, i.e., in terms of the procedure of legislation or legal force, these 'fundamental laws' do not differ from ordinary acts of Parliament.⁷⁴ The term was nevertheless used by both legislation and scholarship. Did it make any difference in public law? Concha's answer was positive: 'The essence of fundamental laws is the sovereign will limiting itself through these.'⁷⁵ Yet the question remains as to what the ground of such self-limitation can be. The self-limitation of the state can be based on some constitutional custom, or the expressed will of the state, i.e., a constitutional provision.⁷⁶ Since the latter apparently cannot be the case with 'fundamental laws', customs may perhaps play a role here. Is there any constitutional custom that acknowledges the specific public-law character of these 'fundamental laws'? According to the argument of Viktor Jászi, even if certain practices can be identified in this respect, they certainly cannot be regarded as customs. In maintaining or altering such practices, there is a factor that determines the behaviour of the participants.⁷⁷

There are certain commonly shared principles concerning the structure of state sovereignty, as well as the relationship between the state power and the individuals.

⁷³ Jászi (1901) 202.

⁷⁴ See also Joó (1908) 248.

⁷⁵ Jászi (1901) 202.

⁷⁶ Jászi (1901) 202.

⁷⁷ Jászi (1901) 202.

The statutes in which these principles are proclaimed are regarded as fundamental laws. It is these principles set by or expressed in the statutes that are protected by those who object to the modification of these laws. Yet there is no legal claim to obstruct modification – the only way to stop it is through public political resistance. It is in that sense that these principles are publicly acknowledged political principles. Now, if being part of a fundamental law only means that a certain principle can be protected by political means, Jászi argues, then the term has no legal relevance. Thus, Concha and his followers only wish to claim constitutional status for a commonly shared political principle. The controversy is not purely theoretical, as shown by the case of citizens' rights. That is also emphasised by Jászi –

Where legally qualified fundamental laws provide for certain spheres of individual liberty even against ordinary legislation, it makes sense to discuss the rights thus protected in the field of public law. Yet we have no such 'fundamental laws'.⁷⁸

Concha's 'fundamental laws' have no specific features that would distinguish them from ordinary laws.⁷⁹ One of the most important points of doctrinal criticism appears in Jászi's analysis. By regarding certain ordinary laws part of the constitution, to protect the identity of the latter, the historical approach blurs the limits between the legal and political aspects of the constitution, which makes it more difficult to protect individual rights, in particular, against the state.

From a present perspective, what is remarkable in that context is that Somló's formal theory attributes no particular importance to the distinction between the constitution and ordinary laws.⁸⁰ The primacy of the constitution has brought a new paradigm in understanding legal systems based on a chartal constitution, with Hans Kelsen's Pure Theory of Law as one of its implementations. In Somló's work, the hierarchy of legal sources is limited to the distinction of primary and secondary rules.⁸¹ Statutes issued by the legislative all count as primary law. Yet that concept is not equal to that of 'constitutional laws'. Exerting legislative power primarily means ordinary legislation. Where legislative power and ordinary legislation do not coincide, ordinary legislation relates to legislative power as public administration to the latter and fundamental laws relate to ordinary laws, as acts of Parliament to decrees elsewhere. The essence of legislative power is constitution-making power. It made no difference to Somló whether the legislative power issues all the rules itself or just determines who is to exert legislative power, leaving the making of all other statutes to subordinate organs. Contemporary public-law scholarship was more precise in that respect. As Ernő Nagy writes in his textbook:

In our country (and e.g. in England), there is no difference between ordinary and constitutional laws in terms of legal nature. It only appears in their content, i.e. that the

⁷⁸ Jászi (1901) 203.

⁷⁹ In distinguishing between 'fundamental law' (*lex fundamentalis*) and 'cardinal law' (*lex cardinalis*), and equating the former with the constitution, makers of the Hungarian constitution of 2011 completely disregarded traditional usage. In Hungarian constitutional tradition, there was no real difference between 'fundamental laws' and 'cardinal laws'. See Schweitzer (2017) 148–49.

⁸⁰ Funke (2004) 259. That, however, is not due to any Hungarian tradition of parliamentary sovereignty (unlike in the UK), see Szente (2016) 23–32.

⁸¹ Somló (1917) 319–20.

one regulates some of our cardinal public institutions, while the other contains a more average legal rule. Yet on that account, by the term 'constitutional law' we only describe the content of a statute, without making a legal concept of different nature, unlike in other states, where there is a more difficult procedure of amendment and the constitutional law defines the way that ordinary laws need to follow. In that way, they protect themselves against hasty amendments.⁸²

Although contemporary public-law scholarship would have provided the possibility for Somló to ground his theory in a more juristic conception of constitution, the constitutional context of the age did not make that feasible. Quite to the contrary, if Somló was to create a formal theory of law capable of grasping the reality of Hungarian public law then he needed to realise that several important principles of the historical constitution, often regarded as unchangeable, were more of political ideals. These ideals worked only incidentally, through customs and the constitutional world-view of political actors, who happened to regard certain laws as having constitutional importance, rather than through laws issued by the legislative power. In protecting the constitution, political protest and indeed resistance could play a greater role than formal legal procedure.⁸³ That was partly due to the feudal character of the Hungarian constitutional tradition, still alive in Somló's days. That tradition could survive because these feudal instruments, such as the right of resistance – *ius inertiae* proved to be efficient means of mobilisation against Austrian influence.⁸⁴

The political character of the historical constitution was further strengthened by the institution of 'constitutional safeguards'. The term 'fundamental laws' was used to mark those laws that were considered as parts of the historical constitution due to their political importance. However, the political importance of these principles did not change the legal validity of ordinary laws. 'Fundamental laws' were distinguished from 'constitutional safeguards' in scholarly literature. Ernő Nagy used the latter concept to describe the historical development of the Hungarian constitution. In his interpretation, constitutional safeguards comprise all those regulations, statutory provisions and institutions, which serve to protect the constitution from illegitimate amendments.⁸⁵

There were two important means for protecting the constitutional safeguards. One was the right of resistance of the nobility as provided by the Golden Bull, while the other was

⁸² Nagy (1914) 209.

⁸³ Due to the inherently political nature of constitutionalism, at the time of the 1905 constitutional crisis, it was quite difficult to explain to external observers how to assess the situation from the perspective of constitutional law. The crisis was sparked by the 'military debate', dating back to Spring 1903. The common Ministry of War was seeking to raise the number of soldiers, but the Independence Party obstructed the bill in the Parliament, and demanded a national reform of the army, introducing Hungarian as the language of command and service, in exchange for their support. Francis Joseph did not grant these, however, and insisted on keeping the organisational unity of the army. At the 1905 elections, for the first time in the history of the dualist monarchy, the coalition of the opposition parties won the majority in the House of Representatives. The coalition did not abandon their demands concerning the language of the military, and the political crisis escalated into a constitutional one. The monarch tried to enforce his will by administrative means, through the Lord Lieutenants of the counties, which provoked resistance in the name of protecting the historical constitution.

⁸⁴ See Péter (1998) 290–338.

⁸⁵ Nagy (1914) 210.

the practice of the counties to regard unconstitutional decrees of the government as unenforceable. Today, it would be said that these safeguards defined the limits of constitutional identity. Ernő Nagy enumerated seven rules and principles he regarded as related to the identity of the Hungarian constitution:

(1) coronation, as well as coronation charters and oaths, (2) the right of the National Assembly to reject taxation and conscription, (3) the right of the National Assembly to decide on the budget and ministerial responsibility, (4) the so-called right to grievance of the municipalities and to appeal to the Court of Administration, as well as their right not to enforce government decrees about collecting taxes and providing recruits not approved by Parliament, (5) the independence of judges, (6) freedom of the press, freedom of speech and the right to political discussion based on the freedom of thought, (7) citizens' freedom of association and assembly, as well as their right to grievances and petitions.⁸⁶

Yet the legal nature of these constitutional safeguards was even more controversial than that of the fundamental laws. The functioning of the press was regulated by legislation back in 1848 and a reform, called for by everyone, was never implemented.⁸⁷ The freedom of assembly was not even regulated by ordinary laws; it was part of the inalienable constitutional principles, while its content practically depended on the discretionary power of the respective minister.⁸⁸ Protecting the safeguards defining constitutional identity was only possible by way of political protest as these institutions had no legally defined status within the historical constitution. Their political importance, on the other hand, was immense, as they could serve as the basis of political resistance, i.e., of not regarding as law those decrees of the monarch that did not respect the institutions related to the identity of the constitution. An example may be the way Hungarian public law treated the legal expressions of pre-1867 Austrian absolutism. According to the dominant view, regulations issued in the absolutist period could not be regarded as valid law, only as *de facto* expressions of violence.

It is small wonder that the problem of unjust law was for Somló, a too obvious question to be examined.⁸⁹ The problem of the legitimacy of law may mean that the moral views of those subject to the law can be of importance when considering obedience to the law. Illegitimate law, in turn, refers to an unlawful way of making law. That may occur in various ways: through revolution, annexation, or even *coup d'état*.⁹⁰ Illegitimate law can also result from a legal rule being issued by someone legitimately exerting state power but in an illegitimate way, or from an 'unchangeable' norm being changed in an otherwise legitimate procedure.⁹¹ Somló, however, emphasises that legitimacy is not an element of the concept of law. He, with Verdross, held that the legitimacy claims of law can be assessed only with reference to a specific legal system,⁹² through interpreting substantive rules and not on the basis of meta-juristic considerations. Nevertheless, when arguing that the legislative power

⁸⁶ Nagy (1914) 210.

⁸⁷ See Révész T. (2013) 301–12.

⁸⁸ Horváth (2007) 4–15.

⁸⁹ Somló (1917) 116–21.

⁹⁰ Somló (1917) 117.

⁹¹ Somló (1917) 118.

⁹² Somló (1917) 121.

can exist only together with those whose convictions it needs to respect, if its commands are to be obeyed.⁹³ Somló comes quite close to the views of Jellinek, who is generally regarded as an exponent of the recognition theory, even though Somló was no adherent of the latter.⁹⁴

Due to the peculiar character of Hungarian public law discussed above, the (sporadic) theoretical reflections of public lawyers display quite different conceptions regarding the duty to obey the law. In his monograph on administrative law, Viktor Jászi argued that the pedigree of the rule is only one of the criteria for legal validity. A rule will be valid if recognised by those for whom it has been created: that is the decisive factor of validity.

If the people concerned by the issue regard it as law and accept it, then it is not a problem if it was not created through a legal way. And conversely, a rule that is legitimate by its birth according to the refined scrutiny of objective legal investigation, is never going to be alive and efficient law, if the community does not accept and regard it as such. Legal rules defining the way of legislation serve only to help making the rule thus created recognised as law.⁹⁵

Whose practice counts as to the recognition of law? Who are the addressees of these rules? In Jászi's conception, it is not the citizens and it is not their opinion that matters but that of state institutions.

Most legal rules comprise two commands. One in the regulation and one in the sanction. The command expressed through the regulation is the legal subject or state organ, whose action or behaviour is required by the state through the legal definition. The addressee of the command expressed through the sanction is always a state organ.⁹⁶

One can speak of sanction only where the state wants to command, through a legal rule, a legal subject or a state organ to act or to refrain from acting – it seeks to make the addressee obey the command.⁹⁷ The main question here will be how state organs regard legal rules. Normally, their attitude is determined by the obedience following from their subordination. 'So far so good, but what does force the highest organs of the state to follow the command of the legal rule?'⁹⁸

In Jászi's view, legal commands create (legal) obligation but whether one follows the command of the rule depends on one's moral sentiment. It is not the content of the rule or the goal of acting this way or that, that arouses that moral sentiment itself: it is only the question of whether one has followed the legal rule or not.⁹⁹ In a political community coordinated by the law, the functioning of the state is based, among others, on the moral sentiment according to which it is right to follow the commands of valid law and it is wrong

⁹³ Somló (1917) 119.

⁹⁴ See Funke (2004) 255.

⁹⁵ Jászi (1907) 76.

⁹⁶ Jászi (1907) 79.

⁹⁷ Jászi (1907) 82.

⁹⁸ Jászi (1907) 82.

⁹⁹ Jászi (1907) 84.

to violate it. Jászi does not object to that either.¹⁰⁰ Yet moral sentiment is not always sufficient to guarantee obedience. It is exactly the obedience to the law that requires some further factors. According to Jászi, the duty to obey the law can be based on:

- a) approving of the substance of the legal command, supporting and following it on principle,
- b) obedience based on the moral insight according to which humans have the duty to follow the commands of the law,
- c) obedience due to threat of coercion,
- d) a careful consideration of the possible consequences of not obeying the command of the law and trying to avoid sanction,
- e) state organs performing the action provided for by the legal rule.

Thus, in Jászi's view, the validity of law presupposes that legal commands can ensure obedience to the law in one of the above ways.¹⁰¹ In his work, the theory of public law, linked to positive law, points towards a primarily empirical general theory, even though it is not developed in a consistent manner. The status of moral considerations forming the basis of obedience is not made quite clear. His theory seems to be closer to psychologising approaches to law than to later theories grounded in practical philosophy, which seek to translate these moral considerations to the language of 'reasons of action'. For Jászi, especially the link between validity and the duty to obey can be problematic. He does not suggest, however, that the validity of legal rules would be dependent on the willingness of the citizens to obey. Validity and efficacy are not confused, as Jászi does not discuss the duty to obey from the perspective of the citizen, but from that of state organs. That approach was quite ahead of its date, suggesting a theoretical framework similar to Hart's description of the validity of the 'rule of recognition',¹⁰² even though its empirical basis was the (feudal) struggle of Hungarian state organs against the power of the monarch, to protect the constitution and national independence. The historical context notwithstanding, it seems worthwhile to have a look at how that conception of legal duty, bound to a particular legal order and developed as part of a doctrinal theory, relates to the conceptual frameworks of great general theories.

4. THE PROBLEM OF LEGAL OBLIGATION IN THE JURISTISCHE GRUNDLEHRE

4.1. Jellinek: State Purposes and the Recognition Theory

As emphasised by Jellinek already in his early work, the final ground for obedience to the state is the acceptance of its general will among members of the political community.¹⁰³ Jellinek followed the recognition theory, which provided a conceptual framework, which was generally accepted by public lawyers of the time, for explanations of the political and legal duties to obey. A classical version of the recognition theory was Jellinek's theory of 'state purposes'.¹⁰⁴

¹⁰⁰ Jászi (1907) 84.

¹⁰¹ Jászi (1907) 85.

¹⁰² Hart (1961) 106–07.

¹⁰³ Jellinek (1880) Jellinek's early writing is the first comprehensive formulation of the theory of self-obligation.

¹⁰⁴ Koriath (2000) 117–32.

According to Jellinek, the practical importance of understanding state purposes lies in the possibility to develop a cogent psychological and moral justification of the state. State power can be justified only by the state as an institution not by its individual actions. State actions have no evident justification. It is through the clarification of the substance of state purposes that state power can be justified. Yet defining the content of state purposes belongs to a field shared by the theory of the state and practical politics and is part of a process that is not legal but political in nature.

All changes in legislation and state institutions, all related declarations and bills need to be justified by the purposiveness of these changes. These justificatory attempts are then debated by political parties representing various world views, who accordingly have different ideas as to the content of the state purposes. Throughout these debates, the content of state goals becomes defined with political principles, which can be practically regarded as teleological value judgements.¹⁰⁵ Thus, Jellinek's version of the recognition theory requires contemplating substantive political and moral principles for answering the final questions of legal and political obligation. Regarding the bases of the validity of law, Jellinek's theory mainly focuses on citizens' duty to obey the law. It still leaves open a number of questions concerning the practicalities of recognition: Whose recognition counts? Is it the majority? If so, how is it defined? What about fundamental rights? etc. For public lawyers eager to protect the autonomy of legal scholarship, it is also less than reassuring that Jellinek links the limits of legal obligation to an (apparently endless) evaluation of political principles.

Hans Kelsen, who counted as the strictest opponent of Jellinek's theory, made some efforts in his discussion of legal obligation in the *Hauptprobleme*¹⁰⁶ to refute Jellinek's views.

4.2. Kelsen's criticism of subjective theories of legal obligation

By seeking to answer the questions of justification of state power, Kelsen argues, one is practically looking for the power of the law to create obligations, i.e., the basis of the validity of the legal order. Thus, these questions do not differ from the problem of legal obligation and are generally connected to questions of legal validity.¹⁰⁷ Yet, according to Kelsen, two senses of the concept of 'validity' need to be distinguished:

1. Why do members of the legal community actually obey the rules of positive law?
2. Why should legal rules be obeyed?

The first question refers to causal links, motives of obedience, psychological and sociological facts – all these call for methods of natural sciences.

Any reference to a higher moral order would mean abandoning the autonomy of the legal order, as well as the independence of legal scholarship and dissolving the latter in ethics. Jurists cannot raise questions as to the substantive bases of validity of the legal order. Jurists can only answer formal questions: those of 'how?' rather than the fundamental 'why?'. The above possible meanings of the question concerning the basis of legal validity are irrelevant from a juristic perspective. The one refers to the motives of lawful behaviour,

¹⁰⁵ Jellinek (1914) 236–37.

¹⁰⁶ Kelsen (1923).

¹⁰⁷ Kelsen (1923) 351–52.

which is a psychological question and Kelsen thinks it belongs to the field of sociology. The other looks for a moral justification, which belongs to the field of ethics.¹⁰⁸

These questions keep on being asked to jurists, as some people still think that these should be answered by lawyers. Kelsen, however, thinks that jurists obviously cannot answer these by using their own means. First, they lack the necessary scientific method to determine what actually happened. Second, they are not in the position to review their own rules from a perspective that is higher than theirs. The above theoretical nonsense can yield but a fiction, that of recognition.¹⁰⁹

These theories are capable of pointing to the factual motives of law-abiding action, or to the moral justification of legal rules. Yet recognition theories cannot keep psychological and moral elements apart. The fiction of recognition cannot provide either explanations or justifications until its theoreticians become aware of the fundamental difference between the two types of their theoretical moves.

4.3. Somló's criticism of Kelsen and the concept of law-as-promise

Somló's discussion of legal obligation and related to that, the structure of the legal rule, in *Juristische Grundlehre*, are primarily based on his critique of Kelsen's views as explained in the *Hauptprobleme*. Here, two aspects need to be highlighted. First, Somló thinks that Kelsen misinterprets the concept of legal obligation and second, he finds the Kelsenian theory insufficiently general, as it leaves the character of several existing legal systems out of account. What is particularly important is how Kelsen's early conception can handle institutions such as constitutional freedoms or the right to resistance.

Somló thinks Kelsen is wrong in describing moral obligation as some kind of a psychic state resulting causally from an objective moral law. That view is mistaken, since moral obligations, as legal ones, are forms of behaviour prescribed by a rule,¹¹⁰ independently of causal connections. The question of obligation has no direct links to the problem of efficiency.

Kelsen's other mistake concerning legal obligation is, according to Somló, to describe it as a duty of the subjects. Such a conception may be illuminative in terms of criminal law or administrative law, but much less so in other fields.¹¹¹ Somló's key claim is that legal rules constitute obligations not only for the subjects but also for the state. What follows from that insight is that legal rules cannot be modelled by a single structure. It is for this reason that the concept of 'law-as-promise' becomes important.

Here, Somló could come quite close to Jászi's view, yet he does not explain why state organs' duty to obey would be important for legal validity. Similarly to Jellinek, Somló conceived of the relationship between legislative power and state organs within the framework of self-obligation, which fitted perfectly with the conception of 'law-as-promise'.¹¹²

For Somló, Kelsen's view of legal obligation is problematic not only because it is based on a wrong interpretation of obligation, but also because it makes Kelsen's theory fall short of his own requirement of generality.

¹⁰⁸ Kelsen (1923) 353.

¹⁰⁹ Kelsen (1923) 353.

¹¹⁰ Somló (1917) 435.

¹¹¹ That is Hart's main objection to is Kelsen's concept of 'norm'. Cf. Hart (1961) 35–38.

¹¹² Funke (2004) 270; Zödi (2016) 353–54.

Criticising Bierling, Kelsen argued that recognition theories are unable to describe constitutional situations, where a stable constitutional structure is based on an arbitrary constitutional amendment. If recognition in a republican regime depends exclusively on the decision of the Parliament, i.e., the legislative, then what happens if absolute monarchy gets restored by a *coup d'état*? How does recognition take place in such cases? As a solitary revolutionary gets overwhelmed by the power of the majority, a similar resistance cannot harm the law. Yet a law that is not recognised by the public is tantamount to the suppression of the law. According to Kelsen's theory, however, the cases between these two extremes are not for the jurists.¹¹³

According to Somló's criticism, Kelsenian reductionism cannot be generalised, as there are legal systems where the constitution provided the citizens the right to resistance, in addition to the freedoms and liberties, against unlawful coercion, in order to protect the identity of the constitution or to defeat those violently seizing power.¹¹⁴ The right to resistance is an important example for Somló, as the mere possibility invalidates Kelsen's explanation of legal obligation and directs his theory towards a conception of obligation, which is capable of expressing the content of legal obligation in more than one normative structure.

On the other hand, the existence of the right to resistance does not logically follow from general conceptual characteristics of the law, it depends on its substantive provisions.¹¹⁵ That is not the first time Somló has to face the limits of a formal general theory of law. Yet in all these cases, unlike Kelsen, he does not conclude that the problem of the right to resistance would be beyond the limits of the law but puts it to the field of substantive theories of law, thus making concessions from the generality claim of his theory. While Kelsen's reductionist conception of legal scholarship classifies most substantive legal questions as non-legal, thus maintaining his claim to generality for his formal theory, Somló distinguishes between questions to be answered by the general theory and those pertaining to the study of positive law. As seen, the most important conceptual problems in the public-law scholarship of the time are substantive questions, where a formal general theory cannot offer any directions. Nevertheless, Somló's theoretical efforts could have made a major impact on public-law arguments as well.

For Somló, it was of key importance to produce a general conceptual structure of law that is able to grasp the peculiarities of freedoms and liberties as well. Here, Jellinek's systematic description of public-law rights was a first, yet unsuccessful, attempt. Within Jellinek's system, freedoms and liberties fell to the field of legally irrelevant actions and therefore his description did not take into account claims to the non-intervention of the legislative power.¹¹⁶ While in Kelsen's work the construction of freedoms and liberties resulted in a legal impossibility, since due to the idea of imputation, practically every legal rule could be interpreted as the will of the state. It is because of the rigid construction of imputation that Kelsen's conception of law, as formulated in the *Hauptprobleme*, is often labelled as statist.¹¹⁷ Somló, in turn, was interested in a general theory of law that is able to give a legal form to the claim expressed in constitutional freedoms and liberties. It is that effort that forms the context to his construction of 'law-as-promise'.

¹¹³ Kelsen (1923) 359.

¹¹⁴ Somló (1917) 462.

¹¹⁵ Somló (1917) 459–62.

¹¹⁶ Somló (1917) 459.

¹¹⁷ Schönberger (2011) 23–35.

If the legislative power promises to remain passive under certain conditions, the resulting claim is termed a freedom (*Dürfen*) and providing it to someone a permission (*Erlaubnis*). [...] Freedom (*Freiheit*) in the legal sense means being free from the intervention of the legislative power, that is, a field of human activities and relations where the legislative power promised not to intervene. The person thus authorised can therefore do or refrain from doing something, without having to expect the intervention of the legislative power, that is, they are free to do it (*er darf*), having a permission (*er hat eine Erlaubnis*).¹¹⁸

Freedoms and liberties do not work in a law-free field, but are a particular type of rights. Apart from the fruitfulness of the concept of ‘law-as-promise’ in the context of public law, however, it seems quite difficult to generalise the category.¹¹⁹

5. CONCLUSIONS

Summarising the investigations into the links between Somló’s *Juristische Grundlehre* and contemporary public-law scholarship in Hungary reveals that the most important finding is that, despite Somló’s apparent hesitation to confront problems of Hungarian public law, the general concepts of the *Juristische Grundlehre* are quite fitting to the contemporary conceptual issues of Hungarian public law. Somló’s work might have been an excellent starting point for developing the language of public-law doctrine.¹²⁰ His discussion of legal obligation and legal claims, in particular, could have served as the basis for a later doctrine of public-law rights. 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. In that respect, his efforts may be close to the theory of Jellinek.¹²¹ Yet these features of Somló’s work seem quite ambiguous; while at pains to make the language of law capable of interpreting freedoms and liberties, his conception of law and state focused on the legislative power, leaving problems of the separation of powers out of consideration.¹²²

These liberal evolutionist traits of Somló’s thought are also made in parallel not only by Jellinek, but also the liberal tradition of the doctrinal approach to public law. That is true even though Somló, especially in his later works, refrained from making evaluative statements as to the content of the law, going out of his way to make only formal-objective statements on the law.¹²³

That Somló’s work still did not make any considerable impact on Hungarian public-law scholarship 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.¹²⁴ For decades, there was no scope for taking the opportunity, provided by Somló, to move the conceptual system of Hungarian public law towards the extension of individual freedom.

¹¹⁸ Somló (1917) 451–52.

¹¹⁹ See Zödi (2016) Funke (2004) 267–72.

¹²⁰ See Funke (2018).

¹²¹ Schönberger (2000) 3–32.

¹²² See Funke (2004) 260.

¹²³ Funke and Sólyom (2013) 86–89.

¹²⁴ See Molnár (1945).

That is clearly shown by the scholarly heritage of Viktor Jászi – His progressive views were completely forgotten whilst his early paper on dynastic succession¹²⁵ exerted considerable influence on the public-law debates of Hungary, a kingdom without a king since 1920. There, Jászi argued that the order of succession as laid down in the Latin text of the *Pragmatica Sanctio* of 1723 needs to be interpreted in the sense that the Habsburg dynasty has a claim to the Hungarian throne only in case the heir is also *legitimus successor* in the Archduchy of Austria. Thus, in Jászi's interpretation, if the Habsburg lose Austria, they also lose their claim to the Hungarian throne. That view provoked much consternation among public lawyers at the time, yet after 1920 it became, due to the influence of Károly Kmety, the dominant view among those favouring elective monarchy.¹²⁶ After 1945, that question, once a cardinal one, lost all its relevance, as did the work of most public lawyers participating in the heated debate.

Finally, after 1989, when the reformed chartal constitution provided the conditions for the reception of authors belonging to the current of civic constitutionalism, Somló's work seemed rather anachronistic. Conceived within the context of the historical constitution, the content of the work could not completely neutralise the circumstances of its birth. The difference becomes visible when comparing Somló's impact to that of Kelsen and his followers. Kelsen had the opportunity to rethink his theory in light of the experience of making a democratic chartal constitution, in the *Allgemeine Staatslehre*¹²⁷ (cf. his theory of the 'basic norm'). Thus, his theoretical heritage could be regarded as still relevant after 1989, during the democratic transition in the Central-European states. Somló's works could not have had the same chance even if the author had lived between the two wars. Increasing autocratic tendencies of the time did not favour juristic inventions aimed at renewing the law. That, however, seems to confirm Somló's view – law is a principally empirical category and jurists cannot avoid the influence of institutional experience.

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¹²⁵ Jászi (1902).

¹²⁶ Kmety (1920).

¹²⁷ Kelsen (1925).

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