

Some thoughts on German legal culture

Since the Hungarian legal culture has developed in many respects within the continental and German legal culture in recent centuries, it is worth to make a brief overview of the German legal culture as well. This brief glimpse makes clearer the peculiarities of the original Hungarian legal culture, its different features and attitudes compared to the German legal culture.

The German and Austrian state theory have some general characteristics, which come from the fact, that Germany and Austria are parts of the continental legal system. These legal cultures are different from the Anglo-Saxon legal system, legal culture and legal thinking. I will call simply both the German *and* Austrian legal fields as *German legal culture*. There are several differences between the Anglo-Saxon and German legal cultures. Now I mention of these only the most important ones.

Firstly, the English legal culture is based on the system of common law. Here the habits and the judicial practice have primary role to play. Secondly, since the destroying of English absolutism (17th century) the civil liberties have been given high priority. In John Locke's philosophy, the main task of the state is to guarantee the rights of citizens to life, freedom and property.² In addition, the concept of the state is not too emphasized in England. Here much greater importance is ascribed to certain specific state institutions, such the government and the parliament. It is also characteristic that in England they speak of the parliamentary sovereignty, and not of the sovereignty of the state. This may also be related to the peculiar English pragmatic, practical approach, which rather prefers concrete things than speculative terms as the abstract concept of the state.

In contrast, the role of the state is traditionally greater in continental legal cultures, therefore also in the German legal culture. Italian politician and philosopher, Machiavelli's linguistic ingenuity was the creation of the state's abstract concept, so called 'stato'³ in the first half of the sixteenth century. In the second half of the sixteenth century, the French philosopher, Jean Bodin created the concept of sovereignty and attributed that to the peculiarity of the state, as abstract entity.⁴ These Italian and French ideas have found their home also in the German legal culture. It is an important circumstance that in German cultural circles absolutism remained untouched until the 19th century.

In Germany a pragmatic scientific trend was widespread in the eighteenth century, so called cameralism. It is a special science of administration, firmly with economic orientation. It aimed to manage centrally the economy for the state's benefit. This concept is in connection with the professional central bureaucracy and its efficiency. In the cameralism it is important to predict the expected population and economic processes, also the state's power and capacity.

Thus, the following major areas of knowledge belong to cameralism: economic, administrative, legal and statistical knowledges. Cameralism fundamentally and operatively served the practices of 'enlightened absolutism'. The first academic chairs in the cameral sciences were created at the Prussian Universities of Halle and of Frankfurt an der Oder by

¹ Associate professor, NKE ÁNTK.

² John Locke: Two Treatises of Government. (ed. Peter Laslett) Cambridge, Cambridge University Press, 1967.

³ Niccolò Machiavelli: The Prince. Cambridge, Cambridge University Press, 2019.

⁴ Jean Bodin: Six Books on Commonwealth. Oxford, Basil Blackwell, 1967.

Frederick William I in the first third of the eighteenth century (1727). Cameralism also became widespread in Scandinavian countries and in Austria.

Paradoxically, the state philosophy of Immanuel Kant (in the eighteenth century), can be interpreted as somewhat of a response to cameralism. Kant's views were greatly influenced by the views of the English liberal thinker David Hume. The two most important differences between Kant's concept and cameralism are: 1) while cameralism is state-centered, Kant is an advocate of individual freedoms and human dignity; 2) while cameralism has a strong practical orientation, Kant, despite his empiricism, is a theoretical thinker. In addition, cameralism is nation-state centered, but Kant's social philosophy has a certain cosmopolitan tendency. He is convinced that mankind will be united in a global society after long wars and suffering. He speaks about the relationship between the peoples and the nations, but the idea of a global state also emerges behind his views.⁵

Georg Wilhelm Friedrich Hegel's theory of state (in early nineteenth century) somehow means a special return to the tradition of the cameralism. In Hegel's philosophy and in his arguments, the state and collective social values are in first place as in cameralism, but his ideas are theoretical, rather than practical as Kant's philosophy.⁶ Hegel searched a special balance between social order and individual freedom. His philosophy was not too collectivistic, nor too individualistic, neither too liberal. It was a special composition of the conservative and liberal values. He accepted the force of the state (all the way to the legitim violence), but he thought the freedom of conscience is a main value in a well-managed society.

In his view, power and violence are necessary to the creation and preservation of the state. According to his ideas the parliamentary monarchy is the best form of government. It can provide the more efficient balance of the social and individual values, and the harmony of social order and individual freedom.

The philosophy of the Englishman John Austin influenced the German philosophy of the nineteenth century. Austin's legal positivism defined the law as a command from power.⁷ According to this, the law is the will of the state. In the German idealism from Kant, law fundamentally had a special social value. The legal-positivist approach in German philosophy placed the state instead of society at the forefront of thinking. However, in German thinking, the state's social approach also has remained alive. Here we need to mention the effect of the French positivist philosopher, Auguste Comte (early nineteenth century). According to him, sociology stands at the top of the hierarchy of sciences.⁸

It is not a coincidence, therefore, that the classic of German state philosophy Georg Jellinek tried to approach the state from two aspects (at the end of nineteenth century and in the early twentieth century). Jellinek in his main work, *General theory of State*⁹ asserts that, the theory of state, as a discipline, has two main parts. First one is the general theory of state. This deals with general questions of the state, for example with the problem of the concept of states, the birth of states, and with the questions of changing of states. The second part of theory of state is the special theory of state. That deals with some special problem of the state, so, with public administration, financial issues, problems of constitutional systems, electoral systems and the others.

⁵ Immanuel Kant: *Idea for Universal History from a Cosmopolitan Point of View*. New York, The Bobbs-Merrill Co., 1963.

⁶ Georg Wilhelm Friedrich Hegel: *Grundlinien der Philosophie des Rechts. Naturrecht und Staatswissenschaft im Grundrisse*. Felix Meiner Verlag, Hamburg, 2009.

⁷ John Austin: *Lectures on Jurisprudence: Or the Philosophy of Positive Law*. London, J. Murray, 1885.

⁸ Auguste Comte: *Discourse on the Positive Spirit*. Reeves, London, 1903.

⁹ Georg Jellinek: *Allgemeine Staatslehre*. Verlag Dr. Max Gehlen, Bad Homburg, 1966.

According to Jellinek on the one hand the state is a social formation, and on the other hand is a legal institution. A special scientific territory within theory of state is the social doctrine of state. This deals with the state as a social formation. There is another scientific theory within the theory of state. That is the legal doctrine of state. This deals with the state as a legal institution. In Jellinek's complex conception, the state appears as an alliance or as a board. The alliance is the social side of the state. The board is the legal side of the state.

In the approach of Jellinek the state needs

- settled population,
- the original main power of this population,
- and an area in which power exists and prevails.

It is an original recognition and thought of Jellinek that the law tries to find an ethical minimum. So Jellinek contradicts the idealistic legal doctrine. In his view the law and so the state are not such a phenomenon, which strives for some ethical high.¹⁰ It is a realistic, practical and pragmatism view, which has also certain necessary ethical contents. According to Jellinek, the main task of the state is to adhere and enforce its own law.

Jellinek draws also attention to an important phenomenon. It is that people attribute normative force to the facts ('die normative Kraft des Faktischen'). It means that people think, if something de facto exists, that needs to be. This has consequences for the state as well. As Jellinek argues, the de facto power appears as a legal power. Thus, the de facto power appears for people as a legal and *legitimate* power.

Max Weber (end of nineteenth century and early twentieth century) has been active in many fields of science. Weber has worked in economics, sociology and theory of state and law. These different fields of knowledge have developed his specific multidisciplinary approach. One of Max Weber's most important findings was the recognition of the importance of irrational factors.¹¹ This is particularly significant in the light of the fact that, the rationalism was a mainstream view in the 19th century still. Rationalism comes from the enlightenment of 18th century, but its effects exist still present. It has a special anthropological view which regards people fundamentally rational beings. This concept was thoroughly corrected by social psychology in the 20th century. The great merit of Max Weber was that he had tried this correction a hundred years earlier.

According to Weber, human decisions are not rational. The values have no rational nature either. Selection of goals does not happen rationally either. However, decisions and choices have consequences. So, we can rationally examine the consequences of our decisions and choices. Weber thought that the scientific-rational examination of social, legal and state phenomena is possible in this sense.

In Weber's view, the state is nothing else than a collective intellectual form. The members of society adapt their actions to this intellectual form. On the other hand, the state according to Weber, is a political phenomenon. The political character of the state is given by the following factors. The state is a ruling organization. The state ensures and enforces its order. The state applies physical compulsion or threatens with it in a specific area.

Weber emphasizes that the state has the monopoly of legitimate compulsion. According to Weber the western states' legal system is so-called formal-rational. Here the subjective sense of justice of the judge falls into the background. Predictability and legal certainty are key values. According to Weber this was required by the capitalist business.

Weber distinguishes different types of domination: firstly: traditional; secondly: charismatic; thirdly: legal-rational. These types assume different forms of legitimacy. The traditional domination is based on a long tradition. The charismatic domination is based on

¹⁰ Georg Jellinek: Die Socioethische Bedeutung vom Recht, Unrecht und Strafe. Alfred Hölder, Wien, 1878.

¹¹ Max Weber: Economy and Society: an outline of interpretive sociology. University of California Press. Berkeley, 1978 (1922)

the individual ability and charisma of the leader. This form of domination has a great importance in the revolutionary or crisis situations. In the case of legal-rational domination, legitimacy is based on a logical and rational relationship between certain relevant social actions (for example election) and the fact of leadership. Here the regulation and clear procedural rules have a great importance.

In the Austrian legal philosopher Hans Kelsen's point of view the sociological aspect of the state has vanished (in the twentieth century).¹² Kelsen approaches the state from the side of law. Kelsen essentially identifies the state with the law. He believes that law and state are two sides of the same thing, however, law is the more emphatic element in that phenomenon.

In Kelsen's interpretation, the state is a compulsion-order. In another respect Kelsen sees the state as a special accounting point, where happens the offsetting of certain activity which were done by persons who operate on behalf of the State. It is an important endeavour of Kelsen to purify the law from the so called metajuristic elements.

In Kelsen's view, law is merely a norm. The norm expresses that something has to be done. This means the compulsory character of the norm. This is the essence of the law. From that point of view, so called metajuristic factors (for example moral, political, religious considerations) are irrelevant.

The compulsory nature of a norm is always based on another, namely a higher-level norm. According to Kelsen, therefore, a legal norm is never based on a moral or other value but always and directly on disposition of another higher legal norm. And in same way, this higher norm is based on an even higher legal norm. There is a basic norm at the top of a legal system. The question is what is based the basic norm on. Kelsen's answer is that the basic norm is based on an earlier basic norm. And if we go backwards in time, we will eventually get to where we no longer find an actual norm. Kelsen tries to solve this problem by introducing a new concept. As Kelsen says, at the end of the chain of norms there is a hypothetical basic norm. In his view, we must be assumed the compulsory nature of this hypothetical basic norm. Kelsen wanted to show the law as a phenomenon what is purely normative and nothing else. But he did not solve the problem but only postponed the question. It is true that he separated the individual, lower-level norms from their moral and other bases. But in the end, he gets to a phenomenon or a concept (hypothetical basic norm) that is highly dubious whether it is a norm at all.

To illustrate the problem, I give an example. The question is that, what is the difference between the basic norm and the hypothetical basic norm. Imagine please a day, when you did not eat anything. But it is already afternoon, about three o'clock. And then I'll ask you, what you want to get, a lunch or a hypothetical lunch. The difference between the basic norm and the hypothetical basic norm is even the same as there is between a lunch and a hypothetical lunch.

The hypothetical norm is not a norm, because of its hypothetical nature.

However, there is some practical benefit to Kelsen's theory. Kelsen emphasized that legislation must be norm-based, and if this condition is not fulfilled, it should lead to the annihilation of the norms. This conception has led to a continental, European solution of control of the norms, and the modern form of the constitutional courts.

In Carl Schmitt's philosophy of state (twentieth century), the idea of unity got the prime importance.¹³ After World War I, during the time of the Weimar Republic, Schmitt experienced the weakness of the German state and government. Since the German electoral system did not contain any restrictions for parties to get in parliament, lot of small parties were involved in political life. This resulted in the instability of the government. The situation

¹² Hans Kelsen: *Pure Theory of the Law*. University of California Press, Berkeley, 1967

¹³ Carl Schmitt: *Verfassungslehre*. Duncker & Humblot, Leipzig – München, 1928.

was complicated by the war-indemnification obligation on Germany. Schmitt's negative opinion on pluralism formed out based on such experiences.

According to Schmitt, pluralism is an ideology to destruct the state. In his view, decision and ability of decision play a crucial role in the life of the state. These are best served by the unity of forces. He did not attach too much importance the role of formal law. Law is just about what have to be. However, the main question is that, what becomes to reality. He thinks the decision is, what connects what *have to be* and what *is*. As Schmitt argues, the significance of the decision increases in exceptional situations. Schmitt thinks, the sovereign ultimately is who decides what is there: a normal situation or an exceptional situation. In an exceptional or extraordinary situation, the sovereign suspends the legal order and with its decision, introduces a factual new order. In such situation it becomes clear that the decision is the basis of the legal order.

Schmitt, in contrast to Kelsen's pure legal approach, also emphasizes that the state assumes the concept of political character.¹⁴ Although it is true, the political character of state is discernible well in the phenomenon of decision, but the basis of political character is distinguishing between friend and enemy. The fundamental interest and duty of the state is to be able to recognize enemy who is threatening relating to the state and its order, and to fight firmly against him. Schmitt's theory is undoubtedly not very heart-warming. This is a philosophy of crisis. It was formed out in a crisis and formulated its theses on how the state operates in critical situations.

From all this, we can clearly see the highly theoretical nature of German legal culture, its strong endeavour to separate and sometimes align individual and social values. However, as we will see, the traditional and original Hungarian legal culture is less theoretical and speculative, but rather practical; it thinks less in abstract structures, rather in symbolic forms; and last but not least, basically and in a priori way assumes the harmony of individual freedoms and community values.

¹⁴ Carl Schmitt: *Der Begriff des Politischen* (Text von 1932). In Carl Schmitt: *Der Begriff des Politischen* Duncker & Humblot, Berlin, 1963. 20-78