The Kantian, Neo-Kantian, Hegelian and Historical School Regarding the Rule of Law

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Abstract

Immanuel Kant, after formulating the inaugural dissertation - "De mundi sensibilis atque intelligibilis forma et principiis" - of the philosophy course from 1770, is no longer tributary to others, he is no longer either a rationalist or an empiricist, but surpasses both, reaching the pinnacle of a synthetic concepts that are only his. He promotes a dualistic conception and believes that there is a phenomenal world and a purely intelligible (noumenal) world. The latter is unknowable to the human intellect, which can only know the phenomenon. In this world, man can rise through morality, whose key concept is the concept of freedom. To define the concept of law, Kant first makes the distinction between what belongs to morality and what belongs to law; the distinction between what relates to exteriority and what is an internal principle that can also extend to exteriority, but never the other way around. In these conditions, law only acts on the external acts of people, those of human interiority are carried by moral acts, which are superior to the previous ones. Freedom, as seen by Kant, is based on moral acts, even if law is based on reason, it cannot extend its scope to purely internal acts, as they remain outside legal regulations. For an action to be what is called legal, it is enough that it conforms to the law, whatever its motive; but in order for it to be moral, it must, apart from this, have as its motive the idea of duty that the law prescribes.

Keywords*: freedom, morality, rule of law, protection of law, doctrine*.

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1. Introduction

Immanuel Kant, after formulating the inaugural dissertation - "*De mundi sensibilis atque intelligibilis forma et principiis*" - of the philosophy course from 1770, is no longer tributary to others, he is no longer either a rationalist or an empiricist, but surpasses both, reaching the pinnacle of a synthetic concepts that are only his.

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Conceiving law in this way, Kant sees in the **state the right affirmed and realized**. The state is like "*a multitude of people living under the laws of law, and associated by a contract*." Observing this conception of the state, it can be said about the social contract that, even under the conditions in which it has a hypothetical and ideal character, "*it is the rule and not the origin of the constitution of the State, it is not the fundamental principle, but that of the administration of the State*". The contract became, in this sense, the act by which the people constituted themselves into the State, the act by virtue of which all renounce their external freedom in order to resume it

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[2] Immanuel Kant, *Introducere în teoria dreptului* in volume *Metafizica moravurilor*, Ed. Antaios, 1999, p.18.

immediately as members of a Republic, this act thus becomes the ideal presupposition of the state[3].. **The contract** is not only the **basis of the state**, but a civil constitution **can be founded on it and only on it, the fundamental law** on the basis of which a state can be established, as Kant claims, "*But this contract (contractus originarius or pactum sociale), as a condition of all the private and private wills of a people in view of a common and public will, it is not at all necessary to assume it as a fact as if it was necessary first of all to prove historically how a people (...) left us oral or written a certain opinion or a document that allows us to believe that we are bound by a civil constitution - already existing*."[4]

From the Kantian theory it follows that "*A law so sacred that it is already a crime, and the mere fact of questioning it from a practical point of view, and therefore of suspending its effect for a moment, does not seem to come from men, but from a supreme and infallible legislator, and this is precisely what the maxim "every authority comes from God" signifies. It no longer indicates the historical foundation of the civil constitution, but it expresses an idea or a practical principle of reason (...).*"[5]

As for authority, it has a sacred origin, and the only way forward is obedience. Its change must come through reforms and not revolution. All this conservatism springs from Kant's contradiction of the revolution with the sacred authority of the state. We observe that the state, as Locke, Montesquieu and Rousseau conceived it, must be based on the division of powers. The legislative power must be separated from the executive power, because only in this way, the constitution is legitimate, the role of the state being that of ensuring the protection of the right**.**

The complexity of the Kantian system and the different ways of approaching it have given rise to several orientations, all animated by the desire to bring clarifications. The Kantian concept, constituting itself as the basis for the philosophical study of numerous doctrinaires, finally gave rise to a critical orientation called **neo-Kantianism**. This current of thought made its appearance towards the end of the 19th century and will dominate the beginning of the 20th century, having a great influence not only in philosophy, but also on the politicians of that time.

Legal Neo-Kantianism is represented by **Stammler** in **Germany**, **Giorgio del Vechio** in Italy, and in Romania by **Mircea Djuvara** and **Eugeniu Speranţia.**

Giorgio del Vechio in his work tries to base a philosophy of law starting from an *a priori* principle, a principle that constitutes the ultimate limit and on which the entire legal edifice rests[6]. This fundamental principle *is justice.*

Del *Vechio's a priori* aims at universality, the center of which is represented by the human soul, which constitutes the logical form on which any legal relationship rests. It thus starts from the idea that every rational being possesses the eternal seed *"of the just".*

As for his conception of the state, after a study of the definitions given by Kant, Hobbes and Hegel, which he considers insufficient, it is that "*The state is the subject of the will that establishes a legal order; or the state is the subject of the legal order, in which the community of will of a people is realized.*"[7] Wanting to establish the difference between the state and society, the philosopher continues by specifying that: *"This consists essentially in the legal order and is, to put it another way, the backbone of society, the skeleton around which the various social tissues are arranged; the complex relationships that make up the life community of a people are based on it. In accordance with the same concept, the State was briefly defined as «the potential expression of society».*"[8]

In fact, it can be observed that the legal development of a society is always varied, but it presupposes a unitary internal logic of the institutions, determined by the very conditions of legal

[3] See Frederick C. Beiser, *`Kuno Fischer, Hegelian Neo-Kantian', The Genesis of Neo-Kantianism*, 1796-1880, Oxford, 2014, pp. 221–254.
[4] Immanuel Kant, *op. cit*., p. 362.
[5] Ibid, p.178.
[6] For a particular aplication in contemporan society see Cristina Elena Popa Tache, *Principles of international law of investments, recognition and trajectory*, in „Juridical Tribune - Tribuna Juridica", Volume 7, Special Issue, October 2017, pp. 155-163.
[7] Giorgio del Vechio*, Lecţii de filosofie juridică*, Ed. Europa Nova, 1997, p. 274.
[8] Ibid, p.274.

consciousness. When the subject "*thinks*" himself, he must necessarily also think as a possible object to another subject, he cannot but conceive himself objectively as a possible content of thought for others.[9]

2. Hegelian and historical school

Georg Wilhelm Friedrich Hegel dominated the 19th and 20th centuries with his philosophy, fundamental currents of thought in legal terms emerged from Hegelianism.

If in **Kant**, **the practical found its basis in morality**, then starting from it to establish inter-human relations, in Hegel, the basis is in law, the latter being the very raison d'être of man in his individuality. It is thus argued that man no longer asserts himself through himself and from himself, but through someone else or something else. If moral obligation is seen as an obligation to myself, the obligation arising from legal norms is an obligation to the other. We observe in the first case that the obligation is immanent, and in the second, it is transcendent.

The primacy of law, as it appears in Hegel, is linked to the great transformations that took place at the end of the 18th century, a century in which a deep rupture occurred in the European episteme. Hegel recognizes that in law, man is an alienated being, but he considers that he returns to himself when law reaches the sphere of the state. The state is constituted not as a result of particular manifestations of will, but as a result of an immanent reason that self-realizes itself as history, that is, as an abstract right in which individuals unconsciously participate in self-realization of the idea of family, civil society, state[10].

„*The state - said Hegel - as the reality of the substantial will, which he possesses in his particular self-consciousness elevated to its universality is the rational in and for itself*."[11] The relationship that the philosopher establishes between the individual and the state is of the state = state individual, which creates an imbalance in favor of the state. We are dealing with an identity relationship between the individual and the state, which is equivalent to an absorption of the individual in the state structure and not with an identity considering the fact that the state = state individual relationship is a subject = object type relationship subjective, which takes place in the sphere of the state.

In the study of the philosopher's work, we must take into account his vision, in its spirit, according to which the law **is based on the free person, and the supreme community is in fact the supreme freedom**, according to which the person and the community are intimately connected because they are inseparable. But this understanding should not make us say that Hegel is not the thinker of a totalitarian state that ridicules the rights of the individual, knowing that demagoguery in a totalitarian state can reach aberrant spheres when it promotes everything for man, the latter becoming an abstraction void that is no longer found in the concrete man.

As Hegel remarked, **societies change differently depending on space and time**, as do legal regulations; however, human behavior is the same, regardless of space and time. This happens because social organizations never capture the human essence, but only fragments of it, the only ones that are objectified. It can be said that social organizations are unsuccessful attempts to capture the essence of the human individual.

The Hegelian conception left a strong stamp on all thought of his time and on subsequent thought, up to the present day, highlighting the need to study social phenomena in an evolutionary way, to relate them to the past, to find "*den Geist*", the spirit of this evolution.[12]

The historical school appeared in Germany, as a response to the school of natural law, its seeds being found in Hegel's philosophy, according to which a certain idea of morality, a logical idea, is realized in the evolution of mankind gradually, creating the "*state*". The recognition of the

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[9] Mircea Djuvara, *Teoria generală a dreptului,* Ed. Socec & Co.S.A., Bucharest, 1930, p. 401.
[10] Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, „Oxford Journal of Legal Studies", vol. 12, no. 3, 1992, pp. 311–332.
[11] Georg Wilhelm Friedrich Hegel, *Principiile filosofie dreptului*, Academy Publishing House, Bucharest, 1969, p. 277.
[12] Mircea Djuvara, *op.cit*., p. 334.

significance of the historical school for law is not only due to this current of thought - Hegelian, Cicero himself proclaimed historia magistra vitae and even Montesquieu stated that "*les lois sont les rapports necessaires qui dérivent de la nature de choses*."

Just as language is not created through an effort of reflection, but through a rational effort, so also law is born, not through the thinking effort of legislators, but through a spontaneous growth. Under these conditions, law is the slow and very complex product of a long historical development. To talk about legal institutions without knowing their historical development is in fact to capture the form without knowing the substance, without understanding the meaning. Institutions are living organisms, which carry within themselves all the past that lives in the present.

A doctrine derived from the German historical school is the national-socialist one, also derived from Hegel's conception, a state based on the idea of the spirit of the nation[13].

Based on the notion of the spirit of the people, thought by Savigny, national-socialism adopts a doctrine of action based on irrationality and political mysticism, denying any truth of law. The denial of the right is also due to the abusive use of the Hegelian conception, of the identity of opposites, which, in the opinion of the national-socialist theorists, can lead to the identification of the right with force.

In a succinct way, it follows that National Socialism retains only the rationale of the state that the Führer is the only one called to lead and judge. In this way, the rationale of law disappears for a good period of time, its place being taken by the totalitarian state which has its own rationale, in total opposition to law. Politically, this dissolution of law was equivalent to the dissolution of any democratic idea and, implicitly, to the disappearance of the individual from the political sphere.

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