

# THE RULE OF LAW AND COMMON SENSE: RETURNING VOEGELIN TO CENTRAL EUROPE

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## **I. The search for the point of departure: few autobiographical reflections instead of introduction**

Three years ago, at the 16th (?) meeting of the Eric Voegelin's Society in Washington in 2000, I presented the paper ERIC VOEGELIN, "COMMON SENSE" AND CENTRAL EUROPE. The escape from Central Europe and the naturalization in America, I intended to focus on, represents, for sure, the fundamental fact in the Voegelin's biography. However, I have to openly admit: the true point of departure in this paper was the changing horizon of my own understanding of Voegelin's political ideas and philosophy. My real aim was to analyze the alienated relation between Voegelin and Central Europe as someone who has been always connected with this part of the world and who has been experiencing the crisis of European humanity - with its loss of "common sense" - in his own Central European situation.

My encounters with Voegelin started in the 1980s, in the meetings of Academia, a small group of friends who got together in the context of dissidents' "parallel polis" (footnote), with a bold intention to "revive" the tradition of Socratic/Platonic thought in the midst of a "small" Czech society (footnote), stricken by the totalitarian plague of the 20<sup>th</sup> century. The revolutionary changes enabled by the collapse of communism in 1989, however, have transformed fundamentally not only our way of life, but they have brought at the same time our political thought literally from the heaven to the earth. (Our philosophical Academia still exists, holding its regular "conventions". Nonetheless, its original pathos of resistance, its young, fresh, genuinely Socratic atmosphere is lost irretrievably, and our aging conversations are taking place in the climate of ideas not so much conducive to the "remembrance of the things past", but rather reflecting the growing "gap between past and future".) (footnote)

The new social and political context shaped by the newly gained freedom could not let my reading of Voegelin untouched. On the one hand, I have got the chance to become acquainted with the activities of global network of Voegelinians and have benefited greatly from it. I have gained the opportunity to study the Voegelin's Opera Omnia volume after volume, to read the abundance of the secondary Voegelinian literature, to participate in the on-going Voegelinian dialogue within a group of distinguished scholars, and to present my own insights, comments and eventual "discoveries" at the regular annual meetings of the Eric Voegelin's society. On the other hand, being pushed forward in the irreversible historical time - growing older and becoming more and more perplexed not only by all the difficulties of our own transition to democracy, but by all the intricacies of the New World Order emerging on the ruins of the Old One - I had to realize that my perception of political ideas is also changing. I had to admit that in the current situation I am simply unable to read Voegelin in the way I got originally used to; that I have some difficulties with my original understanding of the Voegelinian project aiming at the "defense of civilization"; that in spite of the undisputable fact that it is among Voegelinians where one can find a living political thought today, there is something problematic, at least from my own point of view, in the prevailing focus and style of the current Voegelinian research.

Struggling with my personal loss of direction, I have started looking for a new point of departure. Surprisingly, I did not find it in the realm of ideas, among the Voegelin's fascinating insights into their history, that made him without any doubt one of the greatest philosophers of the 20<sup>th</sup> century, but in his biography. His escape from Central Europe and his encounter with American "common sense" have lead me to raise the following questions: Is not it here, in Central Europe where the Voegelin's anabasis that begun in the 1930s when totalitarianism characterized by him as "cadaveric poison of Western civilization" (footnote) was on the rise, must come to its end? Is not this potential homecoming - rather than all these efforts to summarize the results of the Voegelin's Herculean "search for order", all attempts to compare or confront them with the products of other philosophical schools and traditions - what represent the biggest challenge for the Voegelinian legacy in the beginning of the 21<sup>st</sup> century? Is not it just here, in the midst of singular, passing human matters, and not only in Central Europe, where we should be looking for the Voegelin's proverbial Rhodos and where the question of potential immortality of his teachings must be tested?

In short: I have decided to invite Voegelin to become, if possible, a guide in our current Central European "transitions" and to give us some orientation in our current confusions, to help us to rediscover the tradition of "common sense" in our part of the world, to restore or to introduce here that spirit that is still, let us hope, animating the political life in America and whose absence in Central Europe in the 20<sup>th</sup> century made him to leave his home and resettle on the other side of the Atlantic. Re-reading my article presented in Washington three years ago, I see some useful hints pointing into the right direction here, but as far as my basic intention is concerned ❖ to get Voegelinian ideas really involved in our current Central European affairs ❖ I failed. My writing plan for this piece is then very simple: it is the second try to achieve this goal. I will depart here from a concrete, almost technical problem Voegelin was confronted with during his sixteen years long teaching experience at the Louisiana State University in Baton Rouge: to explain what is the nature of the law to his American students. (footnote)

## **II. On the way towards the reconstruction of a complete political science: the Kelsen's "pure theory of law"**

Voegelin himself studied law at the University of Vienna under Hans Kelsen who was undoubtedly one of the most important European jurists and legal philosophers of the 20<sup>th</sup> century. Even though his own approach is based on the profound critique of his teacher, one cannot say that Voegelin has decided to commit - as the Eleatic "guest" in the Plato's Sophist ❖ a "parricide". The Kelsen's "pure theory of law" represents according to Voegelin the end of a certain European tradition, a tradition that has to be properly understood and seen within its own historical context, within its own limits. This is, however, exactly the reason why it is here where we should start our search for the way from the current impasse; where we should start testing our capacity to understand our own situation as far as the idea of law and its place in the human society are concerned; where we should be looking for "a point of departure for an advancement towards the reconstruction of a complete political science" (footnote).

It is therefore necessary, before we advance to the elaboration of Voegelin's own analysis of the "nature of the law" - laid out in 1957 in a mimeographed "temporary edition exclusively for the use of students registered in" his course at the Louisiana State University in Baton Rouge (footnote) - to stop for a moment at the Voegelin's exposition of the Kelsen's "pure theory".

What will suit best to this purpose is a small article he wrote after he returned from the United States - where he spent two years (1924-1926), studying American common sense philosophy and jurisprudence - in order to introduce the basic ideas of Kelsen's *Allgemeine Staatslehre* recently published in Germany to the American public. (footnote)

From the American perspective, the least comprehensible trait of the Kelsen's legal thought is its foundation in the neo-Kantian positivistic logic. Kelsen departs in his basic arguments from the Marburg school of Simmel and Windelband. What determines the character of data, we are primarily dealing with in the realm of law ♦ legal codes or statutes, procedural rules, case-law, etc. ♦ is according to him not their empirical content, but a form in which they are given, their specific a priori, in Kantian terminology, antecedent to all forms of experience. Before studying or eventually constructing any positive legal system one must be aware of the fundamental distinction between "original categories" (categories whose further definition, notes Voegelin, is for Simmel, impossible!) of *Sein* (Being, Existence, referring to the realm of what is) and *Sollen* (Ought, Essence, referring to the realm of what should be). This point of departure becomes clearer when we move from the ontological to the epistemological level: The distinction between *Sein* and *Sollen* is translated into the distinction between the causal method of natural sciences (studying the causal relations between existent things), and the normative method applied in human sciences - dealing with various aspects of cultural objectification (besides science or theory of law it is ethics, political science and all other topics falling in the classical thought of Aristotle under the category TA ANTHROPINA).

The basic aim of Kelsen's "pure theory" is to approach the law strictly as a positively given normative system, i.e. as a structured, hierarchically (i.e. top down) organized and complete whole, composed of elementary legal rules (maxims) derived from the basic norm (*Die Grundnorme*), the first and supreme legal maxim, articulating the primordial will of the sovereign, i.e. the state. The simplest analytical element of this system, the norm, must have a clear formal structure corresponding to the normative a priori of *Sollen*:

The norm, *Rechtssatz* must be, explains Voegelin to his American readers, " *composed of two parts: The first contains a statement concerning unqualified human behavior, the second makes a statement concerning the coercive behavior (Zwangsact) of the state official. The complete rule*

*is a hypothesis making the coercive behavior of the state official dependent on the previous occurrence of the behaviors and events stated in the first part of the rule."* (footnote)

Consequentially, the Kelsen's concept of the state, laid down and developed in his *Staatslehre*, also departs from the neo-Kantian normative paradigm. The state is fully identified with its law. It is conceived as a materialization of the will of a concrete human society to erect around all manifold forms of its life the protective walls of legal order. The state should not be built, justified, explained as a shelter of its national ♦ religious, cultural or linguistic ♦ identity, but only as the sole source of its law and the guarantor of its sovereignty. According to Kelsen, the theory of state has to cope first with the question of its origin and its position within international society under international law; than it proceeds to its basic law, the state constitution whose task is to provide the overall composition or anatomy of state body; then to the state organs performing their diverse functions in the process of creation of norms and their enforcement; than to all concrete forms and procedures how the principle of "*Rechtsstaat*" (the state ruled by the law) is realized in all diverse relations between the citizens and the state and between the citizen themselves.

Voegelin rightly notes that the above indicated reduction of legal orders to "a system of postulates in the realm of *Sollen*" (footnote), to a system composed of legal maxim that make members of human society accountable for their behavior, can "*surprise the American lawyer who is accustomed to a wealth of rights, duties, privileges, powers, liabilities, and disabilities...*"(footnote). He could actually use much stronger formulation. The neo-Kantian monism (footnote) that represents the philosophical foundations of the Kelsen's "pure theory" goes directly against the American pragmatic stance and preanalytical understanding of the law. Already the first step, that made the whole normativist enterprise possible, the distinction made between the realms of *Sollen* und *Sein*, strictly separating the normative process whose aim is to enforce justice and order, from the social reality within which this goal is to be achieved, had to be found hardly acceptable or even entirely meaningless in the context of American jurisprudence. I will return to this evident clash between European and American perspectives later, in the context of Voegelin's own exposition what is the "nature of the law". In the article from 1927, however, Voegelin evidently adopts a much more pro-Kelsenian attitude, despite the fact that in order to explain and defend the "pure theory of law" he has to use arguments that go

clearly against the Kelsen's neo-Kantian methodology and spirit: he has to point to the pragmatic, i.e. concrete, really existing horizon of its creation.

In order to explain the meaning and significance of the Kelsen's "pure theory of law" to the American reader, Voegelin needs first of all to show its place in the context of evolution within the German *Staatslehre* that took place in the close connection with the political development in Germany from the 1860s to the Great War. The Kelsen's legal doctrine did not come as a "bolt from blue", but was preceded by the theories of whole generation of jurists and legal theorists, who - inspired by the rise of the empire that was to be built by Bismarck as a modern constitutional federal state - subscribed to legal positivism and rejected all traditions so typical for previous Prussian jurisprudence, based on the concept of natural law developed in the 18<sup>th</sup> century.

The following point Voegelin is making in his article is even more illustrative. No matter how purified the Kelsen's theory could be from any non-normative content and from any remnants of state doctrines originating in natural law that were still present in the teachings of his predecessors, it never could be fully dissociated from the reality of human society it was supposed to form and order. Lalland, Gerber or Jellinek were, for sure, looking primarily at the evolution of law in the imperial Germany. For Kelsen, the main point of reference was the reality of Austrian Republic that came into existence after the dismemberment of Austro-Hungarian Empire defeated in the Great War 1914-1918. His "pure theory of law" based on the categorical distinction between *Sein* and *Sollen*, pretending to isolate normative legal order from any undesirable interference from the supreme echelons of "naturally ordered" human society, simply could not remain isolated from the real events happening in the human world thanks to its openness and historicity. Can one imagine a better illustration of the fundamental problem of the neo-Kantian foundations of the Kelsen's legal doctrine than the fact that Kelsen, asked to draft the new Austrian constitution, proceeded as much as possible in conformity with the principles of his "pure theory" and then had to cope with and eventually comment on all the effects and influences caused within the emerging Austrian legal order by the Austrian political reality and both normative and non-normative practice?

Nonetheless, no matter whether the final result of genesis of Austrian constitution was "pure" or rather "tainted", in 1927 Voegelin still speaks about it in unambiguously positive terms. He evaluates the Kelsen's practical achievement not only as "*the most important event in the modern history of constitutions from the point of view of legal technique*", but "*with the its background of the pure theory of law*", as "*a remarkable contribution to the development of democracy*":

(footnote)

He concludes his article with a kind of resume of the Kelsen's position that does not seem to be showing any sign of approaching spiritual and political crisis:

*"By transferring the legal system into an ideal realm of meanings and reducing it to an instrument, Kelsen destroys any undue respect for existing legal institutions. The content of law is shown to be what it is: not an eternal, sacred order, but a compromise of battling forces and this content may be changed every day by the chosen representatives of the people according to the wishes of their constituencies without fear of endangering a divine law."*

(footnote)

*"No state entity hides behind the law and issues the legal rules; every rule can be traced back to its origin in a definite governmental agency, which again is but a part in the machinery set up for turning out legal rules in accordance with the desires of different social groups. The pure theory of law thus signifies not only an important progress in legal analysis and technique, but also a development from the half-absolutistic philosophy of the German empire towards the spirit of the new democracy."* (footnote)

### **III. The Voegelinian way from the legal order as "an aggregate of norms" to the law as the substance of order**

"The spirit of the new democracy", however, prevailing in the years right after the World War I and so manifestly present in the above mentioned Voegelin's paper from 1927, had not a very long duration. The political evolution not only deteriorated in Europe but also discredited one might be inclined to say "falsified" - the dominating positivistic legal theories. The totalitarian movements seized power first in Italy, than in Germany and in both countries such a profound change of form of government could take place without any visible violation of existing legal order. After Austria was "legally" annexed to Germany, the crisis of European humanity burst out in the full speed and the world was heading quickly to a new global conflict. Voegelin had to escape under quite dramatic circumstances from Central Europe and found a new home in America. In the beginning of 1950s he returned to the legal questions in communication with his

American students in Louisiana where he taught for several year a course that focused on the "nature of the law".

**IV. The "rule of law" and "common sense" in the context of current Central European political transition**

**V. In conclusion: the epochal change and "immortalization" of a philosopher**