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Voegelin's Escape from Legal Positivism: Constitutionalism and the Politico-Religious Problem[1]

Abstract: The following article deals with the polemic between Eric Voegelin's political philosophy and the legal positivism of Hans Kelsen. The research question deals with the importance of this polemic, following a key text analysis. Based on Voegelin's early writings, the Munich lectures and autobiographical reflection on his postgraduate studies, I argue that it is the critique of Kelsen's legal positivism that gave Voegelin the initial impulse to develop his own philosophy of politics. Specifically, it led him to his project of investigating the basis of the functioning of different political bodies and to the conclusion that they are not structures which can be adequately researched without considering the absolute values (as elements of the "structure of being"). This philosophical reflection has a significant impact on the theory of law and constitutionalism; it however, does not provide a satisfactory answer to the practical politico-religious problem, or, in other words, the problem of theologizing and thus absolutizing ordinary politics.

Keywords: Voegelin, Kelsen, legal positivism, political science, grundnorm

As the editor in chief of the *Voegelin View*, Lee Trepanier, puts it, "Voegelin became a model of thinking devoid of ideological rant in the student's quest for the true, the beautiful, and the good" [Trepanier 2017].

In order, however, to understand how Eric Voegelin embarked on his intellectual quest it might be more useful to think of him more as a theorist of law than a modern positivistic or (even more so) a postmodern political scientist. Indeed, Voegelin

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(a German born in Cologne) obtained his doctorate at the University's of Vienna faculty of Law (1919-1922). The connection with law is hardly surprising given that political science historically evolved from legal and historical science in the late nineteenth century. Interestingly, the process occurred first in the Anglo-Saxon world, with the creation of the American *Political Science Quarterly* [PSQ 2024], the oldest journal in the discipline, published since 1886. In continental Europe in the beginning of the twentieth century, the discipline was, nevertheless, still relatively new, and although it attracted some interest, it was seen as a legal sub-discipline. However, it had less prestige and provided less lucrative opportunities than the main field of legal study.

Voegelin himself ponders in the *Autobiographical Reflections* why is it that he chose to study political science. He writes:

> I had registered as a student for the curriculum that would lead me to the *Docror rerum politicarum*. My decision to take these courses leading to the doctorate in political science were partly economic, partly matters of principle. So far as economics are concerned, I was very poor, and a doctorate that would be finished in three years had a definite appeal. The law doctorate would have required four years. The matter of principle was a vague but strong impulse even at that time that I would embark on a career in science. The doctorate in law had the temptation that ultimately one could land, if one did not become an independent lawyer, in a civil service position; and I did not want to be a civil servant [Voegelin 1996: 3].

Indeed, the decisions both to study at the university of Vienna and to study political science had profound consequences both for Voegelin and for political philosophy in general. Over time, for the most part after his death, Voegelin became increasingly influential [Franz 2001] and was recognized as a conservative critic of both modern progressive ideologies and reactionary counter-ideologues, the likes those of Joseph De Maistre and the national socialists [Voegelin 1975: 183].

The following article is based mainly on Voegelin's own recollections, found in his *Autobiographical Reflections* [1996], his lectures on national socialism found in the volume *Hitler and the Germans* [1999], *The Authoritarian State* [1999b] and conversations with one of Voegelin's teaching assistant – the late prof. Ellis Sandoz, during my work and research at Louisiana State University. The tentative

answer to the research question suggests that Voegelin's intellectual enterprise stems from the rebellion against legal positivism, particularly that of Hans Kelsen [cf. also Cooper 2023: 61-71] and because of this, Voegelin should be reread not just as a political philosopher but as a constitutional theorist. This reading of Voegelin seems particularly important now in the times of deep moral, intellectual and constitutional crisis of many liberal democracies, not dissimilar to the 1930s, which were a formative period for Voegelin's intellectual development [cf. Reiter 2017, Katrougalos et. al. 2023, Szlachta 2022: 563-665].

Eric Voegelin wrote his Ph.D. thesis with two renowned Austrian theorists of law: Hans Kelsen and Othmar Spann. Of the two, Voegelin clearly identifies Kelsen as his main influence. The inspiration is both positive and, over time, negative. Voegelin writes:

"What attracted me [in Kelsen – MK], so far as I recollect, was the precision of analytical work that is peculiar to the great lawyer… what I learned from Kelsen, I should say, is the conscientious and responsible analysis of texts as it was practiced in his own multivolume work and in the discussions in his seminar" [Voegelin 1996: 20].

He also notes that having both Spann and Kelsen as his advisors was somewhat usual since "the universalism of Spann and the neo-Kantianism of Kelsen were considered incompatible" [ibid.: 21].

He, however, is very clear about the fact that, already at those early stages, he opposed restricting the study of politics to positivistic legal theory and gradually his differences with Kelsen evolved. Voegelin also identifies this opposition as a key driving factor in his further academic career. He remarks that "already at that time" he has "conceived the task of a future political scientist to be that of reconstructing the full range of political science after its restrictions to the core of *Normlogik*" [ibid.: 22].

It is important to note that Voegelin in his writings does not contrast legal positivism with legal normativism. He treats the normativism of Kelsen as a continuation of earlier positivist approaches to law and social sciences, particularly those of John Austin inspired by Thomas Hobbes and Jeremy Bentham [cf. Rumble 1985]. Such approach to the positivist-normative problem seems typical of the English and American theorists of law, who speak of a continuous "positivist tradition"

[Gardner 2001: 1999-201]. Voegelin's general opposition to positivism and not simply legal normativism is also further confirmed by his critique of the philosophical positivism of Comte [Voegelin 1987: 24-26].

The catalyst for Voegelin's approach was, of course, the history of 1930s Europe. Voegelin as a young researcher quickly became highly critical of the political developments in his country. The result of which was his "first major attempt to penetrate the role of ideologies, left and right, in the contemporary situation" [ibid.: 41]. The volume was published in Austria in 1936 under the title *the Authoritarian State – Der autoritäre Staat*. As Gilbert Weiss notes in the introduction to the English edition in volume 4 of Voegelin's *Collected Works*, *the Authoritarian State* was considered very controversial at the time of its publication and immediately banned after the National Socialists took over in 1938 and Voegelin decided to flee Austria with his wife [Weiss 1999: i].

In the work, Voegelin expands the hypothesis that first started during his doctoral research with Kelsen, namely that a typically positivist firm connection between the state and the law and the law and the fundamental norm (*Grundnorm*) [cf. Kelsen 1949] is deeply flawed. Of course, the ostensive aim of this approach is to make political science more "scientific" and to present an easily definable object of research which is not entirely material but is much closer to the natural material world than ideas or psychological states of mind. That object is the law understood as a device regulating relations between humans. In Voegelin's view, this positivistic approach stems from a "neo-Kantian demand for purity of method" [Voegelin 1999b: 165] and results in a distortion of the subject matter of politics by creating "very significant limitations for the object of a theory of the state" [ibid.: 167]. In other words, for a positivist, the state or in a broader context any form of politics in its essence is what we can perceive at the foundation of its institutions, i.e. the law. The law is in turn just a regulatory principle, the "genetic" code of the state and the question about its deeper roots, especially ones which would remain outside of our immediate empirical perception (documents, records, etc.) is according to Kantianism "inadmissible" [ibid.].

This approach results in a radical reductionism of political science. Voegelin, when trying to understand the state describes it as a realm of being, which includes "objects such as: 'system of norms', 'masses and elites', 'power relations', 'legitimacy', and 'political idea'" [ibid.: 169]. In a legalistic positivist understanding of law and politics, we are, however, technically reduced to constantly

researching the internal logic of what the state says about itself, i.e., its institutional relations rather than probing the deeper mechanics behind those relations. And let us add that, although political science has long abandoned this type of legalistic dogmatism, it is still practiced by some constitutional law scholars [cf. George 1996]. In such studies, objects other than law itself are sometimes hinted at (as "we the people" is the American constitution) but are not studied seriously. Voegelin notices the same "vacillation" in Kelsen. According to Voegelin, this was due to the "fact that in the system of pure theory of law the positivist theory of the object [*Gegestandstheorie*], according to which a science may deal only with one subject, must somehow be brought into harmony with the existentially determined delimitation of a relevant realm of being that includes more than one object realm" [Voegelin 1999: 171].

Interestingly, Voegelin seems to grasp the interdisciplinary and eclectic nature of political science in a way that became more widely accepted only much later, when the discipline was exposed to more influence from economics, including econometrics statistics and the like [cf. Munck. al 2007, Miller 1997].

The state is, clearly, for Voegelin more than the law. Particularly more that codified law. We must, however, note that Voegelin does not focus in his work on the inner dynamics of the state as such. He barely touches upon subjects like clashes between the competing elites, class dynamics, party politics etc. He contents himself merely with cursory observations, like, for example, the one that Machiavelli is a theorist of the state, who "correctly recognized the structure of reality" [Voegelin 1987: 170] and is now being wrongfully accused of immorality. It is surprising that a political scientist like Voegelin writes so little about every-day politics. This brings forth the crucial question: what is the proper subject of Voegelin's general scientific inquiry? My proposed answer is that he is primarily interested in the ontological basis of the legal system, beyond even the material constitution itself. He seems to focus on what Edward S. Corwin calls "the higher-law background" [2008] of politics. It is therefore clear that Voegelin is in fact a theorist of constitutions rather than politics in the normal meaning of the word.

It is interesting to note in this context that Kelsen wrote a lengthy response to Voegelin's critique of legal positivism in the *New Science of Politics* – a small book widely read as an accessible introduction to Voegelin's more lengthy works such as *Political Ideas* [*Collected works* v. 19-26] and *Order and History* [*Collected works* v.14-18]. The polemic, written in 1952, was, however, not published during

Kelsen's lifetime and was only later found among his papers. In the essay, Kelsen valiantly defends the moral relativism resulting from the positivistic approach by simply claiming that progress in understanding can be made only by completely abandoning any "recourse to theology or any other metaphysical speculation." [Kelsen 2004: 13]. He also shows a far-reaching disdain for his former student by accusing him of describing "relatively simple and by no means unknown facts in a complicated language overloaded with superfluous foreign words, especially Greek terms, which are out of place if their use is not necessary to reproduce faithfully the content of classic writings" [ibid.: 29]. That is to say that Voegelin is for Kelsen something of an intellectual charlatan, who wants to bring back political science to the middle-ages and create an apology of a theocracy.

Kelsen repeats the old positivistic dogma that there is no "ought" in "is" [ibid.: 21]. Moreover, he completely misunderstands Voegelin's teaching on Machiavelli, assuming wrongfully that Voegelin expresses a critique rather than a praise for the Florentine [ibid.: 105]. The mistake is very indicative of Kelsen's line of thinking. He defends the social science of human actions without any recourse to absolute values. And while this approach can be imagined with respect to a descriptive study of human psychology or economics, it is somewhat problematic in the case of constitutional theory, as we have established the real object of Voegelin's philosophical inquiry. This is because the very object of constitutional theory is to establish the values on which the political system should rest.

Vogelin's response is that a lack of "ought" in "is" might be true in the case of the natural sciences. However, it is demonstrably not true in the case of politics, and for that reason, the study of political phenomena is perhaps not a science in the positivist sense, and it might be wrong to term it as such [Voegelin 1987: 27]. This is mainly because in politics we are always dealing with some values that the people experience as order and try to represent institutionally. Nevertheless, the question remains whether Voegelin really means politics, or more properly speaking, constitutional theory. The confusion in terms results from the fact, in modern European languages, we are accustomed to use the term "politics" in the sense partly infused by the thought of the afore mentioned Machiavelli. When we say that, for example, in a certain activity we want to avoid "politics", what we usually mean is that we want to avoid the confrontational nature of political strife that presents itself as a technical pursuit of gaining votes, followers, donations etc. In the normal use of the word, calling for "less politics" does not mean placing a given activity outside of the realm of legal public activity, and this is precisely

how an ancient author using, e.g., the Greek word *politicos* could understand being outside of the political.

Kelsen seems to be aware that a conscientious constitutional inquiry cannot completely escape value judgements. The assumption that there is no "ought" in "is" would then take on the form that the "is" is the "ought". In the social world, this would translate into the belief that power is law. Kelsen, painfully aware of the problem, tries to explain himself:

> It is incorrect and a misleading interpretation of the postulate of a value free political science to maintain, as Voegelin does, that from the point of view of such science the values of a political order are "beyond critical evaluation," that these values have "to be accepted as unquestionable." A value free political science only maintains that the values which a political system tries to realize cannot be confirmed by science as absolute values. That does not mean that a critical evaluation of the political system is impossible; it means only that the recognition of an absolute value is not possible on the basis of a political "science" [ibid.: 24].

However, his explanation amounts to semantics. Kelsen simply excludes the law and the legal profession in general from entering into a discussion concerning values and instead demands that they solely focus on the hypothetical fundamental norm. Of course, the fundamental norm of the law is somehow related to the values of the society. However, the legal system is to operate as if it knew nothing of the nature of that relationship. This leads to the situation in which norms, construed at purely theoretical concepts, contrary to the intention of Kelsen, indeed become quasi-values. Thus, the question remains: what is the substantial difference between a norm which is fundamental and a value which is absolute? A simple answer could be that a fundamental norm is necessary for upholding the legal system [Bindreiter 2002: 11-16]. But this only reveals an inherently positivist problem of associating chaos with danger or degeneration and order with security or development. The problem with this line of reasoning is that positivism does not account for the possibility of creating a legal system, which is inherently coherent, ordered and based on clear basic norm, but nevertheless that norm or norms, are blatantly detrimental to the development and welfare of human beings. What do we do when we encounter a well-functioning positivist legal murdering machine? Voegelin asks precisely this question is his famous Munich lectures from the Summer of 1964, published posthumously under the title *Hitler and the Germans*.

In the volume, Voegelin exposes the greatest historical failure of legal positivism, a failure so blatant the even Kelsen himself finds the argumentation on this point difficult to refute and seems to suggest that Hitlerism was just a short lived "tragi-comical joke" [Kelsen 2004: 81] in the history of Western law and politics. This is, nevertheless, a very weak argument given the amount of lives and human suffering that this "joke" cost. Indeed, it is possible to portray the law of the Third Reich as quite a coherent, efficient, professionalized and utterly value-free legal system. This is because, as Voegelin rightly observes, what took place under national socialism was drawing the ultimate consequences from the postulate of purging law from values. The result was a "descent into the legal abyss" [1999: 213-239]. In the first part of his lectures, Voegelin also disguised two similar descents, one into the "academic abyss" [ibid.:70-110] and the other into the "ecclesiastical abyss" [ibid.:110-155] – both dealing with various forms and levels of collaboration with the nazi regime or condoning its atrocities. However, the content of those chapters is mostly anecdotal. It is the chapter on legal matters, as it is often the case with Voegelin, which contains a more in-depth analysis of the relevant theories and trends.

Nowadays, positivist lawyers – even in a country which could turn totalitarian – can in theory close the gap between the moral and the legal by referring to the UN Charter of Human Rights and Rafał Lemkin's definition of mass murdering a nation in the Convention on the Prevention and Punishment of the Crime of Genocide [UN 1946]. However, in the 30s and early 40s, there was no internationally accepted legal standard to fall back on. And where some regulations did exist, lawyers were by no means eager to accepts their superiority over national law. Indeed, one may wonder whether simply looking for basic norm at the higher level of human organization (alliance, civilization, etc.) is a satisfactory solution. Voegelin rightly notes that "the situation where the jurist is only bound by positive law as the basis of the order of a society functions only as long this society is socially and morally intact" [1999: 225].

We might hope that the possibility of corruption of the whole group diminishes once we move beyond a single nation onto an international community of some sort. But this is just a supposition, a popular American author writing on the phenomenon of racism correctly notes that before World War II, it was the global anthropological mainstream [Goldberg 2007: 243-284]. Interestingly, racism as a morally deplorable international phenomenon was also a topic of Voegelin's academic inquiry [Voegelin 1997, cf. Kuź 2016].

Nevertheless, both the formation of postwar international law and respective national orders was basically a return to legal positivism. The previous problems were simply assumed to be removable by either applying the international law (or nowadays the EU law) or by a crude negation of the significance of the totalitarian experience. Voegelin is, however, clearly, concerned that the problem with legal positivism in not simply a historical one. In his Munich lectures, he critically cites, on this account, the modern German constitution of 1949. The most striking clause, for him, is the famous article 70, which forbids any amendments to articles 1-20, which deal with fundamental rights and human dignity [Voegelin 1987: 226-227]. From a purely theoretical point of view, a question immediately arises: why can those clauses not be amended by normal legal procedures? One might hypothesize that the legal positivists who were the authors of the constitution, had to, in practice, acknowledge some absolute values; this would, however, break all the rules of Kelsen's legal theory. Nevertheless, such course of action might have been taken because German framers had a recent experience of a legal order based on the fundamental norm, which was the exact opposite of human rights. The fundamental norm was the right of just one racial group and denied human dignity to all others.

Voegelin, in his interpretation of the clause, concludes that the positivists assume that certain fundamental changes to the constitution can only be made by a political revolution. But in this case, the moral issue returns. The less firm the values in the political order, the more violence is needed to achieve a substantial change of that order. And even after a violent revolution, the question of values returns yet again. Voegelin notes that after a violent change of government, whether "all these wise provisions of the Basic Law are simply changed depends on whether the society is intact and does not carry out these changes" [1999: 229].

In other words, according to Voegelin, a society whose political odder is completely detached from the notion of absolute values and their metaphysical origins is likely to witness a much quicker erosion of the legal system.

Although Voegelin is extremely efficient at explaining the mishaps of legal positivism, he, however, does not clarify how to avoid the politico-religious problem, which Carl Schmitt writes about [2007: 89-96] and, as a solution, proposes a theological turn in politics, i.e., a return to political theology. A constitutional court acting according to the positivist doctrine will not be able to rebel against an unjust system as long as it is a coherent system of law, even if the fundamental

norm it is based on are, for lack of a better word, inhuman. However, the other danger would be to have a court or another body, be it a legislative, executive or judiciary institution, subscribe completely to a very narrow understanding of the absolute values. Such institutions, like e.g. Iran's Supreme Council of the Cultural Revolution, can indeed become theocratic. Voegelin's admonitions not to "immanentize the Christian eschaton" [1987: 166] can be thus confronted with the same simple questions as the absolutizing clause of the German Constitution. Why? Or at the very least, how much immunization of the eschaton in law and politics is appropriate, and how much is excessive? Voegelin himself admits that every mature society with a "long and glorious history" [Voegelin 1987: 168] tends to see its order as the eschaton, i.e. as something absolute.

Sadly, the politico-religious problem is not answered by Voegelin satisfactorily. Unless, of course, we are prepared to treat the open-endedness of his philosophical and constitutional inquiries as an answer. In one of his essays, Elis Sandoz called Voegelin a "mystic philosopher" [Sadoz 2011], and indeed he is one in the sense of being a thinker, who at the same time firmly believes in the absolute basis of political order and remains confident that how we experience this basis is a mystery, which cannot be fully explained by means of language, laws, and institutions. This incomprehensibility of the experience of order, as in the biblical story of the tower of Babel, ultimately will always lead to its differentiation, which indicates development of some sort but not necessarily progress.

Nevertheless, it seems that all those intellectual discoveries of Eric Voegelin can be traced back to the initial impulse resulting from analysing and criticizing the legal concepts of Hans Kelsen. It was Kelsen's legal positivism that provided Voegelin with the first impetus to construct his own political philosophy. Over time, the critique of Kelsen had led Voegelin to investigate the theoretical rules governing the functioning of various political entities and the realization that political bodies are not structures that can be fully examined without taking into consideration the absolute values of all the humans involved.

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