Towards Breaking up of Czecho-Slovakia 1939: Within the Light of Memorandum by Hans Kelsen*

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Towards Breaking up of Czecho-Slovakia 1939: Within the Light of Memorandum by Hans Kelsen. Czecho-Slovakia was under pressure of German Reich. Part of its territory was occupied by German forces even in March 14, 1939. Professor Hans Kelsen's Memorandum from August 1939 conceived as a complaint to the forum of the League of Nations reflects this fact and to that added legal ornaments as legally entirely void. Our contribution is focused on argumentation on behalf of peaceful country (Czechoslovakia) and law versus arbitrary force of aggressor.

Key words: *Hans Kelsen's Memorandum, breaking up of Czecho-Slovakia, March 1939, League of Nations, void treaties*

Nearly almost every student of law in Slovakia had at least likely heard about Hans Kelsen (1881-1973) in connection with his book The Pure Theory of Law. This master piece was completed in Geneva in German language as Reine Rechtslehre in 1934 and remains his often quoted and most famous published work.[1] However, in Slovak milieu the title is known also thanks to its shorter but equally named parallel or kind of minimalist version which was published in Czech language as Ryzí nauka právní even little bit earlier.[2]

As concerns preliminary Reine Rechtslehre Czech edition, it can be reviewed in the light of evidence of absence of a separate part dedicated to the field of international law but firstly understood within the bright light of several traces of large mutual relations between Kelsen and particular community of lawyers active in the conditions of Czechoslovakia, above all with academic circles of the first republic.

Quite recently one may remark that it is only some months ago from the moment of complete Slovak translation of Reine Rechtslehre done by Professor Holländer.[3] However, here is especially appropriate to remain in the context of the common state of Czechs and Slovaks and to take into account Kelsen´s bibliography, as well as biography or written range and personal influence. „Both the personality and work of Hans Kelsen are well-recognised by the legal community as Kelsen´s work at the time of the first republic, especially his co-operation with Prof. František Weyr and other lawyers from Brno, significantly influenced the quality of Czechoslovak jurisprudence."[4] Furthermore,

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[1] See for instance KELSEN, H.: Reine Rechtslehre. Studienausgaben der 1. Auflage 1934. Tübingen: Mohr Siebeck, 2008.

[2] KELSEN, H.: Ryzí nauka právní: Metoda a základní pojmy. Brno – Praha: Orbis, 1933.

[3] KELSEN, H.: Čistá právna náuka. Bratislava: KALLIGRAM, 2018.

[4] KUKLÍK, J./ NĚMEČEK, J.: Memorandum by Hans Kelsen on the Breaking up of Czecho-Slovakia. In: JABLONER,C. – OLECHOWSKI,T. – ZELENY, K.: Das internationale Wirken Hans Kelsen.Wien: MANZ Verlag. Schriftenreihe des Hans Kelsen-Instituts, 38, 2016, p. 107.

Kelsen was born in Prague where he later loyally returned transgressing thus a status of stranger or net of foreigners.

Even though Kelsens in 1883 moved to Vienna where he studied and became widely known Professor (1919) – author of the project of the Constitution of Austria (1920) including the first operable continental Constitutional Court where he was a judge 1920-1930[5], the 20th century narrative of his life runs further: Due to political reasons family later left for 1930-1933 Germany and afterwards from Köln to Switzerland. Even later in April 1936 Hans Kelsen, his wife Margarete and their younger daughter Maria acquired Czechoslovak citizenship. Thus as a citizen of the Czechoslovak state he became an orderly Professor of the international law at the German University in Prague (1936-1938). Kelsen´s afterwards departure from Prague in the autumn 1938 took place after series of events some twenty months before the final leave from Geneva for the United States of America[6].

In any case, some matters are to be taken as sure for far reaching importance: Professor Hans Kelsen was always very sensitive to fate of the common state of Czechs and Slovaks. Driven by the rising power and aggressivity of German Reich the CSR was led to Munich and Vienna Arbitrage arrangements and thus among others to considerably smaller and more vulnerable territory of the second republic.

Despite Kelsen´s cordial relation to CSR one could also signalize certain kind of deep or cold formalism, as well as very strict methodological approach presented within above mentioned book The Pure Theory of Law. Widely known is its valuefree attitude and perhaps provocative conclusions as every state is a law-state (Rechtsstaat) or reference to justice as to „irrational ideal“[7] which were criticised from some either outside milieux, or external points of view on the one hand and from the side of some part of theoretic environments on the other.[8] „Kelsen´s doctrine is perhaps the most consistent expression of positivism in legal theory. For it is characteristic of legal positivism that it contemplates the form of law rather than its moral and social content, confines itself to the law as it is without regard to its justness or unjustness, and endeavours to free legal theory from all qualifications or value judgments of a moral, political, social, or economic nature. Rarely has the complete segregation of jurisprudence from all other branches of social science

[5] Compare e.g. WALKER, D.M.: The Oxford Companion to Law. Oxford: Clarendon Press, 1980, p 699.

[6] Towards Kelsen´s years 1930-1938 see generally OLECHOWSKI, T. / BUSCH, J.: Hans Kelsen als Professor an den Deutschen Universität Prag 1936-1938. In: MALÝ, K. /SOUKUP, L. (usp.): Československé právo a právní věda v meziválečném období 1918-1938 a jejich místo v Evropě. Sv.2. Praha: Univerzita Karlova v Praze. Nakladatelství Karolinum, 2010, pp. 1111-1139. Further informations to American years since 1940 (Harvard 1940-1942; Berkeley, University of California 1942-1952 and later years) may be found in: OLECHOWSKI, T.: Hans Kelsen in Berkeley. „Des Wandermünden letzte Ruhestätte“. BRGÖ 2016. Beitrage zur Rechtsgeschichte Österreichs. Accessible at http://www.austriaca.at/Oxc1aa5576%20 0x0033efdd.pdf

[7] Besides Reine Rechtslehre and its commentaries one may quote here from KELSEN, H.: Was ist Gerechtigkeit? (1953) Stuttgart: Reclam, 2010, p 49. Indeed, one has to see also KELSEN, H.: Reine Rechtslehre. Studienausgaben der 1. Auflage 1934. Tübingen: Mohr Siebeck, 2008, pp. 28,136.

[8] See e.g. BODENHEIMER, E.: Jurisprudence. Cambridge, Massachusetts: Harvard University Press, 1962, pp. 99-102.

been carried to such extreme as in the Pure Theory of Law.[9] However, it seems that several ideologically valuefree moments (which are of course basically present also in the second, only bit altered or "revised" edition of Reine Rechtslehre from 1960) were sometimes somewhat transgressed by Kelsen´s own works.[10]

As a starting point of Memorandum by Hans Kelsen on the breaking up of Czecho-Slovakia from August 1939 – hereinafter as „Memorandum"[11]-- one may consider Article 10 of the Covenant of the League of Nations adopted at the Paris Peace Conference in 1919: The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon means by which this obligation shall be fulfilled.

Kelsen's Memorandum was elaborated in the shadow of events signalizing the approach of the World War II. Dramatic acceleration of those times could be considered as one of decisive reasons for the fact that Kelsen's text was never presented in the frame of the League of Nations, although it had a form of a complaint of the CSR permanent delegation by the League of Nations.

As a key statement of the text of Kelsen's Memorandum[12] one may consider Article 10 of the Covenant of the League of Nations (quoted supra). That is especially in the light of its run, as well as in the light of Article 2 of the Kellogg – Briand Pact from 1928 (see infra) from where the chain of events of March 14-16, 1939 is measured and appreciated and legally qualified by Hans Kelsen.[13]

As to the facts: The afternoon of March 14, 1939 brought the event: northern industrial part of the Czecho-Slovak Republic had been occupied by a part of the army of German Reich. This military action exercised a huge pressure on run of events and acts in the middle of March 1939. Events were reported by media (press and broadcast) side by side with the information about departure of President Hácha to Berlin. There in his precarious position he was exposed to deep pressure which Kelsen appreciates as a purpose of previous northern military action.

In parallel Kelsen refers also to Article 2 of the Pact of Paris: The High Contracting Parties agree that the settlement or solution of the disputes or conflicts of whatever nature

[9] Ibid., pp. 101-102.

[10] See generally e.g. KELSEN, H.: General Theory of Law and State (1945) New Brunswick, New Jersey: Transaction Publishers, 2006.

[11] Authentic German text of the Memorandum may be found sub Appendix: The Memorandum by Hans Kelsen from August 1939 to KUKLÍK, J./NĚMEČEK, J.: Memorandum by Hans Kelsen on the Breaking up of Czecho-Slovakia. In: JABLONER, C. – OLECHOWSKI, T. – ZELENY, K.: Das internationale Wirken Hans Kelsen.Wien: MANZ Verlag. Schriftenreihe des Hans Kelsen-Instituts, 38, 2016, pp. 107-119; Memorandum on pp. 115-119.

[12] Full text of the Memorandum may be found sub Appendix: The Memorandum by Hans Kelsen from August 1939 to KUKLÍK, J. / NĚMEČEK, J.: Memorandum by Hans Kelsen on the Breaking up of Czecho-Slovakia In: JABLONER, C. – OLECHOWSKI, T. – ZELENY, K.: Das internationale Wirken Hans Kelsen. Wien: MANZ Verlag. Schriftenreihe des Hans Kelsen-Instituts, 38, 2016, pp. 115-119. Text will be quoted in a form indicated in n 16.

[13] Covenant of the League of Nations is accessible at http://www.unhcr.org/refworld/docid/3dd8b9854.html (League of Nations Covenant, Treaty of Versailles, Part 1, articles 1-26, in force 10 January 1920.)

or whatever origin they may be, which may arise among them, shall never be sought except be pacific means.[14] This valid pact was conceived outside the frame of the League of Nations. (Czechoslovakia and Germany were among its original signatories).[15]

In this context Kelsen underlined that it was within conditions of considerable pressure when in a very difficult situation was placed President Hácha vis-à-vis German requirement to conclude Berlin Treaty (Berliner Vertrag). Albeit one could feel also bit of nostalgy over Kelsen's French quotations, e.g. that of "moyens pacifiques", it could be in addition also pointed that Kellogg –Briand Pact could be seen also in parallel with Kelsen's own pacific personality. However, threat of violence results into conclusion that the Berlin Treaty is void. Treaty from March 15, 1939 is considered as contradictory to the Pact of Paris, as well as to the Covenant of the League of Nations. But the Treaty from Berlin has to be seen as void also because its contradiction with Munich Treaty.

Kelsen considered the Berlin Treaty as void with reference to guarantees of "new frontiers of Czecho-Slovakia" given in Annex to the Munich Treaty (Münchner Vertrag). Here the Berlin treaty is declared void since its text instead of such guarantees given also by the United Kingdom and France (§1) on the one hand and by Germany and Italy on the other (§2) reads otherwise. Of course, the Berlin Treaty is void because of its linkage: "the President of the Czecho-slovak state ….remits the fate of Czech people and country with full confidence to Führer of the German Reich." While Munich treaty considered Czecho-Slovakia as sovereign state with frontiers guaranteed also by Germany (§2 of the Annex), Berlin Treaty is contradictory to that and deprives the Munich Treaty of its sense. Referring to L. Oppenheim's influential work International Law (1905/1906) Kelsen supports his own opinion on nullity of Berlin Treaty.[16]

Moreover, Kelsen pointed to nullity of the Berlin Treaty also from the point of view of the Czechoslovak constitutional law. Having on mind the Act No. 121/1920 Rec. of laws from February 29, 1920 which introduces the Constitutional Charter of the Czechoslovak Republic one may follow how Kelsen points to §64 stating the "Czechoslovak Constitution" competences of the President. As concerns international treaties his competence to negotiate and ratify international treaties presupposes "that the state also after the conclusion of the treaty further exists as sovereign subject of the international law."[17] Furthermore, Constitution cannot be changed by a treaty concluded by the state but by "constitutional laws".

[14] Known as the Kellogg – Briand Pact, officially named General Treaty for Renunciation of War as an Instrument of National Policy from 1928 this pact outlaws war between its signatories (and came into force in 1929).

[15] Compare e.g. WALKER, D.M.: The Oxford Companion to Law. Oxford: Clarendon Press, 1980, p 699. Full text of Kellogg – Briand Pact presented a nice piece of brisk illustration of the textual evolution of the international law; (text may be found at www.jura.uni-muenchen.de/satzger).

[16] KELSEN, H.: Memorandum. In: JABLONER, C. – OLECHOWSKI, T. – ZELENY, K.: Das internationale Wirken Hans Kelsen.Wien: MANZ Verlag. Schriftenreihe des Hans Kelsen-Instituts, 38, 2016, p 117.

[17] Ibid.

Accordingly to constitutional statement of §1 People is the only source of the state power and in accordance with §2 Czechoslovak state is the democratic Republic, headed by an elected President.

Indeed, under Kelsen´s opinion the Berlin Treaty is in contradiction with constitutional paragraphs mentioned above since in its run instead of power of the people Kelsen saw the "foreign state" and instead of the democratic Republic something as a "province" under "autocratic rule" or "province of other state". Moreover, according to §64 an international treaty would require a consent of National Assembly. Thus the Berlin Treaty from March 15, 1939 is void and in consequence of that the Czecho-Slovak Republic "ceased to exist only the facto but not de jure".[18] If a chain of violent events started with an attack which was not provoked and Berlin treaty is nothing but void slip of paper calling for occupation of the territory, Article 10 of the Covenant of the League of Nations is accurate applicable to such situation what can be said also about (later) military actions of Hungarian government against the Sub-Carpathian Ruthenia[19].

Last but not least one has to refer to Kelsen's remark on "separation of Slovakia form the Czecho-Slovak state". Albeit any sort of position to that (existing even now), is stressed one may already hope to guess how looked the light of Kelsen´s assertion of continuity of the CSR statehood, it's worth to indicate here some few words. Although separation of Slovakia is considered as formally legally based in decision of the Slovak Parliament from March 14, 1939, Kelsen considered it as "void" due to "threat" that "otherwise Slovakia would share the fate of [Protectorate of] Bohemia and Moravia." Thus despite that it came from "internal political movement" or in spite of that "literally interpreted" here it was not a case of "external attack", it also falls under Article 10 of the Covenant of the League of Nations.[20]

And now we know how Kelsen came to such conclusion. The decision of Slovakia resulted from "essential participation of foreign power" and thus also implied a fate of Bohemia and Moravia and accordingly "entitled to use Art. 10 of the Covenant of the League".[21]

As it was indicated, Kelsen's legal opinion expressed in August 1939 had never been presented before the forum of League of Nations. Let me conclude that in spite of that this document could not been (shortly before the outbreak of the World War II and some other reasons) used in the intended way, it still remains a brisk legal study. Even many years after August 1939 it may serve as a shine of light on belated imitation of (pseudo-) legality or bitter mechanically formal copy of already done forced violent events covered by patch resembling to law. Or something as kind of fuzzy appearance of law called into being by a pressure of a stronger autocratic actor strange to visions of the developed international community.

[18] Ibid., p. 118

[19] Compare ibid., p 119. (Remark: In this context one has to deal with violation of the Vienna Arbitration Agreement by aggressive forces of Hungary.)

[20] Ibid., p 119.

[21] Ibid.

Kelsen represents a voice calling for really responsible international community which is capable to face very every state violating the international law from the position of arbitrary and aggressive use of force.

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