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POLISH CRITICISM OF HANS KELSEN'S NORMATIVISM

Normativism, referred to as the pure theory of law, or Vienna School, is recognised as one of the most formalistic trends in the history of political law doctrines¹. Hans Kelsen (1881–1973), the founder of the school, postulated controversial ideas related to the theory of the state and law. His radical approach to the traditional science of law was, for instance, reflected in his identification of law and state, negation of the commonly accepted distinction between public and private law, and elimination of the idea of purpose from the subject matter covered by jurisprudence. Kelsen also opted for strict separation of the spheres of being and obligation. This separation was to constitute a criterion for distinguishing normative and explicative sciences. The thesis about disconnecting the law from reality and separating it from politics, psychology and sociology, as well as the theory granting the primacy of international law over state law brought heated response from representatives of legal sciences.

The new theory enjoyed significant popularity, particularly during the two interwar decades, and like every novelty it gained many supporters and a host of opponents and critics. Critical comments were mainly to be found in writings by Antoni Peretiatkowicz, Andrzej Mycielski, and Czesław Znamierowski. The most original polemics in the Polish literature related to this subject matter, include the critique by Jerzy Lande representing juridical psychologism, the Thomistic negation of the assumptions presented by the Vienna School authored by Czesław Martyniak, as well as Marxism-based criticism by Jerzy Wróblewski.

The Thomistic, as well as psychological and Marxist critique of Normativism aimed to demonstrate inaccuracies or gaps in Hans Kelsen's doctrine. The elements covered by all of these critical opinions include the basic norm and the separation of being and obligation. Each approach uses its specific argumentation

¹ Normativism was considered to be the most formalistic trend in the history of political law doctrines by G.L. Seidler, *Doktryny prawne imperializmu*, Lublin 1979, p. 108.

in the critical evaluation of the specific assumptions of Hans Kelsen's juridical normativism. Notably, the critical opinions concerning normativism formulated by Jerzy Lande and Czesław Martyniak did not seek to discredit the doctrine from an academic standpoint, contrary to the concept presented by Jerzy Wróblewski.

Analysis of the "pure" theory of law from the viewpoint of Thomism and psychologism made it possible to highlight Kelsen's achievements in the area of methodology². Nevertheless, Jerzy Lande's study entitled *Norm versus juridical phenomenon. Considerations on the foundation of legal theory in the context of Kelsen's system critique* (published in *Czasopismo Prawne i Ekonomiczne* vol. XXIV from 1925) emphasised that, although apparently coherent and logical, the general methodological assumptions upon close examination reveal "a serious deficiency in traditional juridical thinking. His work, so integral in its assumptions and upon review at times producing such beautiful results, in its own structures turns out vacant or erroneous"³. Detailed and meticulous analysis of the Vienna School assumptions led Czesław Martyniak to similar conclusions; he points out that Kelsen's theory contains "errors, *petitiones principii*, contradictions, and – disguised in modern presentation – a return to old theories recognising strength as the basis for the authority of law; finally [it contains] a certain dose of ignorance"⁴.

As a common feature, the criticism of normativism published during the two interwar decades applies a narrowed down area of exploration. The author of the psychological criticism of normativism narrows down the scope of investigation: "only to the basic question of [Kelsen's] approach to law"⁵. Jerzy Lande treats normativism as "an intersection of certain philosophical and ethical aspirations", and its detailed analysis makes it possible to show deficiencies of this doctrine and the conclusions which should be reached by it.

Jerzy Lande accuses Kelsen of "a continuous tendency to identify ideality with obligation"⁶. He recognises correct logic in a statement that each normative sentence inherently contains ideal cognition, however the reversed construction is erroneous. In connection with that Kelsen and his disciples cannot assume an ideal position with regard to a legal norm, i.e. a position which, as emphasised by Lande, would also be theoretical rather than only normative. Explicative sentences, according to Jerzy Lande, are a certain variation of theoretical sentences ("objectively cognitive") "about that which is real". In addition to these, there are theoretical sentences about that which is ideal. At the opposite end, in relation to theoretical sentences, there are sentences expressing assessment. Varia-

² J. Lande, *Norma a zjawisko prawne. Rozważania nad podstawami teorii prawa na tle krytyki Kelsena* [in:] *Studia z filozofii prawa*, Warszawa 1959, p. 140–141.

³ The current study has used the reprinted version, included in the collection „Studia z filozofii prawa”, Warszawa 1959. *Ibidem*, p. 141.

⁴ C. Martyniak, *Moc obowiązująca prawa a teoria Kelsena*, Lublin 1938, p. 245.

⁵ J. Lande, *Norma a zjawisko prawne...*, p. 142.

⁶ *Ibidem*, p. 144.

tions of the latter include sentences containing evaluation of conduct, and their subgroup of normative sentences, “containing basic regulations as opposed to teleological rules”⁷.

Although Lande considers it appropriate to refer to the normative science, as defined by Kelsen, with such terms as dogmatic jurisprudence or legal dogmatics, he disagrees with the claim that a philosophy or a “pure theory of law” can be built based on and within the boundaries outlined by this science. He believes that accurate theory of law may be developed only based on findings of explorations focused on a legal phenomenon, and provided by psychology and sociology⁸.

Kelsen, seeking to achieve methodological purity, moves the “entire social phenomenon of law”, or the “actuality of law”, from the sphere of *Sein* to the domain of *Sollen*. As a result, he passes the sphere of being to explicative sciences, i.e. sociology and psychology. According to Lande, it is difficult to clearly understand whether, in Kelsen’s opinion, law is a social or mental phenomenon⁹. On the other hand, a normative experience itself, approached by normativism from psychological standpoint, is characterized by “chaos”. In this context “experiencing” a norm is equivalent to thinking, feeling and wanting. Lande admits that in accordance with the approach of normativism, one can agree that “a real-life counterpart of a legal norm is not a social phenomenon (...) but a mental phenomenon of experiencing a norm” as objectively described by its specific characteristics, however one cannot disregard the attempts to “smuggle in normative qualities inherently containing evaluation”¹⁰.

Psychological critique of normativism also touches upon the relationship of law and morality. According to Jerzy Lande, normative regulation recognized as a mental process is always a real phenomenon, whether it is autonomous (intuitive) or heteronomous (positive), or takes a form of “legal, moral or aesthetic normalisation”¹¹. On the other hand Hans Kelsen attributes autonomous motives with traits of real existence only, failing to notice elements of *Sein* realised in heteronomous norms. From the standpoint of juridical psychologism, antagonistic approach to autonomy and heteronomy leads to numerous defects, inaccuracies, lack of precision, “numerous ambiguities and contradictions” in Kelsen’s doctrine.

Analysis of Kelsen’s model of positive law system leads Lande to the following conclusion: the ultimate foundation of each system is a fact predicted by no norm (“with a peak point in the constitution, a monarch’s order, etc.”). Indeed, the ultimate foundation of a legal system cannot be reduced to a legal norm, because a search for the basis for that specific norm would commence.

⁷ *Ibidem*, p. 145.

⁸ *Ibidem*.

⁹ *Ibidem*, p. 150.

¹⁰ *Ibidem*, p. 152–153.

¹¹ *Ibidem*, p. 199.

Obviously, it is necessary to define, which Kelsen fails to do, a specific criterion allowing to distinguish a legal fact from other facts, e.g. related to ethics. Analysis of normativism leads Lande to a conclusion that such distinction is “enabled by application of a norm”¹². Hence, strength and means of enforcement guarantee respect for a norm, as they impose an obligation “on a subject, “independently or even against his will”, to apply the sanctions”¹³. Lande concludes: “enforceability again distinguishes legal norms from moral, logical, and grammatical norms (...) a state becomes a system of enforcement”¹⁴.

The structure of the basic norm was also met with criticism. Dynamic legal system is “the most classic case of *definitio per idem*: to ensure legal nature of a sanctioned norm, the related sanctioning norm must be a legal norm, otherwise we would be dealing only with «actual enforcement», however the sanctioning norm may be lawful only if it has legal sanction ... and so into the infinity. If the chain is broken at any point, all the preceding links, including the first one, become legally invalid”¹⁵. A remedy is provided by the hypothetical sentence “with the following structure: when someone does so and so, the state will apply a penalty or execution”¹⁶.

The basic norm, according to Lande, is not “a positive norm, it is not even a legal norm, unless it is derived from a legal system of a higher order, e.g. from international law; in such case, however, it is no longer the basic norm. And in this way, the very concept of the basic norm, selected to be a criterion and a guarantee for positivity and lawfulness of a system of norms, opens the doors for the absolute and extra-legal domain”¹⁷. Thus, Kelsen appears to be stepping down from the pedestal of positivity, and edging away towards the idea of natural law. Moreover, Lande notices that the concept of the basic norm contains the “specific” feature of law, and in normativism this seems to be compulsion.

Lande points out that identification of each and every concept with the idea of norm, i.e. duty is a norm, subject of law is a norm, and the state is a norm, leads to an absurd situation. If the state is a synonym of law, and law means strength, while the terms “strength”, and “authority” are “actual” elements contained in the set named “being”, it transpires that “Kelsen denies it is possible to describe authority in normative terms”¹⁸. Kelsen considers the state to be an ideal

¹² *Ibidem*, p. 259. “Fear of the sanction is recognised as the only motive specific to legal proceeding; ultimately it is assumed that in view of the exclusive importance of sanction in the law, the very nature of obligation in a legal norm is redundant, and it is enough to inform that in specific conditions there will be a sanction”. *Ibidem*, p. 267–268. Cf. *ibidem*, p. 302, 310, 313.

¹³ *Ibidem*, p. 267.

¹⁴ *Ibidem*, p. 277.

¹⁵ *Ibidem*, p. 266.

¹⁶ *Ibidem*, p. 276.

¹⁷ *Ibidem*, p. 296–296.

¹⁸ *Ibidem*, p. 185.

structure, as seen by legal dogmatics, but at the same time he rejects the feasibility of sociological research of the state approached as a real being, which contradicts his own classification of sciences¹⁹.

Lande argues that one of the major drawbacks of Kelsen's approach lies in the fact that in his considerations he combined issues related to dogmatics with those pertaining to the theory of law²⁰. Like Czesław Martyniak, he objects to Kelsen's errors using the very assumptions which were adopted by the latter²¹. Identification of the state and law leads to a conclusion that law is the will of the state, i.e. what is willed by the state becomes law. Hence the author's conclusion: in this case, if Kelsen's criteria, evaluations and terms are adopted, we are dealing with a concept of "moral autonomy". Lande demonstrates the "shakiness" of the concepts of autonomy and heteronomy. "And law «in a broader sense» remains the law, while constituting no sanctioned, or even «heteronomous» norm"²².

As a conclusion for the criticism of normativism from the standpoint of juridical psychologism let us cite words penned by its author: "In law he focused all his efforts on purification of normative thinking by eliminating false realism: and here to a certain extent, as long as the thing was about negation, he achieved his best results. However, he was then carried away: one by one, all the concepts are stripped of their specific meaning, and reduced to their identity with a norm; obligation, right, person, state drown in a norm, a normative fact disappears, and the applicable law, forcefully extracted from its consecutive layers, loses its own form, and dissolves in the pure yet completely empty «applicability». Strenuous «purification» and the ugly stain destroyed the purified object itself"²³.

The second constructive criticism of the assumptions proposed by the "pure" theory of law, formulated during the two interwar decades, is to be found in a dissertation by Czesław Martyniak, entitled *The binding force of law versus Kelsen's theory*²⁴. The foundation for the discussion with the views presented by Hans Helsen was provided by Thomistic concept of natural law²⁵.

¹⁹ Cf. H. Kelsen, *Der soziologische und der juristische Staatsbegriff*, Tübingen 1922, p. 91, 190–191.

²⁰ His position is presented in the context of normativism: "These two areas must be separated; this is a sine qua non condition for the due development of legal sciences". J. Lande, *Norma a zjawisko prawne...*, p. 325.

²¹ "Indeed, to point out and refute Kelsen's errors in the distinction of morality and law, sufficient means in the above deliberations were provided to us by the cognitive principles of Kelsen himself". *Ibidem*, p. 227.

²² *Ibidem*, p. 276.

²³ *Ibidem*, p. 319.

²⁴ C. Martyniak, *Moc obowiązująca prawa...*, p. 256.

²⁵ In his critical review Czesław Martyniak took into account all the scientific works published by Hans Kelsen by that time; the author also proved he was well-acquainted with the literature discussing normativism, both in the Polish and in foreign languages. The most frequently cited works by Hans Kelsen include: *Hauptprobleme der Staatsrechtslehre*; *Das Problem der Souverä-*

Since a comprehensive analysis of juridical normativism combined with constructive criticism of that doctrine would have exceeded the scope of a single-volume monograph, and would have required many years of study, Martyniak decided to narrow down the subject matter and focused exclusively on the issues of the binding force of law. Owing to this approach, the publication gained in accuracy and insight.

Like Jerzy Lande, the author of the psychologism-based critique of normativism, Martyniak also points to Hans Kelsen's philosophical inspirations. Both scholars emphasise that the philosophical assumptions of the "pure theory of law" are underestimated and frequently overlooked in studies by the supporters and opponents of the Vienna school. Exploration of its foundations related to philosophy of law makes it possible to get better insight into the doctrine of normativism. Notably, however, the related transcendent critique conducted by Martyniak does not constitute a summary of Kelsen's ideas, but rather it provides a synthesis of the fundamental assumptions of the doctrine showing inaccuracies in its theoretical and philosophical assumptions and negating the logical coherence and uniformity of the doctrine.

Czesław Martyniak in his research on "pure" theory of law sought to demonstrate that Kelsen not only successfully dealt with the problem of the binding force of law, but he went much further, because he included in his doctrine the view on the discussed issues²⁶.

The critique of the Vienna school was performed in two stages. The preface was followed with general characteristics of the "pure" theory of law, which provided the background for internal critique, by the author referred to as "immanent critique".

Czesław Martyniak consistently places normativism within legal positivism. This way he addresses the contentious issue related to the classification of this political and legal doctrine²⁷. Furthermore, he emphasises that Hans Kelsen, in his

nität und die theorie des Völkerrechts. Beitrag zu einer reiner Rechtslehre"; *Der soziologische und derjuristische Staatsbegriff, Allgemeine Staatslehre; Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, Reine Rechtslehre.*

²⁶ C. Martyniak *Moc obowiązująca prawa...*, p. 46. Makes reference to studies by J. Maritain, *Philosophie et science expérimentale*, in *Cahiers de Pphilosophie de la natue*, Paris 1929, p. 192; E. Kaufmann, *Kritik der neukantischen Rechtsphilosophie*, Tübingen 1921, p. 27.

²⁷ According to Czesław Martyniak, Kelsen represents "a certain persistent type of mentality occurring regularly for centuries. Kelsenism may be the most logical and precise formulation of positivist approach, for years affecting the minds of jurists, but predominantly seen as fascinating in the 19th and early 20th century". C. Martyniak, *Moc obowiązująca prawa...*, p. 2–3. The author points out that in the literature one may encounter numerous concepts: for example K. Lorenz (*Rechts – und Staatsphilosophie der Gegenwart*, Berlin 1935, p. 39) believed Kelsenism represented pure form of positivism, and legal nominalism, whereas E. Kaufmann (*Kritik...*, Tübingen 1931, p. 27–29) referred to this school as metaphysical rationalism or metaphysical logicism, and R. Treves (*Il diritto come relazione. Saggio coritico sul neokantismo contemporaneo*, Torino 1934) applied the term "critical idealism" while talking about the school. Furthermore, one

pursuit of methodological purity, goes so far that negation of existence as a basis for obligation is insufficient; indeed “even an entity subject to an obligation «is purified» to eliminate any elements of the reality: the state becomes a norm, subjective law is a norm, and even man is a norm”²⁸. This way Kelsen ends up with the so-called principle of immanence, according to which everything is a norm. A jurist does not know other norms than norms of man-made law, hence one should not even ask what is the difference between a legal norm and other norms.

A thorough analysis of Hans Kelsen’s works allowed Martyniak to point out a number of ambiguities, doubts and logical errors.

In his opinion Kelsen is inconsistent, and he “trespasses the limits of the pure theory of law” when he uses the term law exclusively with reference to positive law, and he refuses to acknowledge existence of any higher legal order which *lex humana* could draw on. “Pure theory of law can only say: *ignoramus et ignorabimus*, which means it must admit that it cannot resolve the issues lying beyond its limits, and it can by no means do what Kelsen did, that is provide a negative answer”²⁹. Another example of “a leap beyond the outlined limits and an instance of a fanatical methodological doctrinairism” is the thesis on the identity of the state and law. Martyniak points out that sociological research based on causality cannot be refuted in the name of strictly scientific laws. Such negation, in his opinion, is unscientific³⁰.

According to the assumptions of Hans Kelsen’s doctrine, law must be endowed with objective binding force³¹. Objective obligation is to distinguish law from ordinary compulsion. For this purpose, a legal norm should draw its binding force from the binding force of another norm, which already has such force. Consequently, there is an equality sign between the manner law is made and the way the basis for its binding force is determined³².

The theory of basic norm, as Czesław Martyniak emphasised correctly, without doubt, is the crowning achievement of Kelsen’s system and also its Achilles’ heel. This is because it is extremely difficult to define the binding force

can encounter statements that the Vienna school is nothing more than a revival of scholastic way of thinking (F. Brobmann, *Was ist Recht und wo ist es*, Berlin 1935, p. 17). Hans Kelsen referred to his system as “legal positivism and even more so critical positivism, aware of its assumptions and limitations” in the following publications: *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, Charlottenburg 1928, p. 67; *Reine Rechtslehre*, p. 19, 20, 25, 38.

²⁸ C. Martyniak, *Moc obowiązująca prawa...*, p. 65. The author compares jurist to the mythological King Midas; unlike the latter who turns everything to gold, the former puts everything into norms.

²⁹ *Ibidem*.

³⁰ *Ibidem*, p. 84.

³¹ H. Kelsen, *Hauptprobleme der Staatsrechtslehre*, Tübingen 1911, p. 531. Kelsen writes that the issue of the essence of law is tantamount to the question of the basis for applicability of a legal norm (hence, the basis for applicability of a legal order).

³² Cf. H. Kelsen, *Allgemeine Staatslehre*, Berlin 1925, p. 17.

of the basic norm, which reflects the internal contradiction of Hans Kelsen's doctrine. The binding force of the norm cannot be derived from morality, from an absolute value, because, according to Kelsen, it does not exist; it cannot be based on phenomena of the world of being, since reality is separate from obligation. Hence, being a phenomenon from the sphere of obligation, as assumed in the "pure theory of law", the basic norm may only be rooted in another obligation. Czesław Martyniak claims that this clearly reflects Kelsen's relativism and his positivist conviction about a lack of permanent and absolute values. The existence of the fundamental norm is up to us; it can be any single norm we recognize as such. This structure of obligation would be of absolute nature and would violate the adopted approach. Hence, the norm constituting a foundation for the whole legal order is hypothetical (it relates to law as an object of knowledge, and to the problem of the existence of legal science), and relative (as the author wrote, it does not claim to hold any absolute value).

This way the basic norm goes beyond the limits of the system of positive law, because its binding force breaks off with the dynamic principle. This in turn is in conflict with one of the principal assumptions of the "pure theory of law", that is with the narrowing of the research area only to man-made law. The basic norm, as pointed out by Martyniak, is of "non-positive nature", because "the foundation of the whole system providing the basis for its uniformity and binding force, *is situated* outside the system of positive law"³³.

The author of the critique aptly points out the erroneous assumption of the whole doctrine of the Vienna school, where the cornerstone of the legal order, the principle generally unchallenged, remains in question: "that which should have been justified, i.e. the binding force of the basic norm, is raised to the rank of the highest authority"³⁴. Consequently, the separation of obligation and reality, and the binding force of the legal order, is based on an unproven postulate. It is a "normative and metaphysical" concept, and "a kind of imperative in itself, analogous to a thing itself"³⁵. Hence the conclusion of the Thomist from Lublin: *Grundnorm* is in force as long as one believes in it. This approach is the only one that is justified, otherwise we would have to agree that law is based on strength and compulsion. Kelsen's critic is definitely right when he insists that this foundation is too fragile for the imposing edifice of the system of law.

In simple terms one could say that *Grundnorm* loses its binding force "when the reality no longer matches it, and a norm which is in line with the reality becomes binding"³⁶. Deliberations of this type lead directly to the following con-

³³ C. Martyniak, *Moc obowiazujaca prawa...*, p. 108.

³⁴ *Ibidem*, p. 109.

³⁵ *Ibidem*, p. 110. C. Martyniak compares the basic norm to I. Kant's categorical imperative. "One may argue that this simply is a juridical version of categorical imperative which is transferred from the sphere of autonomic morality to the heteronomous domain of law". *Ibidem*, p. 109–110.

³⁶ *Ibidem*, s. 130. Cf. Kelsen, *General Theory of Law and State*, Harvard 1949, p. 115.

clusion: “To be recognised as the basic one, the norm must always be supported by strength; what is more it is deemed to be binding as long as it can get such support”³⁷. Hence, an entity attributed with real strength determines the shape of the basic norm, which is clearly manifested by the legal orders introduced by leaders of winning revolutions. Briefly and generally speaking: strength is law³⁸. Law is made by those who command obedience. Respect for norms is equivalent to their effectiveness. By assumption, the basic norm was to be the highest authority, ultimately however it is a creation of the highest authority, that by Martyniak is identified with the law-maker. Therefore, as consistently emphasised by Martyniak, “the problem of its binding force is reduced to the question who has sufficient power to institute law”³⁹. Hence, an obligation is to abide by orders issued by those in power. This way law is based on “actuality” which was so ostentatiously repudiated by Kelsen.

The theory of the basic norm, according to Czesław Martyniak, leads to the inevitable observation that obligation is shaped based on the reality, and the contents of the basic norm must match the actual behaviour of people⁴⁰. The discussion presented by Martyniak shows that the basic norm is a response to the law-maker’s actions conforming with the public expectations. Hence, there is a relationship between changes occurring in the reality and transformations in the legal obligation. This way the duality of being and obligation is invalidated by Hans Kelsen himself.

Similar comments as those related to the distinction of *Sein* and *Sollen* are offered by Czesław Martyniak with regard to the strict separation of form and content. In this case the methodology-related differentiation is transformed into an ontic opposition. The form and contents are inseparably linked, one complements the other, and together they make up a whole. “Science of law is feasible only if it is assumed that a legal norm has a certain content”⁴¹.

Czesław Martyniak argues that normativism should have stayed true to its methodological assumptions. As a result, it would have avoided many errors, ambiguities and inconsistencies. The suggestion voiced by Czesław Martyniak seems to convey a noteworthy way to maintain the unity of Kelsen’s doctrine and its methodological purity. Furthermore, the doctrine of normativism at times provides a reference point for presentation of the critic’s own position and for suggesting solutions in line with the spirit of the doctrine by St. Thomas Aquinas⁴².

³⁷ C. Martyniak, *Moc obowiązująca prawa...*, p. 130.

³⁸ This idea, brought up by Martyniak, was inspired by G. Husserl. *Ibidem*, p. 141.

³⁹ *Ibidem*, p. 142.

⁴⁰ *Ibidem*, p. 134–135.

⁴¹ *Ibidem*, p. 126.

⁴² In his conclusion to the discussion on the relationship between positive law and natural law, Czesław Martyniak presents his own opinion with regard to that relation. He describes it as: “delegation limited by contents” which shows “association of formal nature”.

Polish critique of normativism in the interwar period was characterised by matter-of-factness, and a constructive approach to the subject. The polemic with Kelsen was not an art for art's sake, nor was it intended to discredit the doctrine or to ridicule its author by showing logical errors or design flaws. In their related studies the scholars, as a rule, focused on one specific issue or a group of problems. This would generally have been linked with editorial requirements and the willingness to perform a detailed and accurate analysis of a given "fragment". Notably, most authors acknowledged the value of Kelsen's scientific work, and the critique voiced by them provided a background for the presentation of their own conceptions.

The most noteworthy critical analysis of the doctrine of normativism published during the post-war period was carried out from the standpoint of Marxism, by Jerzy Wróblewski⁴³.

Contrary to the discussions in the Polish literature related to normativism, based on Thomism and psychology, the Marxist criticism fails to identify any positive value in Kelsen's doctrine. It offers exclusively negative opinion about the "bourgeois science of law". The position presented by Jerzy Wróblewski is connected with the basic assumption of Marxism: the state and law are inseparably linked to class warfare. According to Marxist approach, the state seeks to achieve the domination of the ruling class, and law represents interests of that class. These two institutions, being manifestations of social life, may be studied exclusively "using the only scientific method enabling research of social phenomena, i.e. historical materialism"⁴⁴. If an author takes a different approach, their doctrine is devoid of a scientific value and must be negatively evaluated from the standpoint of Marxism. Hence, given the fact that Kelsen chooses to apply the formal-dogmatic approach, elevating it "to the status of a general juridical theory", he is described as a promoter of "imperialist ideology". The essence of the doctrine of normativism, Wróblewski wrote, is "theoretically defective and politically antagonistic", hence its scientific value is renounced. By abandoning the formal-dogmatic approach, Marxist critique of normativism can demonstrate logical contradictions. This way it is possible to show "the superiority of the Marxist theory of the state and law over the pure theory of law"⁴⁵. Pursuit of methodological purity is perceived as hostility towards Marxism. In accordance with the Marxist approach, normativism represents interests of "bourgeoisie" exclusively, and by defending "the capitalist state and law" it becomes enmeshed with politics. "Hence, the theoretical and legal formalism, promoted as apolitical, scientific, pure, etc., is a political methodology designed

⁴³ J. Wróblewski, *Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena*, Warszawa 1955.

⁴⁴ *Ibidem*, p. 5.

⁴⁵ *Ibidem*, p. 7.

and oriented against historical materialism⁴⁶. Normativism, by itself described as a successor of juridical positivism, applies the formal-dogmatic approach thereby separating science from reality, and turning it into “speculations where the tone is mainly set by phenomenology”⁴⁷.

Like Jerzy Lande and Czesław Martyniak, Jerzy Wróblewski criticises the absolute distinction of the sphere of being and obligation. However, he does that in an entirely different way. The Marxist rhetoric aims to discredit Kelsen’s doctrine, also seeking to reflect a strongly negative approach to the interwar reviews of normativism. The wording used to describe normativism, psychological school in jurisprudence, or Thomistic point of reference in assessment of social reality, clearly reflects a lack of objectivity in the opinions expressed. According to the Marxist approach, this is a doctrine defending “the rotting capitalist society”⁴⁸. Wróblewski claims that by “extracting” issues related to the life of the society, in particular linked to the state and law, Kelsen uses “metaphysical speculation”⁴⁹. He makes reference to doctrines “trying to combat Marxism on the grounds of vulgar sociology and psychology”⁵⁰. He also uses the term “bourgeois” when referring to the Thomist critique of normativism⁵¹.

Marxist critique of normativism is enmeshed in politics. It makes reference to the situation in international politics at the time (the monograph by Wróblewski was published in 1955). This is particularly clear when the discussion focuses on international law. The normativist concepts of international law and its relationship to the legal order in the specific states are believed to be at the service of imperialism. “The cloak of pacifism, and hostility towards the concept of sovereignty on behalf of the future *civitatis maximae* under American rule are an excellent illustration of the political and class-related meaning of the pure theory”⁵².

At each stage of the Marxist critique of normativism it is emphasised that warfare is conducted by “bourgeois humanism” against Marxism in order to “eliminate scientific foundations of the proletariat’s class struggle”⁵³. “Pure theory of law is not pure as far as its purity from politics is concerned, or as regards the purity of methods of fighting with its opponents”⁵⁴.

Kelsen’s separation of the spheres of being and obligation is in conflict with Marxist approach, since it suggests there is no relation between law and the base of the life of society. “Conceptual speculations” separating the state and law from

⁴⁶ *Ibidem*, p. 68.

⁴⁷ *Ibidem*, p. 294.

⁴⁸ *Ibidem*, p. 245.

⁴⁹ *Ibidem*, p. 11.

⁵⁰ *Ibidem*.

⁵¹ *Ibidem*, p. 168.

⁵² *Ibidem*, p. 210.

⁵³ *Ibidem*, p. 35.

⁵⁴ *Ibidem*, p. 227.

the sphere of *Sein* exclusively in favour of *Sollen* deprive social beings of superstructure which is due to them. The method of cognition cannot create the object of knowledge⁵⁵. Given the broad spectrum of social phenomena, the only legitimate method for researching the social reality, according to Jerzy Wróblewski, is the method of dialectical and historical materialism. It also enables analysis of “the anatomy of a capitalist society”⁵⁶. The arguments supporting criticism and showing a lack of logical consequence in the juxtaposition of ontology and epistemology are cited directly from works by Joseph Stalin: “science cannot live and make progress without recognising objective regularities, without studying those regularities”⁵⁷.

According to Marxists, law is a product of a society which is at a given stage of development. It is an element of the superstructure to the base, subject to objective rules of social development. These objective laws of development are defined by historical materialism. “It was Marxism that first discovered these laws of social progress, while investigating the laws governing the capitalist economy, and it identified the important causes and origins of social patterns”⁵⁸.

Law is seen by Marxism as both a goal for and a tool of the ruling class. Hence, like the state, law is also a “political category”⁵⁹. Normativism, “ignoring the purpose of the state and law”, conducts “an assault on the materialist discovery of the class nature of the state and law”⁶⁰. Only in a socialist community can law be equated with morality, because of “the unity of law and morality, resulting from the lack of antagonistic classes, and from the fact that law is a manifestation of the will of the whole society, just like morality”⁶¹. Analysis of Kelsen’s doctrine leads Marxists to a conclusion that law means strength, most of all political strength. On the other hand, the basic norm provides a “blanket” authorisation for issuing “legal regulations of any kind”, i.e. conforming with the goals of the ruling class⁶². Identification of law with the state leads to anthropomorphisation of the legal norm: law is instituted by obligation rather than by man; the state is a system of norms rather than an institutionalised form of social life⁶³.

Quintessential for the critique of normativism with regard to the basic norm and formalism of the “pure theory of law” are the following words:

⁵⁵ *Ibidem*, p. 40. Cf. J. Wróblewski, *Niektóre zagadnienia teorii państwa i prawa w świetle pracy J. Stalina, Ekonomiczne problemy socjalizmu w ZSRR*, „Państwo i Prawo” 1953, no. 7.

⁵⁶ J. Wróblewski, *Krytyka normatywistycznej teorii...*, p. 41. With regard to that J. Wróblewski refers to: J. Stalin, *O materializmie dialektycznym i historycznym. Zagadnienia leninizmu*, Warszawa 1954; W. Lenin, *Materializm a empirokrytycyzm* [in:] *Dzieła*, vol. 14, Warszawa 1949.

⁵⁷ J. Stalin, *Ekonomiczne problemy socjalizmu w ZSRR*, Warszawa 1953, p. 139.

⁵⁸ B. Bierut, *Przemówienie na naradzie aktywu PZPR w Warszawie dnia 4.11.1952*, „Nowe Drogi” 1952, no. 11, p. 4.

⁵⁹ A.J. Wyszyński, *Zagadnienia teorii państwa i prawa*, Warszawa 1952, p. 108.

⁶⁰ J. Wróblewski, *Krytyka normatywistycznej teorii...*, p. 153.

⁶¹ *Ibidem*, p. 158.

⁶² *Ibidem*, p. 184, 222.

⁶³ *Ibidem*, p. 236–237.

„The concept of the basic norm and the dynamic system of law is a construction in which comes to light the final bourgeois theory of the period of imperialism, built on the formal-dogmatic method; this is an evidence of the fact that formalist speculation based on metaphysical separation of the content and form of law, on separation of law from the phenomena which it serves, and whose product it is, ultimately must lead to the issue of the binding force of a legal system, to a question which remains a question although it is removed into the meta-legal domain”⁶⁴.

The type and form of the state met with particular criticism from the Marxist standpoint. In critique, Jerzy Wróblewski also presents assumptions of Marxism in a way typical for propaganda: “We fight for socialism because it is a better system than capitalism, because it is not based on abuse of others, contrary to all the earlier systems involving exploitation”⁶⁵.

The presented critiques addressing the assumptions of juridical normativism are characterised by originality resulting from the point of reference adopted by each author. All the critics use a similar approach where they point out inaccuracies of Hans Kelsen’s assumptions, however they present different arguments to support the proposed theses.

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Summary

The article introduces the reader to the main theses voiced by opponents of Hans Kelsen’s theory. Notably, the review focuses on the most original achievements which can be found in the related Polish literature; these include the critical comments by Jerzy Lande drawing on the prem-

⁶⁴ *Ibidem*, p. 183.

⁶⁵ *Ibidem*, p. 247.

ises of juridical psychologism, the Thomistic critique of the Vienna School's assumptions authored by Czesław Martyniak, as well as Marxism-based criticism by Jerzy Wróblewski. All of the critical reviews address the basic norm and the separation of being and obligation. Each concept uses its own argumentation when critically evaluating specific assumptions of Hans Kelsen's legal normativism. Notably, the critical comments formulated by Jerzy Lande and Czesław Martyniak, by no means aimed to discredit the doctrine, contrary to the approach adopted by Jerzy Wróblewski.

Keywords: legal normativism, Jerzy Wróblewski, Czesław Martyniak, Jerzy Lande, Hans Kelsen, pure theory of law, Vienna School

POLSKA KRYTYKA NORMATYWIZMU HANSA KELSENA

Streszczenie

Artykuł przybliży czytelnikowi główne tezy głoszone przez oponentów teorii Hansa Kelsena. Należy podkreślić, że wybrano najbardziej oryginalne dokonania, na jakie zdobyła się polska literatura przedmiotu: wychodzącą z założeń psychologizmu prawniczego krytykę autorstwa Jerzego Landego, tomistyczną negację założeń szkoły wiedeńskiej w ujęciu Czesława Martyniaka oraz marksistowską krytykę Jerzego Wróblewskiego. Elementami wspólnymi każdego krytycznego stanowiska staje się norma podstawowa oraz rozdział bytu i powinności. Każda z koncepcji przy krytycznej ocenie poszczególnych założeń normatywizmu prawniczego Hansa Kelsena posługuje się właściwą sobie argumentacją. Podkreślić należy, że krytyka normatywizmu sformułowana przez Jerzego Landego oraz Czesława Martyniaka w żaden sposób nie zmierzała do naukowej dyskredytacji tej doktryny, w przeciwieństwie do koncepcji Jerzego Wróblewskiego.

Słowa kluczowe: normatywizm prawniczy, Jerzy Wróblewski, Czesław Martyniak, Jerzy Lande, Hans Kelsen, czysta teoria prawa, „szkoła wiedeńska”