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KISTYAKIVSKYI'S PHENOMENON OF LAW

What is the philosophy of law and what does it study? It should be noted that there were different approaches to the philosophy of law and its subject in the history of philosophical and legal thought. For example, George Hegel believed that it is a philosophical science of law, which has as its subject the idea of law. Ukrainian philosopher Bohdan Kistyakivskyi understood the philosophy of law as the doctrine of socio-cultural, humane essence of law. Scientists distinguish two major approaches to the philosophy of law science substantiation – historical and contemporary. The historical approach is based on the fact that these issues always disquieted the mankind throughout its existence. The philosophy of law is an ancient science which has a rich history. It is important to elucidate the formation of history of the Ukrainian philosophy of law and the main tasks of major periods.

The aim of the article is to analyze Kistyakivskyi's doctrine about the concept and essence of law, to investigate the methodology of Kistyakivskyi's law, to highlight different approaches as well as to study the essence of law and the synthesis of comprehensions in early XX century.

History Overview

It should be noted about the significant contributions that were made by professors from *Kyiv-Mohyla Academy*, Kyiv St. Volodymyr University, Universities in Kharkiv, Novorosiysk (Odesa), Lviv. In particular, such scholars as C. Dnistrianskyi, B. Kistyakivskyi, O. Ogonovskyi, E. Spektorskyi, V. Starosolskyi, F. Taranovskyi, A. Fateev, P. Yurkevich, K. Yarosh set up the theoretical basis of theory of law in late XIX – early XX century. The significance of studying historical and philosophical heritage of Ukrainian philosophers of law is caused by the necessity of conceptual understanding of problems of the philosophy of law and development of modern law. In fact, the deep study of law philosophy will contribute to the development of in-depth holistic and systematic knowledge of the law. Scientific works analyze important aspects of methodology of cognition and research of the philosophy of law.

“Three worlds” about Kistyakivskyi

Bogdan Aleksandrovich Kistyakivskyi (1868–1920) could be considered as the founder of Ukrainian philosophy of law. The life of Kistyakivskyi can be embodied in „the three worlds” – Ukraine, Russia and Germany.

Kistyakivskyi studied in Kiev, Kharkiv, Dorpat Universities (1888–1892), from which he was excluded because of the participation in the Ukrainian cultural and educational circles. He was arrested for the propaganda of Marxist ideas in 1892. From 1895 he continued his studies in Berlin, Strasburg, Heidelberg universities. He wrote and successfully defended his doctoral thesis on „Community and Individual” (1898). German philosophers, sociologists appreciated the thesis of B. Kistyakivskyi. Among the supporters of Kistyakivskyi’s theory there were such prominent scientists as G. Kelzen, H.Yelinek, M.Weber.

Bohdan Kistyakivskyi was a dean of Law Faculty in Kiev University. Together with V. Vernadskyi, N. Vasilenko and F. Taranovskyi he was the founder of the Ukrainian Academy of Sciences where he was at the head of the scientific foundation (1919–1920). The eminent scholar was known for his journalistic and publishing activities. Kistyakivskyi published „Political works” (1908) which was written by Drahomanov with his own preface.

In his letters to B. Kistyakivskyi, F. Taranovskyi noted the importance of the publication of his extensive work for legal science and a valuable source for the writing of textbooks in teaching activities. F. Taranovskyi mentioned that B. Kistyakivskyi published a book *The Science of Law. Methodological Introduction to the Philosophy of Law*. E. Spektorskyi and A. Fateev considered the need to revive the publication of *Legal Bulletin* which was published by B. Kistyakivskyi and kept its significance as “valuable gift”, “the spirit” of comprehension and sense of law as well as “a living, life-giving and creative power”.¹ According to F. Taranovskyi, Kistyakivskyi’s research works are valuable because of their reliability, objectivity and epistemological and methodological pluralism.

Ukrainian scientists such as M. Vasilenko, S. Dnistrianskyi, B. Kistyakivskyi, F. Taranovskyi, M. Palienko, E. Spektorskyi, A. Fateev, K. Jarosz taught and studied history and problems of philosophy of law, mainly advancing their own hypotheses and arguments for their interpretation. The magazine „Yuridichesky Vestnik” launched a discussion about the crisis, including law, created by the collapse of the old theories and development of new views on the law. One of the areas of discussion was the comprehension of crisis of justice and inherited theories about state and law. B. Kistyakivskyi, who edited the journal in 1913–1917, emphasized that lawyers should confidently defend

¹ Кистяковскій Б. А., *Соціальныя науки и право. Очерки по методології соціальных наук и общей теорії права*, М. 1916, с. 97.

the principles of the autonomy of law and jurisprudence. Only this way in law theory can become a strong pillar of modern intellectual culture. This idea is relevant today. Although the beginning of the XXI century significantly varies from the previous century in the socio-cultural, political and humanitarian dimensions, in order to understand the complexity of current debates, opinions that were expressed in the past regained their special significance.

N. Polishchuk considers the creative contribution and importance of B. Kistyakivskyi in the context of Western culture. She notes that the period of the philosopher should be considered in the context of „local intellectual narrative”.² So the period of late nineteenth and early twentieth century is characterized by a variety of Western European thinking, which is also true about B. Kistyakivskyi and identifies his intellectual achievements and significance in the development of Ukrainian national culture.

Some Comments on Kistyakivskyi’s theory of law

The period of the late XIX – early XX century is characterized by the intense intellectual stress, collision of conflicting approaches in cultural studies, philosophy, politics, law. In the early twentieth century many lawyers and philosophers have formulated the task of creating the science of law. Kistyakivskyi emphasizes that the development of the science of law is very important to the philosophical thinking in general. He shares Kant’s view that the definition and subject matter are complex, since it belongs to the philosophical concepts. Therefore, analyz-

² Поліщук Н. П. *Плюралістична методологія Б. Кістяківського у контексті західноєвропейської інтелектуальної культури початку XX ст.*, „Виміри людського буття: логіка, методологія, семіотика культури. Філософські діалоги „, вип. 1, Київ 2009, с. 277.

ing the work of Kant, „Critique of Pure Reason”, Kistyakivskyi notes that the definition of right is philosophical, this is based on the principle of freedom:

„In modern terms this definition is usually expressed in a formula: the right is a set of rules that establish and differentiate the freedom of individuals”³.

Kistyakivskyi made a point of Kant’s definition of right in the work of “The Science of Right” which is the first part of “The Metaphysics of Morals”. Kant defines the right, based on the principle of freedom. This definition is formulated as follows:

“Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom”⁴.

That right is a set of rules that establish and differentiate the freedom of persons under the requirements of the categorical imperative of morality. Right does not only limit the freedom, but also protects and provides it and opposes violence. It traces the purely philosophical definition of right. Legal relations are external to the relationship between people objected in certain words and actions. Right, by Kant’s definition, restricts the freedom of every person, in agreement with the freedom of all others, to the extent possible under certain common law. Considering the statements of Kant on the right as a philosophical concept, Kistyakivsky called attention to the potential acquisitions of thought about the philosophy of science of law.

³ Maksimov S. B. *Kistyakivsky – an outstanding Ukrainian philosopher of law*, „Bulletin of the Academy of Sciences of Ukraine”, вип. 1, 1997, p. 233.

⁴ Kant, *The Science of Right*. Edinburg 1887, p. 264.

This view is not consistent with the true concept of law and the science of the right over the past century.

According to B. Kistyakivskyi, the order which establishes the law is always reasonable, fair and it guarantees freedom. Also, the law is stipulated both with the reason and theology. In general, law, as a phenomenon, is unique despite its diversity. Therefore, all knowledge of law is needed to be synthesized. The result of this synthesis should be disclosure of the essence of law and its understanding. In synthesis, revealing the essence of the law, general law intersects with the philosophy of law. The way for synthesizing philosophy of law is found in the philosophy of culture but not in the humanities.

The philosopher of right convincingly argued that the science of right belongs to the realm of the humanities, thus it should not be focused on one of the humanitarian discipline or on their complex, but on the philosophy of culture primarily. And only through the philosophy of culture the science of right focuses on the humanities, which are combined with the same philosophy in a system of scientific knowledge. Thus, the philosophy of law is possible to be disclosed through integrating analytical and synthetic knowledge in general philosophy and the philosophy of culture in particular.

Kistyakivskyi defines main tasks of science of law as the following: a) there is a strictly difference between legal dogmatic law and theory of law due to they should be separated; b) an explanation of essence of law according to causal and teleological determinations; c) a research of transcendental and empirical aims; d) to analyze mind as intellectual purpose and morality as ethical purpose; e) to explain ethical aims such as freedom and justice.

In Kistyakivskyi's view, the scientific attitude considers a law as teleological phenomenon. It means finding the aim of law in itself, as the aim determines the essence of law. According to Kistyakivskyi science of law as cause determined phenomenon, it may be researched by two approaches: social

and psychological. By social approach the causal social relations between individuals and social groups, their interests, competition, reconciliation are studied in order to analyze and find elements, which concern imperative nature of law experience.⁵ As a result phenomenon of law ought to be perceived as complex phenomenon. Not only is law teleological phenomenon but it is also psychological and social. It is human estimation of aims that makes law various and diversified. In this respect, Kistyakivskyi marks out aims which determine essence of law:

- Empirical (heterogeneous), which organized commune life;
- Transcendental, which belong to mind;
- Rational, which determined the essence of law (as law embodies all intelligence in commune life);
- Ethical, which embodies freedom and justice.⁶

Kistyakivskyi argues against the XIX century idea about the law which conveyed only one aim – freedom. In his opinion, law embodies two aims: freedom and justice. That is the reason why Kistyakivskyi reckones ethical aims as the most important ones.

Kistyakivskyi was interested in methods enabling to study the essence of law. In terms of humanitarian sciences, he admitted that there was no strict methodology. Scientific scholarship is obtained in virtue of subject classification but not by scientific methods.⁷ In order to obtain scientific scholarship on essence of law, the notion of law should be defined as social-science, psychological, normative, state-organized. According to Kistyakivskyi ideas, every notion must be defined separately but not systemized and united.

⁵ Кистяковскій Б. А., *Соціальныя науки и право. Очерки по методології соціальных наукъ и общей теоріи права*, М. 1916, с. 674.

⁶ Ibidem, p. 678–680.

⁷ Ibidem, p. 681.

The most controversial issue is what the realm phenomenon of law belongs to. Therefore, Kistyakivskyi says there were four ways in theory of law: state coercive, social, psychological and normative.

Regarding state coercive way, the main feature of law is the state monopoly which establishes norms and controls their execution. Law is contained of government-guaranteed commands. The coercive element is the main to reveal the essence of law and consequently this trend is named as “imperative or government-command phenomenon”.⁸

Social way explains law “as social phenomenon which embodies relation between people and is reserved by community”.⁹ Kistyakivskyi distinguishes some particular qualities of law: law appeared before state did and thus it can exist without state; it does not matter whether there will be done any interventions of state in voluntary fulfillment legal norms; law-making occurs not in law-making institutions but in societies where law is in prospect where it arises and ripens; agency of states are grounded on legal norms, which are founded by constitution. Therefore law is not direct consequence of regulatory and monitory acts of governmental power. Act of governmental power is the external cover of present law order. In this case, the social trend in science of law does not concern the issue on the essence of law.¹⁰

The third way with regard to Kistyakivskyi is psychological. Kistyakivskyi points out features of psychological trend: a) law is voluntary phenomenon and solely psychological; b) law is emotional stress.

Kistyakivskyi concerned that social and psychological ways determined science of law. Normative notion defines science of law as teleological phenomenon which is intellectual and

⁸ Ibidem, p. 375.

⁹ Ibidem, p. 375.

¹⁰ Ibidem, p. 376.

axiological simultaneously. Kistyakivskyi insisted the phenomenon of law not to be only social, or only psychological, or government-command.¹¹

In his philosophical and legal concept of B. Kistyakivskyi the general principles of scientific knowledge about the law are analyzed. He revealed law as a social phenomenon, which expresses the culture of the society, based on a pluralistic approach and complementary methods. The basic approaches to the understanding of the right correspond to four concepts of law. He defined them as methodological approaches that meet four sides of cross-law and act as cultural phenomenon.

Kistyakivskyi noted that the social sciences and philosophy may influence development of the law, but they do not have to absorb or take the place of law. Philosophical approach reveals the theoretical and practical purpose of law, which is to achieve the results. Thus, the philosophy of law as a specific field helps to comprehend and solve cognitive and ethical problems of law, but does not substitute it. Notably on the relationship of philosophy of law, legal theory, law, sociology, law, psychology, law, anthropology, law, political rights, was written by Kistyakivskyi, should be developed in a holistic and synthetic knowledge of law.

Current issues Ukrainian philosophy of law

Making complete and systematic exposition of the philosophical and legal concept of Kistyakivskyi, Alchuk summarizes the relevance of his views for the formation of modern Ukrainian state.¹² Kistyakivskyi revealed the development of the philosophy of law by Russian liberal intelligentsia, representatives of which sought to overcome historically rooted

¹¹ Ibidem, p. 682–683.

¹² М. Альчук, *Філософія права Богдана Кістяківського*, Львів, 2010, 300 с.

contempt of law and insufficient development of the legal domain and overcome the crisis of the early twentieth century jurisprudence. The importance of the principle of autonomy of law and jurisprudence of Kistyakivskyi is pointed out. He believes that the revival of philosophy in the nineteenth century in Neo-Kantian variant contributed to the development of scientific knowledge about law. Nowadays, the same trends are observed in post-Soviet world because these processes are still topical for Russia and Ukraine.

Ukrainian scientists consider law as diverse polyphonic phenomenon that exists in different forms and types. With the proclamation of independence of Ukraine in the 90's, courses in the philosophy of law have been introduced in higher educational institutions. M. Alchuk, V. Babkin, A. Baumeyster, V. Bachynin, W. Bigun, A. Bandura, M. Bratasiuk, O. Grischuk, D. Hudyma, M. Damirli, L. Depenchuk, K. Zhol, A. Kozlovskyi, M. Kostytskyi, V. Kuznetsov, S. Maksimov, P. Rabinovich, S. Slivka, V. Shkoda explore the history of philosophical and legal thought in Ukraine, philosophical and legal methodology, the ontology of law, epistemology of law, axiology of law, philosophy of human rights. The history of legal philosophy, methodology and purpose of science, the correlation between the theory and philosophy of law, current philosophical and legal problems are revealed in books, dissertations, encyclopedias, scientific articles, and manuals.

The teaching of the philosophy of law is very important in Ukraine nowadays. It does not only aim at solving specific problems of law, but helps researchers, philosophers or law, to understand their own standpoint clearly, to organize their knowledge, to look at their subject from a different prospective. In particular, the fundamental problems of law find their solution or at least their argumentation on the philosophical level. In this lies the complexity of the phenomenon of law, and this feature determines the fundamental role of philosophy of law in the system of jurisprudence.

The current issues in Ukrainian philosophy of law are defined and discussed by Community organization of *Ukrainian Association of Philosophy of Law and Social Philosophy* was founded in 2002. The aim of the association is a formation of principles of law and social sciences which are based on the ideas of the rule of law, democracy and human rights. Ukrainian Association includes the national section of the *International Association of Philosophy of Law and Social Philosophy* (IVR). Since 2003 the International theoretical journal *Problems of Philosophy of Law* has been published. The pages of the magazine include debate among philosophers and lawyers on the ratio of philosophy of law and general theory of law and state, philosophical and legal methodology, dualism of natural and positive law, the opposition of right and law. Annual national round table on *Anthropology of Law: Philosophical and Legal Dimensions (Status, Problems and Perspectives)* has been held since 2005 in Lviv. Ten meetings with the assistance of scientists and experts in the field of the philosophy of law, lawyers and legal practitioners have been held. A lot of articles written by the members of the meetings have been published in scientific collections. A Laboratory of investigation of theoretical problems of human rights and Department of Theory and Philosophy of Law have been established at the Faculty of Law which provide the opportunity to discuss and address issues of anthropology of law, human rights. Ivan Franko National University of Lviv has launched anthropological and legal research in Ukraine. It can be asserted that philosophical and legal school of anthropology of law has been created in Lviv.

