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THE ANTI-POSITIVIST ORIENTATION OF UKRAINIAN PHILOSOPHICAL AND LEGAL THOUGHT OF THE LATE 19th AND EARLY 20th CENTURIES

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INTRODUCTION

The contemporary history of the meta-European community is largely conditioned by technocratic, rational-centric thinking, formed in the era of scientific revolutions, intense industrial development, the creation of large-scale social projects, etc. As S. Prolieev points out, "it was a world of powerful mobilizations of different types – purposeful and rapid concentration of resources, practices, institutions, people and awareness on the implementation of large-scale socio-economic and socio-political projects and programs. Utopias were the most grandiose projects of the twentieth century, followed by the social state of prosperity project"[1].

Positivism as a specific method of cognition would not have been possible without a Western European mentality, a rationalist tradition that originated in ancient culture, and the socio-cultural realities of the Western European goal of the modern-day ethnos. Positivism appeals to a subject-sensory experience, but it is a form of Western European rationalism, which has taken extreme forms, become a self-contained and a singular rationalism.

The modern era believed in the omnipotence of the mind, in the ability of qualitative improvement of humanity by the means of rational thinking, believed in social engineering, which had to end with the mass enlightenment of everybody. V. Soloviov, "The meaning of all historical development of mankind, according to positivism, is that positive knowledge and life forms, which are based on it, have to finally replace and destroy the theological and philosophical, or metaphysical"[2]. That is, positivism is rationalism, purified from a worldview, value, subjective dimension, it is cold, sober, indifferent to humanistic content, self-assured mind. It was fused with a culture of quantity, which in the 19th century in Western Europe was intensively formed by people infected with the bourgeois virus, practical people, with the psychology of free entrepreneurism and business initiative. These were representatives of the

[1] Пролєєв С. Соціально-політичне самовизначення сучасного українського суспільства. *Філософська думка*, 2018, № 6. С. 85.

[2] Соловьёв Вл. Вера, разум и опыт. *Вопросы философии.* 1994. С. 127. http://philosophy1.narod.ru/www/html/library/vopros/63.html

European bourgeoisie, which politically dominated over other social strata, sought to enrich oneself "in a business way", and this became to some extent their lifestyle.

"Positivism is the rationalism of reason, which enumerates, calculates, compares, measures, cuts off, prepares, and imposes on it all its utilitarian forms, in which the meanings and values of human being are not fit in"[3]. Positivism embodied an "accounting mindset" (M. Heidegger), which has become a powerful factor in the life of the modern era. M. Berdyaev noted that it was an "anti-Renaissance phenomenon and a crisis of humanism", "some inhumane act of cognition, purified from everything humanistic"[4]. The above mentioned M. Heidegger wrote: "The question" What is thinking?" is clarified by the question "What causes thinking?", which sends us to being. Being turns to thinking, has a need in it, needs it, and thinking is a response, a recall to this call of being, co-conformity with it[5]. Such thinking, which would be in harmony with being, would organically grow out of it was destroyed in Western Europe of that time. Life testified that the positive knowledge embodied by the "positive" sciences was the result of a narrow pragmatic projection of the spirit serving a grounded near self-interest.

Positivism in the period under study had a significant impact on humanitarian knowledge. The legal branch of knowledge was no exception. It is positivism that become the theoretical and methodological basis of legalism, a legal doctrine that has effectively replaced law as a universal human phenomenon with an act, which is an artificial phenomenon dependent on partial interest. Considering that the legal (legalistic) doctrine has successfully served undemocratic, totalitarian regimes, it becomes clear that rationalism and positivism as a method, specific ideology and practice are incompatible with democratic values and principles that affirm them. And as the legalistic interpretation of law, its forms and manifestations continue to influence the legal sphere of life in current Ukraine and, therefore, slow down democratic processes and legal reforms, it becomes clear how important this topic is for us today, and therefore requires scientific reflection.

The Ukrainian legal tradition has felt positive influences. They were particularly noticeable in the Soviet era when legal positivism was used by totalitarian power to secure its domination. But the expansion of positivism into the legal sphere of Ukrainians was very noticeable at the end of the

[3] Братасюк М.Г.Антропоцентрична теорія права. Київ, 2010. 395 с.

[44]Бердяев Н.А. Смысл истории. М., 1990. С. 126. https://platona.net/load/knigi_po_filosofii/filosofija_istorii/berdjaev_smysl_istorii/29-1-0-1944

[5] Хайдеггер М. Что значит мыслить? Разговор на проселочной дороге. Избранные статьи позднего периода творчества. М.: Высшая школа. 1991. С. 134–146. http://www.odinblago.ru/haideger_razgovor/

nineteenth and early twentieth centuries. Many representatives of this field have become real translators of positivist positions both in jurisprudence and in legal practice. However, the most notable figures in Ukrainian philosophy of law remained in the positions of natural law, which formed an alternative to legal positivism, the logistic paradigm of thinking. Such figure was Ivan Franko, in whose works there is a great interest in law and various manifestations of legal reality.

1. The philosophical and legal views of Ivan Franko and positivism

The researchers note that I. Franko, who lived and worked in the era of mass admiration of positivism by scholars, also did not escape from its influence and considered a number of issues of the social and philosophical plan from the standpoint of a positivist approach. This is indicated by such scholars as: V. Artiukh, I. Zakhara, N. Horbach, O. Vozniak, A. Potseluiko, etc[6]. However, there are many reasons to support V. Artiukh's position, which emphasizes that blind copy of positivism was not peculiar to I. Franko, that he "freely" dealt with the achievements of positivism[7]. An even more balanced position, considering the problem of connection between scientific and artistic creativity of I. Franko with positivism, is taken by I. Zakhara, who noted that "Ivan Franko was not a positivist in the classical sense of the word, but he could use a lot of interesting things corresponded to his thoughts and beliefs, getting acquainted with the works of representatives of this philosophical direction"[8]. The above mentioned V. Artiukh emphasizes that Ivan Franko, has shared the positivist mindset, identified it with the scientific one.

Taking into account the above-mentioned positions of positivist influences researchers on I. Franko and his works, it is difficult to agree with the position of M. Miroshnychenko and V. Miroshnychenko that I. Franko "considered the problems of law and political life of Europe of that time / ... / from the

[6] Див.: Артюх В. Позитивізм в історіософії Івана Франка. *Українське літературознавство.* 2011. Вип. 74. С. 86–92; https://institutes.lnu.edu.ua/franko/wp-content/uploads/sites/7/ukr-literaturoznavstvo/74_2011/74_2011_v.artiukhl.pdf Захара І. Позитивізм у соціальній філософії Івана Франка. *Іван Франко – письменник, мислитель, громадянин:* М-ли міжнародної наукової конференції (львів, 25-27 вересня 1996 р.), Львів: Світ, 1998. С. 180–185; Мазепа В.І. Культуроцентризм світогляду Івана Франка. К., ПАРАПАН, 2004. 232 с.; Возняк О., Поцелуйко А. Вплив позитивізму на соціально-філософські погляди Івана Франка. *Молодь і ринок*. 2016, № 11-12. С. 58–60. http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=Mir_2016_11-12_14

[7] Артюх В. Позитивізм в історіософії Івана Франка. С. 91–92. https://institutes.lnu.edu.ua/franko/wp-content/uploads/sites/7/ukr-literaturoznavstvo/74_2011/74_2011_v.artiukhl.pdf

[8] Захара І. Позитивізм у соціальній філософії Івана Франка. С. 180–185.

positions of positivism and "social Darwinism"[9]. The philosophical and legal perspective of the thinker's works belongs to the poorly developed ones, therefore, it needs research, which "will enable to present I. Franko as a thinker who, with all his commitment to science as the embodiment of rationalism, did not allow positivism to absorb himself completely and remained in the line of Ukrainian natural and legal tradition"[10].

In order to understand better, as a matter of fact, from what position the thinker considered philosophical and legal problems, let us consider the basic provisions of legal positivism. Analyzing the crisis of Western European society, E. Husserl emphasized that "the causes of the tensions of a rational culture lie not in the essence of rationalism itself, but only in its distortion by "naturalism" and "objectivism"[11]. This "naturalism" and "objectivism" appeared in full growth in a legal (legalistic) paradigm. The positivist approach involves the construction of society via rational norms, rules, laws, programs, etc.; the society has to become scientifically organized, the constructive part of philosophy has to be assimilated by science, and the metaphysics has to disappear as such that has no practical value. The scientist has to be an impartial, sterile, free from philosophical and ideological knowledge and attitudes, indifferent to the life-purpose and valuable meanings subject. All the features are inherent in legal positivism. A characteristic requirement of legal positivism is the total negation of the connection of jurisprudence with human philosophy, with all manner of metaphysics. Representatives of legal positivism emphasized that the law should be empirical, sensually-substantive, fixed, and not a metaphysical and ideal phenomenon. The only possible and correct, in their view, is only the state, positive right – as opposed to the natural, so called negative law. Negative, because it is unwritten, indeterminate, speculative, metaphysical, etc.

Only state law is worth to be investigated, as it is a priori correct, so the evaluation and critical analysis of it were denied by positivists. Thus, from a positivist point of view, law emerges as a purely state and power, political phenomenon, and as a form of existence of universal values, a universal, common to all mankind human phenomenon, it essentially disappears. Legal positivism emerges as a state-centric position that elevates state and law as the embodiment of its authority over a person and his or her rights. The

[9] Мірошниченко М., Мірошниченко І. Історія вчень про державу та право. К., Атіка, 2001 179.

[10] Братасюк М.Г. Філософія права у творчості Івана Франка: юснатуралізм vs позитивізм *Вісник Львівського університету . Серія філософські науки.* 2019. Випуск 21. С.79-89. https://filos.lnu.edu.ua/wp-content/uploads/2019/10/21_2019.pdf

[11] Гуссерль Э. Кризис европейского человечества и философия. *Вопросы философии.* 1986. № 3. С. 115. http://www.infoliolib.info/philos/gusserl/crisis.html

contemporary of I. Franko, the Russian positivist G. Shershenevich emphasized that the philosophy of law should not strive "… to reveal beyond the legal phenomena the eternal idea of law revealed by sense. The scientific philosophy of law builds its concepts only on positive law. Its construction should be the result of only observations of the phenomena of real life. The philosophy of law should not put under real notions its ideal perceptions, disguising the law as what in its opinion should be law"[12]. So, no legal ideals.

Researchers note that one of the main ideas of positivism is to explore not the substantive side of law, but to elevate the formal, external side over it. Because the value and meaning dimension of law is denied by positivists, it is important to declare the form, not the content of the law, which can be arbitrary. Law from the standpoint of legal positivism is a set of behaviour rules – some norms that are given to an individual objectively, being created by state power, and do not need justification. This position of legal positivism actually leads to the equalization of law and act, and it is impossible to distinguish them in this case. Positivist study of only the formal side of law is, in fact, a substitute for the actual scientific study of law by formal and technical description.

In legism, the law is seen as a purely empirical, material, instrumental, state and political phenomenon, that is, an act that is considered self-sufficient, as the state is. Since from the standpoint of legalism in law (act) there is no value-semantic dimension, it is necessary to appreciate its coercive-power essence, that it is the embodiment and expression of the power-state command. "The letter of the law" becomes more important than justice, freedom, human dignity, and so on. No attention is paid to the extent to which the content of the state-government normative act by the legists. "On the basis of the principle of the identity of law and act, the legists assert and justify the lawful wrongfulness, that is, any violence of power over man", – some scientific sources emphasize[13].

Law is a universal spiritual and cultural phenomenon that is denied by legal positivism. The biggest drawback of this doctrine is the humiliation of man before the state and the law, the denial of his or her natural rights and universal values. In legalistic legal thinking, a person is given a minimum of space. In it, he or she remains face-to-face with the state, which predetermines his or her unequal position in advance and increases her experience of social defeat. Legism is a nonhumanist legal consciousness, and therefore it is incompatible with democratic values and unfit to serve democratic social relations.

[12] Див.: Шершеневич Г. Философия права. М., 1911. С. 20; Шершеневич Г.Ф. Общая теория права. Вып. 1. М., 1910.

[13] Братасюк М.Г. Антропоцентрична теорія права. Київ, 2010.

With all the affection for positivism, Ivan Franko, in the philosophy of law, is most drawn to the people's legal life at the time when the official legal science dominated by positivism did not pay attention to it. The greatest value for I. Franko is not the power and its laws, but the "true, living man", because he is the bearer of the spirit, which "tears the body to a battle" for the happiness and will of everyone. Within the field of view of the thinker is constantly the real life of the Ukrainian person, his/her existence in natural and rural as well as urban environments, his/her existence, his/her inner world.

He senses this person with all the fibers of the soul, intently looking into his/her natural essence. From the pages of his works his characters appear in harmony with nature, they are among it, with it. He has a deep understanding that the Man, the Nature, the Space and the Life are inalienable and closely interconnected. I. Franko recognizes the right for everything, all cosmic forms. For him, the natural rights of the man, people, different social groups are obvious, organic, inalienable.

Franko's man is "rooted" in nature, he gives the human status one of the forms of being, which is most closely connected with other forms such as: nation, people, social groups. These are all phenomena of the cosmic order. For I. Franko, the natural-legal personality is the basic philosophical and legal characteristic of the man. Human rights are determined by human nature, human being. Their realization means becoming a full-fledged human personality. The idea of natural legal capacity belonging to a person (D. Hudyma), that is, the possession by a person of inalienable natural rights, has long and thoroughly existed in the Ukrainian folk justice and this fact testifies that Franko's philosophy of law is formed on the basis of the Ukrainian natural and legal tradition: "Am I a man who has no right for life like they have? They did not give me light and science, and I had to study in criminality what I would have learned in school among the children"[14]. I. Franko's deep understanding of this problem forces him to become a fighter for these rights.

I. Franko appeals to peasants' culture and way of life, which is coexisting among nature, the peasants' vision to the artistic reflection of the organic nature of the Ukrainian peasantry, its harmony with nature, which is one of the characteristic features of the Ukrainian outlook and natural legal tradition, "which emphasizes on such meanings of law as: the absolute value of human life, human dignity, justice as the principle of cosmic being, the metaphysical beginning, the absolute value that is the purpose of law; legal equality,

[14] Чайковський А.Я. Хто винен : оповідання. Олюнька : повісті та оповідання. Львів : Каменяр, 1966. С. 44–62. С.62. https://www.ukrlib.com.ua/books/printit.php?tid=4553

freedom, good, common good, etc., which are the criteria for the validity of any element of legal life, etc."

All these meanings are enshrined in principles, which in the broad sense are right. Because "for positive law, as opposed to natural law, absolute value has only been declared as absolute value by the state power"[15]. Scholars say that Franko's views were an alternative to the legalistic view on law, which identified the law with the act, asserting state-governmental permissiveness, did not distinguish between legal law and unlawful, interpreted legal consciousness as an act of consciousness, turning a person from a subject to an object of the state legal influence, etc. I. Franko denied state-centrism in law, so his views were not shared by the jurisprudence authorities of that time[16]. In the work "Cross pathes", the author, expressing his sincere affection for the lawyer Rafalovych, submits his vision of the real lawlessness of the Ukrainians in the Austro-Hungarian Empire: "How ironic in Yevhenii's ears were the lush phrases about the independence of the judiciary, the illegitimacy of the judges, the strict legality of their actions and the high sense of justice of the various tribunals, which so often lawyers like to use in their speeches…", because important investigations are carried out "everywhere in Halychyna under the instructions of the prosecutor and via him usually by the orders of the political authorities." Because every tribunal in Halychyna has judges, often the majority, who "hide their conscience in their handfuls, but sharpen their ears the most vigilantly to what the prosecutor says."

I. Franko understands well the problem of importance of the independent court for the people, so he writes with bitterness that the distinction between the judiciary and the administration as the first basis of a truly independent judiciary "... we have only on a paper, but in reality this is an ideal to which we are very far away"[17].

I. Franko, deeply awares of the importance of the court for the protection of human rights, the rule of law, shows the alienation of the people from the judiciary through the image of "bringing someone to court", which, as it turned out, was "a terrible threat to the people's concept, greater than when someone boasted about it: "Behold, I will smash your head with a stone" ... He, who went to court, at least one hundred times, the truth was on his side, trembled and considered himself unhappy, because "no one is sure of the

[15] Братасюк М.Г. Антропоцентрична філософія права…С. 102-103.

[16] Павлусів Н.М. Філософсько-правові погляди західноукраїнських письменників кінця XIX – XX ст.: дис. …к. філос. н.: 12.00.12. Київ, 2011. 225 с.

[17] . Франко І. Перехресні стежки : повість. *Украдене щастя : вибрані твори.* Х. : Фоліо, 2007. (Українська класика). С. 285–286. https://www.ukrlib.com.ua/books/printit.php?tid=658

lord's court"[18]. And further, "... whether rightly or wrongfully won the case, no one wrote about it"[19], because courts in the empire had become places of manipulation of people and a privileged group of few people. Franko's idea of an independent court as a regulator of legal relations and a defender of law as justice is relevant to modern Ukraine no less than a century ago.

Being committed to such ideals as selfless work, the common good, justice, legal equality, etc. Ivan Franko, having become the defender of the disenfranchised and oppressed Rusyns, reaffirms this mission, in Regina's words to lawyer Rafalovych: "You are a lawyer. You are the defender of the offended"[20]; "a lawyer and a doctor do not choose clients"[21]. The commitment to these ideals is expressed in the following lines: "You are Rusyn, and Rusyns are on their own. You are a man of sense, so you are an idealist. I am sure that you have higher goals in front of you, you are trying to go up and lead others behind you…"[22].

I. Franko established himself as a national thinker, absorbing in his entirety all the best achievements of the culture of his people, including legal, from which natural law boils down to compulsory principles that express fundamental ties of being, meet the interests and needs of man that are primary in relation to state, positive law. Natural law is interpreted as the Law of Nature, the Law of Life, which is unacceptable to violate, since it will cause the destruction of the foundations of being a nation, people, and individuals[23]. The core of the naturalistic tradition is the above mentioned human values, which, in contrast to the legist tradition and its values such as state, law, punishment, order, discipline, responsibility, etc., have a strong humanistic potential[24].

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[18] Франко І. Перехресні стежки : повість. *Украдене щастя : вибрані твори*. Х. : Фоліо, 2007. (Українська класика). С. 285–286. https://www.ukrlib.com.ua/books/printit.php?tid=658

[19] Там же. С. 286.

[20] Там же. С. 363.

[21] Там же. С. 373.

[22] Там же. С. 246.

[23] Див.: Принцип верховенства права має нерозривно пов'язуватись із основними невідчужуваними правами людини, в яких матеріалізується ідея справедливості. – Інтерв'ю з М. Козюброю. Верховенство права. Законодавчий бюлетень. К., IREX U-Media, 2005. С. 33–38; Братасюк М.Г. Природно-правова парадигма як концептуальна основа сучасного правового розвитку Доктринальні засади розвитку держави і права: національні та національні та міжнародні тенденції: монографія /заг. ред. проф. Бошицького Ю.Л. К.:Видавництво Ліра- К, 2014. 440 с.; Градова В.Г. Ідея верховенства права в українській правовій традиції: дис. … к.ю.н.: 12.00.12 Київ, 2013. 251 с. https://mydisser.com/en/catalog/view/6/825/13423.html

[24] Див.: Радбрух Г. Философия права. М., 2004. 230 с. https://www.studmed.ru/view/radbruh-g-filosofiya-prava_a62d91f054b.html.; Нерсесянц В.С. Философия права. М.: Норма – Инфра. 1997. 647 с.

I. Franko does not accept violence in any form, he condemns arbitrary Austrian laws and judgments that have defied law. He gives the image of a judge, who embodies a repressive rather than a restorative nature: "The judge was "sharp "... and God ordered all judges to be "sharp" to scold the accused, order gendarmes, threaten prison and gallows"[25] He was disturbed by the lawlessness of the peasants before the arbitrariness and impunity of officials who could "... willfully, without understanding their instructions, shackle the peasants summoned to court in the nature of witnesses[26] this gentleman, has not even been called to the court for a repeated hearing"[27].

The thinker conveys the tragedy of the situation of his hero, he is a Ram, who fell into the hands of a court turned into a purely arbitrary-repressive body. At stake there is the life of a person, but the litigants act quickly, mechanistically, coldly and indifferently: "The prosecutor desires the gallows, the tribunal goes out and delivers a verdict in a quarter of an hour: death by hanging"[28].

The thinker is aware that limiting the arbitrariness of power is a way of enacting fair laws. He upholds the idea of a legislature – a parliament elected by the people on the principles of equality and commonality. Franko's understanding of the complexity of the rule of law is deep enough. He raises the problem of the quality of state power, on which the implementation of equitable legislation depends on. He notes that "a lot will depend here on whether the authorities themselves wil unlawfully act and cause deliberate provocation to push people out of the legal way"[29]. All these ideas are relevant to modern Ukraine, aren't they?

Franko's philosophical and legal reconnaissance gives reason to conclude that he was a deep expert of the legal culture of his people, so legal positivism did not become his position in legal matters. The ideas of natural law sound in his works very clearly, the principles and values of natural law are affirmed and protected. I. Franko continued and in the period under review, he developed the Ukrainian natural and legal tradition that has more than a thousand years of history.

2. Legal positivism and philosophy of law of B. Kistiakivskyi

A striking representative of the Ukrainian philosophical and legal thought of the late nineteenth and early twentieth centuries is B. Kistiakivskyi. As a scientist, he, like many other Ukrainian scientists, was influenced by

[25] Франко І. Перехресні стежки : повість . С. 277. https://www.ukrlib.com.ua/books/printit.php?tid=658

[26] Франко І. Перехресні стежки : повість . С. 277.

[27] Там же. С. 175–176.

[28] Там же. С. 341

[29] Там же. С. 341.

positivism in his works, but, thanks to his wide erudition, sound European education and the influence of the Ukrainian natural and legal tradition, he did not become a positivist in legal science. Although there is a position in the scientific literature that makes B. Kistiakivskyi a representative of this area. In one of the sources we can read: "Kistiakivskyi stressed that the state is the sole creator of legal rules. As the sole creator of the legal norms, it is bound to abide by the legal norms it has created"[30]. The emphasis on state monopoly in legal rulemaking is inherent in the positivist approach, which, as we saw above, promotes state-centrism. We will try to disagree with the position that attributes B. Kistiakivskyi to the representatives of this approach, since there are a number of reasons for this.

In particular, B. Kistiakivskyi's understanding of the methodology of jurisprudence attests to his rejection of legal positivism as the only legal methodology. He emphasized that legal science should be based on the totality of the humanities, which are embodied in philosophy, and not just on the formal and dogmatic descriptive approach, as the positivists have emphasized. And in continuation of this thought he emphasized that at the level of descriptiveness it cannot be the pre-existing science of law, and dogmatic jurisprudence is a science only descriptive, and with regard to the general theory of law, its task is to be a deep theoretical science that explains the value-meaning characteristics of law[31].

B. Kistiakivskyi proposed methodological pluralism in jurisprudence, as he believed that it was possible to grasp law as a whole because of this complex approach, especially emphasizing the philosophical and cultural approach, thereby favoring the understanding of the law not as empirical, state-political phenomenon, on which positivists insisted, but as a spiritual and cultural phenomenon. Legal positivism eliminates all metaphysics and idealism in law, but for B. Kistiakivskyi they are the organic features of law[32], so he emphasized the need for the philosophical preparation of the lawyer, his appeal to the idealistic and philosophical approach, believing that without it to grasp adequately the law as a cultural and civilization phenomenon is impossible[33].

Just as P. Yurkevych did not accept materialistic nonhumanist philosophy, which became the basis of Marxism and devoted all his work to the

[30] Мірошниченко М., Мірошниченко В.Історія вчень про державу і право. С. 185.

[31] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму.* Політико-правові вчення та верховенство права. К. 2008. 992 с.

[32] Кистяковскій Б.А. Наши задачи *Юридическій Вестникь.* М., 1913. Кн. I. С. 3–17.

[33] Кистяковскій Б.А. В защиту научно-философского идеализма. *Вопросы философіи и психологіи.* https://runivers.ru/upload/iblock/055/Voprosy%20filosofii%20i%20psixologii.%20Kniga%2086%20p1907nirued229sr.pdf

affirmation and defense of philosophical idealism, which carries a huge humanistic potential as an ideology and method of cognition, as well as B. Kistiakivskyi directed his creativity against positivist jurisprudence, which, having put as a doctrine, a system of state-centric ideas and the same methodology, elevating the state and law (system of norms) over man and law, has become an instrument of humiliation and destruction of individual man by state power[34].

As an anti-positivist, B. Kistiakivskyi is described by his interpretation of law as a socio-cultural phenomenon. He did not accept the thesis that the law was entirely dependent on economic and political forces (it is relevant for modern Ukraine, isn't it?), in every possible way emphasized its autonomy, as well as the autonomous nature of jurisprudence.

The idea of inalienable human rights is clearly expressed in B. Kistiakivskyi's works, and this is another evidence of his natural and legal position. He is aware that it is impossible to implement the rule of law without recognizing the inalienable natural human rights. Speaking against the monopoly of the state in the legal sphere, the scientist wrote: "The inherent rights of the human are not created by the state; on the contrary, they are inherently directly assigned to a person. Freedom of conscience comes first among these rights inherent directly to man"[35].

This principle is impossible beyond recognition by a person of inalienable, inviolable and indestructible rights. While defending the primacy and determination of man in relation to the state, B. Kistiakivskyi raised the problem of the human right to a dignified existence and provision not only of civil and political rights but of social ones, that is, the human right is to require from the state to provide him/her with appropriate conditions of economic and spiritual existence.

The thinker has devoted considerable effort to developing the concept of the rule of law. This problem did not occur by chance. Previously in the legal science there was a concept of the rule of law as such, which was governed by the law that embodied the authority of power[36]. It is also a positivist state centrist concept, which was not accepted by B. Kistiakivskyi. In his view, the rule of law is a state, where the most inalienable natural human rights are recognized and realized, and in this position the scientist asserts himself

[34] Братасюк В.М. Правосуб'єктність індивіда в легістській доктрині. *Держава та регіони.* Науково-виробничий журнал. Серія: Право. 2018 р., № 3 (61). 200 с. С. 196–200. http://law.stateandregions.zp.ua/archive/3_2018/35.pdf

[35] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму.* Політико-правові вчення та верховенство права. К., 2008. 992 с. С. 846.

[36] Див.: Шершеневич Г. Философия права. М., 1911; Шершеневич Г.Ф. Общая теория права. Вып. 1. М., 1910.

definitively as an adherent of the natural and legal paradigm in law, which was an alternative to the logistical-positivist one.

A person has the right not only to think anything and to believe anything; he/she has the right to express himself/herself freely, to defend and to disseminate himself/herself verbally and in writing. For this reason, a person has the right to communicate freely, so among the essential rights of a person recognized in a constitutional or legal state, freedom of association and freedom of assembly are one of the most essential rights. "People have the right to gather freely, to organize societies and unions", – he wrote[37]. All these rights would be a sight if the rule of law did not recognize the person's integrity.

Considering the person as primary one in relation to the state, developing the concept of the rule of law embodying the rule of human rights, B. Kistiakivskyi asserted the idea that the rule of law would not happen without the restriction of state authorities' powers. "The limit of power in the rule of law, – as the thinker wrote, – is created by the person's recognition of inalienable and inviolable rights". In a constitutional or legal state, "it is first recognized that there is a sphere of self-determination and self-expression of a person to which the state is not entitled to interfere"[38] In a state governed by law, "the powers of the state authorities to stop the violation of law are placed within the strict limits[39] These lines are more than spoken. Apparently, in anticipation of the threat of the Bilshovyk police regime, B. Kistiakivskyi tried his best to defend human dignity and human rights by declaring them inviolable, inalienable and indestructible.

Developing the concept of rule of law, which should be embodied in the state of law, the scientist wrote that "… administrative power, or more precisely, police cannot deprive a person of freedom for a term of more than two or three days. During this time, it must either release the arrested person or transfer him/her to the hands of the judiciary"[40]. Today we call it the principle of legal certainty, which prevents the arbitrariness of the authorities. The scientist believed that due to the inalienable rights and inviolability of the person, the state power in a legal or constitutional state is not only limited but also strictly subordinated by the law. B. Kistiakivskyi obviously knew the rule of law doctrine developed by A. Daisy[41] Based on the above mentioned ideas,

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[37] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму*. Політико-правові вчення та верховенство права. К., 2008. 992 с. С. 846.

[38] Там же. С. 847.

[39] Там же.

[40] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму*. Політико-правові вчення та верховенство права. К., 2008. 992 с. С. 747-748.

[41] Див.: Дайсі А. Вступ до вчення про право конституції. *Антологія лібералізму*: політико-правничі вчення та верховенство права. К.: Книги для бізнесу. 2008. С. 511–528.

we can assume that the thinker clearly distinguished between law and act, denied their identity, and, therefore, also distinguished between the principle of the rule of law and the principle of legality, which attests to its complete divergence with the legalistic and positivist doctrine.

Similarly to A. Daisy's views, denying state-centrism, state-power monopoly in law, B. Kistiakivskyi associates the rule of law with real democracy. (It is relevant for modern Ukrainians, who have the power of the people in all its glory!) He states that: "Public authorities are only truly bound by the law when they are opposed by citizens with public rights." And further: "… there is no doubt that securing lawfulness in the face of common lawlessness is a true illusion. In lawlessness, only administrative arbitrariness and police violence can flourish. Legality implies strict control and complete freedom of criticism of all actions of the authorities, and for this recognition for the individual and society of their inalienable rights are required.

Consequently, the consistent provision of lawfulness requires, as a supplement, the freedoms and rights of the individual and, in turn, naturally follows from them as their necessary consequence"[42] So, firstly – right, then – law as its consequence! And this is quite consistent with A. Daisy's idea of positive law (act) as a consequence of natural human rights. It means the law is primary and decisive with regard to state law, that is, legislation is an assertion quite opposite to the positivist "the letter of the law" that is higher than a person, his or her dignity, rights, justice, etc.

The state of law in B. Kistiakivsky's works is a state of people and democracy in essence, a state in which the rule of law, not the law, is secured. Thanks to popular representation and human and citizen rights, which guarantee the political activity of both individuals and social groups, "the whole organization of the state of law has a social or national character"[43]. Its main function is to ensure and protect the human right to a decent life. Without democratic movements from below, without active implementation of law and order and state interests, the state of law is impossible. The key to the implementation of the state of law, according to B. Kistiakivskyi, is a high people's consciousness and a strongly developed sense of responsibility: "In the state of law, the responsibility for the proper functioning of law and order lies with the people themselves. But precisely because the concern for the state and legal organization rests with the state of law on the people themselves, it is indeed an organized, that is, orderly state"[44] B. Kistiakivskyi

[42] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму.* Політико-правові вчення та верховенство права. К., 2008. 992с. С. 848-849.

[43] Там же. С. 854.

[44] Там же.

was the antipode of such a state, considered the state as a police one and directed scientific criticism against that state, treating it as the embodiment of violence against a person.

Unlike the police state, the state of law excludes the possibility of anarchy, – he wrote, – because in it people carried on their shoulders all legal and state organization[45].

Working in a direction of Ukrainian natural and legal tradition, the thinker defended the concept of people's natural right to their national identity, mother tongue, territory, state, etc., that is, the natural right of people to be the masters in their own state. Similarly, in developing the doctrine of the state of law, the Englishman A. Daisy emphasizes that the law, which a king must obey, is the law of England, its people. For B. Kistiakivskyi, the rule of law is also not the rule of positive one, because it is impossible to exhaust law in the state ; it exists in various forms. Obviously, it refers to the people's natural right to its truth. And it is impossible to confirm this truth without democracy, which is emphasized by the thinker. In a state of law, "power must be organized so that it does not oppress the individual; in it, both the individual and the totality of individuals – the people – must be not only the object of power, but also the subject of it", the scientist emphasized[46].

Developing the idea of the rule of law, not the act, B. Kistiakivskyi noted that "… by resisting the state, the law, at the same time, gradually obliges it to obey the legal orders and to abide them. Following this way, law is expanding its dominance over the state. At the end of this process the law rebuilds the state and transforms it into a legal phenomenon"[47]. He argued that only a modern constitutional or legal state can claim the status of a state created by law. A. Daisy's rule of law doctrine and B. Kistyakovsky's concept of the state of law as a state, in which the principle of the rule of law is implemented, differ only terminologically, but their essential features are identical.

CONCLUSIONS

Summarizing the study of the problem of the anti-positivity orientation of Ukrainian philosophical and legal thought of the end of the 19th and early 20th centuries, we can say that the Ukrainian philosophical and legal thought, represented by the works of I. Franko and B. Kistiakivskyi, attested the devotion of these thinkers to the natural and legal paradygm, the heirs of the

[45] Там же. С. 854.

[46] Кістяківський Б. Соціальні науки і право. *Антологія лібералізму.* Політико-правові вчення та верховенство права. К., 2008. 992 с. С. 855.

[47] Там же. С. 849.

Ukrainian youth, which have over a thousand years of length, and their rejection of legalistic and positivist positions that are not organically inherent in Ukrainian legal culture. This rejection is manifested in the natural and legal interpretation of rights as a universal phenomenon, focused on a set of universal principles that affirm such universal values as: man and his/her life, dignity and honor, natural inalienable human rights, good, justice, freedom, common good, etc. These thinkers distinguished between law and act; upheld the principles of recognition and protection of human rights, the principle of the primacy and determination of human rights and their inalienable rights in relation to the state and its legislation; emphasized the principle of fairness and accessibility of court; interpreted the state of law as a state, where the rule of law and not the act is implemented; developed the idea of an inseparable link between the principles of rule of law and democracy, etc. These ideas and regulations are distinctly humanistic, in contrast to the ideas and provisions of legal positivism as a paradigm aimed at elevating state power and the law over man and his/her rights.

This anti-positivist orientation of the philosophical and legal ideas of the Ukrainian thinkers of the period under study was the complete opposite of the imperial Austro-Hungarian, Russian, and subsequently of the Soviet-Bilshovyk pseudo-law science and practice, which were based on the positivistist and legalistic repressive doctrine.

SUMMARY

The article reveals the problem of the anti-positivist orientation of Ukrainian philosophical and legal thought of the late 19th and early 20th centuries. During this period, official Russian Empire legal doctrine, denying the human's rights, thus asserted the monopoly of autocratic will, its rule of positive law.

At the center of the Ukrainian jus tradition is the idea of natural law as a set of mandatory principles that express the fundamental connections of being that are in line with the interests and needs of man and are primary in relation to state, positive law. The universal values is the core of the Ukrainian naturalist philosophical thought: life, human dignity, honor, justice, freedom, equality of the subjects of law, goodness, common good, truth, truthfulness, etc., which, in contrast to the legist tradition and its values: the state, the law, punishment, order, discipline, responsibility, etc., have a powerful humanistic potential.

In the eyes of the thinkers is constantly fate the Ukrainian person, its existence in the natural-rural and urbanized environments, its inner world. They feel a very good person, his characters are in harmony with nature, his natural essence, they are between them, with them. They have a deep understanding of the fact that Man, Nature, Cosmos, and Life are

interconnected, that this is the concept of one order. Franko's "roots" man in nature, gives human status one of the forms of being, which is closely related to other such forms: the nation, people, social groups.

Similar views we find in B. Kistyakivsky creativity. I. Franko and B. Kistyakivsky protected natural human rights, universal values, rule of law.

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