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PHILOSOPHY OF BORIS KISTIAKOVSKI. LESSON OF THE IDEA OF STATE OF LAW FOR CONTEMPORARY AND FUTURE GENERATION

Boris Kistiakovsky was the Ukrainian philosopher of law whose considerations about the idea of the state of law can have immortal value. Kistiakovsky is the member of the legal school called Russian liberals. The idea of these group assumed changing of the tsarist system without using false revolutionary methods. However the difference between Kistakovsky and many of liberals was connected with his support for idea of the free develop of the Ukrainian nation. Kistiakovski wasn't indirectly in favour of Ukrainian independence. He support idea of multinational empire. However he saw the necessary element of such state in the rights of national freedom to all nations of empire. Ukrainian nation should gain all tools of free national development in the new model of state¹. In my article I would like consider the Kistakovski's philosophy of law. In my opinion this philosophy doesn't lost actuality in the contemporary Middle-Eastern Europe.

The school of Russian liberalism promoted idea of the building state of law in Russian empire. Liberal was against tsarist despotism. However they were also in the sharp conflict with revolutionist. State of law should included unquestioned human rights. But from the other hand the idea of human rights shouldn't be sacrifice for realization of the idea of the abstracted will of nation or or the will of people. The idea of the state of law should be base on the respect for dignity of individuals. Liberal was in conflict both with tsarism and revolutionist. The revolutionist accused them of support regime. These group was also divided. Some between them was in favour of natural law as Pavel Novogredcev or in favour of religious rebirth as Volodimir Soloviov. To this group is included also Leon Petrazycki with his theory of psychological school in law². But all of them support evolution of Russian empire to the model of the state of law.

Kistiakovski was fascinated by the school of neokantianism. Another than his counterparts from the camp of liberals he had his own time of the marksist's fascinations. But by all time he try connected the idea of social human rights with strongly respect for constitutionalism³. Even in the time when he was member of marksist camp he was inspired only by they philosophy of economics⁴.He praised

1 S. Heumann, *Kistiakovsky: the struggle for national and constitutional rights in the last years of tsarism*, p.13-48. Cambridge 1998.

2 A. Walicki, *Filozofia prawa rosyjskiego liberalizmu*, Warszawa 1995, passim.

3 S. Heumann, op.cit, p.13-48.

4 A. Walicki, *Filozofia prawa...*, op.cit, p.369-434.

marksist for explored stable economical theory. From the other hand he rejected the social revolution. He saw the social justice idea realization in the respect for constitutional legal principles¹.

Kistialovski's philosophy included elements of psychological, sociological, analytical and normative orientation². We must remember that in his time the strong legal positivism was totally dominated in the legal discourse. Positivists perceived law as the independent value which can be the tool of the social change. The most important value in positivist's discourse "stabilization of law" needs in such interpretation separation of our understanding of law from moral values. In other words law can be the effect of will of sovereign which are not the results of social moods in this time. The philosophy of Kistiakovski was more sociological orientated. He convinced that legal system should be rooted in social system and social moods of the time³. The society was established before the legal system. For that reason law is the effect of the social development but not the tool of forced social changes. Changes can be made also in accordance with values. But from the other hand the Kistiakovski's philosophy was also normative. He doesn't questioned the necessity of the legal norms which are the quarantine of the mature society. This social develop should be protect by the stable system of legal regulation⁴. We can see that Kistiakovski was the member of the sociological and normative school. He rejected positivism but his system wasn't voluntarist and Kistiakovski was in favour of legal stability. According to Andrzej Walicki the whole school of Russian liberals is very interesting. They rejected positivism due to its lack of respect for the moral values. But from the other hand they were in favour of legal stability⁵

The considerations about role of Russian intelligentsia are very important part of Kistiakovski heritage. He accused the Russian intelligent of legal nihilism and voluntarism. In XIX century the very popular between Russian intelligentsia point of view assumed messianic and forcing social changes even for the price of "necessity victims" These social changes should lead to the social reform and social progress. But this progress was worth social costs included even the acceptance of necessity of victims of such change. At the beginning of XX century Kistiakovski was editor of the *Viekhi* newspaper when philosopher also for example the young Mikola Berdayev tried to project the reform of Russia without revolution⁶. Kistiakovski expected the grow of the legal conscious of Russian intelligentsia. Although he was for social justice he defend the necessity of respect for constitution. He very sharp criticized intelligentsia. According Kistiakovski intelligent when they project social changes totally not respect the rule of law⁷ The group of *Viekhi* was in sharp conflict with Lenin. This philosopher foresaw the future cruelty of revolution. Lenin attacked *Viekhi* as "the agents of tsarism". But the Kistiakovski accusation of Russian intelligentsia was fully justified in the light of future crimes of communist. He convinced that Russian intelligent want to build "better world" without respect to law. In the opposite he proposed social change even slower but deeply rooted in the respect for law. Ukrainian philosopher foresaw that lack of respect for law is equal wit the replace of one tyranny by

1 S. Heumann, op.cit, passim.

2 <http://osvita.ua/vnz/reports/sociology/12673/>.

3 A. Walicki, *Filozofia prawa*, op.cit, p.369-434.

4 *Ibidem*.passim.

5 *Ibidem*,p.369-434.

6 *Ibidem*.

7 S. Heumann, op.cit,p.79-99.

other. But the proposition of Kistiakovski and his counterparts from the Viekhi group haven't chance in the discourse with radical revolutionist. Russia was going to revolution and there aren't chance to avoid its cruelty. At the end of this point we must once again quoted Andrzej Walicki. Walicki perceive that another than other author of Viekhi Kistiakovski hadn't seen future of Russia in religious revival. However Walicki perceived also the common platform between Kistiakovski and Viekhi. It was rejection of voluntarism and revolution¹

Kistiakovski was also philosopher of human rights. He defend the necessity of respect for both political and social rights. In his point of view it is impossible to difference human rights and respect only some of them. As we wrote Kistiakovski perceived social revolution and the improving of the situation of workers and peasants in social reforms in constitutional state. In his opinion such state much respect human rights. Stability of law in the constitutional state is the quarantine of social reforms realization. The respect for normative aspect of law is the connection between Kistikovski and positivist. However in place of abstractive will of sovereign which can do everything Kistakovsky prefer the state which is able to protect basically human rights. In such point of view Kistiakovski is similar to for example other neokantian philosopher Gustaw Radbruch. Radbruch also was situated in the philosophical spectrum between positivism and natural law². He was also neokantian. From the other hand both philosopher rejected the hard version of neokantianism represent by Hans Kelsen³. Both Radbruch and Kistiakovsky perceived law as the instrument of realization democratic and social equally state. In my opinion it wasn't divorce with legal positivism but its improvement⁴. Law still should be stable but the most controversial separation of law and morality seem to be solve in the more mature way than in Hart or Austin philosophy. To sum up Kistiakovski proposed philosophy of stable legal system as the quarantine of the social progress and social reforms. The triumph of liberals in Russia legal discourse can saved Russia against communist regime. However the reality was cruel.

Together with his counterpart Mykhailo Drakhomanov Kistakovski tried to realized the idea of constitutional system on the Ukraine. The Ukrainian revolution from the period 1917-1921 was totally different than Russian⁵. Hetmanat try to realize social reforms and democratization without violence and cruelty which characterized Russian revolution. The first Ukrainian statehood was based on the respect for constitutionalism and human rights. As stated Ivan Rudnicki some people accused hetmanat that it were too leftish and progressive, some about far conservatism⁶. But both Ukrainian both Polish historic convinced that this first Ukrainian statehood was totally different than Russian barbar revolutionary project. It was conflict between Ukrainian emigrants. Some of them are in favor of the back to the vision of hetmanat. But some proposed the back to the voluntarist ideology of Dmytro Doncov. In my opinion the thought of Doncov was the Ukrainian example of the spirit of 30-th in all Europe. It was time of negation of

1 A. Walicki, *Filozofia prawa*..., op.cit, p.369-434.

2 J. Zajadło, *Dziedzictwo przeszłości: Gustaw Radbruch: portret filozofa, prawnika, polityka i humanisty*, Gdańsk 2007.

3 J. Zajadło, *Formuła Radbrucha; filozofia prawa na granicy pozytywizmu prawniczego i prawa natury*, Gdansk 2001.

4 The same Jerzy Zajadło *Gustaw Radbruch Formuła Radbrucha*..., Zajadło classified Radbruch's philosophy in the middle between positivism and natural law.

5 I. Licak-Rudnicki, *Istoriczni ese*, passim, Kyiv 2004.

6 *Ibiden*.

the principle of the state of law and fascination by nationalism and voluntarism. This spirit turned Europe into the war. When we condemn the Doncov ideology we must remember about tragedy of the nation who have three enemy. Moreover such conception based on voluntarism and nationalism was created also in Poland. Ideology of the Boleslaw Piasecki Falanga was similar with the vision of revolution projected by Doncov. But from the other hand Ukraine should decidedly rejected the condemnation of hetmanat with was the heritage of the Doncov ideology¹. In his work he condemned this time of Ukraine history as the “soft Bolshevism²”. I think that tradition of this democratic first statehood is the tradition which in many aspect can inspiring contemporary Ukraine. It is fact that Ukrainian society is in the different part of history than for example Poland and the Czech Republic. The danger for the existence of the independent state caused fascination by ideas of national heroism and sacrifice. It is completely understandable and this sacrificed of the young Ukrainian people such visible in revolution of dignity or during contemporary war can be inspiring for many people in all Europe. But the idea why Ukraine people fighting with Russian chauvinism lied in the effort of building democratic, modern state. And in this aspect ideas of Kistiakovski, ideas of hetmanat can be very inspiring for Ukrainian people.

However not only for Ukrainian people idea of hetmant can be inspiring. In Poland we can observe back to proposition of the voluntarist comprehending of law³. However such experiment in history always lead to the tragical results. Many people in our country prefer fast social changing than realization of the conception of state of law. However before we start a experiment with realization of the *will of nation* we should remember the Ukrainian-Russian discussion about constitutionalism. The history of the country when the conception similar to Kistakovski vision had won in XX century and the results of the winner of his ideological counterpart should be a memento.

From our contemporary point of view also one other Kistiakovski's idea can be very interesting. He convinced that constitutionalism need legal mentality of citizens. Citizens must have conscious of they rights and must realize they rights. The opinion of Petrazycki was similar. Petrazycki also support the grow of legal mentality⁴. According him the conscious of the right of petition to court in England can be inspiring for Russian citizens. After 27 years of transition in Middle Europe we know very well that democracy need citizens. The period between first world was was in many ways similar to our reality. For that reason, knowing they later experience, we should listen the great philosopher of that time very very carefully.

1 *Ibidem*.

2 D. Doncov, *Za aku revoluciu*, Lviv 1990.

3 <http://osvita.ua/vnz/reports/sociology/12673/>.

4 A. Walicki, *Filozofia prawa.....*, op.cit.