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FOREWORD

Today more than a hundred specialized legal journals and collections are annually issued in Ukraine, publishing thousands of scientific articles from various branches of legal science.

In 2008 by the decision of the Presidium of the Academy the nationwide scientific periodical – the Yearbook of Ukrainian law was founded, in which the most important legal articles of academicians and corresponding members of the National Academy of Legal Sciences of Ukraine, as well as research associates, who work in the Academy's research institutions and other leading research and higher education institutions of Kyiv, Kharkiv, Donetsk, Lviv, Odesa, are published.

Yearbook aims to become a guide in the field of various scientific information that has already been printed in domestic and foreign journals during the previous year. «Yearbook of Ukrainian law» is a unique legal periodical dedicated to the widest range of legal science's problems striving to become a concentrated source of modern scientific and legal thought on current issues in the theory and history of state and law, constitutional, criminal, civil, economic, international and other branches of law, that has no analogues in Ukraine. The journal's pages contain modern legal concepts and theories of the further development of Ukraine as a democratic, social, law-governed state, full of the most provoking contemporary ideas, fundamental and substantial issues of jurisprudence.

The selection process of articles is carried out by the branches of the Academy (theory and history of state and law, state-legal sciences and international law, civil-legal sciences, environmental, economic and agricultural law, criminal-legal sciences), which combine leading scientists and legal scholars from all over Ukraine.

From 2014, the Yearbook of Ukrainian Law is published in English. Each issue of the English version is sent to more than 70 law libraries of the world, including USA, Canada, Australia, Great Britain, Germany, Portugal, Switzerland, Norway, Denmark, Latvia, and Lithuania. This enables scientists from other countries to get acquainted with the problems relevant to Ukrainian legal science, both the general theoretical, as well as different branches of law, modern Ukrainian legislation and practice, to provide opportunities for international scientific cooperation.

Honorary President of the National
Academy
of Legal Sciences of Ukraine
V. Ia. Tatsii

THEORY AND HISTORY OF STATE AND LAW

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LEGAL UNDERSTANDING IN UKRAINIAN JURISPRUDENCE: TOWARDS AN INTEGRATIVE APPROACH

Integrative jurisprudence is a direction of modern legal science and legal practice, based on the perception of law as a holistic and multidimensional social phenomenon, designed to serve as an effective regulator of social relations, the guarantor of fundamental human rights and freedoms [1].

Formation of integrative jurisprudence as one of the actual legal concepts became the answer to the comprehensive differentiation and specialization of legal knowledge, which threatened the loss of a holistic vision of law, an understanding of its role and functions in society. After all, each area of legal research became more and more self-sufficient, obtaining its own argumentation and a special conceptual expression that led not only to theoretical discussions but also to some extent the principal incompatibility between the main schools of legal thought – natural, positive, historical and sociological.

The stratification of legal concepts and relevant theoretical arguments «eroded» the content and structure of legal science, provoked a certain level of distrust in the jurisprudence, its conclusions, and recommendations, devalued the significance and capability of law as a universal social regulator, which could not but affect its ability to influence the streamlining of social relations, prevention and resolution of social conflicts.

The urge to perceive the law as a holistic and versatile social phenomenon was conditioned by the updating of methodological foundations and tools of modern scientific knowledge. First of all, it is about understanding the priority methodological pluralism in the study of phenomena of social reality, because reality itself as a social fact is

not exhausted by only unilateral characteristics. Instead, it must be investigated from a variety of points of view and with the use of a number of methodological techniques and means, each of which denotes only a specific method of cognition, one of the ways of acquiring knowledge, thus bringing it to a comprehensive understanding.

The broad social context of the scientific study of legal reality is a challenge in the search for a «new legitimacy of law», which leads to a cognitive situation where no theoretical construction itself can serve as an adequate reflection of the social world and therefore, by its definition, cannot claim to be uncontroversial truth or absolute objective reality. At the same time, each legal theory, reflecting certain essential features of the law, gives the ability to synthesize them, thus representing such a complex and multidimensional phenomenon. Accordingly, different study approaches should be considered as necessary important components of the cognition of law and must be integrated into a coherent scientific representation of the legal world.

The need to rethink the science of law principles of jurisprudence was conditioned by a change in the cognitive parameters of the legal design of society. The complication and differentiation of social reality contributed to the emergence of the need for generalized legal knowledge. Accordingly, the general theoretical legal discipline created in the late nineteenth century had its direct objective set on the elimination of legal research beyond the scope of the encyclopedic description of law by restricting the knowledge about the most significant norms of various branches of law in one discipline. Formed in this way the general theory of law, distancing itself primarily from natural law concepts, was viewed in the context of cognitive priorities of its time as «solely a subject of positive science.» The terrible consequences of the Second World War substantiated the need to shift the emphasis on the perception of the legal component of social life to a search of values, instead of concepts, norms, and ideologies, which relied on the «apparent neutrality of legal terms and rules».

To achieve a holistic vision of law, we must first overcome the dualism of natural and positive law as the most controversial and «irreconcilable» views on law, its essence, meaning and social purpose. Under any circumstances, the natural law concept is intended to become the rational basis of positive law, providing the development of the basic concepts that should form the conceptual foundation of the legal theory, since fundamental legal values are one way or another an integral part of the content of legal norms, and the norms themselves are perceived as ones protecting social values.

Today, this approach is represented by the concept of «soft positivism» by the English philosopher of law H. L. A. Hart, which implies the need for a certain rule of cognition to ensure the connection between the two levels of legal reality – the natural-legal and positive-legal, compulsory justice of the German scientist Otfried Höffe etc.

Thus, the law is perceived as a synthesis of two content components – human rights and rules of conduct (norms of law). The only question is which of them is considered as the main factor, a pivotal cornerstone of the whole construction of the legal system: the system of norms of law is based on the foundation of inalienable human rights or human rights are considered only as derivatives of the will reflected in the laws (objective law), and therefore, not derived beyond the subjective rights of the participants in specific legal relations.

It is also important to reject the perception of the legal world as a derivative of legal definitions that often lead to the formation of a closed system of «jurisprudence of concepts», when the laws of the mental process are given the status of universal categories, allegedly serving as a basis for social practice. Such a vision of the specificity of legal knowledge, which is actually removed by the laws of «speculative intelligence» from the study of the real subject, in spite of the Occam's razor leads to the multiplication of entities, and thus building excessive abstractions, that have little to do with reality, could in no way contribute either to the authority of legal science, or to the rising of respect for law as a component of the process of streamlining social relations. Therefore, in the context of finding relevant approaches to legal thinking today, one must start with identifying its clear focus on solving practical social problems and tasks that are impossible without the close interaction of jurisprudence with other social disciplines – philosophical, sociological, psychological, ethical.

At the beginning of the twentieth century, outstanding Ukrainian lawyer B. Kistiakivskyi insisted on the creation of the pluralistic foundation of the new methodology, which is intended to provide a multidimensional approach to legal thinking [2]. In his opinion, the very diversity of the factors of law implies the need to apply different scientific approaches, resulting in the isolation of at least four important manifestations of law – «state-order», psychological, normative and sociological. The progression towards a holistic perception of law was also carried out under the title «synthetic point of view in legal theories». Russian lawyer A. Yashchenko argued that the «distraction» of the special aspects of a single idea from a holistic vision caused excessive abstraction and one-sidedness of legal definitions [3]. P. Vynohradov studied law as a social phenomenon and as a part of social experience [4]. From the standpoint of a synthesized approach, Russian and American sociologist P. Sorokin observed the law from three points of view: as rules of conduct; as rules and regulations in the form of legal beliefs; as legal beliefs, implemented through the sources of law and political institutions [5].

According to the well-known scholar of the history of the Western law tradition H. J. Berman, today a law school is needed that will combine all the traditional lines of legal thought and, at the same time, go beyond their limits. Hence the first objective of the social theory of

law, which is to depart from the overly simplified concepts of the causality of law. Accordingly, the law cannot be completely reduced to the material conditions of the society of its origin or to the corresponding system of ideas and values. The active law consists of people involved in lawmaking, the administration of justice, the adoption of court decisions, negotiations and other legal actions [6]. The law should be considered as an independent factor, and not just one of the results of a range of social, economic, political, intellectual, moral and religious phenomena. H. J. Berman concludes that the synthesized jurisprudence must combine three classical schools: legal positivism, the theory of natural law and the historical school; he emphasizes the special role of historical jurisprudence in combining legal positivism and the theory of natural law.

For the first time, the term «integrative jurisprudence» is used by the American lawyer and philosopher of law J. Hall, combining the provisions of the theory of natural law, legal positivism with the sociological understanding of the law on the principles of both theoretical knowledge and practical experience [7]. The law for a scientist as a norm and the law as a process of its implementation should not be studied separately, instead, they form a single whole and should be considered in close interconnection. The law is both a normative act and an act of a legal person, and legal consciousness. It is integrative jurisprudence, in his opinion, designed to become the most «adequate jurisprudence», which will be the focus of redeveloped key ideas, compatible with many legal theories, each of which has its own achievements. As a result, integrative jurisprudence acts as a synthesis of such classical units of legal thought as legal ontology, legal axiology, sociology of law and formal legal science.

Renown French scientist J-L. Bergel summarizes the analysis of law as a system is a short expression: «in law, everything is interconnected.» In this case, the law as such is simultaneously the product of events of social order and manifestations of the will of man, the phenomenon of material and combination of moral and social values, the ideal and the reality, the phenomenon of the historical matter and normative order, a complex of internal voluntary acts and acts of subordination to external, acts of freedom and acts of coercion. Regarding the various manifestations of law, they are partial and express to a greater and lesser extent what is dependent on a particular legal system: either a social system or moral values, individualism or collectivism, power or freedom. Today, according to J-L. Bergel, in any legal activity, such general elements of the legal way of regulating the society as the definition of law, the source of law, the basic principles of law, legal order, geographical, time and social environment of a legal problem, institutes, concepts and categories, special language of law, the correlation of fact and law, judge, process, special types of judgments are necessarily involved in any legal activity [8].

Substantial, according to V. Krawitz, Professor of Munster University (Ger-

many), should be the cognition of the legal system as a kind of social system, reflecting the deep standard of law, exposed to the complex structure of social relations. Since the law is a self-improving social system, the use of the systematic and sociological approach exclusively from the standpoint of the analytical theory of law – natural-legal, positive, historical, psychological, etc., under any conditions comes as limited and counterproductive. As a result, this approach to law implies different levels of comprehension of legal reality: 1) legal practice; 2) practical jurisprudence; 3) dogmatic method doctrine; 4) general theory of law; 5) legal linguistics; 6) legal sociology; 7) legal philosophy; 8) legal logic. The legal system acts not only as a conceptual image, enshrined in legal texts, but above all – as a social reality, which includes both things and actions, and people – prosecutors, judges, officials, etc. It is the system, according to V. Krawitz, which can combine philosophical, legal and sociological and theoretical and dogmatic knowledge of the law, is a necessary and sufficient component of the formation of a modern integral theory of law.

Based on the principles of methodological pluralism, which, incidentally, is understood not as an eclectic combination of different cognitive principles and elements, the Ukrainian philosopher of law S. I. Maksymov offers their methodological ordering in the knowledge of the structure of legal reality that does not pretend to characterize the substantive part of reality, but is only a significant way of organizing and interpreting various aspects of social life and communication, in the absence of which the social world itself collapses, which makes it possible to disclose not only its statics, but also dynamics: the world of ideas (the idea of law), the world of sign forms (legal norms and laws), the world of interaction between social actors (legal life) [9].

A system establishing factor for law as a social phenomenon can be the communicative approach that is used where it is acceptable, an interdisciplinary approach that, according to the Dutch scientist Mark van Hook, bridges the facts with the norms, trying to understand the tension and close relationships between them, whereas traditionally they were completely dissociated, trying to «clear» the norms from the facts. In the categories of communication, understanding the legal phenomenon has important advantages, it: 1) identifies the law as a means of human interaction, and not as a self-sufficient phenomenon; 2) provides for a broad analysis, since communication can be detected at different levels and in different forms; 3) does not lead to the development of a closed system, it remains incomplete, since the emphasis is on the communicative process, rather than on certain fixed elements, such as «norms»; 4) calls for different points of view to be taken into account and protects from unilateral analysis and conclusions [10].

Consequently, the understanding of the concept of law in the narrowed instrumental sense is insufficient to construct a modern theory of law, which predetermines the search for other,

more meaningful and those that are in line with the modern view of the social purpose of law, among which the «act of law», «legal system», «legal life», «law-making», etc. Moreover, the main argument in their favor is reduced to the urgent need to overcome the excessive abstraction of domestic jurisprudence, its actual removal from real social problems and specific social relations, which often leads to an extremely dangerous trend in the knowledge of legal phenomena, in particular the theory of law, which today presents a real obstacle to its development.

The notion of «legal system», which correlates with society as a holistic and multidimensional phenomenon, significantly expands the range of law research, drawing on the arsenal of cognitive capabilities of the systemic approach. It is becoming more and more stable for domestic jurisprudence [11], stimulating the movement towards a more complete and meaningful understanding of the law, which in the context of the legal system can no longer be confined to the proper field (ideology). However, we should not forget that the purpose of the systematic approach, which reflects the specifics of scientific research of real phenomena and processes, is schematization, and hence a certain «simplification of reality». Therefore, a legal system as such is not capable of exhausting all legal reality, and its main problem, as well as any other social system, is the relationship with the environment: the more coherent and intrinsically consistent the system becomes, the more self-sufficient and closed it gets [12].

The conceptual design of the «act of law» is regarded as intended to shift the emphasis in the perspective of the practical implementation of legal norms. However, this notion cannot be interpreted but as a derivative of the traditional understanding of the law, which now remains unchanged and immutable. As a result – the problems of the dynamics of law again fall behind the scenes of the subject of the rule of law, meaningful features of law as a social phenomenon. Therefore, the introduction of the concept of «law of action», expanding the horizon of legal science, is unable to refresh our ideas about the essence of the law itself, and therefore to provide a significant increase in scientific knowledge.

In this context, attention is also drawn to the attempts to introduce into legal science and practice such specific categories as the legal field and legal space, borrowed from the arsenal of sociology and political science [13]. Their main purpose is the emphasis not only on the static, but also on the dynamic dimensions of legal phenomena, in particular, the functioning of a certain network of legal interrelations and relationships of participants in social relations, which can be localized into the relevant «legal segments» (general, regional, local, individual).

An important step towards the cognition of the general social value of law is the proposed by M. I. Koziubra extension of the general problem of understanding of law, its role, significance and opportunities by distinguishing the theoretical (scientific) legal under-

standing, which was the priority topic of the study of domestic jurisprudence of this problem, its specific levels, like a common-empirical and professional legal understanding. The latter is more closely connected with the certain experience of the perception and application of law, the features of the legal mentality and reflects the affiliation to a certain cultural-historical type of society [14]. Everyday understanding of law, in addition, can be characterized as the most mass, widespread, established and in this sense – conservative.

The next attempt to overcome the one-sided approach to legal thinking was the introduction of the concept of «legal life» by the Russian scientist A. V. Malko [15]. The undoubted achievement of this concept is the attention to the real aspects of the behavior of subjects of law, so to speak, «energy of law». An attempt to capture all necessary, as well as random factors, both positive and negative legal constituents (for example, offenses), should also be noted. In general, this category is intended to provide, in the author's opinion, a view of a legal reality without «pink glasses» in order to perceive it with all achievements and disadvantages, strengths and weaknesses [16]. At the same time, A. V. Malko, without going beyond the usual methodological canons, argues that the legal life is called «to cultivate personal, state and social life in a certain way», reduces it to legal acts, «a peculiar pyramid of legal acts», systematization acts-documents [17], which in turn virtually returns it to the context of established legal issues.

The suggestion of the consideration of the elements of creative activity in law, the subject of which can only be a person, by placing in the center of legal theory the concept of «lawmaking» deserves special attention. Thus, the emphasis is placed on the socio-anthropological nature of legal reality, but this factor is proposed to be taken into account in the limited version only in the process of drafting legislation, excluding the possibility of linking the creative approach to the implementation of the norms of law and enforcement, which is thus considered solely through the prism of formal mechanisms. The latter, in particular, is not consistent with the current understanding of the essence of the judiciary, which cannot be considered as a mechanism for implementing decisions of another branch of government, and therefore should have additional grounds and own arguments for resolving legal disputes and conflicts, first of all – established judicial practice [18].

Significantly, the approach of P. M. Rabinovych, who declared the aim towards «European legal thinking» to be based on the interpretation of the practice of the European Court of Human Rights, which implies the need for in-depth study of the essence of law, the establishment of certain «ontic» properties, unusual for the domestic science: the ability to satisfy certain interests, the taking into account of the biosocial characteristics of individuals and their psychological state, the feasibility of the possibility of satisfaction of interests, the uniqueness of the social situation in general, the inability of formal-

ized-only approach, the need to extend beyond the legal text, the fair balance principle [19].

However, the attempt to invoke the proposed criteria of legal thinking, developed based on the analysis of the practice of such a specific legal instance as the European Court of Human Rights, in the canon of «dialectically interpreted materialist understanding», leads to an unexpected context of «general social» (that is, non-state-power, non-legal law) [20]. Obviously, the law has a complicated and multidimensional nature, which implies the need for different approaches to its study and allows for the specifics of its definitions, but this does not mean that it is advisable to recognize the existence of different «types of law» – «social» and «legal». Hence the thesis that human rights are «non-legal rights» and become legal only in the case of recognition by means of legislative consolidation of them by the state authorities.

A more productive, albeit more complicated, the approach should be the one that would allow realizing the principle of unity of legal form and social content in the interpretation of both law in general and individual legal phenomena. As you know, a form cannot exist without content, and the content can exist, only having a form. At present, the separation of the legal form from social content would mean the creation of a special world, which, in its «virtual» nature, is not suitable for testing by reality.

From this point, one must consider the law and human rights as a homogeneous phenomenon, which has a single social and legal nature, and therefore human rights outside of the law cannot exist, as well as the law outside of human rights [21]. Human rights act as a socio-anthropological foundation of law as a normative system, which ensures that it is conditioned by the needs and interests of various subjects of social relations. After all, legal norms, in any case, cannot be used, executed, observed or applied outside the limits of conscious and volitional human behavior.

Summing up, it is vital to conclude that the law always includes at least two essential components – human rights and rules of conduct (norms of law). The problem lies beneath – which of them is considered a system-forming factor, a pivotal cornerstone of the entire basis of the legal system of a country: is the system of law built on the foundation of inalienable human rights or are human rights considered only as derivatives of the will reflected in the laws (objective law), and therefore, are reduced exclusively to the subjective rights of participants in legal relations.

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