Kelsen's philosophical and legal idea is a basis of modern democracy legal doctrine

Andrey Toropov
Year 1 Magistrate student, Dnepropetrovsk State University of Internal Affairs

Eleonora Skyba
Science Adviser, Doctor of Philosophy Sciences, Professor of Social and Humanities Department Dnepropetrovsk State University of Internal Affairs

One of the prominent theorists of legal positivism, the eminent jurist and theorist of law Hans Kelsen founded the concept of the constitutional court and wrote a large number of scientific papers on the problems of philosophy of law, general theory of state and law. Among the works that have been published in English, the most famous are «Society and Nature» (1943), «General Theory of Law and State» (1945), «Principles of International Law» (1952, 2. Aufl. 1966), «What is Justice? » (1957).

Hans Kelsen analyzed democracy trying to find the answer what is the best form of government. While determining the best form of government the most important issues are what they must get, what people are entitled under with such a form of
government. He supported democracy because it meant, as he thought, that people should be free, that freedom was the highest value. Under Kelsen, the ability and capacity to make independent choices and decisions are determined by the individual. But individual freedom is limited by the collective freedom. Democracy for Kelsen is a special mechanism by which the arbitrariness of a group of people is limited; it is a mechanism of restraint, balancing of collective interests. Kelsen emphasized that only positive norms could be the object of the science of law. This principle of legal positivism is opposed to the natural-legal doctrine, which tries to present legal norms as those created by nature and not by people. In this case, nature should be considered as a legislator; thus, we assume that nature is created by God and is a manifestation of His will, which is absolute good. So, he concludes that naturally legal doctrine is not a science but metaphysics of law. The legal philosopher believed that the legal norm is an incentive to do something that provides the normative order, but not only in the sense of "must", but also in the sense of "has the right". Under Kelsen the law country is a democratic state formed according to the constitutional model of social order. Parliament and uniting numerous political parties represent different public interests. According to Kelsen, the constitution is the superlative achievement of the national legal system; it is a collection of legal norms that can be changed only in the established procedural order, the purpose of which is to complicate the process of changing these norms. Kelsen put into practice the idea that national law should always conform to international norms. His idea of the primacy and priority of international law proves that national law in the regulation of processes and states is limited only by the rules of international law, which are binding on the certain state. He strongly believed that necessary conditions for the existence of the state are law and order, the effectiveness of territorial management and independence of society from other foreign communities.

Список використаних джерел: