



LEGAL AND PHILOSOPHICAL VIEWS OF G.F. SHERSHENEVICH: A RUSSIAN SCIENTIST AND POLITICIAN

Gennady S. Pratsko ^{a*}, Julia I. Isakova ^{b*}, Olga A. Andreeva ^{c*}

^a Department of Commercial and Entrepreneurial Law, Don State Technical University, Rostov-on-Don, RUSSIA

^b Department of Criminal Law and Criminalistics, Don State Technical University, Rostov-on-Don, RUSSIA

^c Department of Theory and History of State and Law, Taganrog Institute of Management and Economics, Taganrog, RUSSIA

ARTICLE INFO

Article history:

Received 01 July 2019

Received in revised form 18

October 2019

Accepted 31 October 2019

Available online 26

November 2019

Keywords:

Gabriel Feliksovich Shershenevich; philosophy of law; general theory of law; Russian theory of law; Russian theoreticians of law; methodology of law.

ABSTRACT

This scientific article is devoted to the analysis of philosophical and political-legal concepts of one of the main representatives of Russian liberalism of the late XIX - early. XX centuries Gabriel Feliksovich Shershenevich. The study showed that he considered the main tasks of the philosophy of law to determine the nature of the relationship of universal laws of being with the laws of society, through which legal laws regulate people's behavior. As a result, he points out that there is no single answer to the question about the essence of the philosophy of law.

Disciplinary: Multidisciplinary (Philosophy, History, Law, Political Sciences, Socioeconomics).

© 2020 INT TRANS J ENG MANAG SCI TECH.

1. INTRODUCTION

The study of philosophical and legal concepts is a difficult but necessary task for legal science. Any typology of the analysis of legal space and time will always be incomplete since it reflects various social systems, the unpredictability of their evolution and the limited possibilities of our knowledge in the conditions of inexhaustible philosophical ideas about the nature of law. Philosophical and legal ideas are always associated with a particular historical era, the level of social development at which they appear and are affirmed, as well as with the answer to the question of why they arise and are implemented in this particular society and at a particular stage of its development. Such a formulation of the question of the essence of the history of philosophy of law allowed Gabriel Feliksovich Shershenevich to form his own vision of its purpose, on the basis of which the most general principles of the law of each era that determine the paradigms and mechanisms of its action in society can be understood and explained.

The urgent problem of the science of law of that time was the search for a distinction between the philosophy of law and the theory of law, therefore, issues of legal dogmatism, as a matter of discussion, gained importance precisely in connection with attempts to abandon the traditional understanding of jurisprudence, replacing it with a philosophical and legal approach. Gabriel Feliksovich believed that the subject of the philosophy of law is the study of law, as it is and what it should be. This requires a general concept of law, revealing its essence, which is achieved through the scientific philosophy of law. The subject of philosophy of law should be the study of the categorical apparatus of legal sciences, including the concepts of the rule of law, legal relations, legal responsibility, state, society, etc.

The philosophy of law at that time was seen as an application of its general principles to jurisprudence, that is, a specific field of humanitarian knowledge. It differs from jurisprudence studying specific legal systems in that it poses and solves their problems at the level of philosophical knowledge and in the context of dialectical development. The specifics of the philosophical and legal approach consist in the study of the most general theoretical and worldview problems of law and the state, analyzed within the framework of forms of social consciousness that have a common nature but differ in the subject of reflection, thereby acquiring the form of philosophical knowledge. In each historical era, within the framework of one philosophizing method, various substantive approaches to understanding the essence of legal phenomena can coexist, such as theocratic, natural-legal, positivistic and others, among which there should be a dominant one. According to Gabriel Feliksovich, changes in the types of philosophical reflection of the essence of the state and law are determined by the dynamics of the political, economic, sociocultural life of society.

2. METHOD

Solving the problem of scientific research of philosophical and legal views of a Russian scientist and politician G.F. Shershenevich demanded the use of various methods. Systemic and philosophical and legal methods allowed us to analyze the life and work of the Russian philosopher and lawyer G.F. Shershenevich, an example of the unity of a scientist and a public figure who made a significant contribution to the development of Russian theory and philosophy of law. The socio-legal and institutional-legal analysis made it possible to identify the features of the process of forming its philosophical and legal views, due to the specifics of the political and socio-economic development of Russia in the late XIX - early XX centuries, as well as ideological trends that reflected the pre-revolutionary sentiments of the intelligentsia. A significant role was played by the dialectical method, the application of which made it possible to reproduce the theoretical and methodological concept of G.F. Shershenevich. He believed that “the very concept of law should undoubtedly be recognized as the supreme and basic concept, and in connection with its essence, questions about its formation, violation of the law, violation of the law, and legal relations created by the law” [3]. Consequently, the definition of the essence of law, its relations with the state and morality, depends on the historical conditions in which they exist.

3. RESULT AND DISCUSSION

3.1. THE PRE-REVOLUTIONARY SITUATION IN THE RUSSIAN EMPIRE OF THE LATE XIX-EARLY XX CENTURIES AS A FACTOR IN THE FORMATION OF THE LEGAL CONCEPT OF G.F. SHERSHENEVICH

The formation of philosophical and political-legal concepts of the late XIX - early XX centuries led to the political arena of the representatives of liberalism, one of which was Gabriel Feliksovich Shershenevich. His life and work are an example of the unity of a scientist and a public figure who has made a significant contribution to the development of Russian theory and philosophy of law. The scientific concept reflecting pre-revolutionary attitudes to the public the content of the political and legal problems of his party. A special period in the political biography of G.F. Shershenevich is associated with the Constitutional Democratic Party, of which he became a member in 1906. As a deputy to the State Duma, he acted as fellow secretary of the Duma, Chairman of the 4th department of the Duma and member of the legislative commission of the party, took part in the development of bills on rights and freedoms, civil equality, personal integrity, etc. In the process of deputy activity, he paid special attention to social legislation, the protection of trade unions, the control of working hours, health protection, insurance of workers and employees, the organization of public charity, etc.

Philosophical and legal views G.F. Shershenevich formed under the influence of discussions that took place in law, the theory of state and law, the sociology of law and influenced the formation of his scientific concepts. In his theoretical views, he was close to the tradition of neo-Kantian philosophical thought, in which at that time special attention was paid to the practical problems of law and the state. Based on the Kantian idea of the rule of law, Gabriel Feliksovich wrote that "the practical task of the philosophy of law is to build the ideal of the legal order in its integrity" [5].

The practical need to uphold the program of the Constitutional Democratic Party led G.F. Shershenevich to actualize the history of the philosophy of law, theory and sociology of law, as well as problems of public law, such as forms of government, constitutional monarchy, the responsibility of the authorities to the people, etc. The set of problems posed and solved allowed Gabriel Feliksovich to contribute to the philosophy of law as a fragment of Russian legal thought, which is of particular importance during the period of democratic transit of Russian statehood. Sharing the views of S.A. Muromtseva, who was considered the founder of the Russian sociological school of law, Gabriel Feliksovich departs from dogmatic jurisprudence, showing the close relationship of legal norms and relations with social reality [6].

Creating a philosophical and legal concept of the essence of state and law, G.F. Shershenevich used the formal dogmatic methodology of legal positivism. Analyzing his work, V.D. Zorkin writes that "from the position of legal positivism, he developed a strict dogma of law, especially Russian civil law, and proposed clear and clearly defined legal constructions of individual institutions. All this met the objectives of jurisprudence in Russia during the creation and development of bourgeois legislation. Therefore, Shershenevich's authority was very high not only in academic circles but also among practicing lawyers" [1]. Studying the laws of positive law, Gabriel Feliksovich comes to the conclusion that it is possible to identify trends in its development in various states, but it is impossible to comprehend the eternal idea of law as a fiction.

The philosophy of law, establishing its concepts, proceeds from positive, that is, existing law, through which one can understand the problems of the state and law from the standpoint of

comparative law. Further G.F. Shershenevich concludes that “science deals with the world of phenomena, and only their study, classification, generalization is possible for it. The study of what constitutes the unknown cause of the phenomena is inaccessible to it, but it is possible, they say, for philosophy, which then becomes metaphysics ”[4]. Passion for the search for ideal eternal law leads to a distraction of philosophical and legal thought from pressing legal issues determined by time and place, that is, the law as it really is.

Gabriel Feliksovich Shershenevich defined the totality of norms or provisions, united by the unity of content or internal communication on the subject of regulation, as a legal institution.

The tasks of the philosophy of law were formulated by him as a study of legal institutions, their classification, totality and codification of law in the process of formalizing social relations. He considered the methods of such analysis not only historical or dogmatic but also sociological, “critical” as a new area of legal analytics. This approach opened up the possibility of moving from an empirical analysis of individual legal phenomena to comparative and sociological generalizations that allowed the author to contribute to the philosophy of law.

Analyzing the transformation of legal views S.A. Muromtseva, he defines it as a consistent movement from the historical school of law to the sociological, indicating that objective and subjective law are not two sides of one concept, as representatives of sociological jurisprudence claimed, but two independent concepts. Since subjective law corresponds to objective law, which can exist without subjective law and that does not correspond to the nature of neo-Kantianism, the concepts of subject and object of law can have a relative character, constantly changing places. Objective law, according to G.F. Shershenevich, is the basic concept of positive law, and the subjective is derived from it, reflecting personal and public interests and needs. This inconsistency manifested itself in this matter, caused by the internal struggle, on the one hand of the philosopher, and on the other of the lawyer, in which the author's legal point of view prevailed.

3.2 LAW AND MORALITY: DELIMITING THE SPHERES OF REGULATION IN THE WORK OF G.F. SHERSHENEVICH

Gabriel Feliksovich shared the concepts of law and morality, considering them different due to the public relations reflected and regulated by them. Unlike law, moral standards are social in nature and present their demands on a person. A person's behavior is ensured by the social impact of the moral law on him, existing not in us, but outside of us. He wrote that “the resolution of questions about the essence of law, about its relation to the state, to morality, depends on the historical conditions under which these questions are posed” [4]. Consequently, immutable morality can be neither in nature, nor in society, and all moral concepts are relative and historically changeable. The criteria of morality are not in the behavior of a person but in the assessment of his society. Such behavior should be socially useful, and, consequently, prohibitions on those actions that threaten the public good are necessary.

The main characteristics of law as a regulator of public relations, Gabriel Feliksovich attributed his ability to influence the behavior of individuals; coercive nature; connection with state authority; the establishment of law and order, etc., since these elements form the concept of law, as norms of proper behavior. He was against the broad interpretation of the law and its extension to relations regulated by morality, which creates a false impression of a more effective legal regulation than moral regulation. The task of the philosophy of law, from his point of view, should be a clear distinction between the areas of regulation of law and morality. The law may ascribe to itself what is

actually supported by morality, but this does not contribute to the rule of law. According to Gabriel Feliksovich, the morally due is the manifestation of subjective assessments of law, volatile and not generally binding, therefore the subject of philosophy of law is not subjective assessments of law, but the law itself, as a fact of people's real-life activity.

Moreover, G.F. Shershenevich believed that understanding the essence of law is impossible without a sociological analysis of its manifestations in the life of society, which should be studied by various social sciences. The opposition to the current law of the “ideal law”, he rejected, considering them interconnected. The nature and essence of natural law throughout history have undergone various interpretations, including methodological, historical or political aspects. In his opinion, natural law supplements the existing one and applies when the laws are “silent” or they are clearly contrary to justice and common sense. Along with this, G.F. Shershenevich criticized the concept of changing natural law that existed at that time, considering it scientifically untenable, seeking to replace the existing law with ideology. He wrote that “in any case, the old and the new directions of natural law unilaterally limit the tasks of the philosophy of law to the formulation of the ideal and ignore the study of positive law in its main points. Meanwhile, having only penetrated into the essence of law as a real phenomenon, one can dare to use this tool to build an ideal order ”[4]. Contrasting the existing law with the “ideal” leads, in his opinion, to the complication of legal relations, the confusion of law with other social norms. In general, G.F. Shershenevich defended the position of legal positivism, identifying the general theory and philosophy of law with formal dogmatic jurisprudence.

The source of law in the philosophy of G.F. Shershenevich is a state with legal means to force others to reconcile their behavior with the will of the ruling elites. At the heart of power, in his opinion, is a special mentality consisting of fear, faith and the hope that obedience can be beneficial. The basis and source of political power is state power as a force standing above the law, which is the legal execution of political order. In this regard, the main problem of his philosophy was social and legal issues, due to which the rational principles of law proved impossible to implement in Russia. This determines the appeal of G.F. Shershenevich, like other Russian philosophers of the law of the time to the problem of traditional societies and legal systems. At the same time, he saw the errors of traditionalist systems in the fact that the legislator determined the trends of the time, creating a code imbued with the principles of enlightened absolutism, while life strove to free the individual from the tutelage of the state and provide him with great rights and freedoms.

The practical conclusion of G.F. Shershenevich was in the need for codification of law as a tool for the modernization of social relations in Russia, through their unification, elimination of class division, rationalization as the establishment of legal equality of all members of society and overcoming legal nihilism. He associated the transformation of state power with the separation of powers and the liberalization of public relations, seeing this as the development of Russian constitutionalism. He defined the new law as a set of legal norms establishing private relations of individuals in society, and he saw the content of legal norms in the rules governing coercion between citizens and the state.

4. CONCLUSION

Despite the considerable time separating the work of G.F. Shershenevich from modern times, his

interpretation of the philosophy of law can become a guide, both for students and those who are interested in it. In "History of the Philosophy of Law" [4] he shows how philosophical ideas associated with a certain historical era appear and are approved precisely in this society and at a specific stage of its development. Such a formulation of the question allowed him to show his vision of the development of the history of the philosophy of law, on the basis of which the most general principles of the law of each era that determine its functions in society can be understood and explained.

Modern philosophy of law is an abstract legal discipline, the main purpose of which is to show law as a special form of public consciousness, including political and legal institutions, legal norms and regulations formally enshrined in laws. It is designed to provide answers to questions about the recognizability of the nature of the state and law, the relationship of law and morality, the general principles of interaction of the theory of law, laws and legal policy. These same problems, reflected in philosophical and legal thought, enable Gabriel Feliksovich to show the correlation and features of the traditional and contemporary directions of its development.

From a formal legal point of view, the law is a system of norms that are mandatory for implementation in a given society, but along with such a purely legal definition, a more general interpretation of its essence as a form of public consciousness is necessary. The unity of law for all eras and countries is that it acts as a regulator of social relations. At the same time, this system can be oriented both to the preservation of existing orders, their reasonable transformation, and to the transformation of one legal system into another. The nature of the functional orientation of law is determined by the values of a particular society, associated with philosophical, moral, mental and other worldviews about it. The history of the philosophy of law allows us to understand the evolution of the principle of formal legal equality while maintaining it in any legal system. The historical stages of the development of the state and law correspond to its scale and its measure of freedom, the range of subjects and legal relations, that is, its content of the principle of legal equality.

G.F. Shershenevich believed that the philosophy of law does not give new content to legal concepts, its purpose is to determine the essence of the phenomena of social life, which determines its theoretical and practical orientation. He rightly noted that "the theoretical task of the philosophy of law is a critical study of all those main concepts that underlie the legal sciences and which they are accepted for the most part dogmatically" [3]. The philosophy of law shows how the ideals of the legal order change in history, how they relate to the environment that generated them. In principle, there may be a mismatch between ideal ideas and trends of the time, and then it can manifest itself in the individual direction of thought and will of the author of the ideal. Therefore, when studying various types of legal understanding, it is necessary to take into account the conditions in which philosophical doctrine appears, what is the individuality of its creator, as well as the relationship between new and previous paradigms.

Analyzing the problems of the history of the philosophy of law, which had relevance in different eras from Ancient Greece to Hegel's "Philosophy of Law", G.F. Shershenevich formulated its tasks as an independent science. Both in the past and at present, its main task is to form a value-based attitude of people to law and the state, affecting human destinies, rights, and freedoms. The main tasks of the philosophy of law are to determine the nature of the relationship of universal laws of being with the laws of society, through which legal laws regulate human behavior. As a result, G.F. Shershenevich comes to the conclusion that there is no definite answer to the question about the essence of the

philosophy of law, since “philosophers do not want to go down to the earth, and lawyers do not want to raise their eyes from the earth higher” [2]. However, to date, discussions continue about the nature and meaning of the philosophy of law, its place in the system of legal knowledge.

5. AVAILABILITY OF DATA AND MATERIAL

Data used or generated from this study is available upon request to the corresponding author.

6. REFERENCES

- [1] Zorkin V.D. Positivist theory of law in Russia. *Moscow*, 1978.
- [2] Russian philosophy of law: philosophy of faith and morality (Anthology) / Comp. A.P. Albov, D.V. Maslennikov, A.I. Chislov, S.V. Filippov. *St. Petersburg*, 1997.
- [3] Shershenevich G. F. General theory of law. *Moscow*, 1910.
- [4] Shershenevich G.F. The history of the philosophy of law. *St. Petersburg*, 2001.
- [5] Shershenevich G.F. History of philosophy of law. *St. Petersburg*, 1907.
- [6] Shershenevich G.F. The general theory of law - *Moscow*, 1911.



Professor Dr. Gennady S. Pratsko is Professor at the Department of Commercial and Entrepreneurial Law, Don State Technical University, Rostov-on-Don, RUSSIA. He graduated from the Rostov Law Institute of the Ministry of Internal Affairs of the Russian Federation as a lawyer (specialist) and South Federal University as a manager (specialist). He got doctoral degrees in Law and Philosophy. His specializations are in the fields of Philosophy of Law, Theory of State and Law, Civil Law.



Professor Dr. Julia I. Isakova is Professor at the Department of Criminal Law and Criminalistics, Don State Technical University, Rostov-on-Don, RUSSIA. She graduated from South Federal University as a Lawyer (specialist). She got Doctoral degrees in Law and Sociology. Her specializations are in the fields of Criminal Law, Medical Law, the Implementation of Civilian Control in Modern Society during the Modernization Period.



Professor Dr. Olga A. Andreeva is Professor at the Department of Theory and History of State and Law, Taganrog Institute of Management and Economics (TIM&E), Taganrog, RUSSIA. She graduated from Leningrad State University, Leningrad, the Soviet Union as a philosopher (specialist). She got her Doctoral degree in Philosophy. Her specializations are in the fields of History and Philosophy of Law.