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The Philosophical and Legal Heritage of V.S. Nersesyants / Философско-правовое наследие В.С. Нерсесянца

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Аннотация: В статье анализируются правовые представления одного из самых интересных и оригинальных философов права последней четверти XX в. - начала XXI в., академика РАН В.С. Нерсесянца. Истоки его правовых идей находятся в античной философии и немецкой идеалистической философии. Поэтому сопоставление его

правовых взглядов с идеями гегелевской философии права, учитывая обе диссертации В.С. Нерсесянца, является вполне традиционным для знатоков теории права нашего современника. Однако, как показывает опыт более детального и глубокого анализа, интересные моменты сходства его идей связаны и с другими представителями немецкой интеллектуальной и философской культуры размышлений о праве. Именно понимание характера преемственных и новых аспектов в системе правовых взглядов В.С. Нерсесянца может служить основанием для развития его правовых взглядов в современных актуальных и перспективных исследованиях. Научная новизна проведенного исследования философско-правового наследия В.С. Нерсесянца заключается в некоторых существенных уточнениях характера высказанных им идей, прояснении их связи с идеями не только гегелевской философии, но также учения И. Канта, И. Фихте, Г. Мемеля, а также более поздними идеями юриста-неокантианца Р. Штаммлера. При этом сопоставление правовых взглядов В.С. Нерсесянца и трактовкой права в "Чистом учении о праве" Г. Мемеля позволяет представить теорию права В.С. Нерсесянца как оригинальный вариант указанного учения. В статье также указывается на неразъясненность понятия справедливости в философии права В.С. Нерсесянца, а также перспективные исследования социальной теории, как предпосылке социально-практического учения о цивилизме.

Ключевые слова:

история правовой мысли, Нерсесянц, понятие права, справедливость, немецкая идеалистическая философия, юридическое неокантианство, право и закон, цивилизм, юридический либертаризм, диалектика правовой формы

V. S. Nersesyants' legal views have always been distinguished by their originality and high intellectual and moral perception of the material. His works and ideas have long been firmly included in the best examples of Russian legal thought. It would be no exaggeration to say that in modern literature, both domestic and foreign, few examples of discussions on the law differ in the same fundamental nature and consistency characteristic of Nersesyants' writings. In the most general form, assessing the significance and relevance of our classic ideas in the modern palette of reflections on law, we can say that he is a philosopher of law in the classical sense. He was occupied with the problem of the general concept of law and the definition of the objective essence and purpose of the law, which eventually evolved into a full-fledged author's system of philosophical and legal ideas and recommendations for their socio-practical application (for example, in the form of the concept of civilization).

The opposite approach, which is popular nowadays, is associated with attempts to take the concept of law as such out of brackets and to reduce all legal issues to details, particular arguments, words, and conversation about them, assuming that each of these shades can be the ultimate and sufficient goal or form of legal knowledge, an infinite number of legal phenomena. The legal understanding in this sense is declared somehow outdated because if the concept of law is not relevant, then it is enough to confine oneself to various kinds of epistemological impressionism (legal situatedness, pure sociologism in law, a legal impression unrelated to any meaning, law as a fact or text) or, even more popularly, expressionism (description of the personal psycho-emotional state of the speaker of law, pure psychologism in law, etc.), or even better, a combination of both together with the ideas of culture and almost quasi-religious rationality of a modern sociable person.

In this case, we will not criticize modern legal doctrines, as this would require significant

research and a different focus. For the purposes of this study, it is important to emphasize the relevance of Nersesyants' philosophical and legal ideas, his approach to legal understanding and to pay attention to the importance of striving for complete knowledge and not only to particularism and various shade concepts. The integrity of legal knowledge, which distinguished Nersesyants' approach to the law, is a focus on the knowledge of the law in its objective meaning, and not only from the point of view of the subjective meaning of a commentator or researcher. With a certain degree of conventionality, we can say that from ancient philosophy to the period of modern history, Russian and European philosophical and scientific culture prided themselves on the ability to generalize, in which the essence and objective meaning of the subject would be grasped and, if possible, most accurately reflected. In contrast, the Anglo-American intellectual and cultural tradition almost universally relies on a casuistic way of thinking, description of details, particulars, etc. In the second half of the twentieth century and up to the present, the hypertrophied influence of the culture of private teachings in jurisprudence is easily detected instead of searching for general concepts and objective meaning.

Nersesyants' creative legacy is very impressive, and therefore, we are talking only about an overview of his main ideas, clarifying some of the relationships with the teachings of his predecessors, identifying possible directions for promising research and development of both the philosophical and legal issues in Nersesyants' works closely related to his ideas of the moments of disclosure of the concept of law and the formation of the theory of law.

Nersesyants' works primarily cover issues of the history of political and legal thought. He was a brilliant connoisseur of ancient political philosophy, especially the views of Socrates and Plato, devoting separate monographs to both. Nersesyants very colorfully mentioned Socrates in one of his remarkable and witty quatrains:

Don't write, say everything verbally, Writing is poison …

Did not write Zarathustra,

My mother and Socrates (from the collection "Moods.

Poems of different years") [9, p. 107].

The cycle of works on the political and legal teachings of antiquity includes works by Nersesyants such as *The Political Teachings of Ancient Greece* [5], *Socrates* [4], and *Plato* [7].

The issues of the history of political and legal thought are present in Nersesyants' many works. Therefore, almost any of his works contain historical and theoretical parts. For example, his monograph, which became famous and almost a calling card already in its title, was published in 1983, *Law and the Law: from the History of Legal Doctrines* [6]. V. G. Grafsky, a friend and peer of Nersesyants, more than once cited an example of a remarkable dispute between V. N. Kudryavtsev and Nersesyants, in which Kudryavtsev was surprised and curiously asked his interlocutor: "How is it that the law and the law are not the same?". Nersesyants distinguished between theoretical and concrete historical parts in political and legal doctrines. This is discussed in detail in his doctoral dissertation on Hegel's philosophical and legal views. This approach is justified and, from a methodological point of view, always leads to more accurate and valuable scientific and cognitive results. The origins of this approach lie primarily in the Hegelian philosophy itself and its system. In essence, it distinguishes between the pure logical part, the "science of logic," about a

concept whose dialectic does not experience fundamental obstacles to its disclosure, on the one hand, and the concrete historical part shown in the philosophy of history. As the main determinant in the objective-idealistic picture of Hegel's philosophical system, the absolute spirit logically makes way to the discovery of its opposite and the subsequent removal of opposites. On the contrary, in history, he encounters significant obstacles: passions, interests, needs, etc. And only in the struggle against these obstacles he, i.e., the absolute spirit, is realized.

Undoubtedly, as Hegel showed, by "discovering" history and combining it with logic, two points could be considered essential for the history of thought: philosophical (or theoretical) and historical (specifically historical). In the Russian legal literature, this methodological scheme was most consistently implemented in his doctoral dissertation by P. I. Novgorodtsev [12], who distinguished the philosophical analysis of legal doctrines and their historical analysis. Nersesyants was also a consistent supporter of the above combination of theoretical and historical analysis methods of political and legal doctrines. This scheme was not Nersesyants' invention, but he contributed significantly to its explanation and justification and demonstrated its effectiveness. It allowed him to reveal new facets in the context of Hegel's philosophy of law, to make clarifications and conclusions significant for science.

Both Nersesyants' dissertations were devoted to the Hegelian philosophy of law: the candidate's *Marx's critique of the Hegelian Philosophy of Law* [2] and the doctoral *Hegel's political-legal theory and its interpretation*" [3].

The significance of Nersesyants' creativity today and during the period of the transition from Soviet to post-Soviet Russia against the background of *exhausted* Marxism, on the one hand, and the search for "new" patterns *suggested* by Western literature for the re-creation of reality, on the other hand, Nersesyants' philosophical concept, based on the culture of classical fundamental philosophy, was and remained one of a few significant phenomena at the turning point of Soviet and post-Soviet history. Being a Platonic-type philosopher of law and "correcting" the *shortcomings* of Hegel's philosophy of law, he came up with an original concept of legal understanding. Its peculiarity was that, unlike his predecessors, he formulated an original version of the *dialectic of the legal form*.

Nersesyants wrote: "Law is a *form* of human relationships… The form here is not the outer shell. It is meaningful and in the only possible way, *mathematically accurate* (our italics) and adequately expresses the essence of the relations mediated by this form ..." [8, p. 5].

Since Kant, the law has been considered a form of social life, natural and comprehended precisely in this formal (*mathematical*) dimension. The thesis of law as a form of social life became the leitmotif of the Neo-Kantians, the main ideas of R. Stammler's social monism. But the Kantians could not develop an internal dialectic of form, largely due to the methodological limitations of subjective idealism. However, Nersesyants managed, under the influence of Hegelian objective idealism, to introduce dialectical logic into the idea of a legal form. As a form of social life, the law has acquired its own internal dialectic, the internal law of development. Law as a formal category has its own content, namely formal legal content.

Concrete expression was the interpretation of the law as a universal principle of formal equality, which unfolds in the unity of more specific dimensions (levels of existence of formal legal equality, legal form): equality, freedom, and justice. The first two categories—equality and freedom—have a formal nature. This was convincingly shown by Kant,

explaining freedom as a universal law. The formal nature of equality was explained in detail by Nersesyants himself, saying that the nature of legal equality is the prototype of mathematical equality. In any case, both categories are largely easily linked in the dialectic of the legal form. In the Hegelian philosophy of law, the essential point is the idea of freedom, and equality and justice serve to clarify the concept of freedom.

Among Nersesyants' contemporaries, S. S. Alekseev also reflected on the special formal legal content in law, believing that the legal form has its own specific content, which is its own dialectic [1]. Alekseev wrote in the works of the post-Soviet period: "... law itself (precisely as a "form"! – here is such a paradox here) has *its* own matter, – the *matter of law*, expressed mainly in the *dogma of law*, *in the entire system of legal means* ..." [1, p. 25], and "the power of law as a form ... is the power of its own matter of law, when the law is merged with its internal organization, structure", which "provides a justification for the *intrinsic value of law as a special objective reality, characterized by specific logic and power in people*'s lives" [1, p. 25].

However, justice in Nersesyants' theory turned out to be the least clarified and developed category. It seems it is not limited only to formal signs, so its essence is hardly perceptible. Justice in the concept of legal understanding by Nersesyants must be taken in unity with two other semantic characteristics—formal equality and freedom. In the history of legal thought and political morality, many different interpretations of justice are understood from both formal and material points of view. For example, in R. Iering's legal concept, justice means a reasonable balance of public and individual interests, which, with a deeper immersion in the problems, turns out to be very similar to the idea of delineating the spheres individual freedom proposed earlier in the *Metaphysical Doctrine of Law*" by I. Kant. Iering has a sociologized version of the interpretation of this formula, which formally relies on a similar logical construction, but the content is clearly different from the sermons of individualism characteristic of the philosophical teachings of I. Kant.

Many Kantians and neo-Kantians claimed that justice is an immanent property of law. They often used The definitions of "fair" and "legal" as synonyms. For example, in R. Stammler, reflecting on the subject of the philosophy of law, which, in his opinion, constitutes "pure forms of legal thinking," he specifically emphasized that thoughts about *law* and *justice* form the proper legal ways of determining and directing human aspirations, legal will, or intention. In Stammler's texts , a substantial version of *wollen* is used, which can also be translated as "will" but still has a different semantic connotation (will, intention). This aspiration of the will can be characterized equally as legal and just [15, S. 4]. "Any discussion of *justice*, of course, presupposes the *concept of law*" [15, S. 3–4]. Stammler, as not requiring additional explanations, gave an example of one fragment from Ulpian: "We were called priests on merit because we care about justice, proclaim the concepts of good and just, separating the just from the unjust, distinguishing the permissible from the unlawful, wishing that the good ones would improve not only through fear of punishment, but also by encouraging rewards, striving for the truth, if I am not mistaken, philosophy, and not to imaginary" (quoted in I. S. Peretersky's translation) [13].

The understanding of justice in Nersesyants' works is very similar to those ideas that, for example, are found in the works of German idealist philosophers and neo-Kantian lawyers. And even the above fragment from Ulpian's judgments is chosen in a completely similar way as a leitmotif in the philosophy of law by Nersesyants [11, p. 45]. He, in particular, wrote that "justice is included in the concept of law, that law is by definition fair, and justice is an

essential property and quality of law, a category and the characteristic is legal, not extra-legal" [11, pp. 44–45]. In favor of similarity with the ideas of Stammler, the indication in the definition of justice by Nersesyants of "universally valid correctness" also speaks [11, p. 44]. The latter, precisely in this form, as the idea of universally valid correctness, was the leitmotif of the teachings of the German philosopher of law in all his writings (*Economy and Law*, *The Doctrine of Right Law*, *Philosophy of Law*, etc.). Therefore, the reproaches that can be made to neo-Kantian lawyers regarding the concept of justice, in particular, to a considerable extent, can also be directed in relation to explaining this concept in Nersesyants' teaching.

In the *Pure Doctrine of Law* (several variants of "pure doctrines of law" existed long before the twentieth century and the ideas of Austrian lawyers), G. Memel, who was close to Fichte's ideas, at the beginning of the 19th century, noted justice was placed in the center of the definition of law [14]. "Freedom and equality, G. Memel wrote, explaining the concept of law, are two poles of the common will, and its center is justice" [14, S. 47].

It was impossible to talk about the socio-practical significance of the philosophical and legal ideas of Nersesyants in Soviet times for objective reasons. However, in the wake of radical transformations, the concept of the practical application of legal libertarianism in the most sensitive area—property relations—was undoubtedly relevant [10]. The idea of civil property is already interesting, which boldly overcomes the one-sidedness of the socialist and capitalist approach to private property. Its significance is not exhausted. Its socio-practical orientation in relation to the period of reforms—from the Soviet to the post–Soviet—is easily recognized. However, it also has utopian features. First of all, like Plato's projects and Hegel's historical dialectic, the concept of fair, equal, and free distribution of civil property was distinguished by the same totality and universality, which for objective reasons, makes the corresponding ideal models difficult to implement (Nersesyants emphasized the importance of civilization as a "world-historical idea"). He wrote: "It is in Russia that all the rough work of world history related to the implementation and practical verification of the universal communist idea has been done. The answer has been found: a civilization with the inalienable right of everyone to civil property" [11, p. 435].

The universal model of property distribution throughout the country has no direct analogs in foreign experience, except only in utopian projects. Unfortunately, the capitalist bourgeois experience is traditionally presented in a distorted form in Russia.

In addition, civilization presupposes a long-standing idea of a "normal" person, a "normal sense of justice," a "healthy legal psyche," etc. It is difficult to imagine "equal" owners at all. A person is unlikely to limit themself to "their share," guided by selfish interests, which civilization does not cancel in any way.

It is also important to note that political concepts, such as civilization, which have obvious socio-practical and socio-political significance, are another result of social theories (Marx, Iering, etc.). Social theory can easily be modified and used for any arbitrary purpose without a certain political component. Nersesyants did not formulate an independent social theory (you can try to reconstruct it from individual fragments of his work), but in the conditions of objective changes in the life of society, he immediately formulated a political component, a program of social theory. Therefore, the concept of civilization remains unexplained in its social foundations. Obviously, the reconstruction of Nersesyants' socio-theoretical views can become a promising study.

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