The Co-existence of Public Positive Law and the Private Normative Order: The Constant Spiral of the Developing Interaction and Mutual Transition between Positive Law and Normative Order

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"To do just law, makes a dry tree green".
-Shota Rustaveli (XII Century)

I. Plato, Aristotle, Kant and Hegel were preoccupied with the question of not what is the law, but what the law ought to be.

According to Kelsen's Pure Theory of Law, every legal norm is in accord with another 'higher' legal norm that authorizes its creation. The 'higher' legal norm, in turn, is valid only if it has been created in accord with yet another, even 'higher' legal norm that authorizes its enactment. More concretely, the constitution is the basic authorizing norm of the rest of the legal system, and the Basic Norm is the presupposition of the validity of constitution. Furthermore, Kelsen argued that every pair of norms which derive their validity from a single Basic Norm necessarily belongs to the same legal system and, *vice versa*, so that all legal norms of a given legal systems derive their validity from one Basic Norm. It is widely acknowledged that Kelsen erred in these assumptions about the unity of legal systems.

However, the role of the Basic Norm in explaining the normativity of law is crucially important. The presupposition of the Basic Norm as the condition of validity of legal norms marks Kelsen's theory as 'pure', and distinguishes it from other theories in the legal positivist tradition. Kelsen was convinced that any attempt to ground law's normatively - its 'ought' aspect - is doomed to failure if it is only based on facts, whether those facts are natural or social. Once again, to account for an 'ought' conclusion, one needs some 'ought' in the premises. Therefore, Kelsen thought, the normativity of law, as a genuine 'ought', must, ultimately, be presupposed.

[a] A summary of my scientific researches on this issue since 1977 follows. See: Positive Law and Normative Order (1977). Normative Order as a self-governing and evolutionary system (1978). Normative Force of Judicial Practice (1979). Positive Law, Normative Order and Judicial Practice (1981). Sense of Law and Law in the Action (1990). Evolutionary Interaction between Positive Law and Normative Order from the Point of View of Comprehension of Sense of Law. Doctoral Dissertation Essays. (1992). "A Structure of Normative order", in the Manual: B. Savaneli, "Modern Theory of Law", ed. Technical University of Georgia, 2004, p. 219-239.

Kelsen's pure theory of law is an attempt to find a middle way between natural law's dogmatism, and positivism's reduction of law to the social sciences. Kelsen does not claim that the presupposition of the basic norm is a necessary feature, or category, of rational cognition. The Basic Norm is an 'ought' presumption and, as such, optional. It is not necessary for anyone to accept the basic norm. The basic norm is necessarily presupposed only by those who accept the 'ought', namely, the normativity, of the law. The validity of a legal system partly, but crucially, depends on its actual practice: A legal order is regarded as valid, if its norms are by and large effective. Furthermore, the actual content of the basic norm depends on its 'effectiveness'. However, actual legal practice is characterized by normative pluralism, and the 'effectiveness' of the legal system depends on the normative order, which is free from subordination to the single legal system.

II. Normative pluralism in each country refers to the co-existence of multiple normative orders parallel with a single legal system such as positive law. In other words, in each country we have a **single** *legal* system (legal monism) and a **plural** *normative* system (normative pluralism).

Normative order and normative pluralism are synonyms. Normative pluralism or normative order is used sometimes to apply to those who advocate plural orders in contrast to state centralism. Positive law is a system of legal rules, which point out how public bodies or private persons of law ought to conduct themselves **ideally** regardless of the functioning of the rules reality. The normative order is a system of established rules, which show how public bodies or private persons act in **reality** regardless of what rules of positive law point to ideally.

The normative order comprises both state and non-state orders. Accordingly, there are two fields in the space of normative order in general: official normative order (hereafter – legal order) and unofficial normative order (hereafter – normative facts). In other words, normative order includes two spaces: 1. normative acts of public bodies, and 2. normative facts of private persons. Normative order or normative pluralism is a coexistence of legal order and normative facts.

The legal order comprises individual decisions of public (official) bodies. Legal order has a **vertical character**. Normative facts comprise individual acts of private (unofficial) persons. Normative acts have **horizontal character**. Both also include cross-sectional fields, which reflect a result of the coexistence and interaction of public law and private law in action, and the feasibility of legal order and normative facts. So, the normative order has

legal and non-legal contexts. The notion and functioning of the legal order as well as of the individual decisions of public bodies traditionally have been explored more carefully than the normative order in the non-legal context.

III. The notion of "normative order" in non-legal contexts refers to certain social facts, which have been named by Prof. George Naneishvili as "normative facts":[1] normative facts are the coexistence of different norms in the form of mutual individual rights and obligations within the different every-day social relations of private natural and legal persons' lives.[2] "Autonomous normative facts" in the space of social life[3], nicely catches the imprecision and porosity of the social context of normative order. Naneishvili's position, which is also mine, may be set forth in summary:

1. The normativity of facts does not depend on the positive law or its sources.

2. Normative facts are always prior to positive law.

3. We can always imagine normative facts in a space, which is not subject to the regulation of positive law.

4. Positive law cannot increase or decrease the number of normative facts.

5. The notion of normative facts excludes the idea of the free creation of rules of law. Positive law has an artificial, man-made character.

6. Concerning positive law: Because the specific character of positive law depends on the specific character of external transitional factors we can say that this (but not other) positive laws appeared. Therefore, each instance of positive law is but one of several possible (uninstantiated) positive law alternatives.

7. Concerning normative facts: Because the specific character of normative facts does not depend on the specific character of external transitionally factors, we cannot say that this (but not other) normative facts appeared. Each normative fact is not a possible normative fact, because a normative fact is a fact.

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[1] *George Naneishvili, Positive Law and Normative Facts, ed. Tbilisi State University, Tbilisi, 1930. G. Naneishvili graduated from Freiburg University in 1924. He was an assistant of founder of Psychological theory of Law - Prof. Leon Petrazhitski and follower of Edmund Husserl in Jurisprudence. Prof. George Nanaeishvili is only one scientist who on high creative level develops Reinach's Theory about Social Acts. (See: A. Reinach's major work, "The A Priori Foundations of Civil Law," (trans. John Crosby), Aletheia, 3 (1983).*

[2] *B. Savaneli, Interaction between Positive Law and Normative Order, J. "Law", 1997, N3, p. 34.*

[3] *G. Naneishvili, op. cit, p. 55.*

8. Normative facts can only be used by positive law for its aims or can institute constraints over the result, which, according to its value, should occur, but positive law can never annul normative facts.

9. In contradiction to the positive law, which always has an authoritative legal source, normative facts have no authoritative source. Therefore we always can say that positive law "happens", but we cannot say this about normative facts.

10. Normative facts should be investigated irrespective of positive law.

Normative facts reflects the normative pluralism in the day to day lives of individuals' and their groups, and, partially by the 'production' of individual legal rules by private persons. The normative lives of private individuals and groups form the independent normative life of society as a whole. The theory of normative facts is based on the idea of contract, treaty, and so on. These include, in particular, private civil contracts, mutual contractual aid, trade and collective commercial agreements as well as the vast range of internal institutional rules, rules of private different units, etc. - but not property rights. Property rights have a static, not a dynamic character. Normative facts have a dynamic and not a static character; they reflect active normative relations between two or more private natural and legal persons.

Developing G. Naneishvili's theory, I underline that mutual rights and obligations of individuals and legal persons are neither psychological entities nor are they mental. The bearers of rights and obligations are related to each other psychologically or mentally but their mutual rights and obligations are related **logically**.

The theory of normative facts moves away from questions about the effect of law[4] toward conceptualizing official and unofficial forms of normative order. "Many normative orders do not have discrete boundaries, they tend to be dynamic rather than static, and relations between them are extremely complex".[5] The positive law and the normative order coexist and interact in complex ways. Sometimes they compete or conflict; sometimes they sustain or reinforce each other through interaction, imposition, imitation and transplantation.[6]

Our position is based on the logical investigations of Edmund Husserl.

[4] *G. Naneishvili, op. cit, p. 57.*

[5] *W. Twining, Globalization and Legal Theory, ed. Butterworths, London, 2000, p. 85.*

[6] *B. Savaneli, Interaction between Positive Law and Normative Order from the point of view of comprehension of sense of Law. Doctoral Dissertation Essays. Tbilisi, (1992), p. 25. This work is subsequent development of conception about social facts (Reinach) and normative facts (Naneisshvili).*

Husserl developed a thesis advanced by his teacher Brentano to the effect that all mental acts are intentional, that is, that they are directed towards an object. Husserl maintained that all intentional experiences are in this sense 'objectifying acts'. Husserl's account of meaning builds upon this theory. All uses of language are, he says, referential. Accordingly, Husserl viewed acts such as questions or commands as masked assertions. The command "sit down on the chair" he interpreted as a statement to the effect that "your sitting down on the chair is my current request."

IV. All societies have different normative orders, in which state law does not exist in isolation, and more over is not necessarily the most powerful element thereof. The state has no monopoly of lawful power within a given country, except in criminal law and administrative law, because the normative order does not have discrete boundaries. The normative order is dynamic rather than static, and social relations in each normative order are extremely complex. Moreover, public normative acts and private normative facts coexist and interact in complex ways. Sometimes they compete or conflict, sometimes they sustain or reinforce each other and often they influence each other through interaction, imposition and transplantation. Often such influence is reciprocal.

Permanent and cyclical interaction between public normative acts and private normative facts inside legal orders, and permanent and cyclical inter-transition of positive law and normative order in to create a tendency through which we can comprehend a sense of the law. *The aim and goal of such interaction and transition is to achieve the sustainable development of humankind.*[7]

The above mentioned schema is not unknown to lawyers. All lawyers working in European Union countries or involved with transnational transactions or "alternative dispute resolution" operate in contexts of normative pluralism that typically involve non-state law as well as "official law in action". Concerning International Human Rights Law, particularly law of indigenous peoples, refugee law, law of the displaced persons, lawyers are increasingly involved in complex problems of "inter-legality".[8]

Plural forms of normative facts are based on the idea that there are many real worlds, which are largely independent of the individual's knowledge of a given world. Normative facts are mainly associated with "non-state law". E. Ehrlich, the pioneer of sociology of law, argued that a realistic depiction of the law in action had to account of "the living law" of sub-groups as well as

[7] *B. Savaneli, op., cit., p.35.*

[8] *Boaventura de Santos, Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition, (1995), p. 114.*

"the official law" of the state. He saw that these could diverge significantly and that sometimes one, sometimes the other would prevail. This was an important step not only in the direction of "realism", but also in deliverance from the idea that the state has a monopoly of law-creation.

These ideas were developed in a number of directions. For example, K. Llewellyn saw clearly that within a major group such as a nation-state, society or tribe, the basic functions of law, such as conflict-prevention and dispute-resolution, could be performed at different levels by a variety of mechanisms beyond rules such as education and social sanction and that different bodies of rules could coexist without necessarily being ranked in a clear hierarchical order.

V. A traditional thesis distinguishes between "Law in the books" and "Law in action".

If the task of legal science is to advance the understanding of law in the modern world, the facts of globalization and interdependence dictate that even the most local phenomenon needs to be viewed in ever-widening contexts, up to and including humankind in general. I agree with scientists in the field of globalization that no one can understand their local law by focusing solely on domestic legislation of single jurisdiction or nation states, that the range of significant actors and processes has been extended, and that the phenomena of normative pluralism is central to understanding law in today's world.

The normative order of each country is a gamma of normative orders of individuals and groups bound by mutual rights and obligations. Developing A. Reinach's and G. Naneishvili's theories, I underline that the bearers of mutual rights and obligations are related to each other psychologically or mentally but mutual rights and obligations are related **logically**. Mutual rights and obligations of individuals and groups are neither psychological entities nor mental. Mutual rights and obligations are exclusively normative entities like norms of positive law. Moreover they are always prior to the positive law.

Different levels of normative order are not neatly nested in hierarchies, nor are they impervious, nor are they static. They interact in complex ways. Moreover, to understand the normative order, the study of norms is almost never enough. One also has to take account of values, facts, meanings, processes, structures, power relations, personnel, and technologies.

The only way to make sense of the overlapping normative orders in the modern world is to take refuge in picturing all states legal systems,

international order and other orders in a single monist or pluralist system. Monism and Pluralism are entire process, which establishes a new synthetic system of law building in worldwide scale.

If we compare Positive Laws of different countries inside and/or outside of the contemporary global legal system we will found much more commonality then difference. Principles of Roman Law permeate the global legal system. "Law in the books" has a cosmopolitan character. Differences between Anglo-Saxon and Francophone legal systems are largely superficial and not substantive. For example, the distinction between written and unwritten law is principally superficial, because each composes Norms. "Written law" however is technically precise.

Yet., if we compare legal orders of different countries inside and/or outside of the globalizing ius commune we will found many more differences then commonalities. In other words "law in action" has an ethnocentric character.

VI. I believe that above-mentioned differences should be serve as starting-point for the continuing dialogue among different cultures of West and East (for example, between Christians and Muslims). The constant coexistence of principled positive law and inconstant normative orders is a historical fact. Historically, positive law and normative order never coincided - luckily, because such differences are a precondition of progress and prosperity. But, for sustainable development, it is necessary to create permanent checks and balances between them. If positive law supersedes the normative order, dictatorship results (e.g. the national system). If normative order supersedes positive law, the result is anarchy (e.g., the international system). Positive law, as a monistic phenomenon, consolidates. Yet normative order, as a pluralistic phenomenon, isolates humankind. This is a good balance, like the balance between public law and private law. The goal is to strengthen positive law and to bring normative orders of different cultures closer together, into greater harmony. Looking for isolated differences from the whole is a dangerous mistake.[9] A function of the legislator and of the administration of justice is to create permanent checks and balances between them on both levels.

The "comparative legal families" theory ignores phenomena of normative order as well as different normative orders of and in countries, separating jurisprudence from reality. In this respect, it is necessary to restore a particular jurisprudence, which explores the normative order of each country and then compares the normative orders of different countries.

[9] *B. Savaneli, Theory of Law, Manual (1993), p. 201-2005.*

Thereto it is methodologically helpful to introduce a new branch of the science of law **– "comparative normative orderings**". Such a point of view is necessary for the strengthening of the European house and the distribution of Democracy in Post-Soviet countries and worldwide. This approach is at the heart of the research on Human Rights and Intercultural Dialogue carried out at the LAJP. However, when and where it is appropriate to draw sharp distinctions between legal and non-legal orders and other phenomena, or between state and non-state law, or between legal orders, systems, traditions and cultures is context-dependent: that is dependent on one's vantage-point, perspectives and goals.[10]

Accordingly, a duty of scientific research is not only to comment on and analyze laws but also to describe and analyze the normative order in its several forms. The plurality of the normative order includes the normative order of countries, regions, cities, villages etc, as well as different macro and micro groups in these spaces. The interaction between positive law and normative orders today needs an adequate conceptual framework and meta-language than can transcend national legal cultures. Such a function could be undertaken by universal human rights and freedoms as a coordinator of peaceful and cyclical inter-transitions of positive law and normative order.

VII. A Hierarchy of norms in the World Legal System has to issue from Universal Human Rights as the peak of the pyramid *(Grundnorm)* of World law and order. Excessive passion for Universalization (excepting Human Rights), is as dangerous as excessive passion with Pluralization (except as the *rule of law state*). The method must be based on an investigation of the correlation among "a pluralist approaches to Law", "an intercultural legal theory" and "an intercultural approach to normative orders".

The pluralist approach also means an investigation of the diversity of normative orders. But that is only the start. The task of such investigation is to discover common and distinctive elements among positive law and the normative order, and then the elaboration of "consensus laws" and ways of rapprochement through "an intercultural approach to law and order" based on the **universal human rights**. The next stage is a theoretical rethinking of the above mentioned "approaches" and the elaboration of recommendations towards their rapprochement. That should be and endless spiralling process of civilization. **Universal Human Rights are the sense and spirit of the Law.**

Summarizing the above mentioned principles I underline the following: Positive law is **what ought to be.**

[10] *W. Twining, Globalization and Legal Theory, ed. Butterworths, London, 2000, p.253.*

1. Positive law is an entity of "**ideal"** legal rules, which regulate civil, political, economic, social and cultural relations among persons *in abstracto* through the recognition, separation and/or protection of mutual rights and obligations by the application of judicial force in case of their violation. Public Law and Private Law are the two branches of Positive law. Public Law regulates public relations between public persons. Private Law regulates private relations between private persons. Public Law and Private Law have fields of junction. Positive law includes a cross-sectional field, which reflects a result of some congruence of public law and private law. Positive law has a vertical hierarchy. Legal theory refers to phenomena of positive law In short, Positive Law is "**law in the books**".

2. The normative order is **what it is**. It is the notion of normative order based on the philosophical thesis that there are "multiple realities". The normative order is an entity of "**real**" individual legal acts and normative facts, which regulate civil, political, economic, social and cultural relations among public and/or private persons *in concreto* through the recognition, separation and/or protection of mutual rights and obligations by the application of judicial force in case of their violation. The normative order includes also a cross-sectional field, which reflects the coexistence of the feasibility of legal acts and normative facts. The normative order has a horizontal character.

Legal acts constitute the legal order, which shows the **real** state of public relations in society. The legal order can be directly described, because it has documentary forms, is transparent and easily accessible. The analysis of the legal order is not problematic for legislator. The legal order is an official form of the normative order. Normative facts constitute the non-legal order, which shows the **real** state of private relations in the society. Non-legal order can't be directly described, because it has no documentary forms, is latent and difficult to access. To analyze normative facts is problematic for the legislator: it needs scientific investigation. Normative facts relate to the category of "non-state law". Normative facts are an unofficial form of normative order. The theory of normative facts is an important step not only in the direction of "realism" but also away from the idea that the state has a monopoly of Law-creation.[11] Sociology of Law refers to phenomena of the normative Order. In short, the normative order (normative pluralism) is **"law in action".**

[11] "Normative pluralism is generally marginalized and viewed with skepticism in legal discourse. Perhaps the main reason for this is that over 200 years western legal theory has been dominated by conceptions of law that tend to the monist (one internally coherent legal system), static (the state has monopoly of law within its territory), and positivist (what is not created or recognized as law by the state)". W. Twining, op. cit. p. 232

3. I distinguish positive law on the global and on the local levels.

Positive law on the global level refers to Universal Human Rights Law, Environmental Law, Public International Law, Humanitarian Law, Private International Law, Trade Law, Trans-national Law, Regional Law, Inter-communal Law etc., worldwide. Positive law on the local level refers to the single legal system of each state, which should be compatible with the Universal Human Rights Law, Environmental Law, Public International Law, Humanitarian Law, Private International Law, Trade Law, Trans-national Law, Regional Law, Inter-communal Law etc.

I distinguish normative order on the global level from the local level. Normative order on the global level refers to the state of realization of universal human rights law, environmental law, public international law, humanitarian law, private international law, trade law, trans-national law, regional law, inter-communal law etc, which form legal orders and a large space of normative facts in worldwide. Normative order on the local level refers to the state of realization of Universal Human Rights Law, Environmental Law, Public International Law, Humanitarian Law, Private International Law, Trade Law, Trans-national Law, Regional Law, Inter-communal Law and etc, which form legal orders and a large space of normative facts within each country's boundaries.

4. One of the most fundamental distinctions in legal theory is the interaction and mutual transition between "the theory of positive law" and "the theory of normative order". *The core idea* of the distinction between the theory of positive law and the theory of normative order is simply this: *the theory of positive law seeks to explain what the law* ***is,*** *in other words,* ***what the law claims,*** *whereas normative order theory tell us what the positive law* ***ought to be,*** *in other words,* ***claims what the law should be.***

A bridge between ***what the law claims and what the law should be claim*** is found in seeing the legal order as a part of normative order. Investigation of the legal order in the framework of the normative order gives us an opportunity to assess how positive law (*sollen - ought*) is implemented in practice (*sein - is*). In the process of investigation of the legal order in the framework of normative order, an **idea of law** arises, in other words, claims to what the law should be from the point of view of the Just Law**.**

5. I suggest a spirally, cyclically and endlessly developing theory of interaction and mutual-transition of Positive Law and Normative Order in global and local levels. Permanent and cyclical interaction between positive law and normative order on the locally, nationally and globally present a trend to comprehend permanently an idea of **Just Law,** which must be

based on Universal Human Rights. The aim and goal of such interaction and transition is to achieve sustainable development of Humankind. Already in the XIIth Century the famous Georgian thinker, **Shota Rustaveli,** one of the founders of Neo-Platonism, proclaimed the idea of just law. As he said: "To do just law, makes a dry tree green".

6. The "legal families" theory of Comparative Law ignores the phenomenon of the normative order, because it does not explore and compare normative orders of different countries, which are in the same "legal family". The suggested theory takes stock of new comparative law scholarship to compare normative orders of different countries *within* each legal "family", whether Germanic, Romanist, Common Law, Islamic, Post-Soviet, Far Eastern legal families and etc. So it is necessary to introduce a new branch of legal science: **Comparative Normative Orders Study**. In this respect it is necessary to give theories of general and particular jurisprudence a broader scope, which will explore not only a positive law but also the normative order of each country.

7. My core argument is that the post-modernity is in crisis. It has exhausted its political potential and is in process of being replaced by a new post-positivist paradigm, which could be built on the emancipatory possibilities of the Rule of Just Law based on the Universal of Human Rights.[12]

Conclusions

1. **Legal Monism** (Public Positive Law) indicates how natural and legal persons ought to act **ideally**.

2. **Normative Pluralism** (Private Normative Order) shows how natural and legal persons act **in reality**.

3. **Legal Monism** (what ought to be) and **Normative Pluralism** (what is) never coincide completely.

4. **The Idea of Just Law** suggest what sort and kind of law legislators (in Roman-Germanic i.e. civilianist legal space) or judges (in Anglo-American, i.e. common law legal space) should make, so that that law would be **just** from the Universal Human Rights point of view.

5. The Mutual-Transition of Legal Monism, Normative Pluralism and Idea

[12] *More information: The Universal Human Rights Law As a Pick of the World Law. Religion, Ecology and Justice ... Universal Human Rights Law as "Two Faced Janis" ...www.geocities.com/b.savaneli* - 5k - *Cached*

of Just Law must be based on **Universal Human Rights Law as Basic Norms**, and this process must be repeated **spirally, cyclically and endlessly** [i.e. dialectically; ed.]**.** [13]

[13] *Review: "Dear Professor Savaneli! Thank you very much for your summary about "The Theory of Spirally and Endlessly Development of Mutual-Transition of Positive Law and Normative Order. We are glad that there is so active academic researcher on legal theory like you in Georgia! Yours sincerely, Dr. Klaus Zeleny, Hans Kelsen's Institute, Vienna, Austria, Thu, October 8, 2009, 1:56:29 PM 20.02.08".*