THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

"Law in the Books" and "Law in the Actions"

Bidzina Savaneli

Visiting Professor in Law and Human Rights at the St. Grigol Peradze University, Georgia,

savaneli@hotmail.com

Abstract: Normative order's notion does not pretend to develop some kind of a rigorous science of perfect understanding of human and social processes, nor does it claim to provide the final truth of normative processes at all levels. What I want to argue by way of the above brief account of gap in the laws and their implementation is that the capability of law to control behavior is highly circumscribed. Law as an instrument of social reform has a limited utility if at all.

Keywords: competence; law; social reform; obligation

"The idea of law, in spite of everything, seems still to be stronger than any ideology of power."

Hans Kelsen

Law in the books is nothing else than the single positive law. Law in the books or single positive law is an established **general** rules or acts, by which have been defined the competence of legislative, executive and judicial bodies. Such general rules or acts usually set forth in constitutions or other basic general normative acts. Law in the actions is nothing else than the one part of public normative order (other part is a private normative order). Law in the actions or public normative order is an established **concrete** rules or acts, by which competent legislative, executive and judicial bodies are regulating individual public and/or private relations among public and/or private persons. My position concerning single positive law concerning state law is partially based on the H. Kelen's pure theory of law; partially, because - individual normative acts of public bodies and individual normative acts of private persons are ***"seinregels",*** but not ***"solenregels",*** because ***"solenregels"*** connected with rules of positive law, but not rules of normative order. Hierarchy of state's bodies reflects general legal rules of organization of state's power. Accordingly, hierarchy of state's bodies is a reflection of hierarchy of sources of state's law.

Law in the books i.e. single positive law (public law and private law) is traditionally investigated and explored more broadly and deeper than law in the actions - normative acts of public bodies. On the level of positive law ***"sein"*** and ***"solen"*** are not contradicted each other, they coexisted **logically** in the framework of two parts of structure of each legal rule: hypothesis and disposition. On the level of normative order ***"sein"*** and ***"solen"*** are not contradicted each other, they coexist **empirically** in the framework of two parts of structure of each normative fact: fact and rule. (For example, treaty as

normative fact consists of two parts: a fact of conclusion of treaty and mutual rights and obligations between participants of treaty). In other words, normative order embraces factually settled order (practice) of application of general legal rules by individual public bodies (precedent in broad sense) and factually settled order (practice) of application of mutual rights and obligations by private persons. On the level of normative order ***"sein"*** and ***"solen"*** coexistence not logically but factually and they are indivisible.

More over, all societies have different normative space, in which positive 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 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.

"Law in the action" expresses one part of normative order, which is only connected with the official normative acts of public bodies. By normative acts of public bodies mutual rights and obligations have distributed officially (public order).

Other, comparably independent part of normative order is unofficial normative acts of private persons (private order). By normative acts of private bodies mutual rights and obligations are distributed unofficially. Common for both acts is that both are settled mutual rights and obligations of participants of relations.

Normative order (public normative acts and private normative acts) includes speech acts of public bodies and private persons too. What I talked about normative acts of private persons (normative facts) concerning speech acts in section III I repeat about normative acts of public bodies (legal normative acts). But as far as I would like to consider both together concerning speech acts, I have decided to analyze the problem more broadly.

Speech act theory will forever be associated with the great **John L. Austin.** One of Austin's core insights is reflected in the title of his William James lectures, delivered at Harvard in 1955, "**How to Do Things with Words".** When we use language, we usually don't say: what the world **is** like; when we use language: we **do** things. We command, request, apologize, contract, convey, and admonish. Speech act theory focuses on the ways in which oral language used for the performance of actions.

Speech act theory begins with the idea that language can be used to perform actions. Here are the following forms of speech acts:

Constants: affirming, alleging, announcing, answering, attributing, claiming, classifying, concurring, confirming, conjecturing, denying, disagreeing, disclosing, disputing, identifying, informing, insisting, predicting, ranking, reporting, stating, stipulating.

Directives: advising, admonishing, asking, begging, dismissing, excusing, forbidding, instructing, ordering, permitting, requesting, requiring, suggesting, urging, warning.

Commissions: agreeing, guaranteeing, inviting, offering, promising, swearing, and volunteering.

Acknowledgments: apologizing, condoling, congratulating, greeting, thanking, accepting.

All above mentioned speech acts are individual normative acts, which may have legal or non-legal contexts.

Legal theorists are interested in speech acts theory for a variety of reasons, but one of the most important is that speech act theory helps to explain the way that the law uses language. Constitution,

Statutes and other normative acts aren't like "the cat is on the mat." That is, a statute does not tell us how the world is in the same way that a declaratory sentence does. Legal language is full of speech acts.

Reinach maintains that such truths are not merely necessary and universal, but also informative, thus that they are examples of truths that are both a priori and synthetic. Adolph Reinach mentions many social acts in his treatise on "The A Priori Foundations of the Civil Law" (1913): commanding, requesting, warning, questioning and answering, informing, enacting, revoking, transferring, granting, and waiving of claims, but he devotes the most attention to the act of promising. Drawing on the theory of essences or intrinsically intelligible structures referred to above, Reinach offers the following examples of a priori truths about what he sees as the intrinsically intelligible structure instantiated through the performance of a promising act:

- through promising one incurs an obligation;
- by receiving a promise one has a claim to what was promised;
- such claims are extinguished when the promise is fulfilled;
- such claims may also be extinguished if the claimholder waives the claim;
- promising is subject to a range of variations or modifications, including conditional promising, promising on behalf of or as a representative of someone else, promising to a group, promising by a group, and so forth.

I am sure that one of the most fundamental distinctions in legal theory is the distinction between "positive law theory" and "normative order theory." *The core idea* of the distinction between positive law theory and normative order theory is simple: positive law theory seeks to explain what the law **is,** in other words, **what the law speaks**, whereas normative order theory tell us what the positive law **ought to be speak,** in other words**, what the law should be speak based on the practice of "things" but not on the "words".**

A bridge between **what the law speak and what the law should be speak** *lies through the normative order.* Investigation of normative order gives us an opportunity to assess how positive law (*sollen*) implemented really in legal order (*sein*). In the process of investigation of normative order arises an idea of justice, in other words, an idea *what the law should be speaking***.** Reconcile H. Kelsens' and G. Naneishvili's contradictory theories, I have suggested a new "Spirally and cyclically developing theory of interaction and mutual-transition of Positive Law and Normative Order". Based on human rights permanent and cyclical interaction between positive law and normative order and permanent and cyclical inter-transition of positive law and normative order at global and local levels has a trend to comprehend permanently an **Idea of Justice.** The aim and goal of such interaction and inter-transition is to achieve sustainable development of Humankind based on the Universal Human Rights.

Instead of "**How to Do Things with Words",** *I suggest the formula:* "**How to Do Words with Things**" in the sense of **Giant Goethe:** ***Im Aufang war die Tat",*** because ***"New things produce new words",*** which means that in normative space new facts produce new mutual rights and obligations. Human beings do things without words, the things do words, the words do new things, new things do the new words, the new words do new things and etc. Like this the entity of new facts and new mutual rights and obligations create new normative space, which causes necessity to establish new positive law and etc. It is not surprising that it has been said that "what a judge does is more important than what he says he does". (Dickenson, 1976, p. 53)

Of course, on the one side, speech act is one of the forms of human being's activity. Through speech act human being's activity can be transmitted from one position to another, or its normative state can

be changed, or the volume of its individual rights and obligation can be broaden or get narrow, but, on the other side, in any case, human being more silently acts than speaks. Related to the strictly normative space, speech act is one of the forms of legal act, but in any case, public body more silently acts than speaks. In whole, speech acts are one of the forms of normative order, but in any case, public bodies and private persons more silently acts than speaks.

Permanent and cyclical interaction between things and words and permanent and cyclical inter-transition of things and words at global, regional, national and local levels has a trend to comprehend a sense of existence of Humankind based on the Universal Human Rights. The aim and goal of such interaction and inter-transition is to achieve sustainable development of Humankind.

The positive law and normative order in civilized countries are not strictly contradicted each other, they exist in parallel regimes, because they are entirely different levels of life of the nation state and civil society in whole. Functional asymmetry between them is normal process and that process indicates on the perspective of evolutionary development of civil society in whole. Particularly, positive law is unempirical space of life of civil society, while normative order is empirical space of life of the civil society. Exposition of contradiction between positive law and normative order is possible only **theoretically** in the process of exploration of their dynamics, using comparative and other methods. Moreover, individual public normative acts and individual private normative acts coexist and interact in complex ways. Sometimes they also 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. In this respect, I forced to set forth in large an extract from the work of famous thinker – Bruce Ackerman, because his position brilliantly reflects reality concerning interaction between positive law and normative order, and individual public normative acts and individual private normative acts from the point of view of human rights. Let us listen intently to author: "Rights are not the kinds of things that grow on trees – to be plucked, when ripe, by an invisible hand. The only context in which a claim of right has a point is one where you anticipate the possibility of conversation with some potential competitor. Not that this conversation always in fact arises – brute force also remains a potent way of resolving disputes Rights talk presupposes only the *conceptual* possibility of an alternative way of regulating the struggle for power – one where claims to scarce resources are established through a patterned cultural activity in which the question of legitimacy is countered by an effort at justification. …While it is impossible to analyze every concrete institution that regulates the struggle for power, we must resist the temptation of grossly simplified account. This is, perhaps, the most common mistake made by partisans of the liberal tradition. Time and again, these people speak as if the only significant power in society comes out of the smoking typewriter of government bureaucrats. While they are tireless of their efforts to constrain this power by exacting standards of neutrality, they often react with shocked surprise at the very idea of subjecting the powers of "private" citizens to an identical scrutiny. Yet, first of all, we live in a world in which the powers of government are routinely called upon to enforce (as well as define) all of these "private" entitlements. Without this reinforcement, there is no reason to think that those presently advantaged by the distribution of "private" rights would remain so. …While the past century has not been rich in normative liberal theory, there has been a superabundance of descriptive accounts and positive theories in economics, politics, psychology, child development, and many other areas of obvious normative significance. This overwhelming literature poses serious problems for liberal political philosophy. …Thus, if judges where unable to predict future conduct accurately or if they selectively invoked the risk of future harm to suppress people if they considered "deviant", then the dangers of illiberal abuse involved in preventive restrictions might well outweigh Endangered's right

to physical security. …The problem – relating ideal to reality – serves as a critical test for any political philosophy. On the one hand, a theory that cannot serve as a practical guide is merely utopian fantasy, an inferior form of fiction. On the other hand, a book that offers a detailed action program is merely a symbol of theorist's power lust, an inferior form of autobiography". (Ackerman, 1980, pp. 5, 18-19, 65, 84, 231)

This essay suggests that sharp distinctions between general and particular jurisprudence have a limited value at levels, including positive laws of Romano-Germanic and Anglo-Americans countries, because all of them represent the positive laws of appropriate countries. More over, as justly underlines Twining: "Globalization brings to the fore a wide range of issues as transnational, international, and global levels and is rapidly changing the significance of national boundaries." (Twining, 2000, p. 47)

Controversially, this essay suggests that sharp distinctions between general and particular jurisprudence on the one side, and normative legal and non-legal jurisprudence on the other side, have no limited value at all levels, including normative orders of Romano-Germanic and Anglo-Americans countries, because all of them represent diversity of normative orders, more over, contradiction between legal monism and normative pluralism, between a single positive law and plural normative orders at the internal, regional and global levels.

In this respect, Dworkin's agenda for legal philosophy really support our theory of normative order, because his main interest is correct and arguable adjudication in hard cases. He confines his focus to question: what constitutes a valid and cogent argument on a question of law in a hard case? His answer is much wider than a theory of common law adjudication for at least three reasons. First, within any legal systems judges are not only actors involved in interpretation. Officials, good citizens, an experts are typically concerned with the best interpretation and not just to second-guess judges. Secondly, concepts like "judge" and "court" are quite culturally specific. Thirdly, as Dworkin has acknowledged, his ideas about interpretation and argumentation could possibly apply in societies that have no third party adjudication. Such position belongs to "Law in Action" (normative order), than to "Law in the Books" (positive law), because litigation, lawyers, judges, courts are historically institutionalized at the level of normative order, which is connected with the established practice of legal acts of public bodies. Dworkin draws a distinction between "the very detailed and concrete legal theories lawyers and judges construct for a particular jurisdiction and the abstract conceptions of law that philosophers build, which are not so confined." Dworkin claims that his best theory of law describes legal practice as well as prescribing best practice And this is correct, because for me the established practice (precedent) of normative acts of public bodies is not the part of public law, but the public normative order.

In whole, I agree with Dvorkin in above mentioned directions, but answer is not imperfect on the question: What constitutes a valid and cogent argument on a question of law in a hard case? A valid and cogent argument on a question of law in a hard case should be issued from strong criterion. Without such criterion any answer will be very discussable, and sometimes curios. For me, such criterion is the human rights conventions and established practice (precedents) of human rights courts at the regional and international levels.

Therefore:

I. State Law or Positive Law is the summary of impersonal and abstract legal acts, by which have been generally and hypothetically regulated potential economic, social, cultural, civil and political relations in the country among public bodies and/or private persons through the recognition and distribution

mutual rights and obligations, which in a case of their violations are guaranteed by the possible application of legal force by the just judiciary. (Savaneli, 2004, p. 13)

II. The Normative Order is 1) the established and stabled order or practice of realization of abstract legal acts by public bodies that particularly and concretely regulate real interpersonal relations through the official distribution mutual rights and obligations among the individual participants of normative relations and their interaction; and 2) the established and stabled order or practice of realization of free individual wills of private persons that particularly and concretely regulate real interpersonal relations through the unofficial distribution and realization of mutual rights and obligation among the individual participants of normative relations, and 3) the established and stabled order or practice of realization of abstract legal acts by the just judiciary through the application of legal force that particularly and concretely regulate real interpersonal relations among the individual participants of normative relations in a case of violations of mutual rights and obligations. (Savaneli, 1981, pp. 22, 41)

In legal space, state of positive law does not directly influenced on state of legal order i.e. on the state of established legal practice of public bodies. Analyzing human rights records of such authoritative and competent organizations as are UN agencies, Amnesty international, Human Rights Watch, Charles Humana, Freedom House, Transparency International and numerous of other bodies concerning observation of universal human rights law by different nation states and regimes, directly underlines distinction (sometimes huge distinction) between "Law in the Books" and "Law in the Actions", i.e. generally between Single Positive Law and Plural Normative Order.

Necessity of eradication of contradiction between positive law and normative order arises when "anti-entropyan" (self-regulatory and/or self-governing) autonomous mechanisms exhaust their means and resources, and level of disorder in normative order reaches a critical stage. Necessity of eradication of contradiction between individual acts of public bodies and individual acts of private persons inside the normative order arises when "anti-entropyan" (self-regulatory and/or self-governing) autonomous mechanisms exhaust their means and resources, and level of disorder in normative order reaches a critical stage.

When entropy in any space of normative order reaches the stage, which is threatened the vital life of civil society, is appeared an idea of legal reconstruction of appropriate space of positive law. More clearly, when in the process reaches evident theoretical contradiction between positive law (ought to be) and normative order (to be), and between individual acts of public bodies and individual acts of private persons inside normative orders, which indicates that positive law inadequately and unjustly regulates relations between natural and/or legal persons, any legislator must began the process of thoughtfully investigation and exploration of normative order for the elaboration of new positive law which adequately and justly resolved such contradiction between positive law (ought to be) and normative order (to be) generally, and between individual acts of public bodies and individual acts of private persons inside legal orders particularly. In other words, the aim and goal of such investigation and exploration is to discover the normative disorders inside normative orders, and than elaboration of new positive laws for eradication of normative disorders. Achievement of such aim and goal is the main function of any legislator on the local, internal, regional or global levels.

The purpose of investigation and exploration of normative order i.e. investigation and exploration of individual acts of public bodies (public normative order) and individual acts of private persons (private normative order) are to decrease entropy through the improvement of appropriate fields of positive law. First of all, it means generalization of normative practice of normative acts of public bodies in the

process of distribution of mutual rights and obligation among participants of normative relations and generalization of normative practice of private persons in the process of distribution of mutual rights and obligation by them, which first of all is the obligation not sociologists but professional jurists with the sociological bias. After that, adequate and just resolution of contradiction between positive law (*ought to be*) and normative order (*to be*) normative system of the country in whole, and between individual normative acts public bodies and individual acts of private persons inside the normative order through the creation of new positive law, using P. Ricoeur's general model, generally consists of three stages: pre-figuration (anticipation), con-figuration (formalization) and re-figuration (reorganization). (Ricoeur, 1983, p. 59) Particularly, the process of thoughtfully investigation of normative order for the elaboration of new positive law should be based on the normative pyramid of reasoning.

With a view to explain of process of mutual transition, spiral and evolutionary development of single positive law and plural normative order related to the new comparative normative order study in context of global conflicts resolution it could be used Prof. Dr. L. Djokhadze's impressive model of stylistic-conceptual system in her very important monograph "Literary Text as a Stylistic-Conceptual System" (2008), which closely converged with my position in my monograph "Normative Order and Judicial Practice" (1981). L. Djokhadze's position is following: "In normative pyramid of reasoning the core sensual variants concentrate in the center and move from the bottom-up to the top while all the marginal ones after checking and filtering remain on the lower levels or strata of the model to form background knowledge to the effect to the cognitive normative concepts. Every previous phase is a preparatory stage to proceed on the follow-up phase until finally the investigator achieves hierarchically top phase to elicit the conceptual information. The process of making predictions includes a certain adaptation. The degree of adaptation depends on the amount of frustrated expectations or justified predictabilities. So that in case of regular goal-oriented movement of above mentioned methods – adaptation the investigator may benefit, elucidating the maximum information at expense of minimum time and effort. Simultaneously moving up-ward to the top of cognitive-normative pyramid there is top-down sensor checking process as well, which sets up loose associations condensed in our concept. It offers the knowledge and experience of all the previous phases. Otherwise this self-regulated system shows how to achieve the non-finalized decisions made in every phase. Any element that occurs in this system has its own normative structure. Drawing attention to the most important one, the investigator reluctantly receives information about other parameters i.e. we observe constant changing process of analysis and synthesis. To the end, the cognitive normative concepts assist us the cognize the world, both visible and/or invisible, organizing the surrounding chaos of normative disorder into the order of orders".[1]

The process of permanent taking off a contradiction between individual normative acts of public bodies and/or individual normative acts of private persons inside legal orders, and the process of taking off a contradiction between positive law and/or normative order in the frameworks of their permanent inter-transition creates a spiral, sustainable and evolutionary tendency through which any legislator comprehend a sense of law. In philosophical terms: mutual transition, spiral and evolutionary development of positive law and normative order based on the "principle of causality through freedom", but not "principle of causality of the nature". ***The aim and goal of such mutual transition, spiral and evolutionary development of positive law and normative order is to achieve the sustainable development of humankind.***

[1] L. Djokhadze, 2008, Literary Text as a Stylistic-Conceptual System", Summary in English, ed. "Khirony", Tbilisi, p. 41, in Georgian. See also (Savaneli, 1981).

Therefore, normative order is a system of normative orders ("order of orders" using great Rustaveli's term – see below). Normative orders interact to each other in the frameworks of normative order. Normative order and normative orders interact like interact of whole and part, but not like general and single. More precisely, the normative order of each country is a gamma of normative orders of individuals and/or 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 themselves 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." (Naneishvili, 1930, p. 58)

Different levels of normative order generally 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.

Therefore single positive law (*"solen")* and normative order (*"sein")* are different space of life of Humankind. Single positive law is a summary of impersonal rules, which generally regulates potential economic, social, cultural, civil and political relations in the country through distribution of mutual rights and obligations among the possible participants of these relations. Plural normative order is a summary of personal rules, which individually regulates real economic, social, cultural, civil and political relations in the country through distribution of mutual rights and obligations by the participants of these relations.

At the international level we have a single state (positive) law – international (public and private) law and plural normative order which includes public normative acts of sovereign states and their bodies (official normative order), and private normative acts of sovereign persons and their unions (non-official normative order).

At the regional level we have a single state (positive) law, for example, EU (public and private) law and plural normative order, which include public normative acts of EU member states and their united bodies (official normative order), and private normative acts of sovereign persons and their unions in EU space (non-official normative order).

At all, international and regional (including internal) levels, the normative order censors how positive law favors to the observation human rights and freedoms by public bodies and private persons.

Using great J. Bentham's term on **"Censorial Jurisprudence"** concerning my theory I put in this term the following sense. "Censorial Jurisprudence" should explore the positive law from the point of its conformity to the *jus cogens* principles of law and international law. "Censorial Jurisprudence" should at all levels explore the conformity of positive law and normative order from the point of justice. "Censorial Jurisprudence" should explore at all levels any contradiction between positive law and normative order from the point of their conformity to the principles enshrined in International Bill of Human Rights.

Conclusions

Comparative jurisprudence is a comparison of existing systems of Positive Laws of different nation countries. Comparative jurisprudence is a comparison of existing systems of Normative Orders of different nation countries. Comparative jurisprudence is a comparison of existing systems of Positive Laws and Normative Orders of inside of nation countries. Comparative jurisprudence is a comparison of existing systems of Positive Laws and Normative Orders of outside of nation countries. Comparative jurisprudence is a scientific investigation of harmonization, mutual transition, spiral and evolutionary development of single Positive Law and Plural Normative Order.

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