

LAW AND ORDER OR GLOBAL ANARCHY

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ABSTRACT

Substantial problem of paper is at the junction of Sociology of Law, Legal Theory and Philosophy of Law. My 12 years experience as a city judge has been strengthened fundament for the practical approach to the solution of focal problems of contemporary jurisprudence. My pedagogical experience since 1990 as the professor of Faculty of Law at the Tbilisi State University, Technical State University and Priesthood Academy and Theological Seminary of Georgia, gave me great spiritual impetus to envelop the broad spectra of problems of Globalizing World.

Based on the scientific positions of famous scholars Bentham, Osttin, Holmes, Kelsen, Ehrlich, Reinach, Hart, Llevellin, Kardozo, Dworkin, Rawls concerning the problems of positive law, legal pluralism, human rights, comparative law, justice, post modernism, and Georgian philosophical, sociological and legal traditions since XII century, I am raising the model of dialectical, spiral, evolutionary and mutual transformation of positive law (legal irrationalism) and legal order (legal rationalism) as the effective method of conflicts prevention and peacefully resolution at the International, Regional and National levels under the auspice of Bill of Human Rights.

Key words: Positive Law, Legal Order, Dialectical Jurisprudence, Comparative Legal Order, Social Justice, Human Rights.

Summary

1. Globalization in modern world reflects such transnational problems which have never been exist in history of Humankind in widespread aspect: Monopolization of World Economics and Extreme Poverty; European Union and NATO; World Bank, IMF and Developing Countries; International Drugs Network and Terrorism; Internet and E-mail; ‘Judaism’ and ‘Islamism’; Global Warming and Ozone Depletion; Deforestation and Marine Pollution; Israel, USA, UK and Muslims; Contraband Armaments Traffic and Unregulated Financial Transfers; Amnesty International and Greenpeace; Coca-Cola and Macdonald’s; Exhausting of Non-renewable Earth Resources and Neo-colonialism; Corruption and Illegal Human Trade; International Trade Union Organizations and Transnational Woman’s networks; ”Black Africa” and ”Yellow Asia”; Catholic and Orthodox Churches; Ethnic Conflicts and the vast herds of Displaced Persons; Growth of Racism and Ethnic separatism; and a cross synthesis of above- mentioned realities in combination with other factors.

The matter is that on the planet is raging tornado of amorphous and inadequate rules of politics out of the frameworks of rule of law, justice and human rights. Globalization of such politics globally turned human being into slave without visible fetters. Therefore, we the people of the world need a New Human Philosophy of Positive Law and Legal Order under the auspice of Universal Human Rights, which links the East and West, North and South, ethics and religions, public and private life, technologies and environmental protection, and the myriad problems, which have never been exist in the history of mankind in widespread aspect.

I am suggesting a dialectical model for outcome from unprecedented for the Humankind contradictions of above mentioned problems. In this respect, decisive role belongs to the **Dialectical Jurisprudence**, which will envelop institutionalized study and comparison of legal orders and positive laws of each nation country independently, evaluate a model of their mutual transformation, spirally and sustainable development, envelop institutionalized study and comparison of legal orders in the world, based on it - evaluate institutionalized model of world legal order and positive law, then evaluate a model of their mutual transformation, spirally and sustainable development of under the auspice of the Bill of Human Rights.

2. The fact is that ‘Rule of law’ no more operates effectively in interstates relations. Therefore, as outcome from the above mentioned extreme situation I am putting forward the idea of necessity to replace ‘Rule of Law’ by **‘Rule of Human Rights Law’**. My point is following: implementation of such idea is urgent goal of Humankind.

Of course, in this respect, some crucial questions have aroused.

How should we conceptualize the ‘Rule of Human Rights Law’ with regard to global society? What are the unique challenges of confronting attempts to develop the ‘Rule of Human Rights Law’ given the nature of transnational society? Does ‘Rule of Human Rights Law’ constrain states’ power, facilitate it, or entrench it? What new effective supra-national mechanism must be creates that prevent government to establish tyranny and oppression over own people? What are the particular ways in which ‘Rule of Human Rights Law’ works – are they different in different areas of life of Humankind? What are the accommodations and compromises that ‘Rule of Human Rights Law’ seeks to make with States’ power? Is ‘Rule of Human Rights Law’ more or less effective as a result? If ‘Rule of Human Rights Law’ can be seen as a legal system of power in itself, what are the

characteristics of this system? What is the constructive power of ‘Rule of Human Rights Law’ as a general public idea? Can ‘Rule of Human Rights Law’ be characterized as “Soft Power”? How does such power work? How does ‘Rule of Human Rights Law’ contend with national cultures and/or regional cultures? How successful have ‘Rule of Human Rights Law’ mechanism been in changing local and regional cultures? How does ‘Rule of Human Rights Law’ situate itself in relation to civilizations? As mediator, decider, authorizer? How can we overcome Euro-centrism, West-centrism, North-Atlantic-centrism, and/or male-centrism through the ‘Rule of Human Rights Law’? How ‘Rule of Human Rights Law’ could be work in Muslim States?

3. On the philosophical and abstract level the outcome could be described in following.

Rational reason permanently demands from irrational reason creation a new irrational reason, implementation of which must facilitate spirally and evolutionary development of rational reason. Although, such permanent demand of rational reason to the irrational reason is natural process, but irrational reason, on the other hand, permanently is stated before the choice of versions to elaborate the model of rational reason. Just that is the traditionally substantial problem of Humankind: what criteria should be used Humankind for elaboration of fair model for the rational reason? That is already principally the problem of ethics because ethics must not trust to irrational reason because irrational reason is multi-measured and often contradictory phenomenon. Moreover, from the ethical point of view, inside of irrational reason are presented pure and impure reasons. To eradicate of implementation of impure reason Humankind create two institution Church and State. However, the history demonstrates that concession of more power to one of them fraught with establishing inquisition or tyranny. Outcome was a separation of powers, check and balances between them. Elaboration by ethics the general moral norms states the frameworks of activity of Church and State between them and moral duties before the people. Later these frameworks have sealed by the constitutions and/or concordant and current legislations of civilized countries. So, natural irrational reason has transformed into artificial irrational reason in the form of legal irrational reason, and finally established **legal irrationalism**. The function of legal irrationalism is its transformation into **legal rationalism**. However, the history of Humankind after Second World War demonstrates that such transformation must be under control of Universal Human Rights Law. Moreover, dangerous problems of Global World claim a substantial and strict improvement of judicial mechanism of transformation of legal rationalism, and legal rationalism into legal irrationalism.

4. My position is oriented on the dialectical harmonization of contradictory fundamental legal theories.

First of all, great mistake of canonical jurists is that they identify legal order and positive law.

Legal order is the existence order that it is. More concretely, legal order is the established by the private persons and public bodies real order of distribution of mutual obligations and correspondent them rights among them. At the same time, legal order is such order which has legal pretension to be ideal order i.e. positive law. However, positive law is non-existence order that ought to be. More concretely, positive law is the established by the legislator ideal order of distribution of mutual obligations and correspondent to them rights among private persons and public bodies. At the same time, positive law is such ideal order which has legal pretension to be real order i.e. legal order. After that is becoming apparent transcendental tendency of mutual transformation of legal order and

positive law. Such transcendental tendency produces a necessity to elaborate a model of their mutual transformation based on the laws of dialectics. The name of model of mutual transformation of legal order and positive law is Dialectical Jurisprudence. Translating into philosophical language, legal order is a ‘phenomenological realism’, while positive law is a ‘phenomenological idealism’. More deeply, philosophical point of departure of distinction of legal order and positive law based on the distinction between ‘subjective existence and objective existence’, using by Husserl, and especially Heidegger notions. But made by them such distinction excludes their interaction in the aspect of mutual and endlessly transformation using by me the method of Hegel. In that sense, Husserl comes to a stop in the middle of road, has remaining their isolation.

Remake phenomenological method of Husserl, Heidegger purifies phenomenology of Husserl from the admixtures of ‘objectivism’. At the level of ‘existence philosophy’ Heidegger has exposed individual-personal character of ‘subjective existence’, and does not using dialectical method, he fully excludes any possibility of coexistence with ‘objective existence’. As a result has erased the crisis of ‘existence philosophy’.

Controversially, using dialectical method I have proposed not only coexistence of ‘subjective existence’ and ‘objective existence’, but their mutual transformation. Controversially, using dialectical method at the level of jurisprudence I have proposed mutual transformation of legal order and positive law. Moreover, Heidegger has underlined finiteness (*Endlichkeit*) of human existence and fully excludes the perspective of endlessness. Controversially, using dialectical method at the level of jurisprudence I have proposed endlessly transformation of legal order and positive law.

In this aspect, factual life, factual activity i.e. ‘existence’ of human being overcome the idea of its life, its essence i.e. ‘essencia’. Just that conception has argued Sartre. However, existentialism cannot argue freedom, duty and responsibility, and just because, I have proposed dialectical model of mutual and endlessly transformation of legal order and positive law. As a result, it has been established natural legal order, and artificial positive law. In this sense, positive law is not legal order but potential legal order i.e. legal order establishing of which is the end of State. Legal order is legal reality.

In very short form, legal order has the power of authority, while positive law – the authority of power.

5. Today, Western macro and micro models of comparative law are long ago exhausted its energy and have transformed into schematic, closed and non-dynamic theory, and because of that should be replaced by non-schematic, open and dynamic legal theory, which could be take into consideration richness and diversity of legal reality i.e. legal order of each country or group of countries. Practically, contemporary macro and micro models of comparative law are a result of comparison of positive laws of countries or group of countries that ignoring legal reality i.e. legal order of each country or group of countries. Positive law of each country is only one side of medal, while a reverse side of medal is legal order. Both sides construct a medal in whole i.e. legal system of each country.

Comparison of legal systems of countries or group of countries includes: firstly, comparison of positive law and legal order inside legal system of each country; secondly, elaboration of model of mutual transformation, spiral and evolutionary development positive law and legal order inside legal

system of each country; thirdly, comparison of legal systems of countries or group of countries including comparison of positive laws and legal orders; fourthly, elaboration of model of mutual transformation, spiral and evolutionary development legal systems of countries or group of countries including comparison of positive laws and legal orders; sixthly, analyze of World Legal System i.e. World Positive Law and World Legal Order as a result of elaboration of model of mutual transformation, spiral and evolutionary development legal systems of countries or group of countries; seventhly, comparison of World Positive Law and World Legal Order; and finally elaboration of model of mutual transformation, spiral and evolutionary development World Positive Law and World Legal Order.

However, the deeply roots of not only private positive law but public positive law too are in the wombs of Legal Order. Legal order as fact causally gives rise to private positive law, and private positive law causally gives rise public positive law. The comparative approach to the legal order helps to highlight world outlook bases of the legal reason. It pushes Humankind from the closed cyclic position to the spiral-evolutionary stage. Moreover, that is a New Variation of Theory of Legal Order based on the comparison of the legal orders of different countries through the lens of Bill of Human Rights. Concerning Human Rights the name of this theory is: “Anthropology of Legal Order”.

Therefore, my legal theory is bringing to light Dialectical Interaction between Single Positive Law and Plural Legal Order, and **Dialectical Interaction between Comparative Positive Law and Comparative Legal Order** at the national, international and global levels. Dialectical Interaction between Single Positive Law and Plural Legal Order, and between Comparative Positive Law and Comparative Legal Order means the harmonization, mutual transition, spiral and evolutionary development of positive law and legal order, which is also expressed inside and outside the system of law in relation to legal environment, towards the optimization of the any system of law. Such system of law is under permanent self-organization, self-reproduction and self-catalysis, and is receiving feedback and exchanging legal information with its environment it may move and develop toward decreasing entropy and increasing positive law and legal order.

6. Using terminology of great **Bentham**, I am putting forward a functional characteristic of dialectical jurisprudence.

Dialectical jurisprudence has four functions:

1. To censor how participants of legal relations justly distributing mutual obligations and reflected to them rights in space of legal order (*seinregel*).
2. To censor how legislator justly distributing mutual obligations and reflected to them rights among the participants of legal relations in space of positive law (*sollenregel*).
3. To censor how justly observing the participants of legal relations distributed mutual obligations and reflected to them rights at the junction of legal order and positive law (*solsineregel*).
4. To suggest justly censorial legal (material and procedural) model of mutual transformation, spirally and evolutionary development of legal order and positive law.

Dialectical Jurisprudence studies the modern problems of legal theory, philosophy and sociology of

law at the level of junction of positive law and legal order related to their mutual transformation, spirally, evolutionary and endlessly development based on the comparison of positive laws and legal orders at all levels under the auspice of Bill of Human Rights and the World Court of Human Rights and Freedoms.

