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On the Concept of Normative Gap and some of its Implications

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Die berühmte Frage *nach dem Ursprunge des Übels* in der Welt tritt, wenigstens insofern unter dem Übel zunächst nur das Unangenehme und der *Schmerz* verstanden wird, auf diesem Standpunkte des formellen Praktischen ein. Das Übel ist nichts anderes als die Unangemessenheit des *Seins* zu dem *Sollen*. Dieses Sollen hat viele Bedeutungen, und da die zufälligen *Zwecke* gleichfalls die Form des Sollens haben, unendlich viele.

—G.W.F. Hegel¹—

I、 General Remark

This is a paper about one possible conception of normativity. The problematic concerning normativity in general and law's normativity in particular have raised many discussions in recent publications². I conceive the question of normativity as a question concerning the multi-dimensional — pragmatic, practical, existential as well as communicative — structure of the *forces* connected by *Ought*.

By quoting Simmel, Kelsen once wrote,

As Georg Simmel has already pointed out..., Ought is a 'basic category' just like Is; and we can no more give a definition of Ought than we can describe what Being is. (Kelsen, 1991: 2)

However, Simmel did not successfully persuade people to abandon such engagements. There are a lot of explorations of Is as well as Ought after Simmel. In this paper I will argue that the normativity in its pure form is a matter of *gap*. Every normative expression creates a gap which I call normative gap. The normative gap is the *negative* structure which can absorb or drive *forces* of different kinds into a *dynamic process* which is capable of forming a variety of relationships or connections between Beings (factualities, realities, Is, existence, etc.). I will elucidate some aspects of this conception of normativity in this paper and discuss several implications of it against the condition of globalization.

¹ Hegel, G.F.W., *Enzyklopädie der philosophischen Wissenschaften* (1830), Hamburg: Felix Meiner Verlag, §472, Zusatz.(originally italicized)

² See, e.g., Coleman, 2001; Korsgaard, 1996; Paulson / Paulson (ed.), 1998; Raz, 1999; Spaak, 2003.

II、 The Gaps in normative Domain

Although the most famous gap in normative domain is the gap between Is and Ought, and some philosophers tend to include the value in the domain of norm, in his discussion about the value jurisprudence of German constitutional court, Habermas already pointed out the crucial differences between norms and values. He said,

Norms and values therefore differ, first, in their references to obligatory rule-following versus teleological action; second, in the binary versus graduated coding of their validity claims; third, in their absolute versus relative bindingness; and fourth, in the coherence criteria that systems of norms and systems of values must respectively satisfy. The fact that norms and values differ in these logical properties yields significant differences for their application as well. (Habermas, BNF: 254)

Habermas not only highlights these four aspects that distinguish norm and value, he also emphasizes that they are *logical properties*, therefore in the context of justification norms and values take on different roles in the logic of argumentation (257).

With different interest, Raz also tries to explore the question: How can it be that rules are reasons when they do not point to a *good* in the action for which they are reason, and he calls this phenomenon *the opaqueness of rules* (Raz, 2001: 3). Raz stresses that normativity is ultimately based on evaluative considerations, but in a way which leaves room for a *normative gap* rules display between the normative and the evaluative (8, 10). Mainly relying on the content-independent thesis, Raz goes further to explain the normative gap. A normative gap can open because the validity of a rule does not depend on the value of the act the rule is a reason for (11). He imports a new terminology called *transitivity* and points out that rules break the transitivity of justification down which we usually have by the normative justification (12).

By indicating the intransitivity character of justification of rules Raz tries to back up the practical difference thesis which means that rules create new practical considerations one would not have if those rules do not exist³. In my opinion, Raz did make important improvements of our understanding of rule's normativity, for Habermas only shows us mainly the *epistemic differences* between norm and value, but Raz by indicating the intransitivity of rule's

³ Raz calls it the autonomy thesis, see Raz, 2001: 13.

justification explains the reason why rule can make *practical difference*.

III、 The Typology of Normative Gaps

Thus, so far, we have observed two kinds of gaps in normative domain, one is the gap between ought and is, the other, between norm and value. However, there are actually many different kinds of gaps we can sort out in normative domain. If we enlarge the way Raz used it, we can call them all normative gaps.

For example, there also exists a logical gap between general norm and its application in concrete case. Some will use the term ‘jump’ to describe the reasoning meant to overcome this gap problem⁴, some other will emphasize the indeterminacy thesis caused by it.

Though Habermas points out the teleological character of value, it is still reasonable to distinguish purpose from value, because we can conceive purpose as the state of affairs the norm giver wants to achieve or realize. This is the typical effectiveness problem of norm.

To be clear, I will use the following scheme to present a preliminary typology of normative gaps:

Main types	Second classifications	Explanations
Argumentative gap	logical gap	Non inferentiality between normative propositions
	evaluative gap	the opaqueness of the value the norm aims to protect
	purpose gap	the opaqueness of the state of affairs the norm proposes to realize
practical gap	action-guiding gap	the non-conclusiveness between general norm and the individual directive for action in concrete situation
	effectiveness gap	the gap between actual compliances and the expectation of norm
domain gap	validity gap	the discontinuity of validity of norms of different sorts
subjective gap	attitude gap	the different attitudes of various actors toward the norm

⁴ See Peczenik’s explanation in *Foundation*, 136-.

	subjugation gap	the empty place or space that calls for commitment under the binding of norm
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IV、 Normativity as normative gaps

After the short scrutiny of the typology of normative gaps, we can easily see that the intransitivity — if we again extend the way Raz uses it — problem exists all over every dimension of ‘ought’, and many legal theorists already pointed them out and made subtle analyses in different ways. Therefore some may have doubt about the propriety of such simple juxtaposition of various norm-relative phenomena and putting them roughly under a single idea of normative gap. I will try to answer it in two ways.

First, I will suggest that precisely because of the uncertainties caused by the complexity and contingencies of this spatial-temporal world, we, the human race, developed one highly sophisticated communicative device, namely the ‘ought’, to tackle down this problem. And the particular merit of the nature of ‘ought’ or the normativity is not what it positively can offer or do, but *what it negatively leaves rooms for*. Raz already shows us this negative merit of normativity with one nice sentence: Rules allow agreement in the face of disagreement. In another formulation we may prefer now: *rules allow agreement by leaving room for disagreement*.

By way of this room-leaving character we can utilize the normative expressions to render a dynamic structure which can produce *normative forces* of different kinds to carry out various functions and to deal with uncertainties and contingencies all societies have to face with. In this respect, normativity may be one of the most crucial findings of civilization. Thanks to the normativity human beings can develop their uniqueness as *free* agents (see below) and build up their *form-of-life*, not just stay in the *bare* life⁵.

Second, however, it still needs to elaborate it more legal theoretically. I cannot give a full account of this complicated problem right at this place, but I will try to explain it within the problematic of Is-Ought-relation, because most kinds of normative gaps have connections with certain aspects of this problematic. Von Wright once said that

The history of the Is-Ought debate is often traced back to a well known passage in Hume’s Treatise — and the idea that there is ‘*an unbridgeable*

⁵ About the concept of form-of-life and bare life, see Agamben, 1998; 2000.

gap' separating fact from value and norm is sometimes also referred to as 'Hume's guillotine'. (von Wright, 1998: 366)(ital. by me)

Many accept as unbeatable truth the Hume's guillotine⁶, some other try to refute it, the most famous one may be John Searle. No way seems that this controversy can find its final solution, not here either. But I want to suggest a *novel way to see the problem*: maybe there is no gap at all between Is and Ought, rather, *the Ought is the gap itself* which not only spans between factualities or realities of different space and time, it also creates the very possibility to bridge the gap, or more exactly, to handle the contingencies in the *agency-centered* world which can also be characterized as the *normative* world or world of *reasons* and *freedom*⁷. This means that the Ought is at the same time the gap as well as the source to bridge it.

In the next paragraphs I will and can only present some preliminary thoughts on this topic which concern primarily the problem of freedom and of bridging.

V、 Subjugation Gap and the Problem of Autonomy

The problem of subject belongs to the fundamental issues of legal study. Every jurist is familiar with the concept of *Rechtssubjekt* (legal subject or person) who can possess legal rights or be burdened with duties. Without this general concept no juristic thinking and legal analyses can be undertaken.

In the field of legal theory, the subject problem has its relevance particularly with two questions. One concerns the problem of obligation, because the obligation always refers to that *someone* has the duty to do or not to do something. Hart indicates three necessary characteristics of obligation in order to distinguish it from being obliged. First, the insistence on importance or seriousness of social pressure behind the rules; Second, the rules supported by that seriousness are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Third, it is generally recognized that the conduct required by these rules may conflict with what the person who owes the duty may wish to do (Hart, 1994:

⁶ Although according to von Wright and Alasdair MacIntyre, the attribution of this separation thesis to Hume may not be historically entire fair, see von Wright, 1998: 366 n.5 where MacIntyre's paper was cited.

⁷ Comp. Raz, 1999: 67, "The normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reason....So ultimately the explanation of normativity is the explanation of what it is to be a reason, and of related puzzles about reason."

87). In Hart's description, the subject under the obligation is someone who has her / his own *wish* for doing something that might conflict with rule's requirement, and *beliefs* of the essential importance of rules for maintaining the social life. In short, they are real human beings.

In the context of offering a coherent interpretation of Pure Theory of Law, Raz distinguishes three kinds of legal subject: first, the legal man who is the individual whose moral beliefs are identical with the law. Second is the legal scientists who formulate the conditional legal propositions like '*if* the basic norm is valid, then one ought to do thus-and-thus.' The third kind is the legal practitioners who are stating *that* the law is valid therefore one should, for instance, pay the tax. But the legal practitioners do not commit themselves to the isomorphism between moral belief and legal norm like the legal man. Thus Raz calls the practitioner's statements the 'detached' statements (Raz, 1979; Paulson, 1998: xli-). I will call this difference of attitudes of subjects toward law the attitude gap. Since they have various attitudes toward law, they are referred to real human beings as well.

Kelsen offers a radical explanation of legal person. He thinks that the legal person is not a separate entity besides "its" duties and rights, but only their *personified unity* or — since duties and rights are legal norms according to Kelsen — the personified unity of a set of legal norms (Kelsen, 1945: 93). Kelsen says,

To define the physical (natural) person as a human being is incorrect, because man and person are not only two different concepts but also the results of two entirely different kinds of consideration. Man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms. (Ibid., 94)

In one way, the theory of normative gap welcomes the Kelsenian approach to legal subject more than that of Hart and Raz, because the former shows a more constructionist tendency. For Kelsen, legal norm determines only a particular action or forbearance of the individual human being, not her *whole* existence. This analysis not only reminds us that legal person is a construction of legal norm, it also shows that there is a *gap* between the whole existence of real human being and her being treated as a legal person who has rights and duties. I will call the necessary transformation process of human being into legal — or any normative construction of — person the *subjugation* process, and the gap the *subjugation gap*.

The theory of subjugation gap has two essential dimensions: first, every

normative system must open up an empty place for the construction of its own subject. Although Kelsen deems it only as a duplication of knowledge, even points out the similarity between such substantiation with the primitive thought of animism (Kelsen, 1945: 93), this legal subject does emerge as a necessary *agent* within legal domain, and the so called real human being needs to become — or to be animated to — the unreal legal subject or legal person. Otherwise the human beings cannot gain their proper *status* within legal system and will turn their form of life into bare life⁸. In this aspect, every legal, or even every normative, system is a *status-rendering and - protecting* system.

In the other hand, Hart's characterizing of obligation also indicates some important insight for the theory of subjugation gap, because it shows that we cannot establish the normative ground of obligation without resorting to the *beliefs* of human beings. According to Raz, the legal man is the individual whose moral beliefs can be mapped isomorphically onto corresponding legal norms. Thus, the subjugation gap can be grasped as the empty space which is *calling for* or inviting those real human beings whose moral beliefs correspond isomorphically onto legal system to occupy it, or put it in another way, to become the *subjugated subjects* of the legal system. The problem of obligation is always the problem of *choosing to be bound or subjugated* which Hart calls the *acceptance* and von Wright talks about the *assent* (von Wright, 1998: 380). In this sense, the normativity is a *calling force*, or, I will describe it in this way, a *calling-reason*, which calls the norm addressee to deliberate about her / his choice to take the subjugated place and for what reasons.

Normally most human beings will choose to take that place through the process of subjugation, because they want to be recognized as having certain legal position or status within that legal system. Otherwise they cannot have rights and duties. However, the normativity can *show* its force more deeply in the case when the addressee takes the other, not-being-subjugated place, particularly through the escape, resistance and refusal⁹. This is a very

⁸ Actually, in this sense, the unreal legal person is far more real than the human being who do not have any legal status and cannot have any rights or duties.

⁹ To be noticed, such choice of non-subjugation is a choice to be *out of the binding* of that normativity; not simply avoid complying with the requirement of that normativity, but still deems herself under the obligation. Although in both cases the agent will usually take the same course of non compliance, what involves in the latter case is the reason of strategy, in the former a matter of principle. In fact, in the case of refusal the agent can comply without subjugation. Von Wright already noticed that when he said, "one can refuse assent and still obey." (von Wright, 1998: 381)

complicated problem I cannot deal with here. Only one point I want to mention briefly: to resist a normativity means to appeal to, or more exactly, to *forge another normativity*.¹⁰ It is because you need to render some counter reasons to respond to the reasons the original normativity now presses on you and they would not present themselves so clearly if you did not resist. Resistance makes the normativity more evident and powerful.

More than this somehow radical conception I will further suggest that thanks to the subjugation gap normativity must carry with, the autonomy of agent finds its proper channel to manifest itself. Thus, not the autonomy is the source of normativity, on the contrary, *the normativity, as a gap, is the source of autonomy*. Autonomy shapes itself out through the process of bridging the endless normative gaps occurred in the whole life of everyone, and primarily by way of resistance, not subjugation. Without normativity, the Self, as a being or factuality, cannot find its *autonomous* connection with the future Self.

VI、 Structural Affinity

If normativity is, or at least can be deemed as, a matter of gap, the problem of filling or bridging it become one crucial issue we have to explore. Raz uses *isomorphism* between moral belief and legal norm to describe the attitude of legal man. By way of performative contradiction and discursive necessity Alexy tries to defend the *Verbindungsthese* (connection thesis) of law and morals (Alexy, 1992). For Habermas, the autonomous morality and the enacted law that depends on justification stand in a *complementary relationship* (Habermas, FG: 137; BFN: 106). I will consider all these efforts as explorations into how the legal normativity can generate the forces to bridge itself as a gap. And the most attractive method is always to appeal to, in this or that way, moral values. It is reasonable to do so, because moral values possess some *positive weight* for reasoning and can thus constitute direction of force which can lead us to the next reality. Of course, it happens always that there are conflicting directions of forces moral values could bring about. Usually we call such situation the collision of value or norm. But actually it can also be understood as the struggle for different imagined future of reality we want to have and which necessarily concerns what we *are* and what the reality *is* now

¹⁰ I think von Wright to certain degree has already caught the idea of subjugation when he said, "To assent (dissent) is more like an act of legislation or norm-giving itself." (von Wright, 1998: 381). Only he did not realize that being subjugated and not being so, do not stay on the same plane of reflection, and to resist will bring a lot more meaning than to be subjugated for the normativity.

at this point. Moral value can only be meaningful when it shows *an interpretation of our own existence* and only through this way it can play a positive or constructive function for bridging the gap between various Is.

John Searle has proposed a well known challenge to the separation thesis of Is-Ought by using the example of promise. By giving a promise — this is a fact, Searle thinks — we can logically conclude that the promise-giver *ought to do thus and thus* (the content of promise). Von Wright tries to develop a new idea of *technical norm*, which is an *Is* and is *internal* to the assumed existence of a ‘normative’ Ought, to tackle that interesting and powerful challenge (von Wright, 1998: 377). Von Wright thinks that by having promised, the promise-giver has created for himself a *practical necessity* of doing the thing promised in order to fulfill his obligation. And this is a fact, not a norm. However, *ought* the promise-giver to fulfill the obligation in genuine normative sense? Von Wright thinks this is a contingent problem. Some one else may urge him to do so. The promisee who has interest in this promise may ask him to fulfill the obligation. With high keenness von Wright not only defends the separation thesis of Is-Ought with some success, he has also seen that the genuine normativity of promise must have connections with some *contingent occurring of prescriptive activities* and from which we can deduce Ought (von Wright, 1998: 378).

Nevertheless, I think, everyone would see that von Wright’s solution is a model too weak, because it is hard to accept that the normativity or the genuine Ought of a promise has to rely on some *contingent* prescriptive activity occurred *after* a promise has been given.

My revision of this model suggests that the promise is an institution that can help us to achieve many different goals through the fulfillment of the conditional norm, i.e. the technical norm in von Wright’s sense, inherently coexisting with that institution. Every agent who makes promise must sincerely believe that the institution of promise is important or valuable in that function. Therefore by making promise he transforms the value of the institution to an Ought for him and this Ought points to some future reality, that is the fulfillment of the obligation.

I will call the corresponding relationship between the institution of promise and the agent’s belief that promise ought to be kept and, if necessary, all those reasons and justifications supporting that belief, the *structural affinity* (*strukturelle Verwandtschaft*)¹¹. The structural affinity is the essential condition

¹¹ I borrow this concept of affinity from Weber’s elective affinity (*Wahlverwandschaft*). See,

for every normative institution to connect its own being, as an institution, with those future reality this being meant to realize. The reason I use the term affinity is because there is neither logical deductive nor necessary causal relations between normative institution and the agents' belief. But the affinity is essential for the *proper* existence of institution. If there is no or only weak affinity the normative institution can still exist, but in an improper way. If we use the classical way to describe it, the *excellence* or *goodness* of that institution has been lost or cannot be realized¹².

In the realization process of institution, the Ought precisely plays the negative role to leave room for the transformation of the intrinsic value of institution into the extrinsic values of each agent's goal of action. As a gap, normativity calls for the reasoning which will produce *rendering force* toward certain reality. The structural affinity can stabilize the direction of this rendering force.

Furthermore, the structural affinity is also the very condition for the agreement oriented illocutionary speech act about which Habermas has discussed thoroughly¹³. Norm-giving or normativity-creating can only be done with illocutionary act. Only by way of structural affinity the understanding- oriented norm-giving can transform itself to agreement-oriented normativity which can still maintain a two-layer structure: agreement on the intrinsic value of institution, disagreement about the extrinsic values of each agent's act.

Besides the function of structural affinity just mentioned above, we must also pay attention to the perlocutionary dimension of norm which pulls the force of enforcement or sanction into that structure. The problem of legal normativity has great deal to do with this dimension, because the reality the legal normativity is pointing to consists not in compliance / non compliance, but compliance / sanction which surely has psychological impact on the agents.

As a summary, the structural affinity of normativity has four essential elements: (moral) values, belief, reasoning, and perlocutionary force. The more completely normative gap can be bridged through these elements, the more positively the normativity can show. If the structural affinity lacks of these elements or the proper arrangement of them, the normative gap cannot

Weber, GAR I: 83.

¹² See the discussion of the concept of excellence in the western tradition of metaphysics by Korsgaard, 1996: 1-5.

¹³ See, Habermas, 1999: 121.

be bridged successfully and the normativity will become the *pure Sollen*.

In the final remark in this paragraph I will suggest that the so-called normative proposition, if we put it under the scrutiny of normative gap, is a kind of *incomplete* proposition which still needs to be complemented with those elements of structural affinity. Therefore, if legal science is a scientific study of normative propositions of a particular legal system, such study must at the same time take the elements of structural affinity as its objects. Otherwise the legal scholar cannot reasonably show the soundness of any legal propositions.

VII. The Implications in the Age of Globalization

There can be many ways to define globalization. I understand under globalization one of the unavoidable results of modernization. There are two major characteristics of modernization I would like to stress: rationalization (or intellectualization) and disenchantment. In each of them I will emphasize that the emerging of universal communicative media, e.g. law or money, is one crucial aspect concerning rationalization, and, because the inherent connection between *Sollen* and *Sein* is permanently broken, the emerging of *pure Sollen* and the lost of excellence and intrinsic value become the inevitable outcome of the disenchantment.

Against this background I will discuss two implications of normative gap related to the globalization.

The first is concerning the colonization and the decolonization process in the third world. Within present context, we can characterize the colonization as the *subjugation process* of the *multitudes* of the non-imperial areas into the *subjects* under the imperial sovereignty and within its territories. The normativity of the imperial legal system opened up a place of subject-status and called those people to incorporate themselves into that status. There is hardly any possibility to refuse it. If you refuse, you can no longer gain a secured position to hold your privileges, rights and duties, because you would not be *recognized* as *legal person* being capable of having them. The colonizer also had to develop new structural affinity, particularly by way of education, medical care, and modern technology, in order to secure their imperial Ought can be smoothly realized into reality. They don't want their imperatives turns to be *pure Sollen*.

In the other hand, the decolonization is not simply to give up or destroy the status of legal person established by imperialism and colonialism. On the contrary, those who gave their efforts to decolonization have already seen

that such process is irreversible and has an immense power of liberation. Therefore, the decolonization will occur as a *second subjugation process*, only with the replacement of imperial sovereignty by a *national sovereignty*. The imperial subjects now become the *national citizens*. Similarly, the new national ruler do not want to have a pure-Ought system of law, they will try to develop a new structural affinity.

These double subjugation process and structural affinity are very interesting and complicated phenomena, but I can only mention one point here. The replacement of imperial with national sovereignty is not just a juridical process. Yes, it is also political, but political in what sense? To establish a national sovereignty is to create a new state, a state in its original meaning of status, stand, or *Zustand*. Thus, the second subjugation is simultaneously a pursuit for new identity, a looking for new existence form in this enchanted world. This means that the decolonized new state will possess certain features of legal existentialism: they do not know who they are, but they are all, legally, citizens of certain *State*¹⁴. They can have this legal state of existence without any essence of being.

Another issue I want to deal with in brief is the reception. The reception of western legal system from Europe to the third world is a prominent part of the globalization. My question relative to present context is: can the third world country, for instance, Taiwan, adopt the western legal system, e.g. the BGB of Germany, solely as a system of legal Ought; or, have we inevitably to accept the whole western structural affinity that helps the legal Ought bridging its own gaps in Europe?

The answer is clear: both are impossible. According to the analysis offered above, the norm-proposition is incomplete and we cannot comprehend it without appellation to other elements of structural affinity, particularly the reasoning with values. Thus, the reception of foreign legal system can be effective and successful only when the adoption of those elements are been taken at the same time. In the other hand, it is also obvious that it is impossible to move the whole European legal affinity into the receiving country. Since both ways are impossible, the reception must be a broken process. We can only adopt the western legal system in a broken manner, in most cases, in a technical, pure-Ought manner. And when we

¹⁴ In the case of Taiwan there is a little bit difference: because Taiwan is de jure not yet an completely independent state, many Taiwanese want to establish that de-jure-status in order to confirm their identity.

enforce the society to accept that adoption, the structural affinity we need to reestablish can also be a broken structure, because it is very unlikely to expect the people to have the same *beliefs* as the European people which can establish the genuine normativity. This broken phenomenon can be observed particularly clear in those legal domains with high density of value setting, for instance, the constitutional law, family law and criminal law. I cannot explain them thoroughly now, but I believe that the broken reception will remain a major problem for the law-receiving countries.

VIII, Conclusion

Hannah Arendt once wrote,

Yet isn't it clear to everyone that the world is not, and has never been, what it *ought* to be? And who knows, or has ever known, what this "ought" should be? The "ought" is utopian; it has no proper *topos* or place in the world. (Arendt, 1978 part 2: 196)

Is this a statement that supports that the Ought is only an empty place or the normativity in its pure sense a gap? I am not sure. But it surely shows that the problem about the nature of norm or normativity will keep bothering us with a long time. The difficulty is partly because it is not just an epistemic problem, but a practical and even *existential* one. I hope my idea of normative gap can help a little bit to clarify some puzzles around this problematic.

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