A Normative Metastasis?

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Abstract

The article presents the argument that contemporary societies are facing an ever-growing over-production of norms which are choking its efficient functioning. The argument however is subsequently de-constructed, in particular through a comparative (European vs. US) analysis, pointing out that what is of great concern on this side of the Atlantic apparently is not at all on the other side. The article concludes with some possible remedies – admitting that we are facing an illness – to the current over-production.

Keywords


1 Introduction

If cancer is a degenerative disease of human cells which begin dividing themselves without stopping and spread, malignantly, into surrounding or distant tissues of the body, in this paper I will discuss the following arguments:

(a) Contemporary advanced societies are affected by a social-institutional disease by which “healthy” norms start dividing and multiplying themselves creating masses that prevent the functioning of society.

(b) Beyond a certain point – which has to be established through attentive and distinguishing social research – norms, interacting with other norms, multiply in an irreversible process.

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(c) The consequences of such normative tumours are not only a clog in societal activities but the generation of astronomical costs in compliance, prevention and repression, generating even more norms.

(d) This process tends to extend – hence the metaphor of metastasis – to areas of society which are mostly immune from normative intervention or are only moderately affected.

(e) While in the human body one can try to stop the fatal consequences of cancer through chemo-radiotherapy and/or removal or amputation, there does not appear to be, presently, a remedy to normative metastasis. It might appear contradictory if not hypocritical that a lawyer denounces the excesses of normativism, which is tantamount to biting the hand that feeds him. A disclaimer is therefore necessary. The author, having given, as many other lawyers engaged in institutional counselling, his contribution to the increase in the production of norms is in no position to point his finger against anybody or against a system of which he is – albeit in a minuscule fraction – part. This paper more simply aims at highlighting a significant problem of contemporary societies. There are no culprits or villains. There is however a dominant idea – rather, a dominant ideology – which sets norms above everybody and everything. Seen from a lawyer’s point of view normative metastasis raises ethical issues on the role of lawyers in society. Seen from outside normative metastasis could be one of the factors that generate anti-institutional behaviours and movements in developed societies.1 Or, seen from the other way around, proliferation of norms is seen as an expression of complexity and specialization which one wants to eliminate through a drastic simplification, i.e. it is in the eyes of the beholder. It is important to clarify at the outset that this topic will be discussed with reference only to Western democratic legal systems, and specifically the European and North-American areas which share common values and law making processes.

2 “Be ye fruitful and multiply”

The Biblical quote is helpful to try to stress some basic differences between human beings (and any living entity) and norms. While the former naturally

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reproduce themselves (and this is the basic difference between the animal and vegetal world on the one hand, and the mineral world on the other), there is no intrinsically compelling reason for which norms should “be fruitful and multiply”. As a matter of fact, over the last two centuries anthropologists have been investigating – with the enthusiasm of gold-diggers – primitive populations to try to discover the norms that regulate their societies.

It is a fact however that the maxim “ubi societas, ibi ius” has been and still is true. Roman society, and especially its Empire, was very advanced from a legal point of view, and generations of highly insightful scholars of Roman law have thrived, and still thrive, on such rich heritage. The Middle-Ages – mistakenly seen as the uneducated forefather of glamorous Renaissance – were mostly based – from the highest institutional levels to daily life – on a wealth of norms and of lawyers working around them.

Therefore, the first question is: is the present production of norms in line with the need of a globalized world inhabited by over seven billion humans? “Normative metastasis” may be a provocative title, but does it represent fairly present-day legal processes?

The question is practically impossible to answer as – like in all social structures – there is no perfect formula and within the Western tradition and history there can be significant variations. “How much” is “too much” remains a riddle. Someone might object – but all institutions are actively engaged in such objection – that there are not enough norms, or that their quality is not appropriate. A view which clearly, as its opposite, has few irrefutable counter-arguments. One point, however, must be made: the production of new norms does not – not even from a formal point of view – eliminate the previous ones. Even if the subsequent ones expressly repeal the existing norms these still continue to rule over legal relationships which were created when they were in force. New norms are not subtracted from the existing ones, but instead are added to them. To use a metaphor, they are like water constantly pouring into a

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2 It is however useful to point out that the well-known maxim “ubi societas, ibi ius” actually is obscure in its origin and its first expression can be found only at the beginning of the 20th century: see A. Levi, ‘Ubi societas, ibi ius’, in Id., Saggi di teoria del diritto (Bologna: Zanichelli, 1924) 49.

reservoir, from which only a trickle is dispersed. At any rate it is highly debatable that one can reliably measure the number of norms in force in a system, and that one can infer from such quantification largely shared conclusions.

One can therefore limit oneself to a few factual elements.

(a) Institutions are created by norms and their main, if not exclusive, raison d’être is producing norms. Each time a new institution is created – at a local national, supra-national, international level – it is tantamount to the creation of a new factory. One indicator one can look at is the multiplication of norm-producing entities. The common term is that of “sources” of the law. Once they were reasonably determinable. Presently the list is countless.

(b) The multiplication of such entities is, largely, the result of the “unbundling” of law and norm-making monopolies. Since the early 19th Century, especially in Europe, law and norm-making was the prerogative of Parliament and of Government, centralized entities which had a physiological output. Decentralization (“devolution”) of public powers with the goal – perfectly legitimate – of bringing institutions nearer to communities has generated local parliaments and governments, to which one must add to municipal entities. Specialized branches of administration – typically so-called independent regulatory agencies – have been set up to govern complex economic sectors (financial markets, telecommunications,

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4 It is extremely difficult to measure the amount of normative production because numbers in their selves are ambiguous. If one looks at the relevant website of the European Union [https://eur-lex.europa.eu/statistics/legislative-acts-statistics.html?locale=en. Retrieved 25 November 2019] one can count 2119 pieces of primary and secondary legislation for 1990; 1939 for 2000; 1690 for 2010; 2023 for 2018. It would appear therefore that the yearly output has not significantly increased. This should not, however, lead to the conclusion that production of norms is stable. First of all, not all texts are equal in length and complexity. Secondly the data indicates that in the last 20 years nearly 40.000 legal texts have been added to the EU legal environment. One should then consider the interaction with the legal system of the Member state.

5 For a clear summary of the different approaches and of the controversies surrounding them see the International Encyclopedia of Social Sciences (2nd ed.), ad vocem Quantification (Farmington Hills, Michigan: Gale, 2008) 655. See also Virgilio Zapatero Gómez, The Art of Legislating (Heidelberg: Springer, 2019) who titles the paragraph (at p. 16) “The Alleged Inflation” (the only conclusion that can be reached is that “In absence of precise studies that measure the normative density of our societies with reliable methodologies, the partial and provisional data available allow us to confirm that the number of norms that have been poured out daily on our societies has certainly grown”).

Indispensable international cooperation rests on norms, but no longer only on stand-alone treaties, but on institutions whose aim is that of fostering and furthering the goals set out in the treaties. The foremost example in Europe is the European Union, but in a global perspective the United Nations and its scores of specialized agencies: The World Bank; the International Monetary Fund; the World Trade Organization; and the endless list of other regional or international entities. There is no point in challenging the reasons behind such multiplication. One could, with good arguments, point out that, at a national level, decentralized normative production is the result of a democratic process. And that at an international level it is much preferable that nations produce norms rather than weapons.

(c) Traditionally, explicitly or implicitly, the production of norms rested on rather well-defined hierarchy. This was essential especially in the construction of norms to understand whether it was compliant with another norm placed at a higher level, or if its deviation was allowed or not. With the multiplication of sources there is a growing conflict of competences and of existing norms which can be settled only by the law or by constitutional adjudication.

(d) Multiplication of sources necessarily implies a multiplication of interpretative agents: thousands of people, from full-fledged judges to lay persons, are engaged in some form of adjudication or of interpretation of rules, creating new rules, which often are a blend of substantive and of procedural norms. These interpretative decisions have a normative role not only – as is quite obvious – in common law jurisdictions, but in every system. One does not have to institutionalize the role of precedent to know that lawyers and those who take decisions upon norms are extremely path-dependent: the legacy of Roman law in civil law jurisdictions is mostly due to this embedded frame of mind.


8 Catherine Thibierge, ‘Sources du droit, sources de droit: une cartographie?’, in Mélanges Jestaz (Paris: Dalloz, 2006) 519, points out that not only sources have multiplied but also that their order and hierarchy are uncertain and widely debated. See also G. Pino, La norma giuridica (Pisa: ETS, 2016) chapter VIII, and Id., ‘La gerarchia delle fonti del diritto. Costruzione, decostruzione, ricostruzione’, Ars Interpretandi. Annuario di ermeneutica giuridica XVI (2011), 19.

9 Suffice here to refer to Alf Ross, On Law and Justice (Berkeley: U. California Press, 1959) at § 17, p. 84 ff.
are submerged by norms, this clearly brings to divergencies and further multiplication of rules.

(e) Norms have an extremely long life that goes well beyond the time span between their enactment and the date in which they are formally repealed. They continue to regulate relations that were created during their lifetime. They influence the way subsequent norms are interpreted. They create a layer on which the new norms are built. It takes decades, if not more, before they fall completely in disuse and are of mere historical interest. Metaphorically, it is like on the road where we find ultra-modern vehicles but also automobiles that are decades old and are regularly used.

(f) If one looks at the production of norms from an institutional market perspective one can suggest that what appears to be an “over-production” actually is the response to very high demand of norms which drives the system. Norms are not the solipsistic result of institutions insulated from reality but follow a request from society. In contemporary Western societies norms are seen as granting rights and privileges to various groups of stakeholders. Norms set the balance between competing interests, and pressure groups and lobbies work in order to obtain new norms or to shift the existing balance in their favour. Interests are mainly economic – such as in regulated markets – but also in non-economic matters (e.g. religious affairs) there are issues of status and of ideology that beg for a legal recognition. In many societies, norms create a comfort-zone for those citizens who believe that a well-ordered society is based on a widespread regulation of human activities. And the growing social request for “safety” and “security” is used as an argument for “n’importe quoi” laws. To all this one must add the interaction between science and regulation: scientific procedures are regulated; scientific procedures become regulations themselves.

As one can see there are extremely complex and reasoned justifications for the multiplication of norm-producing entities and therefore of norms. One can


11 The term “norm” immediately suggests that of “normal”: see Michel Foucault, Sécurité, Territoire, Population (Paris: Gallimard – Seuil, 2004) 59: “Si la loi se réfère à une norme, la loi a donc pour rôle et fonction de codifier une norme (...), j’essaie de repérer comment, en dessous, dans les marges et peut-être même à contresens d’un système de la loi se développent des techniques de normalisation”.

simply acknowledge the phenomenon without, however, been able to state, undisputedly, that the number of norms is excessive. Is it possible to assess or forecast that society would be more efficient if there were fewer norms? When over 30 years ago the term “deregulation” became politically fashionable it seemed that the tide might be turned. Experience tells us that, as often happens, ideological manifestos are not followed by facts. At any rate the term “deregulation” is a useful sign to detect the willingness – or its opposite – of a community to give up norms and substitute them with individual freedom.

3 Norms and Their Self-reproducing Nature

Until now one has used the term “norm” in very general and generic way. In the first place it is quite common to add to the term a specification which should better qualify it: “legal”, “technical”, “social” etc.\(^\text{13}\) And among legal philosophers there is an extremely heated debate – which is long-dated and to which great names have given their contribution – on what we actually mean for “norm”, in particular on the level of its binding nature to be considered such.\(^\text{14}\)

For the purpose of this paper one will adopt an analytical definition common to legal informatics. When one has to translate a norm into a computer program it necessarily has to be broken down to its elementary components.

\(^{13}\) See Håkan Hydén, Måns Svensson, ‘The Concept of Norms in Sociology of Law’, Scandinav. Studies in Law 53 (2008) 15 who (at p. 25) distinguish, from their viewpoint, between “Legal”, “Social”, “Technical”, “Economical”, “Bureaucratic” norms. This classification may not be appropriate from a legal point of view because “the two epistemological systems compete in the explanations of one and the same problem” (at p. 28). The approach followed here is strongly influenced by the many writings on these topics of Jean Carbonnier. In the first place that “le droit se préte à une multiplicité de definitions” (‘Il y a plus d’une definition dans la maison du droit’, in Droits 11 (1990) 5). A view that is shared among many, not only French, scholars: see Raphaël Draï, ‘Mémoire du droit’, Droits 11 (1990) 17 (“Définir le droit c’est s’affronter à une tache presque impossible”). This is not a novelty: “Jurists are still without a complete definition of the idea of right” (Immanuel Kant. Critique of pure reason, Trascendental doctrine of method, Ch. 1, § 1 (1781). And, from a legal realist perspective “The ‘nature of the law’ is the main problem of jurisprudence” (Alf Ross, On Law and Justice (Berkeley: University California Press, 1959) 11.

\(^{14}\) In Anglo-American literature there is, very often, a strong insistence on the differences between “norm” and “law”: see e.g. Saul Levmore, Norms as Supplements, Virginia Law Review 86 (2000) 1989. For the purposes of this paper we shall consider “norms” binding propositions, in which the binding nature is not only in an explicitly legal context, but also when compliance is imposed de facto (typically through technological devices). From a European perspective see G. Pino, La norma giuridica (Pisa: ETS, 2016) chapters from 1 to 3.
Each variation is a different norm. One easily understand that if one follows such an approach even a short legal text can contain a number of norms: let us take the 1st Amendment to the US constitution or the classical provision of article 711 of the Code Napoleon: “Ownership in goods is acquired and transmitted by succession, by donation between living parties, or by will, and by the effect of obligations”. Both provisions can be broken down in multiple norms: the first in at least six, the second in at least eight.

The problem is that no norm stands by itself, but is immersed in a legal environment in which there are paramount rules (e.g. the Constitution), other rules that are placed on the same level, norms that claim they are the implementation of others; procedural norms et caetera.

Constantly – and this is the main task of any lawyer under any sky – one must combine norm N with norm N\(^1\) to N\(^n\).

Each of these operations gives birth to new norms. Hypothetically one could imagine unlimited number of combinations between all the existing norms. In practice this is improbable, but one finds areas – typically in judicial procedures – in which the interaction is constant and generates an inextricable thicket which troubles lawyers and judges.

For this reason, it makes little sense to try to measure “how many norms” exist because only experience can tell us what combinations arise.

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15 Thanks to the pioneering works of Vittorio Frosini (ex multis Cibernetica, diritto e società (Milan: Edizioni di Comunità, 1968)), and of Mario G. Losano (Giuscibernetica: Macchine e modelli cibernetici del diritto (Turin: Einaudi, 1969)) legal informatics have had an extraordinary flourish in Italian jurisprudence. For some of the many analysis of the IF/THEN logic applied to legal norms see Renato Borruso, Stefano Russo, Carlo Tiberi, L’informatica per il giurista. Dal bit a Internet (111 ed., Milan: Giuffré, 2009) 83 ff.; Giovanni Sartor, L’informatica giuridica e le tecnologie dell’informazione (111 ed., Turin: Giappichelli, 2016) 74 ff.

16 See Vytautas Cysis, Friedrich Lachmayer, ‘Legal Norms and Legal Institutions as a Challenge for Legal Informatics’, in: Aulis Aarnio et al. (eds) Positivität, Normativität und Institutionalität des Rechts. Festchrift für Werner Krawietz (Berlin: Duncker & Humbolt, 2013) 581 (“Legal norms are interpretative products whereas legal documents are tangible products and are represented according to documentary rules”).

17 This phenomenon has been described as “autopoiesis”: see Guenther Teubner (ed.), Autopoietic Law – A New Approach to Law and Society (Berlin: De Gruyter, 1988) 2, quoting Maturana: “Law, like other autopoietic systems, is nothing but an ‘endless dance of internal correlations in a closed network of interacting elements.’ Teubner however sees autopoiesis as the effect of closed systems, which surely – both de iure and de facto – is not the case in Western legal tradition. “Les normes continueront d’enfanter d’autres normes” (Jean Carbonnier, Droit et passion du droit sous la Vrèpublique (Paris : Flammarion, 1996) 51).
The issue becomes even more complex when one considers case-law, and not only in common law jurisdictions. Apparently, a judicial decision stands by itself, in the sense that it decides the issue presented to the court and should apply only to the parties of the case. But we know that, regularly, case-law modifies, supplements and even suppresses an existing norm whose content cannot be established without considering its judicial interpretation and the unlimited variations in which the case can present itself.

Henceforth a further element: not only do norms combine with other norms generating new and different norms, but each time a norm is the object of a judicial decision new norms are created.

One could imagine a “fertility rate” of each norm taking into account its aptitude to reproduce itself. This has also to do with the drafting of the text and the possibility of unintended consequences related to the controversies that arise.

The main result of this endogenous process of normative reproduction is that of considerable uncertainty: the meaning of norm A can be clear, but when it is combined with norms B, C, D and N, the variables in interpretation are endless.

The common example – but one could call it the “common nightmare” – in any jurisdiction is that of taxation law in which every taxpayer is constantly in doubt whether he or she has correctly filled the form and paid what is due.

One should therefore consider what are, for each norm, the costs of compliance, enforcement, litigation, and sanction.

Apparently, this seems an impossible task. However, one can extract some indicators from the number of people who are employed in order to ensure compliance with the normative framework; if it has increased over the years; what is the cost, in percentage, in the balance sheets.

From an economic point of view there are further elements to be considered: if and what is the competitive advantage – in a perspective of international

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18 Law is “a concept which comprises statute law as well as case-law” (ECtHR, Varvara v. Italy, 29.10.2013, § 55). According to the ECtHR not only case-law but also “hardened soft law is a source of law with ‘considerable importance’ or ‘great weight’ in European human rights law” (Mursic v. Croatia, 20.10.2016, § 61).

19 Jean Carbonnier, Droit et passion du droit sous la V\textsuperscript{e} République (Paris: Flammarion, 1996) 59 ff. speaks of “jurisprudence comme parole” (du droit) and of “jurisprudence comme action”.

trade and of foreign direct investment (FDI) – for operating in a less burdensome legal environment. And to what extent is the cost of compliance passed on to the final consumers/users of the product or of the service.

This process has been thoroughly investigated under the heading of “auto-poiesis of the law”. And surely the staggering increase of norms confirms such a theory. What we are interested in, here, is this constant interaction between norms that generate, *ad infinitum*, new norms and that is, apparently, unstoppable. What is most important to understand are the unintended consequences of the combination of different norms, bringing about results that not only were unexpected but are also out of control. When this happens – and it happens quite frequently – the reaction is that of some kind of legislative or sub-legislative intervention whose aim is that of establishing the correct interpretation of norm, of expunging the “malignant” element from the system. But this can be done only by introducing more norms, which inevitably determine further uncertainties.

Another way of seeing the phenomenon is, with the aid of visual analytics, that of detecting clusters of norms, belonging to the various parts of the system, which regularly interact between themselves, as separate from the (very few) “stand-alone” norms that can operate without the need of other norms.

One could use the metaphor of chemical elements (but in the case of norms the periodic table is much, much, greater). While new chemical elements and components are generated in laboratories under some kind of control, for norms it is society, without much specialized control, that constantly combines and mixes the various elements, generating new formulas.

Moving along this path, one must consider that not only norms interact between themselves in unlimited combinations, but one must consider the billions (here one can provide a more reliable count) of persons and legal entities (both private and public) to whom norms are destined and who continuously use them. Users (both active and passive) of norms create new norms. And

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21 See fn. 17.
23 And when people travel to other countries or entities are in relations with foreign entities “plus il y a de lois qui s’entrechoquent, plus la passion du droit (droit international privé) devient enivrante. Tel le métier de changeur, qui s’épanouit dans la multiplication des monnaies” (Jean Carbonnier, *Droit et passion du droit sous la Ve République* (Paris: Flammarion, 1996) 45).
those who do not comply with them generate the need to enforce and sanction the non-compliance. Only in dramatic situations of non-compliance and non-enforcement (typically war or civil war contexts) does the production of norms – as many other products and services – decrease.

From a statistical point of view one might attempt to calculate how many norms do we “consume” every day, distinguishing between norms that are long lasting (the lease of a house), and those that have, ordinarily, a very short life (the purchase of a bottle of water from a vending machine).

If we consider ourselves (and all the various kinds of legal entities) as “norm consumers” the obvious ensuing issues are those of “consumer protection” from unnecessary forms of regulations, transparency and clarity of norms, unfair and deceptive normative practices and what might be called an induced “normative obesity”.

The issue is far from merely theoretical and hypothetical. There is a growing concern about the consequences of ignorance of the law, which for centuries has been considered of no excuse in any field, but now becomes an obligation which in many cases it is impossible to perform owing to complexity, obscurity, untraceability. To all this one must add that the development of the Internet creates a serious problem of authenticity: when looking for a norm the common user meets dozens of websites which purportedly give access to the text that has been searched for without any guarantee that it is still in force, and that it is updated. In pre-digital ages the sources were few and costly (official journals, specialized publishers), but more reliable and, any rate, liable for eventual mistakes.

Now, anybody can copy, paste and disseminate legal texts whose authenticity is doubtful, increasing the confusion.

One has used the metaphor of tumoural masses which obstruct social processes. One could use, in regards of individuals, the metaphor of a legal ball and chain or of legal shackles which render extremely complicated and time-consuming normative compliance.


25 Under the heading “Les effets de l’inflation” Jean Carbonnier, Droit et passion du droit sous la Vᵉ République (Paris: Flammarion, 1996) 111 states that “le plus immédiat est l’ignorance, la non-connaissance des lois”. One can find similar views expressed in Italy by Michele Ainis, La legge oscura (Bari: Laterza, 2010).

26 Many of these issues are examined in Ginevra Peruginelli, Mario Ragona (eds), Law via the Internet. Free Access. Quality of Information. Effectiveness of Rights (Florence: European Press Academic Publishing, 2009).
Metaphors can be seducing; however again one could and should start refining the rather coarse researches on the time individuals spend in complying with norms and try to understand if this is an increasing phenomenon, if it is related to the occupation of the person, his or her age, and location.

4 The Metastasis

One of the effects of over-production of norms is the development of an expansionist mentality which extends to new fields.

It would appear that if some area – from nanotechnologies to black holes – has not been normed it is not “civilized”. This is not only a lawyer’s view – who is eager to expand his or her expertise, whether professional or academic to new fields – but also that of institutional decision makers and, as we have seen in the first paragraph, of many stakeholders. The rush to normate what until then has been a virgin territory appears to be grounded more in anthropology than in ideology. As Westerners we have been used for the last two centuries to legal anthropology which has devoted much effort to detect and put order in the behaviours of members of primitive populations, trying to distinguish between religious, spiritual, social and institutional norms.

If we reverse the sides, sending a hypothetical anthropologist from the Amazons to Europe or the US, however, it is important to understand to what extent, the tendency to normate is part of the Western mental structure which could be defined as innate, similar to that which urges to build houses in stone, brick or wood; roads; towns; set up institutions that govern society; develop production systems.

One would wish to understand what is the correlation between development and normation; if the latter is the result of the first, or vice versa; or if they are processes that walk together, like two legs of the same body.

New territories – not only physical – are a useful field of investigation because they allow us to measure phenomena starting from zero and putting on the same chart the economic importance of that sector, the number of enterprises and individuals involved, and the quantity of norms enacted. At the

27 Maurizio Mistri, ‘Procedural Rationality and Institutions: The Production of Norms by Means of Norms’, Constitutional Political Economy 14 (2003) 301: “Based on their knowledge of norms used in similar situations, subjects have a fuzzy knowledge of the relationship between behaviour and pay-off, so they prefer to adopt behaviour patterns resembling those adopted in similar situations in the past. The choice of a given behaviour can thus derive not only from social constraints, but also from cognitive constraints determined by past experience” (at p. 307).
same time, one could compare sectors under an intensive regulation (e.g. telecommunications) with those which have a much lower level (e.g. the Internet). Or see the phenomenon, in the international context, as a form of “normative imperialism”, using norms as agents that conquer the globalized world and uniform its social and economic processes according to the Western capitalist model. Together with their products and services Western states and business entities tend to export legal models which surround their sale, distribution, production, and protection. The basic argument is that a country is developed if it has a complex legal system which mirrors Western ones. This expansion of normative production in non-Western countries is strongly encouraged, if not imposed, by international organizations such as the International Monetary Fund and the World Bank.28

If the tendency to create norms is an ineradicable feature of Western mankind, criticism towards what appears to be an excessive production of norms is scarcely effective since its roots go too deep in the past and in the development of our society. The debate therefore shifts from “how much” to the quality of norms and their coordination as a system.29

5 A Cultural Divide: Legal Norms v. Social Norms

When investigating the topic of normative over-production, a comparatist is struck by a significant difference in approach.

It would appear that the concern over an inflationary process is typically European. If one can measure a legal phenomenon through its academic relevance one finds a multitude of writings by philosophers and sociologists of the law, and by specialists of the various areas. The authors start from trying to define what one means by “norm”, and then delve into the different aspects.

The topic is also present in public and institutional discourse. Mostly business associations publicly express their concerns over the economic and organizational burdens that ensue from the enactment of new norms. Lawyers,

28 The best example is the annual “Doing Business” report by the WB. For a recent criticism of the underlying fallacies of such report and the primitive (to put it mildly) approach to the legal phenomenon (sees as some kind of computer program) see Marta Infantino, Numera et impera. Gli indicatori giuridici globali e il diritto comparato (Milan: Franco Angeli, 2019) 145 ff. (available in open access at the web page http://oj.s.francoangeli.it/_omp/index.php/oa/catalog/book/429).

29 Doubts can be also expressed on other forms simplification: see Wim Voermans et al., ‘Codification and Consolidation in Europe as Means to Untie Red Tape’, Statute Law Review 29 (2008) 65.
through their bar associations, repeatedly denounce obscurity, complexity and inextricability of the law. This outcry is often picked up by the institutions, which endeavour to provide some kind of response: “simplification” commissions, or even Ministries; guidelines on “better regulation”; monitoring at a legislative process level.

This paper follows this track.

When one crosses the Atlantic, however, it is extremely difficult to find an equivalent. Again, if scholarly writings can be taken as a reliable parameter, the debate – expressed by hundreds of articles – is practically entirely absorbed by discussion on “social norms”; what they are; how they are generated; to what extent are they effective; what is their relation with legal norms.30

The direction therefore appears to be different: an attempt to encompass within the legal system social behaviour which is formalized in such a way that it may supplement the law.

These different approaches surely are the result of a different ideological approach. In Europe, since the Enlightenment, laws and regulations are the main tools of government in order to pursue public goals. In the USA the common creed is that government should not interfere – or should minimize its intervention – with business and social behaviour.31 It is doubtful whether this doctrine is actually observed – there are many reasons to doubt it – but this has a strong influence on the viewpoint, especially in scholarly works.

The idea of “mentality” returns forcefully. It is quite likely that if one compares the number of legal norms in specific sectors (e.g. financial markets, products, and telecommunications) the result would be of a substantial equivalence both quantitative and qualitative. The question therefore is why on this side of the Atlantic there is a bleak view, while on the other side there is a massive effort to annex to the empire of the law what is, apparently, below, above or beyond.32

30 It is impossible to list the hundreds of articles that examine the topic from all the different points of view. Suffice it here to indicate as Ariadne’s thread the works of the most influential scholar in this field: Eric A. Posner, Law and Social Norms (Harvard University Press, 2000); and Id. (ed.), Social norms, nonlegal sanctions, and the law (Cheltenham: E.Elgar, 2007). See also Cristina Bicchieri, The Grammar of Society: The Nature and Dynamics of Social Norms (Cambridge University Press, 2006).


32 “The law must reward and punish acts, not the actor’s character. Instead of promoting civic virtue directly, the state must align law with social norms. Enlisting preexisting morality in the service of the state helps solve agency problems that plague government.” (Robert Cooter, at fn.31, p. 1601).
This comparative appraisal sheds light also on some basic differences that
go well beyond the issue of normative production.33

In the first place one must consider that philosophy of law plays a funda-
mental role in how the system is shaped. The European view of “rule of law” is
significantly different from the Anglo-Saxon template and is properly qualified
as État de droit or Rechtsstaat where the accent goes on the State as nearly ex-
clusive producer of laws or franchisor of normative powers. The liens with
dominant political theory – throughout Europe, irrespective of North or South,
continental or insular – are clear.

In the US the continuing role of legal realism and the very limited influence
of European political theory inevitably enhance a sociological approach which
focuses, pour cause, on social norms.

In Europe to study the legal process we shall begin from popular sovereignty.
In the US one can start from the case of a load of cantaloupe melons gone
rotten.34

The second aspect that one can point out is the schizophrenic relationship
that Europeans have with legal norms: invoked as a factor of order and of con-
ferral of benefits, but at the same time despised as the expression of an institu-
tional Moloch.35

This can be paralleled with a widespread hypocritical US tendency to vilify
regulation but then introduce it without hesitations.36 But even without

33 In this direction see Helen Xanthaki, Drafting Legislation. Art and Technology of Rules for
Regulation (Oxford: Hart, 2014) in the chapter devoted to ‘Comparative Legislative Draft-
ing’ (p. 199 ff.) pointing out how strong clichés still are in the trans-Atlantic dialogue.
34 The latter reference is to the case which opens Henry M. Hart’s and Albert M. Sacks’ case-
book The Legal Process: Basic Problems in the Making and Application of Law (New York:
Foundation Press, 1994).
35 For a strong defence of EU legislative production see Eric Van den Abeele, “Better Regula-
the point: “Europe is not a cost. It is the absence of Europe that costs dear, by preventing
entrepreneurs, citizens, workers and consumers from seizing all the opportunities of the
internal market. Regulatory work remains to be done in areas such as social protection,
sustainable development, energy, the digital economy, financial services and internation-
al trade” (at p. 74). The Author also (p. 5) states that “Studies into the costs of regulations
are one-sided and mostly tend to exaggerate the results, which also allows the expected
benefits of deregulation to be inflated”.
36 The exaltation of social norms is challenged, at least with regards to corporations, by John
Review 149 (2001) 2151. And from a very practical point of view it is sufficient to try to find
one’s path through the 1601 sections of the Dodds-Frank Act or the 1107 sections of the
Sarbanes-Oaxley Act to understand that in corporate law and in securities markets legal
norms are absolutely paramount.
applying anthropomorphic categories to social bodies – the directions in which the analysis moves are quite different. If one were to apply a quantitative approach one can easily understand that the US federal system, with its two layers of government (state and federal) and of courts, has an enormous normative output, but this does not appear to be perceived as a problem. Apparently, society (both citizens and entities) and legal scholars can cope with intricate systems without having to invoke every day a drastic simplification.

Legal culture is therefore extremely important and so is comparing its features on both sides of the Atlantic; between the Anglo-Saxon world and other Western cultures; between North and Southern Europe; between Latin America on one side, and Europe and the US on the other. This comparison goes well beyond the traditional common law/civil law cliché (a divide which appears to be quite immaterial in this case) and points at the general Weltanschauung of the legal community: The studies its members have made, their exposure to political and social theories, the role they feel they have in society and vis-à-vis the institutions.37

A good example could be the widespread literature one finds on the topic in France and in French speaking countries, not only among lawyers but also among social scientists. Can one establish a link with the very elaborate and sophisticated philosophical trends expressed by authors who have had a wide influence on intellectual milieus such as Sartre, Althusser, Foucault, Derrida, Deleuze? In that case one could say that the problem is not with norms, their number and pervasiveness, but with the way one looks at them.

The fact that vast regions (Europe and the US) which share common values and have reached similar levels of social and economic development have rather distant perceptions of the phenomenon of norm inflation is revealing of long lasting and deep differences. The issue of “normative metastasis” is, really, not a substantial one and the views one has on it may be considered immaterial. What we are interested in is, instead, detecting common grounds where one can move ahead on the assumption that pre-comprehension allows reaching a certain solution. And other areas where such an agreement is extremely difficult because the way the problem is seen is substantially different. Comparative research should therefore focus not only on objective features – norms

and their application – but on highly subjective and volatile aspects, such as perceptions, directions, forecasts, priorities.\(^\text{38}\)

6 Is There a Cure?

In order to discuss about cures, one should first reach a reasonable consensus that there actually is an illness. This is a point of significant debate. Especially institutions whose \textit{raison-d'être} resides in creating and enforcing norms are understandably opposed to reducing their production which is tantamount to reducing their powers. Seen from this perspective, the legal process which is now common in the Western world (preliminary reports, call for comments, public hearings, consultations on drafts, request for advice to external bodies) have the effect of creating social consent around the new norms, which therefore have not been imposed, but are the result of debate, discussion, negotiation. It is therefore highly debatable that the idea of a “normative metastasis” with fatal consequences for society is widely accepted. One can however attempt to suggest some possible cures.\(^\text{39}\)

(a) \textit{Moratorium}: The idea of a normative moratorium appears to be rather utopic. Production of norms is not considered analogous to industrial production and to the emission of environmentally damaging substances. The parallel with international conferences and agreements on climate change may be appealing but of little practical result. It has been already pointed out that a legal system is autopoietic and therefore produces norms on its own, through social interaction and the indispensable activity of dispute resolution bodies. Even suggesting a less drastic measure such as the reduction in the production, this is very difficult to determine because, as we have already seen, it is extremely arduous to establish accepted indicators on what is a “norm”; how many norms exist; how to operate a reduction in a sector in which quantitative criteria are extremely doubtful.\(^\text{40}\)

(b) \textit{Sunset clauses}: Explicitly or implicitly introduced in EU normative texts “sunset clauses” convey the idea that legislation is no longer a long-term

\(^{38}\) This is the approach favoured by Pierre Legrand in his vast recent writings. \textit{Ex plurimis see} his latest book \textit{Negative Comparative Law} (London: Routledge, 2019). The nihilist conclusion proposed by Legrand is not shared in this paper.

\(^{39}\) See also Jean Carbonnier, \textit{Droit et passion du droit sous la V\textsuperscript{e} République} (Paris: Flammarion, 1996), 112 ff. who however uses the term "placebo".

product but depends on economic and social conditions. When the latter change so does legislation. It is doubtful, however, that such clauses determine, after a certain time, the disappearance of norms as if they were degradable materials. Generally, once they have expired, they are subject to a restyling which brings to a wider and more complex intervention. If one follows the metaphor of the sunset one must acknowledge that after a very short night the normative sun rises again, stronger than before.

(c) “Better regulation”: A reformist approach to excessive normative production is that of a “better regulation”. “Better” in the sense of more coherent, less invasive, proportionate, attentive to economic and social costs. In this proposal there is a first paradox: its implementation requires normative interventions, and non-compliance with the aims – typically proportionality – invokes judicial intervention.

41 For a history of their precedents see Antonios Emmanouil Kouroutakis The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis (London: Routledge, 2016).


One cannot say that the EU proposal for a “simpler legislation” has met a better fate.45

(d) **Digital response (i):** The most obvious reply to the complexity of the normative system is that of finding a digital answer, which thoroughly simplifies the detection of the solution to the problem. An example is that of expert taxation systems: once one has inserted the individual data, the system elaborates them according to the applicable rules and turns out the correct result. From this point of view, it is quite irrelevant whether the norms are 1 or 1000, because the work is done by a computer and not by humans. One could even maintain that more are the norms, more precise is the result. This way out is, apparently, easy and coherent with our times. It presents, however, a series of drawbacks. In the first place we have been well aware, since the last 20 years, that “code is the law”.46 Gradually, digital applications direct the action of individual and entities, compliance is with pre-determined digital patterns (the typical example is that of the fields of an online form which must be filled in order to obtain a certain result). Norms are substituted by binary codes, lawyers by informaticians.47 The main questions are to what extent the digital result is the same, and what is the influence of the constraints of programming.48 There is also an issue of transparency and accountability which is becoming of increasing importance in relation to algorithms: what are the political, economic, social assumptions underlying them? Efficiency, fairness, social justice? The “gentle nudge” that comes from digital applications perhaps may solve the issue of normative over-production but opens that of control over digital decision-makers. Should the solution be found in new norms for the digital world?

(e) **Digital response (2):** Can other digital technologies be of assistance to simplify, and rationalize the normative thicket, and offer new methods in drafting norms? Over the last four decades jurimetrics have attempted to

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45 See the European Parliament resolution on the communication from the Commission to the Council and the European Parliament on a review of SLIM: Simpler Legislation for the Internal Market (A5-0351/200 in OJEC C 262 – 18.9.2001). The Resolution states that “research shows that 4–6 % of the gross domestic product of the Member States of the European Union is wasted on unnecessary administrative burdens on business enterprises”.


offer the appropriate tools in order to organize the system. One of its branches, legimatics or computing for legislation is aimed at suggesting computer assisted procedures in the legislative process based on the replication of legal reasoning.49 One must admit, however, that the results are, yet, far from encouraging and are bogged down by complex definitory and theoretical issues which are of the utmost importance but on which a consensus is far from reached.50 Even a more recent approach, that of legal ontology, while surely intellectually stimulating does not appear to be functional for the task of rationalizing and reducing the system. The main obstacle appears to be that norms, their production, implementation and development appears to be a highly social product which is practically impossible to contain in the necessarily formal structure of informatics.51

Is the “normative metastasis” a problem without a solution? Or is it a non-problem? Can one provide an optimistic view of the phenomenon of hyper-production of norms, seen as natural process which is inherent in growth cycles? Or should one elaborate a “legal environmentalism” which raises serious concerns about the increasing “normative pollution” which endangers the planet?

Some tentative conclusive remarks are:

(a) There is no reliable quantitative data on the number of norms which are active within a legal system of the Western world. One can simply register


Already 30 years ago C.-A. Morand (‘La croissance normative. Comment faire face à une masse de droit considérable’, originally in szsg 87, 337(1986) and republished in Foro italiano 1987, v. 497) warned that “Un des dangers de l’informatique juridique est d’induire par des facilités qu’elle procure une production normative débridée. Croyant à tort avoir surmonté par l’informatique les problèmes de mémorisation et d’assimilation des normes, les producteurs de celles-ci risquent de perdre toute retenue”.

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an increasing number with the inevitable multiplying effect when such norms enter into contact (connexion or conflict) with other norms.

(b) It is difficult to ascertain the social and economic benefits of such normative environment, and the related costs, and therefore if the latter outweigh the former.

(c) The discussion on a “normative inflation” appears to be highly influenced by more general views on how a society should be organized and on the role that institutions have in governing it through general rules.

(d) Comparative analysis between Europe and the US reveals very different approaches which are the result of mentalities and of the subjectivity of legal scholars.

(e) It is however a widespread opinion that the sheer number of existing and applicable norms renders the legal system substantially unfathomable and increasingly unpredictable. This uncertainty has a financial, organizational and administrative cost.

(f) The normative silos might be considered as a Big Data repository that could be organized and managed through digital analytics tools. This however opens the road to algorithmic decisions, gradually replacing human legal expertise.

These few pages, opened by a provocative appraisal, close therefore on a much more cautious note. A lawyer historically presents (or is presented with) an issue and attempts to offer a solution to it. In this case the paradigm fails and opens the door to multiple replies or closes it onto silence.