A PRELIMINARY STUDY ON THE QUANTIFICATION OF THE NORMATIVITY OF THE JUDICIAL PRECEDENT

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Abstract: *This work faces the need to scientifically measure and quantify the normative value of each new decision. The access to the Supreme Court, the constitutionally essential guarantee of the Italian justice system, now depends on the recognition of a «judgement» as a guiding principle. This rule raises the need for an appropriate measurement, which is therefore such as to assign a normative quotient with non-arbitrary criteria and which takes into account all the incident elements in the elaboration of the marginal normative range of the single decision. The work is based on and directed to legal systems in which (or in the extent of) the principle stare decisis does not apply, or is expressly forbidden as in the case of the French regulation of arrêts de règlement.*

1. Introduction

The law – certainly its sentence – is a normative act, that is, an act that does not communicate a truth of the world, but formulates goals, imposes goals, which through the behavior of people other than those who formulated it, must be achieved (the ought, *das Sollen*).

There is no coincidence or overlap between what is and what ought to be, the two worlds are not isomorphic. On the contrary, in order for the duty to be fulfilled, the activity or the act of some agent is necessary. For this reason, the passage or derivability of a datum or meaning of one from that of the other represents a logical problem difficult to be solved.

The naturalistic fallacy is the logical error of naive deriving the ought from the being, while the opposite error, that is deriving the being from the ought, is resolved in a set of statistical fallacies, all related to the fallacy of complete induction.

There is no philosophical agreement on the contents of the «world of normativity». For most people, the normative legal world enter the field of ethics and shares with it the tendency towards the absolute, the universal, the true, the eternal or even the transcendent, qualities which, in fact, legal normativity lacks. This work faces the need to scientifically measure and quantify the normative value of a decision. This is because now many national systems, outside the stare decisis based systems, let the «jurisprudence» – instead of the «precedent» – to become guiding principle in order to filter appeals, to reject claims prima facie or simply to manage proceedings along different paths. Our goal of objectivity and standardization seems possible because the first

obstacle has been removed, i.e. the material access: where available, the electronic civil proceedings creates a natural warehouse of all decisions of the Courts.[1]

Hans Kelsen, armed with Immanuel Kant's philosophy and his contemporary neokantianism, closes the full meaning of the normative act in the fortress of the individual, that is, in the act of will of the one who decides addressed to others behavior, leaving as a glimmer of communication or objectification the «meaning» of the act of will.

The individual choice, of the legislator as well as of the judge, is, in the last instance, what gives shape to the act that currently establishes normativity. This individual choice is unavoidable and this leads us to assume that, although to a negligible extent in some, nevertheless a normative coefficient is present in every judgment, even the most repetitive of precedents already known. However, in these cases the normative choice of the judge is reduced to the full acceptance of *stare decisis* and to the choice of the eligible precedent, with a negligible content relating to the innovation of the legal system. Because of this insignificance, it is methodologically possible to consider the normative content of such a judgment *as* null and void.

Normativity, therefore, at least from a strictly legal point of view, is indissolubly linked to the subjectivity of the interpreter, but it is also linked to the world of meanings already expressed by other interpreters in previous acts and to the subsequent acceptance, and realization, of the meaning of the original act of will.

Here we accept the neo-Kantian and Kelsenian point of view on normativity as ought to be and on juridical normativity as ought objectified in a sense communicated in an act coming from the authority legitimated for this purpose.

The investigation into normativity that we are proposing concerns the possibility of quantifying it, the object of which is not made by absolute values or objective truths existing as such, but by the meaning of acts of will addressed to other meanings of acts of will, i.e. the previous judgments, or to real behaviours.

The investigation is sociological, therefore descriptive of the reality of law, but it also contains a normative part, at least in the choice of the unit of measurement or reference, which inevitably defines not only the measure, but the whole set of what can be measured by means of it.

2. Normativity and the need for measurement

We will provide examples from three different systems where the need is now particularly felt: French, Italian, Brazilian. The French system has been chosen because of the peculiar tradition opposing normative judgment; the Italian because of the current development we are facing in procedural law and the Brazilian because of the new code, just entered in force, which is really a border of the hybridization of civil and common law systems. The need to scientifically measure the normative capacity of each decision derives, at least in the Italian legal system, from recent regulatory data which raise the «precedent» (art. 118 disp. att.) and the «compliance with the jurisprudence of the Court» (art. 360-bis c.p.c.), respectively, to the *sufficient* condition of the justification of a subsequent judgement or to the *necessary* condition for the judgement of admissibility of the appeal to the *Corte di Cassazione*.

According to the «Programmatic Document» issued by the Prime President of the Italian *Corte di Cassazione* on 22 April 2016, the «jurisprudence of the Court» must be considered to be formed – in order to recognize

[1] Jurisprudence is different from precedent even when it is resolved in only one of these because it is the normative secrecy of the precedent that determines the jurisprudence and, a fortiori, of a set of precedents. In the systems of stare decisis the precedent is endowed with an own intimate normative ability, the discovery of which by the judge is a matter of factual cognition. It happens differently in the recognition of the normative momentum, able to transform one or more precedents in jurisprudence: here we are facing a question of law, that asks the judge who must recognize his norma agendi. Of these statements, coherent application will be seen, at least in hypothesis, manifestation in the measurement technique that is proposed (0 1) and not [0,1]. On today debate about this topic: T. Spaak, Legal Positivism, Conventionalism, and the Normativity of Law (June 1, 2017), available at SSRN: http://dx.doi.org/10.2139.

its «orientation» (the normative nature of which must be taken into account checking any new appeal) – when «there is a decision in Joint Chambers; when there is a consolidated orientation of the single Chambers; when there are few judgments of one or more simple Chambers, if convergent; when there is only one decision, if considered convincing»[2].

It is, as everyone can see, an empirical gauge of the normative value of the «judicial system», in which – just to exemplify – no gradients of normativity are recognized to mere *obiter dicta*, although listed as normative factors in some precedents of the *Corte di Cassazione* itself.

At present, the need to measure the marginal normativity of each decision also belongs to other legal systems of the same family and is immanent to the evolution of procedural systems, even though they were not originally linked to stare decisis: in this sense, the references to the French regulatory environment and to the most recent model of procedural code, which took place in Brazil in 2015, confirm the need for a reliable measurement of the normative increase brought about by the individual judgement.

On the legislative level, France has been characterised since 15 March 1803 by a ban of arrêts de règlement[3] *(Article 5 of the CC: «It shall be prohibited for the courts to pronounce orders by general and legislative provisions on causes which are their subject matter»).* However, despite the prohibition of giving reasons for judgments on the sole basis of the precedent which would otherwise end up being a general rule, at least since the 1960s *constant jurisprudence* has been regarded as a source of law by operators and, in the Court of Cassation, the conformity of the ruling on appeal with the established case-law of the Court can be used as a ground for non-admission from the *formation restreinte*[4].

The interest in the degree of normativité of the arrêts is therefore significant; in this field, some indications can be drawn from the classifications made by the Court of Cassation itself, and are sufficiently objective to be taken into account in the search for the marginal normative coefficient[5], «*l'intérêt normatif de la décision*». «*Cet intérêt étant notamment attaché: -à la décision qui précise la portée d'une règle de droit; -à celle qui amorce ou consacre une jurisprudence nouvelle; -à celle qui infléchit ou modifie une solution ancienne; -à celle qui rappelle des principes acquis, afin qu' ils ne soient pas perdus de vue ou pour montrer l'attachement de la Cour à des solutions controversées*».

In France, too, it is recognised that the accessibility (allowed by technology) of decisions is the recent and fundamental discrimination in the development of the issue. However, a graduation of normativity within the 20,000 (approximately) decisions of the Supreme Court was created in order to identify the publication regime of the individual decision, so that there may be[6]:

«**D** = *diffusion sur la base de la Cour, mais sans publication. Ce sont les arrêts qui, pour les chambres, n'apportent rien à la doctrine de la Cour de cassation. Ils sont fréquemment qualifiés ‹d'arrêts d'espèce›;*

B = *publication au Bulletin d'information de la Cour de cassation (BICC, diffusé tous les quinze jours à tous les magistrats), comportant le sommaire des arrêts qui seront publiés, et dont la Cour estime nécessaire de porter rapidement la solution à la connaissance des magistrats du fond*;

P = *publication au Bulletin de la Cour de cassation, édité désormais uniquement en version numérique. Ce sont les arrêts qui ont une portée doctrinale, soit par la nouveauté de la solution, soit par une évolution de l'interprétation d'un texte au regard de la jurisprudence antérieure, soit enfin parce que la Cour n'a pas publié cette solution depuis longtemps (une dizaine d'années) et qu'elle entend manifester la constance de sa*

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2 L. Passanante, Il precedente impossibile, Contributo allo studio del diritto giurisprudenziale nel processo civile, Giappichelli, Torino, 2018, pp. 1–60; Gorla, Precedente giudiziale, Enc. Giur, vol. XXIII, Treccani, Roma 1990, p. 1–14.

3 P. Malaurie, Les précédents et le droit, in: Revue internationale de droit comparé, 2006, p. 324.

4 P. Deumier, Un arrêt non publié peut-il faire jurisprudence ?, in: RTD Civ. 2011, p. 87.

5 A. Lacabarats, Les outils pour apprécier l'intérêt d'un arrêt de la Cour de cassation, in: Rec. Dalloz, 2007, p.889; J. F. Weber, Comprendre un arrêt de la Cour de cassation rendu en matière civile, in: www.courdecassation.fr.

6 J. F. Weber, cited work.

position;
I = *diffusé sur le site internet de la Cour de cassation: il s'agit des arrêts qui, de l'avis de la chambre, présentent un intérêt pour le grand public, parce qu'il s'agit d'une question de société ou parce que la solution a des incidences pratique évidentes pour la vie quotidienne de nos concitoyens*;
R = *ce sont les arrêts dont la portée doctrinale est la plus forte. Ils sont analysés au rapport annuel de la Cour de cassation, qui permet l'actualisation, en léger différé, de l'essentiel de l'évolution de la jurisprudence de la Cour*.»

It therefore seems that the search for the specific weight of a decision, *i.e.* the calculation of normative energy that it supplies to the system, is empirically felt as a need, and even at an already high level of detail. This is not, however, the subject of predictive justice, although not alien to the French debate, where the technological resource constituted, for example, by Predictice (www.predictice.com) is also being experimented with the Courts of Appeal of Rennes and Douai: there, in fact, the interest is focused above all on the decisions of merit and is substantiated in a mass analysis (a sort of quantitative formant), which is logically antithetical with respect to the calculation of the specific weight of the single decision.

Around the subject of the jurisprudence acquired as determinant of the way of being of decisions or acts of part also revolves a series of institutes of the new Brazilian code of civil procedure, the border of the hybridization between the families of common and civil law.

The doctrine explicitly speaks of *«measures, aimed at using jurisprudence as a parameter for the elaboration of decisions»* and concludes that *«it is not new the idea of enhancing the value of jurisprudence and encouraging the issuance of uniform decisions, if there is a repeated orientation of the courts, especially the higher ones, such as the Supreme Federal Court and the Superior Court of Justice»*[7]. In this perspective, the possibility of reaching objective measurements of the normative gradient of a single decision would determine progress in terms of predictability, stability and efficiency of the system as a whole, as well as fostering an intimately coherent development of the institutions that refer to the so-called *uniform jurisprudence*, so that «the courts must conform their jurisprudence and keep it stable, intact and consistent» (art. 926).

In Brazil, in short, «*the new code no longer tolerates the existence of different positions on the same matter within the same court*», and this even outside the hypotheses in which «*the judges and the courts will observe*» certain decisions, to which – that is – they are properly bound (art. 927): this is the case, for example, of the preliminary rejection of the application, among whose hypotheses (see art. 332) there is that of the existence of a consolidated orientation of the courts.

It is clear that in Brazil the technique that enhances the jurisprudential deposit is oriented (more than to other values) to the efficiency of the judicial organization, but there is no doubt that, it is exactly when the efficiency of the organization makes use of an instrument in biased antagonism with the right of access to justice, that the objectification of the measure of the judicial paradigm marks the highest index of importance and significance.

The need is felt then for an appropriate measurement, which is therefore such as to assign a normative quotient with non-arbitrary criteria and which takes into account all the incident elements in the elaboration of the marginal normative range of a single decision.

There is no doubt, in fact, that – given the regulatory framework described above – to every decision today is to be attributed an innovative capacity for the system as a whole, *i.e.* exceeding the dynamic of the relationship between the parties towards which the direct effects of the decision itself are explained: this means that the system is never equal to itself for the simple fact that a new decision has been taken, and yet its concrete innovative importance cannot be alien to the rank of the authority, the sign of the decision, the number of compliant decisions, the interval between the latter and *coetera*.

7 P. Lucon, Il sistema dei precedenti nel c.p.c. brasiliano del 2015, in: Riv. Dir. Proc., 2018, 1271.

Our goal of objectivity and standardization seems possible because the first obstacle has been removed, i.e. the material access, even before the intellectual one[8]: where available, the electronic civil proceedings creates a natural deposit of all decisions of the Courts and always the Supreme Court's collection of decisions is total.

Thus, new energies could be released to promote the formation of new rules (jurisprudence) where, in their absence, the rate of conflict is bound to increase and uncertainty to undermine the relations and prospects of private individuals.

3. A theoretical starting point and parameters for a possible quantification

On a general theoretical point of view, the link between legal normativity and ought is, as we have already explained, the core of the definition of law in Hans Kelsen[9]. Taking this starting point from Kelsen's position, one of us has defined legal normativity as divisible into two parts[10].

The first part is a temporal shifting that takes place in cultural representations and allows the contemporary evaluation of temporally separated realities (this is the ought: establishing the future of an event as due or possible or simply probable).

The second typical component of legal normativity is the expectation or trust that the ought will come true.

In this work we define the adjective normative, in the legal sense, as a qualification of the meaning of statements addressed to behaviours that will have to be realized according to the model expressed in the statement.

This definition does not capture the whole legal normativity, because it excludes the will, which produces both meaning and statement, and also the trust in their occurrence, however it allows a restriction of the investigation to what is perceivable and susceptible to objectivation, namely the events in the space-time, excluding psychological and subjective aspects that require a different investigation.

Perhaps we can better rephrase the term by calling normativity, in our narrow sense, the normative range of the precedent. Of course, we are saying nothing about the qualitative importance of the precedent, about its cultural relevance or value.

In this way, even in a narrow sense, it is perhaps possible to quantify, or at least to parameterize, normativity.

On the basis of these assumptions, the normative extent of a precedent can be evaluated both with regard to the change introduced with respect to its precedents, and, looking towards the future, with regard to the modifying effects on other fields, as well as with regard to its current diffusion and consolidation as a precedent. In each of these aspects, what needs to be assessed is whether or not there is a change, either in the set of legal statements, or in the behaviour of their makers or users.

The extent, and therefore the measure, of the change, whatever it is and in whatever direction it goes, is the benchmark of legal normativity.

For instance, on the basis of the classification of the French Supreme Court's publication regime, the reference value «0», or absence of normativity, could be attributed to all the judgments in class D, the so-called «arrêts d'espèce» in which no changes or innovation have been made, while for all the others the reference value could be «1», that is, the presence of normativity, in a logical interval [0,1]. But the lack of normativity for the «arrêts d'espèce» is a stipulative decision concerning our classification and not a claim of effective and real existence of judgments without normative value. In other words, to stipulate that the value 0 is attributed whenever no identifiable innovation has been brought in does not mean that it does not exist, it means that it

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8 P. Callé, L'efficience des décisions de justice civile, in: Cohen, Droit et économie du procès civil, LGDJ, 2010, p. 219.

9 H. Kelsen, Introduction to the problems of legal theory, transl. by Paulson/Paulson, Oxford University Press, Oxford, USA, 1992, pp. 7–14; Alchourron/Bulygin, Normative Systems, Springer, Wien-New York 1971.

10 F. Romeo, Some aspects of the evolution of legal norms in the Lower Pleistocene, A quantitative approach to normativity, JusIT 2011; F. Romeo, Antropologia giuridica. Un percorso evoluzionista verso l'origine della relazione giuridica, Giappichelli, Torino, 2012, pp. 59–67.

cannot be identified or defined, or it is negligible, even though the possibility of a future redefinition of the value is left[11].

4. Time and space of the precedent

However, this modulation into two truth values is by no means sufficient to represent and account for the marginal normativity of a decision.

One of the two factors highlighted in the previous definition, is the projection in time: a normative judgment always provides for a future time. Therefore, normativity is measurable in its duration in time and it has already been stated that the more a single judgement stands not overruled in time, the more regulatory capacity it reveals[12].

Duration in time is not the only possible parametric value.

Another possible parameter could be the amplitude of the change brought in, therefore the space. In the legal field, the way in which the two parameters operate can be studied in the way in which the previous judicial precedent is spread:

1. from the point of view of its continuing use by other judges as a precedent;
2. from the point of view of its frequency of use, i.e. the number of times it is used in judgments of other courts;
3. from the point of view of the «command sphere», i.e. the domain of actions over which it can be valid. For example, it can be assumed that the judgment is only available for the case decided and has no value in the disposition of other cases. In fact, the rule created by the decision applies only to the specific case, it is not an instance addressed to human behaviour beyond the future. The normativity of the precedent is a different question from that of the normativity of the decision. The first does not derive from a decision on the future case, while the second closes with the decision on the case currently to be decided. Normativity is attributable to the precedent, not to the decision by virtue of it.

Apart from the question of the individual case decided, a precedent for interpreting a very general rule, for example a general or constitutional principle, can have a very broad domain and bring about major changes in many other areas as well. In particular, the action of the principle of reasonableness in interpretation can lead to far-reaching changes as a result of a single decision.

If we transform the discontinuous interval [0,1], previously adopted in the measure of normativity, into a continuous interval (0 1), we can take into account all the variables that we have, albeit very briefly, mentioned in the work and that appear to influence the amplitude or the relative normative weight of each sentence. These variables can therefore be statistically studied and used as parameters in the calculation of the normativity of a precedent.

In the definition of the unit of measurement, however, we must redefine the value (1) for the continuous interval, which should indicate not just the presence of normativity but the full normativity. This can be done, for instance, by assigning the value unit to a decision taken, among other conditions, in the absence of precedents. In this case the judgment rules in an empty space, while, as stipulated, the normativity is equal to zero in the case that it slavishly repeats a precedent already affirmed without any noticeable change. The adoption of the continuous interval (0 1) provides us with a number of analytical and quantification possibilities which are excluded from quantification at finite truth values. First of all, it is possible to better define the value 0 as the limit towards which an «arrêts d'espèce» tends, making unnecessary the discussions on the

[11] Here the Leibnizian principle of identity of the indiscernible is applied. It founded the infinitesimal calculus and was later placed at the base of the mathematical analysis.

[12] V. Capasso, Il valore della «giurisprudenza» in Francia, essay still unpublished and read thanks to the courtesy of the authoress.

possibility/impossibility of mere application of the law. Also the continuous re-assertion of a precedent by the courts for a long period of time can strengthen an infinitesimal value of normativity that may be therefore taken into consideration. Secondly, it is possible to use a mathematical calculus, which is also well suited to entities that are not fully known, allowing extrapolations, interpolation and so on. We could even use very sophisticated mathematical tools like mathematics of dynamical systems or vector calculus.

It is now a question of assessing the weight of each different instance such as social or cultural impact or proximity to the *ratio decidendi* etc., previously listed, although not exhaustively. They define the «magnitude» or «extent» of the legal change, i.e. the legal normativity in the meaning conventionally adopted here.

To this purpose, statistical correlation tools can be used, which correlate various factors, such as, for example, the method of linear regression or quantitative classifying analyses such as the discriminant analysis; the achieved result will depend on the type of tool chosen.

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