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**ROLE OF POSITIVE LAW IN PREVENTING REGULATORY  
INFLATION**

***PAPEL DA LEI POSITIVA NA PREVENÇÃO DA INFLAÇÃO  
REGULATÓRIA***

***PAPEL DEL DERECHO POSITIVO EN LA PREVENCIÓN DE LA  
INFLACIÓN REGULADORA***

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## ABSTRACT

**Objective:** The article studies ways to fight against regulatory inflation and comprehends this phenomenon in modern legal science.

**Methods:** The authors of the article consider the compliance of the law-making concept with the tasks of building a harmonious system of law in the context of progressive regulatory inflation.

**Results:** As a result, they analyze various approaches to improving law-making and finding ways to counteract regulatory inflation.

**Conclusion:** The authors formulate new approaches to defining the essence of law-making and conclude that it is necessary to modernize the concept of law-making and introduce a broader understanding of the rule of law.

**Keywords:** norm; regulatory legal act; legislation; system of law; legal archetype; normative complex.

## RESUMO

**Objetivo:** O artigo estuda formas de combater a inflação regulatória e compreende esse fenômeno na ciência jurídica moderna.

**Métodos:** Os autores do artigo consideram a conformidade do conceito de legislar com as tarefas de construção de um sistema legal harmonioso no contexto da inflação regulatória progressiva.

**Resultados:** Como resultado, eles analisam várias abordagens para melhorar a elaboração de leis e encontrar maneiras de combater a inflação regulatória.

**Conclusão:** Os autores formulam novas abordagens para definir a essência da legislação e concluem que é necessário modernizar o conceito de legislação e introduzir uma compreensão mais ampla do estado de direito.

**Palavras-chave:** norma; ato jurídico normativo; legislação; sistema jurídico; arquétipo jurídico; complexo normativo.

## RESUMEN

**Objetivo:** El artículo estudia formas de luchar contra la inflación regulatoria y comprende este fenómeno en la ciencia jurídica moderna.



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**Métodos:** Los autores del artículo consideran la conformidad del concepto de hacer derecho con las tareas de construcción de un sistema armónico de derecho en el contexto de una inflación normativa progresiva.

**Resultados:** Como resultado, analizan varios enfoques para mejorar la elaboración de leyes y encontrar formas de contrarrestar la inflación regulatoria.

**Conclusión:** Los autores formulan nuevos enfoques para definir la esencia de la creación de leyes y concluyen que es necesario modernizar el concepto de creación de leyes e introducir una comprensión más amplia del estado de derecho.

**Palabras clave:** norma; acto jurídico reglamentari;o legislación; sistema de derecho arquetipo jurídico; complejo

## 1 INTRODUCTION

An excess of legal norms and complex public relations inevitably lead to an increase in the subject of legal regulation and thereby a regulatory array (Mukhachev et al., 2022a). Directions for improving the current legislation should be considered both interspectively and introspectively (Tsapko et al., 2017). The quality of legislation as the basis of a real legal order is of particular importance, which is caused by the increased adoption of laws and the simultaneous decrease in their effectiveness (Mukhachev et al., 2022b). In this regard, it is crucial to study how to ensure the effectiveness of positive law.

The rule of law is the basic element of the system of law. It forms various normative complexes (heterogeneous sets of normative material), consisting not only of the rules of law but also of other regulatory norms, which impose a larger regulatory impact on social relations when combined. Unlike institutions of law, such complexes are formed spontaneously from the outside. The legislator can count on the support of new legal provisions by social and religious norms but there is no guarantee of such support. Positive law is a part of a regulatory legal act, so far devoid of targeted assessment and support from society, which evaluates such a rule through a collectively unconscious analysis of the compliance of its content with the social purpose and, in general, with the public functions of law.



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Although the formation of a normative complex around positive legal norms comes to an end, it begins as a heterogeneous process: firstly, the assimilation of social norms already existing in this area by the norms of law; secondly, building logical links with the declarations and definitions, goals and principles available in regulatory legal acts which do not have unambiguous normative significance without classical norms (rules of conduct). For example, such a normative complex is the family institution established by the Family Code, with some of its provisions formed by the Civil Code, the restrictions imposed by the Constitution of the Russian Federation, and filled with traditional social, moral, and religious norms. The new positive rule of law does not act on its own but rather as part of a microsystem, following internal syntagmatic and paradigmatic laws. A positive legal norm acquires becomes real at the will of the state. The minimum or starting level of effectiveness is provided by such a norm but its full effectiveness (inclusion in the system of other norms) arises after the formation of such a norm as an archetype of a category filled with binary norms-principles, declarations, definitions, and goals, as well as moral and religious norms (Garnov et al., 2022). On the one hand, such substantive supplementation is a means of adopting this norm by a legal institution. On the other hand, it is a means of understanding the new norm by society, a means of expressing abstract and transcendent normative material and translating it into a system of categories familiar to the public consciousness.

## 2 METHODS

The research subject is the compliance of the law-making concept with the tasks of building a harmonious system of law in the conditions of progressive regulatory inflation.

To analyze the categorical boundaries of law-making and the effectiveness of legal norms in the science of law, we used the following methods: general (dialectical,



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formal-logical, analysis, synthesis, and comparison) and special scientific methods (categorical analysis and cognitive categorization).

### 3 RESULTS AND DISCUSSION

There is an opinion that the definition of legislative activity is artificially narrowed and cannot be reduced to the activities of only state bodies. Various social strata and influencers should be able to influence the formation of legal norms, thereby increasing the effectiveness of legal norms as a whole (Nakisbaev, Dugalich, 2022).

The modern legislator does not consider law as a phenomenon, which is caused by the belief in the secondary nature of law in its interaction with the state interests. Law is presented as a common means of control with nothing sacred and all that matters is the development of law-making and law enforcement (Denisov et al., 2022; Kalashnikov et al., 2023). This opinion was formed under the effective application of a regulatory legal act as the most efficient form of law: in comparison with other forms of law, a regulatory legal act allows to quickly introduce a large array of new norms into the national legal system.

Euphoric ideas about the importance of regulatory legal acts, firstly, made us forget about the main drawback of this form of law during the crisis of trust in public authorities (relatively low support by society) and, secondly, caused such a phenomenon as “legislative tsunami”, i.e. going beyond the rationally necessary scope of laws (Burova et al., 2021). The legislator has long been working in the following paradigm: “if there is a problem, then there is no law and it needs to be issued”. This leads to an overabundance of positive legal norms and such a state in the regulation of social relations when different actions in the same situation both comply with a particular law and violate it. This circumstance explains the interest of modern legal science in the means of increasing the effectiveness of positive law.

In our opinion, one of the means to solve this problem is to study the formation of a normative complex around a certain group of positive legal norms, consisting of heterogeneous normative phenomena that get greater public support. “Situations may



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arise when the state does not seek or does not have time to regulate those social relations that currently need legal regulation. In this case, social practice develops its own regulatory mechanisms” (Sorokina, 2022).

According to Kudryavtsev, the existing legal norms are not able to regulate the behavior of legal subjects due to the fact that this norm is not brought to their consciousness, or such subjects fail to understand the content of this norm (Kudryavtsev, 1982). Lawful behavior is possible when the subject who does not intend to act in accordance with the rule of law still does not violate it. The behavior in such cases can be explained by the following reasons: habit (stereotype), imitation, self-interest, satisfaction, random decision, etc.

The most powerful influence on people’s behavior is exerted not only by the current norms of law but also by ethical, religious, and moral views which can be based on one’s experience, religion, existing and repealed laws, etc. These phenomena are the force that makes an individual who is unaware of a certain rule of law established by the state obey the law through their behavior. Our confidence is based on the following assumptions. By the time an individual has to select a behavior model, the whole complex of social norms has already passed the test of long-term application. Accordingly, this complex is recognized by both the whole society and the state. The long coexistence of the system of positive legal norms and the system of social norms, which becomes inevitable due to long-term social norms necessary for their formation and consolidation in the public consciousness, inevitably ends with one set of norms adjusting the other in case of intersystem contradictions. Regardless of the importance given to social norms in society, both social laws and social norms are a symbiosis of two essentially non-contradictory sets of norms, in which inconsistencies that arise from time to time are constantly eliminated.

If the rational growth of legislative norms is exceeded, the effectiveness of new positive legal norms is not ensured by a set of social norms which have not been formed due to the lack of public demand for them. This leads to the emergence of a large number of legislative norms that are formally valid but have no real application. It seems possible to designate such a phenomenon as regulatory inflation (Maltsev,



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2007). The overproduction of positive legal norms causes a rapid decline in their value in the eyes of society: fewer important social relations need legal regulation than legislative provisions intended to regulate them. There is arbitrary variability in the choice of a legal norm for a specific incident, and the achievement of social justice in such a situation is not verified. As a result, society begins to do without legislative regulators in this sphere of social relations and turns to social norms and near-normative phenomena. The struggle for providing effective legal acts and minimizing the level of regulatory inflation is one of the most important tasks of the legislator.

There can be several solutions: the first is the traditional improvement of legislative technique. This tool solves internal contradictions between the rules of law caused by provisions of the same act. However, they are not able to radically change the situation for the better: the perfect text of a legal act does not improve its effectiveness even if this act is a part of the legislative system but does not fit into the existing system of social legal relations. A consistent and terminologically correct regulatory act facilitates law enforcement if it is used in practice. Nevertheless, lexical perfection will not make a legal act more essential if there is no subject to legal regulation due to low public demand. Such an act might have cultural value but it will not perform the role of legal regulation in society. The significance of this method of combating regulatory inflation is debatable.

Secondly, this involves a scrupulous study of the subject of regulation under the draft of a regulatory legal act. This method is effective but brings a consistently positive result only if it is supported by the legislator who ensures the implementation of the adopted act and its constant adjustment. Scientific and technological progress, informatization, and modern technologies facilitate this task but also cause the effect of reverse productivity. Improving the monitoring of legal relations leads to the collection of more up-to-date information on the necessary amendments to legislative acts, which results in the adoption of new legislative acts and an increase in the volume of legal regulation and its quantitative parameters. In turn, even more up-to-date data about necessary amendments to legislative acts is being collected. There is also an issue of blurring the representative nature of the highest legislative body of the state:





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specialists in a narrow field of law enforcement should monitor the subject of regulation by the draft of a regulatory legal act and, subsequently, the act that entered into force. They will decide on amendments to the regulatory legal act guided not by the “average will” of an ordinary person as mandate holders but through professional knowledge and skills, which conditions the need to rethink the existing concept of democracy. This way of dealing with regulatory inflation is large-scale and labor-intensive but can bring results in the short term.

Thirdly, it is necessary to work with the hierarchy of norms. The system of law is presented as a pyramid of norms not only at the macro level but also at the level of normative micro groups. The traditional stratification of legal norms by their legal force is too inaccurate, therefore it is necessary to determine an archetype in each micro group and assess its importance in comparison with other norms (from the same micro group) either by giving greater legal force or by disseminating generally accepted practice. Such a legal archetype should be formulated more abstractly to facilitate systemic interpretation and application by analogy. Then this legal archetype becomes a relatively unchanging core of a micro group of norms. The immutability of this legal archetype gives the entire micro group of norms systemic stability. Improper normative provisions rejected by society or legislative gaps do not deprive all the norms in this micro group of effectiveness. Social behavior is regulated not directly but by analogy. Such micro groups with archetypes are less subject to regulatory inflation. The inclusion of new provisions into the micro group of archetypes does not decrease the effectiveness of new norms once they begin to be implemented since they (like the rest of the micro group) have a unified normative structure and go under the same value assessment as older norms. In our opinion, this method of countering regulatory inflation is effective but it implies an increase in efforts to interpret legislation by the professional legal community and, as a result, a loss of the ability to perceive the content of regulatory legal acts for a significant part of society.

Fourthly, a normative complex is formed around a certain group of positive legal norms, consisting of legal norms and norms in general. Any separately considered legislative provision is a palimpsest, in which the actual legislative provision





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is only the upper layer. The underlying parts of its semantic structure are formed by legal provisions that have lost their force, traditions of interpretation, customs, myths, religious norms, moral imperatives, unshaped judicial practice, folklore, and other normative phenomena of social origin. The legislative provision is applied together with this normative complex, which establishes the boundaries and power of the legal impact on social relations, corrects the meaning of the legislative rule, promotes the assimilation of knowledge about legal and social values by individual members of society with the help of imaginative and easily accessible to every person forms of social creativity. Such a transfer of social experience about safe ways of interaction between an individual and the state makes the normative complex a powerful tool that ensures the lawful behavior of the population even at a low level of legal culture. The question remains open about the relationship between certain components of the normative complex and the possibility of finding greater force in social norms in comparison with positive law, i.e. about derogation. The possibility of abolishing the law by social norms is not discussed in modern legal literature, in contrast to the works of Russian pre-revolutionary and foreign jurists. At the theoretical level, the Russian science of law does not recognize the ability of custom to cancel the law. At the same time, there are judgments about the practical aspects of this problem. “Customary law does not cancel legal norms, it can only weaken its effect if the provisions of positive law conflict with popular beliefs” (Markova-Murashova, Mikhailenko, 2014).

Russian scholars mention some cases of unofficial derogation. According to Tokarev, many, if not all, activities related to the behavior of people in the field of marriage, family, inheritance, and other relations are regulated by law in a superficial manner (Tokarev, 1972). M.N. Kulazhnikov mentioned cases when the population preferred to follow customs rather than legal norms, even though behavior in accordance with the latter had significant material benefits. In this case, customs can change the legal regulation of certain social relations (Kulazhnikov, 1972). In conformity with I. Sabo, there are cases when a change in law is caused by some established practice in society but “the alteration of any existing legal norm is a fact of real life and not a legal principle” (Sabo, 1964). The violation of laws is inevitable,



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indestructible, and not in all cases negative. Legislation is characterized by certain properties, including formal certainty, state coercion, and stability, which are traditionally (and for the most part justified) assessed as the virtues of law distinguished from social norms. However, the formal certainty of legislation does not allow for considering many important circumstances that influence the person's actions. Stability and mechanisms ensuring it do not allow to quickly adapt the existing legal norms to changing needs of society (Yatsenko et al., 2022). Measures of state coercion sometimes turn out to be inappropriate for the offense and are excessively cruel or unjustifiably condescending. In many cases, people prefer to break the law but to fulfill social norms. This is done not out of stubbornness but because it is the rule of conduct that, more than legal norms, corresponds to the moral and fair ideas of these people.

Social norms regulate social relations inaccessible to law and widespread in the public consciousness. According to Kulchar, "if a written legal norm is so (...) contrary to social relations that it does not become an actual behavioral pattern, then sooner or later this will be expressed in the operation of state bodies. Law enforcement forms legal norms and enforces its compliance with social relations or, in extreme cases, refuses to enforce the compliance of such legal norms. In the future, they will not be effective, although they might have formal power" (Kulchar, 1981).

We believe in the following facts:

- a) Some laws are purely formal and are not applied in practice.
- b) In some cases, the role of law in the regulation of social relations is replaced by social norms.
- c) People are capable of certain hardships associated with violations of laws, which relates to the inconsistency of laws with common ideas of justice.
- d) Many (if not all) social norms express people's ideas about morality and justice. Consequently, people guided by social norms inevitably violate the law.

It is possible to assert that there is no institution of abolishing the law by social norms only if we equate law with a system of legislative acts, i.e., with their clear definition of legal force inherent in each level. Therefore, this institution should be regarded as absent in the legislation but not in law as a whole and not as a legislative



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principle. It is a phenomenon that is always and incurably inherent in real legal regulation. According to Korkunov, “no norm, whether it is a law or something else, can claim eternal existence or weaken future norms.” Therefore, the derogatory power of social norms should be resolved from a positive perspective (Korkunov, 2019). The law does not correspond to social relations for a long time, the custom isolated from social practice (fixed by law) is similar to law. According to Kulchar, “a norm that does not correspond to the development of social relations is an illusion” (Kulchar, 1981). We can either deny that social norms can repeal law or refuse to legislate this institution, but the derogatory power of social norms is a fact of reality that should be taken into account in legislative regulation. We agree that the considered property of social norms is legal since modern law is irreducible to legislation that does not fully operate. We should also recognize the legal nature of social norms that can not only paralyze the real operation of law but also replace it. The functioning legal system does not contain mechanisms that record the facts of such a cancellation or mechanisms that would combine various forms of law. However, the absence of these mechanisms does not prevent society from resorting to social norms.

The technique that complies a certain group of positive legal norms with social norms, and the formation of a normative complex as a whole to combat regulatory inflation, is as follows: to fix a social norm in a legislative act. It is believed that “the adoption of a regulatory legal act containing a custom turns it into a law and endues it with the appropriate force” (Maksimova, 2021). The social norm, whose content is fixed by the legislator, still exists as it is supported by public recognition. A similar legislative norm is observed due to state coercion. It should not be forgotten that a written social norm in ancient times did not always mean its sanction by the state. Customs could be recorded as a result of the intensification of cultural life caused by the introduction of writing. This idea was confirmed by Rogachevskii (1996) who claimed that the records of medieval customs had no legal force and were compiled “for the information and the instruction of people”. Any record of a social norm does not put an end to it because the people’s conviction in the need to comply with it does not disappear.



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#### 4 CONCLUSIONS

This article aims at studying the interaction between components of the normative complex, including both formal and informal rules, in the context of regulatory inflation.

Thus, ensuring the application of certain regulations within positive law by a normative complex, consisting not only of the rules of law, can be considered a relevant, effective, and necessary tool in the fight against regulatory inflation. However, the interaction between components of this normative complex has not been established as a ready-to-use mechanism.

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