

## Résumés des contributions en anglais

What makes the force of norms in law? Is it always the sanction, the constraint, their obligatory nature? How then can we explain the undeniable force of norms of which they are devoid, the force of first articles of laws, non-transposed directives, recommendations of regulation authorities, guidelines, administrative directives, preliminary drafts of reform of the law of obligations, of reports and other declatory instruments?

And among the obligatory and sanctioned norms, is it possible to distinguish different degrees, indeed different natures of force, while no longer confusing obligatory forces and constraining force? Is it possible to see the force of norms in law as a spectrum which expresses its multiple colours and variations, from the most restrictive to those that offer the greatest incentive?

It is to these essential questions for jurists, be they academics or practitioners, that this book brings a kaleidoscope of answers from fifty-seven researchers, of all specialities and sensibilities.

From this research, carried out individually and jointly on a theme which interests all jurists and yet which has never been explored, there emerges a *concept of normative force* as central as that of “sources of law”. A concept which provides a genuine “diagnosis tool” of the force of legal norms and is part of an “open theory of law”, which reflects the complexity of contemporary law and of its interactions with social reality. A concept which shows that law is alive and evolving.

## PHILOSOPHY OF LAW AND SOCIOLOGY OF LAW

### *The normative force of state power in the philosophy of Michel Foucault*

Isaak DORE

Law, understood as power or “force”, has often been viewed in terms of physical or economic restraints that have negative effects on its subjects. It is largely because of this that every exercise of legal power (or, what amounts to the same thing, legal coercion) encounters some degree of resistance. But is it possible to exercise legal power in ways that do not yield negative effects and in ways that do not necessarily elicit resistance? Foucault’s analysis of law and power shows that legal power, viewed either in terms of its “normativity” or its “force”, is not always negative but can be productive. And when modern states and their institutions use power, they can almost imperceptibly gain control of their subjects through power technologies that do not elicit the resistance normally associated with the exercise of legal power. It is therefore necessary to unravel Foucault’s unique conception of power, and to examine its normative force. Also worthy of examination is how this normativity can be used not only as an instrument of domination, but also for the normalisation, if not the very subjectification of the individual.

### *Beyond the concept of force in the philosophy of Jacques Derrida*

Émeric NICOLAS and Cyril SINTEZ

The term “force” is very present in the writings of Jacques Derrida. Even so, is it a concept and a concept at the heart of his philosophy of law? Such is our hypothesis. Seeing the law largely as what is and has authority, Derrida presents an original concept of force of law. Force, which, by definition, is normative according to him, is the ability of our language to establish and perpetuate the law through its aporetic experience of Justice. However, it is without foundation or genesis and is independent of any pre-rhetoric convention. Beyond the rational, the Derridan force of law is purely human as a force of faith. It is a necessarily shared belief, the fruit of our human condition and guarantee of our responsibility.

### *Repeatability and repetition of normative wordings: the power of language as a normative force*

Émeric NICOLAS

What is it that gives a legal norm its own force? Where does the normative force lie? In the norm itself? In the text which would be the substratum? If, on the contrary, the normative force were to be distinguished from the norm, then it could be perceived that it is only through its wording, via a particular structure of the language, that the force appears in its dimension as a condition of possibility. What is this structure? It would then have to be said that the

normative force indeed does not arise from the norms but that it comes from this movement of the repetition of the signs made possible by the repeatability which is peculiar to language. As a bald expression, the force is only potential: never present either in the words or in the expressions as such, yet neither is it completely absent, as it finds in the structure of the sign its condition of possibility, the *virtus verborum*. This force lies in this possibility of repeating them outside any context of utterance. And if this possibility is the condition structural of any language, it is massively exploited in the legal field so that what is true for language in general appears all the more clearly as it is legal language. It is thus a mechanical property of language to some extent, associated with an equally recurrent use, which participates all at the same time in the process of emergence, deployment and intensification of the normative force. Legal language appears in the form of a standard model of repeatable language.

*The symbolic force of the law*

Pierre NOREAU

With regard to the theory of positive law, the force of law is mainly related to the concept of constraint. However, empirically, the law most often asserts its strength in its ability to invoke a certain *sense of duty*. This perspective opens the door to an entire range of considerations and findings about the symbolic force of the law. It refers not only to the legitimacy of a coercive power to which the positivism of modern times refers, but also to the legitimacy of legal normativity itself. This legitimacy depends not only on the recognized ethical value of its content (though it can be one of its sources), but also on its binding force to the extent that it is acknowledged, beyond even the intrinsic value and orientations to which it refers or on which it is based. It is the condition of a “legal order” or a social regulation that would not constantly assert itself through constraint.

THEORY OF LAW

*Normality and legal standard : from one normative force to another*

Sandrine CHASSAGNARD-PINET

The normative propensity of normality leads this concept to enter the sphere of the law. Normality and legal standards are part of a relation of influence and interdependence, normality influencing legal normalcy whereas the latter contributes to shaping the former. If normality can consolidate the normalizing influence of the legal standard, it can also be a source of dispute and evolution of the law. It is thus a relation of complementarity but also of tensions which is born from this balance of normative forces.

*The optional normative force*

Pascale DEUMIER

The question of the normative force of a norm and that of its application are generally treated as one and the same question, the second dimension (the application) rising from the first (the force). However, in the matters open to the will of the parties, the multiplication of norms proposed as options to the parties (acceptance or exclusion) could illustrate the existence of two distinct facets: the normative force peculiar to the norm, in its field of application, and the optional normative force in the field of the laws available.

*The normative force of the juridical paradigm.**The example of the paradigm of juridical reciprocity being superseded*

Émilie GAILLARD-SEBILEAU

The juridical paradigm imperceptibly guides the way of conceiving, developing and implementing the law. It acts as a conceptual matrix for jurists by establishing boundaries, limits to what appears to them as legally desirable or even conceivable. When a paradigm is established, that is to say it dominates, it is generally not expressed, unspoken. Drawing on the strength of obvious facts, its normative strength appears to be invincible. When a new juridical paradigm emerges, a reorganization of the normative strengths involved is necessary. Whether or not the new paradigm drives out the former paradigm, a new process of expansion and of normative creation is set in motion. Traditional concepts, notions and principles are renewed, other new ones become conceivable. New juridical logics then develop, making possible the conception of new solutions enforceable by all involved in the legal process.

The normative strength of the juridical paradigm appears to be a dynamic of creation, of guidance which leads law from the depths of the juridical thought to its daily implementation.

*The normative force of legal standards. Elements for a pragmatic approach*

Benoît GENIAUT

Bringing together the concepts of “normative force” and “standards” makes it possible to enrich the comprehension of both concepts. It is a question of adopting a pragmatic point of view, such as is initially conceived in sciences of language, and to consider the normative force as the active power of the standards. The question initially is to know how and to what extent the standards can have force of a norm, i.e. to apply as a standard. It should be remembered here that, following the example of the norms which contain them, the standards are intended to be used as a reference for operations of evaluation. But in order to understand the action of the standards it is necessary to grasp their normative intensity beyond their function. By virtue of its vagueness, the standard implies, with each application, a reappraisal of the sense of what is just. The normative force of the standards then appears fully in this opening of

the judgement of law which tends to bring the latter closer to an “ordinary judgement”. The pragmatic approach, initially borrowed from the theory of language, is prolonged in the contemporary sociology of the action. A prospect for research into the regulation of which the standard may be the subject then becomes apparent.

*The distinction of the constraining force from the obligatory force of legal norms. For a dual approach to the normative force*

Cédric GROULIER

In the classic approach, a legal norm is considered as a command. Normative strength is then the characteristic of legal norms to impose something and to impose themselves. But this approach leads to confusion between the obligatory force of the norm attached to its function—to serve as a reference—and its constraining force relative to its content, which is not necessarily a command. Considering a legal norm as a model enables these two strengths to be more clearly distinguished and to appreciate the normative strength for what it is, i.e. the strength of the meaning expressed by the norm and the strength of the reference that this norm constitutes.

*The normative force of “rights to ...”: the prism of the enforceable right to housing*

Emmanuelle JAULNEAU

The assertion of “rights to...” holds a normative force which depends on one's perception of the definition of normativity. In a strict sense, “the rights to...” are excluded from the field of normativity, except when “rights to” are considered by some as subjective rights. However, this perception seems to be too exclusive and does not reflect their importance in the legal reality. Indeed, even though all the “rights to...” cannot be recognized as subjective rights (in part, because they do not encompass all the compulsory and sanctioned specifications of subjective rights), they are still potent. But if an extended point of view is adopted, the normative force appears to have different degrees. In this case, “rights to...” can become part of normativity and may thus, in legal terms, hold an inciting and even inspiring normative force for law-makers and the judiciary. The “rights to...” illustrates the idea of a gradual normative force whose obligatory force constitutes the highest degree.

*The normative force of the adage specialia generalibus derogant*

Stéphanie MAUCLAIR

The use of the adage *specialia generalibus derogant* seems to be obvious for the lawyer. However, it must be acknowledged that its normative value is tinted with uncertainty. Indeed, at first sight the adage appears to be non-normative, as it does not fit into any category of predefined norms. Nevertheless, upon closer analysis, its content, as well as, its function reveals a latent norma-

tivity, which must be defined. Thus, it really seems to be indispensable to take into consideration the normative energy this adage emits, in order to be able to transcend the first observation and acknowledge a real normative value. By following this reasoning, we can observe that the adage *specialia generalibus derogant* is a real guideline for the judge in that it provides him with a pattern of solution for the conflict of norms to be resolved.

*The normative force of interest groups: behind the scenes and centre stage*  
Mustapha MEKKI

The context of a crisis of State, as well as the renovation of the notion of public interest and the transformation of the law enhance the privileged role that interest groups are deemed to play both at the social and legal level. They are considered as a “creating force of law”. However, the identification difficulties of these groups make them, for the moment, an obscure force at the root of a breakdown in equality between the representatives of the civil society, thus creating a risk of oppression exercised by the strongest on the weakest. It has therefore become a priority to draw up a typology of these interest groups according to their operational modes. This identification process should diminish the risks of these interest groups becoming a subversive force. The solution does certainly not consist in suppressing the influence exercised by those groups on the normative production. This would be both unrealistic and unworkable. French society, like many others, is organized and still functions through networks. The spreading of centres of power and decision promote the briefing and expertise work accomplished by these different groups. Although they still remain obscure, interest groups are necessary and their legitimacy requires a legal framework guaranteeing equality of representation and the loyalty of the proceedings through the adoption of fair rules of conduct. For a force to be legitimate, it has to be channelled.

*Can proposals concerning law be of law? The normative force of the Catala report*  
Cyril SINTEZ

The Catala report is a doctrinal work. It contains a set of proposals for the reform of the law of obligations. Is it possible to consider that the proposals it contains are of law? At first sight, everything contributes to a negative response: the doctrinal proposals remain external to the legal order. However, we shall try to demonstrate that this conclusion is based on a triple assimilation of the right to normativity, to positivity and to constraint which, called into question, can give way *in fine* to the recognition of a normative force of doctrinal proposals, fruit of the illocution force of language.

**HISTORY OF LAW***The normative force of municipal acts with regard to prefectural authority in the 19th century***Pierre ALLORANT**

Following a decade of revolution when the worship of national law had concealed the limited efficacy of norms, the Napoleonic position of breaking with the past claimed to ensure the enforceability of laws enacted by the consular authority. But behind the stereotyped image of prefectural omnipotence, the impotence of central government against municipal inertia can be discerned. The July Monarchy changed the relationship of administrative authority from a mere power struggle and established different levels of enforceability for municipal acts, with the notion of local interest; the Orleanist compromise resulted in a balance in relations between the autonomy of local government and submission to the national interest. However, legislative clarification did not end the call for more distinct decentralization which returned to the fore at the end of the Second Napoleonic Empire, but which was curbed by concerns about public order; the balance of relations was also modified by the professionalisation of republican civil servants. All through the nineteenth century, the discrepancy between the pretence of a strong legal strength of high level norms and their limited efficacy against the resistance of local social forces of inertia; conversely, educational instruments, “communal schools” by correspondence and the help of the legal adviser close at hand, the “sous-préfet”, of limited normative value, mere incitements or practical guides resulting from delegated powers, proved to be particularly efficient in the improvement of municipal acts.

*The normative force of the municipal referendum: From the Revolution to the first decades of the Third Republic***Pierre BELDA**

The municipal referendum sanctions the consultation of the voters of a commune. It was founded under the revolution before disappearing under the directorial legislation. The revolutionists seized such a process whereas the municipalities of the first decades of the Third Republic considered organizing de facto consultations. The municipal referendum did not have any obligatory normative force, merely the wish of a commune for the constituents, it was declared illegal in 1889 by the Minister of the Interior followed by the jurisprudence of the Council of State. But the normative force can also be extra-legal. When an opinion is formulated by the voters of a commune, the elected municipal officials follow the direction thus indicated. It is then given a political normative force, it takes its place within the initiatory forces of the law and can even become the prescriber of the norm.

*Evolution of the normative force of the acts of kings of France in the Middle Ages: the question of the Jews of the kingdom*

Pierre-Anne FORCADET

In the 13th century, the legislative power of king of France was gradually taking shape. The normative force of the acts adopted by the royal chancellery had several aspects: initiative often shared, assent of the great feudal landowners required, difficult and unequal application... The precise example of the status granted to the Jews of the kingdom which gave rise to an abundance of legal literature makes it possible to illustrate the evolution of the royal power as regards the proclamation of the legal provision: initially the standard was negotiated and set by charters between the king and his barons; subsequently, the rule strengthened by these contracts acquired, in royal decrees of increasingly general range, a quasi-legislative force. Finally the same standard was sanctioned by judgements of the royal Parliament, which completed its force of constraint.

#### CANON LAW

*Candid remarks on the normative force of canon law*

Sylvie LEBRETON-DERRIEN

Normative force, understood as a point of reference of a norm, can not only bind but also inspire. Canon law can be said to have both these qualities. On one hand, it has a binding quality within the Church for all Catholic subjects, the particularity here being the degrees of normativity as a function of the relation between the law and the "Mystery of the Church". On the other hand, canon law has a potentially inspirational force outside the Church, for example in the interpretation of national law, the difficulty here being the constrictions imposed by the doctrine of the separation of Church and State.

#### EUROPEAN LAW AND INTERNATIONAL LAW

*The normative force of police laws in private international law*

Auriane AUDOLANT

Police laws are imperative international rules. They are difficult to identify because of the multitude of expressions devoted to this notion and, correlatively, because of the absence of a satisfactory definition, yet they are numerous and their domain is relatively vast. Their normative force can be defined according to three aspects: obligatory, restrictive and imperative. So police laws have an essentially imperative, indeed "super-imperative" normative force, which is threatened neither by the increasing recourse to jurisdiction clauses in favour of a foreign court or a jurisdiction of arbitration, nor by the increasing interference of community rules in private international law.



*The normative force of non-transposed directives***Romain BOFFA**

The study of the normative force of European directives is that of a paradox: here is a source whose force is greater than national laws, but whose normative range depends on an act of internal reception: the transposition. Under these conditions, it may be useful to consider the non-transposed directives in order to show that the normative force is subject to degrees. In this respect, the distinction of the two functions of the norm, the imperativity and the model of reference, find a particular application in this context. Thus, the non-transposed directive, though not fully imperative in that it is normally deprived of its direct effect, is useful for the national judge as a model of reference, who must interpret the national law in the light of the directive. According to the recipients of the norm (State or individuals), the normative intensity of the non-transposed directive thus presents variations which the study intends to reveal.

*The normative force of the instruments of the Codex alimentarius within the framework of the world Organization of the trade***Julien CAZALA**

Through a system of cross references, WTO law enables Members to make the presumption — as yet never overturned — that any sanitary or phytosanitary measure adopted in conformity with the standards and standards of the Commission of the *Codex alimentarius* is compatible with the organization's agreements. Relations between WTO law and the *Codex alimentarius* instruments show how the normative force (which is not expressed here in terms of obligation) of the latter can be perceived as guidelines dedicated to the Members' sanitary and phytosanitary policies. Once WTO law applies, the influence of the technical standards established within the framework of the Codex goes far beyond their initial recommendatory value without distorting their legal nature. Hence these technical norms are not legally binding but have wide effects in the field of international trade law. Those effects appear to be the main aspect of their normative force.

*Of a degree of the normative force: the imperative force in public international law. Observations around some judgments pronounced by the Court of First Instance of the European Communities***Hélène PICOT**

The idea of imperative norms in public international law is controversial. The imperative force, which we understand as a degree of normative force, is traditionally the subject of a formal or hierarchical conception characterized by its non-derogable nature. However, this may possibly be influenced by a substantial conception. The comprehension of the imperative force can be enriched by a comparison with similar material concepts such as the intrans-

gressible or the absolute character of the laws in question and be articulated with them.

#### CRIMINAL LAW AND INTERNATIONAL CRIMINAL LAW

##### *Prolegomena in the study of the normative force of the law in contemporary criminal law*

**Guillaume BEAUSSONIE**

Does the normative force of the criminal law lie in repression? Limiting oneself to the study of substantive statutes, in the purest doctrinal tradition, could give this impression. But by widening the field to procedural laws, then by noting what is common to one and the other corresponds to the liberal base of modern criminal legality, it appears that the force of these laws is of a more consensual nature. The respect of individual liberties, the condition of the social acceptance of all criminal laws, consequently gives each one its normative force. This requirement, inherent in criminal law, is so significant that it explains the specificity of the regime of the latter. Moreover, because it takes its place, by its nature, in a more global phenomenon of safeguarding fundamental rights and liberties, it is now a legal condition sanctioned by the hierarchy of the norms. Controls of criminal law thus ensure, in a contemporary way, the constancy of its normative force.

##### *The normative force of a legal guide. A study of the victims' guide to the International Criminal Court*

**Amanda DEZALLAI**

A legal guide is a document that has no binding normative force. Nevertheless, it would be wrong to consider that it has no force at all. In order to be as clear as possible, we decided to illustrate the normative force of a guide through the example of the Guide for the participation of victims in the proceedings before the International Criminal Court (ICC). The present article examines this force from two different angles: the force given by the transmitter of this document and the force felt by its beneficiary. This has shown that a document may initially have several different forces and that the real normative force of the document is the result of the interaction of these different forces. But in the case of the chosen example, the guide of the ICC only has a didactic force given by the transmitter, which is the Victims' Participation and Reparation Section (VPRS). This is explained mainly by the particular nature of the beneficiaries of this document.

##### *The dissuasive force of the criminal norm*

**Jacques LEROY**

In order to be dissuasive, a substantive penal norm must be likely to persuade the potential delinquent to abandon committing the offence. It must act

on the reason and be placed in relation to carrying out the act. The dissuasive force is a psychological force. It does not create the norm but rather it emanates from it. The substantive penal norm could impose itself through its object: necessary incriminations and adapted punishments. In these conditions the potential delinquent could perhaps recognize the authority of the criminal law and respect it. The norm would then have an intrinsic force. Unfortunately, contemporary legislative initiatives are disappointing in this respect. There is to more to be expected from the certainty and celerity of the penal response or from an extrinsic force; but there again positive law is muted in these two aspects.

## CONSTITUTIONAL LAW

### *The normative force of the law according to constitutional jurisprudence*

François BRUNET

In the jurisprudence “Future of the school” of 21st April 2005, the Constitutional Council took a step which struggles to convince. While refusing to censure provisions of “dubious normative range”, the Council admits that the normative force may be subject to gradation according to the meaning of the wording. But by sanctioning provisions “devoid of any normative impact”, it appears to deviate from this gradual logic without precisely indicating what it then intends to condemn. The Council seems to adopt a conception of the normative force limited to necessity and considers that, on the face of it, this force lies in the wordings. This representation tends to treat with disdain the normative density of the direction of the statements; it neglects the reality which the normative force claims to influence. These two elements however seem to condition the normative force of the law.

## ADMINISTRATIVE LAW

### *The normative force of the wishes of town councils*

Stéphane DUROY

Is it possible for wishes, and particularly the wishes which the town councils are authorized to express on all objects of local interest, to have a normative force? A negative answer seems to be obvious because wishes are not decisions. But in spite of their non-decisional nature, appeals on grounds of abuse of power have been allowed against them, even if today it is limited to referral to the Prefect. So the wishes do not have any normative force. Without one being able to graduate it precisely, one can undoubtedly say that it is determined by the appearance of a decisional character, likely to influence the legal order. The existence of this normative force, even if it is not clearly identified

by the judge, to some extent establishes the exercise of his control of the legality of the wishes.

*The normative force of proposals from the Departmental Commission for Inter-Commune Co-operation*

Fouad EDDAZI

The study of the normative force of proposals made by the Departmental Commission for Inter-Commune Co-operation (CDCI) poses the question of the origin of the normative force in a heterodox manner. Indeed, in a purely legal approach, the normative force could come only from the law, in particular from the legal nature of the instrument or the quality of its source. From this legal point of view, it appears that the normative force of the proposals in question is weak, because they are stripped of obligatory force. However, this weakness does not make it possible to comprehend the reality of their force. It seems, indeed, that the normative force of the studied proposals is primarily of political rather than legal origin. The normative force cannot thus be identified and measured using only legal science; there are standards whose normative force is of extra-legal origin. Not only that, one same standard can come under two distinct normative universes and its normative force may vary according to the universe under consideration. Moreover, it will be seen that there are no intangible borders between these parallel normative forces because of an original indication of inter-normativity: an extra-legal normative force may reinforce a legal normative force. In the end, it seems that the proposals of the CDCI reveal the existence of true normative Januses.

*The normative force of an administrative directive*

Pierre SERRAND

An “administrative directive” is an incentive norm the aim of which is to guide public authorities in situations where they enjoy a certain margin of appreciation. It cannot be defined by its form or from a formal viewpoint, as it is not made by specific bodies in accordance with particular forms, but only by its content. Indeed, its normative force enables it to be distinguished from other categories of administrative acts and explains its contentious object. It does not belong to the category of administrative decisions, i.e. mandatory measures subject to judicial review. Neither is it similar to circulars, i.e. measures of a purely indicative nature, that cannot be judicially reviewed and the benefit of which cannot be claimed by interested parties. The directive provides guidance, yet it is not binding. It cannot be subjected to judicial review, but its benefit can be claimed by interested parties. Its legality can be indirectly contested in an application for judicial review brought against a measure which has been taken in accordance with it.

*Normative force, prescriptive force? Regarding the “imperative” recommendations of the HALDE*

Alexis ZARCA

It emerges from the jurisprudence of the Council of State that, when bestowed with an imperative force, the general recommendations made by the HALDE (French Equal Opportunities and anti-Discrimination Commission) would be necessarily “administrative decisions”. Must this only be seen as the expression of a denaturing force, transforming these recommendations into commands and, by so doing, into legal norms (enforceable, invocable, contestable)? The answer proves to be more complex if it is admitted that imperativity can affect only the interpretative provisions of the aforesaid recommendations (following the example of the circulars), which then raises questions about the legitimacy of a force of creation of the law (a prescriptive force) through imperative administrative interpretation. The purpose of this contribution is thus to recall that the force given to the norm by its author can create law only if he has been authorised to exercise a corresponding normative power. In this respect the imperative interpretations contained in the general recommendations of the HALDE do not appear able to be prescriptive, unless the judge considers that the mission of implementing the texts prohibiting discrimination would thus make him a true interpreter likely to have a power to create law.

## ENVIRONMENTAL LAW

*The normative force of environmental principles, between environmental law and the general theory of law*

Mathilde BOUTONNET

Environmental principles, the subject of doctrinal study of the normative force, are interesting in that they afford more general lessons on the very concept of normative force. These principles show that two essential actors collaborate in the construction of the normative force, understood as the vocation of a norm to be applied widely and firmly: on the one hand, analyzing the diversity of the sources of environmental principles as well as the evolution of their place in the hierarchy of norms, the doctrine determines what should or could be their normative force, then understood as “potential”. On the other hand, refining and specifying their effects for the recipients, but also guaranteeing the respect of these effects, the judge, by the means of the dispute, implements the passage from the potential normative force to the effective normative force. This profitable collaboration between the doctrine and the judge, between the potentiality and the efficacy, then raises the idea that the normative force is not declared but is shaped.

*The normative force of a draft document and the normative force of its issuer: unity or dissociation? The example of the draft CBD presented by the IUCN*

**Adélie POMADE**

In the 80s, the IUCN introduced a draft convention which was used as the basis of negotiations for the current Convention on Biological Diversity. While the final text did not retain the contents of the draft convention in a rigorous way, the IUCN's involvement with this project made it possible to draft an international legal text which protects the environment. We are obliged to note that the normative force of the draft convention and the normative force of the IUCN on the Convention were not equal. Whereas the former displayed its weakness, the latter, on the other hand, second one showed its strength. This gap between the normative force of the draft convention and that of its originator can be explained by the strong commitment used in the project of the Convention and for which the IUCN became the voice. This contribution, which introduces and explains the distinction between the normative force of a document and that of its originator, continues into an in-depth analysis of their respective characterization and individual influence.

## LAW OF OBLIGATIONS

*The normative force of the notarial formula in law*

**Véronique CHÉRITAT**

Traditionally considered as a simple instrument of application of the legal rule of law, the notarial formula could not claim to have any normative force whatsoever on these grounds. Nevertheless, by observing the very definition of the standard one can convince oneself of the contrary. Indeed, although the notarial formula does not answer the criteria of prescription and penalty, we notice that it exercises an unmistakable force on those involved in the law for whom it constitutes a model, and on the law, when, acting as an instrument of measure, it can validate or cause a decision of justice or a legal rule to sink into oblivion.

As the standard also defines itself as a model or an instrument of measure, it is then possible to assert the unmistakable normative force of the notarial formula in law. At this point the astonishing variety in both the functions and the typology of the forces of the notarial formula becomes apparent, making the apprehension of "the" normative force of the notarial formula as a whole rather tricky.

The adoption of common criteria such as the reception and the legitimacy of the standard could be a first stage in the quest for "the" normative force of the notarial formula in law.

*The normative force of the Principles of European tort law***Laurent NEYRET**

In order to assess the normative force of the Principles of European tort law it is necessary to identify the normative value and impact of these principles. From the point of view of their normative value, the Principles of European tort law are proposals for standards of a doctrinal source, presented in the form of a private codification, which identify the rules common to the various national legal orders and proposals for innovation regarding civil liability, and which are intended to go beyond national divergences and to be used as a common framework of reference for harmonization on a European scale. The principles are formulated in terms of obligation or faculty and can be connected to the category of flexible law without any constraining value. From the point of view of their normative range, the Principles of European tort law have, for the moment, received limited acceptance by doctrine, law-makers, judges, and arbitrators, or even the public in France. Even so, the principles present, following the example of the Principles of European contract law, a significant normative potentiality, which results already in an increasing impact.

**RISK LAW***Food safety and the normative force of guides to good hygiene practices***Pierre-Yves CHARPENTIER**

Recommended by the European food safety regulation, guides that set out good hygiene practices have today become sanitary risk management tools. As compliance with the behaviour models they feature guarantees that professional practices meet regulation requirements, they have the features of a legal standard. Drafted by professionals who have carried out a risk analysis which guarantees that the measures put forward are relevant, being ratified by public authorities, they also have the force of a legal standard: as regards their contents they match the practical requirement, as regards the impact of their being respected they are an incentive, but they are also persuasive, almost considered as obligatory having regard to their reception by the recipients.

**INSURANCE LAW***The normative force of article 1964 of the civil code***Matthieu ROBINEAU**

The examination of the normative force of article 1964 of the civil Code, beyond developments peculiar to the law of insurance contracts, is the opportunity to assess the relationship—paradoxical in the case in point—between the certainty

of the statement of a legal provision and the normative force of the standard which is inferred. This contribution thus highlights the links between the norm and its normative force and stresses in particular the role of the judge concerning the normativity of a statement and the normative force of the interpretation given to it.

## EMPLOYMENT LAW

### *The normative force of the Inter-Professional National Agreement of 11th January 2008 on the modernisation of the labour market*

Nicolas MOIZARD

The Inter-Professional National Agreement (INA) of 11th January 2008 on the “modernisation of the labour market” is the first example of the compulsory consultation between labour and management (the social partners) before a reform of labour law. The wide-ranging content of the agreement has been noticed. The process it has begun is also worthy of attention. The INA is addressed both to the public authorities and to the social partners who will have to implement it. The intention of the signatories is for the global balance of the agreement to be respected. Because of the positive law and of the way the agreement is written, it has only a limited legal force. Its legal force varies according to its recipients and its provisions. Parliament is partially bound and remains the guardian of the general interest. In addition, the conventional non-derogability provision reflects the general orientation of the agreement and has a limited effect on future collective negotiations. However, the ANI has a real influence on its recipients. Nothing compels them to respect its content and its spirit. The influence of the ANI has to be combined with a degree of variety in its implementation.

### *The normative force of the instruments adopted within the framework of the social responsibility of the company*

Emmanuelle MAZUYER

Corporate social responsibility induces the production of many instruments whose legal status is not clearly established. The objectives of this contribution are to determine whether they belong to the legal field and, if this is the case, to measure their normative intensity as far as labour law is concerned. This notion of normative intensity, very close indeed to the normative force, is nevertheless more precise because it implies a sort of variability, a gradation, whereas the notion of normative force appears to be more “static”. We understand the normative force to mean the capacity of a norm to induce behaviours, to guide practices or to have an influence on conducts and /or to be a standard or a model to assess these behaviours, conducts or practices. Yet if some of these instruments are nothing more than a revelation of soft law because they are only declarations or proclamations of already applicable pre-



existing rules, others, on the other hand, will be seen as real unilateral legal acts of the employer or as professional norms. Under these conditions, they can, in some cases, have a binding or imperative force. The analysis shows also that the normative intensity of these instruments varies depending on whether the author or the subject of the norm is concerned. The intensity of the normative force of instruments of corporate social responsibility seems, in the end, to be doubly variable: firstly according to the content of the norms and secondly according to the subject of the norms.

## HEALTH LAW

### *Candid dialogues on the theme of ethics in health law*

**Aline CHEYNET DE BEAUPRÉ and Frédérique DREIFUSS-NETTER**

In the field of health, the legal rule, even enriched by a deontological content, is often insufficient to determine the behaviour of the players because of the totally new character of each situation. Ethics, however, are powerless to play a complementary normative role. Even though there is an official authority, the national Consultative Committee of Ethics, whose opinions are a source of inspiration for the legislator in fields such as medically assisted procreation, antenatal diagnostics, organ donation, genetic tests or end of life, this authority gives only opinions which are devoid in themselves of any normative force. As for the principles of clinical ethics implemented by local committees such as the Centre of clinical ethics at the hôpital Cochin in Paris for providing assistance in decision-making in ethically difficult cases, they are merely an analysis chart which leaves the need for an ethical deliberation by doctors still to be addressed. At most, with time, the accumulation of similar situations can make it possible to bring out common themes which enrich the public discussion and facilitate the decision-making process.

The normative force, in the field of ethics, thus assumes a specific nature whose characteristics fluctuate between the indicative and the incentive.

### *The normative force of recommendations for good medical practice*

**Pauline LOISEAU**

The links between the medical world and the legal world are intensifying. Yet for all that, it is not always obvious to pass from one to the other. This is shown with the example of recommendations for good practice: if their scientific authority is not under debate, their place in the legal order remains vague. Independence, the freedom of doctors to prescribe, and the integration of the recommendations for good practice in the more general category of information gathered by science are enough to show their impossible imperativity. Even so, their normative force is undeniable, as can be noted in the use which is made by jurisprudence and in practice.

*From bioethics to bionorm. A study of the normative force of the discourse in bioethics*

Matthieu MHAMDI

The transcription of ethics into law is a challenge and is in no way neutral. Indeed, paradoxically, the normative force of the discourse in bioethics was the result of the determination of its advocates for it not to take position in a power struggle with other standards, such as legal and ethical standards, by claiming that especially because of the sensitive nature of the issues raised in this matter, bioethical “rules” would have no normative function. Nonetheless, it exercises a real authority, finding its legitimacy outside the legal sphere and is therefore able to “reconstruct” judicial reasoning in its field, including legislative reasoning, while claiming to be a mere paralegal regulation.

**BUSINESS LAW AND INTELLECTUAL PROPERTY**

*The force of economic attraction of the law*

Céline CHARLTON

Attracting a businessman in search of a site.

Studying the force of economic attraction of the law, which is the result of a preoccupation with economic effectiveness being expressed through the creative forces that act on the legal standard, leads to the discovery of a force of seduction. It is both that which the applicable law exerts on the economic players and that of the law which is all the more easily applied as those to whom it is aimed (who sometimes chose it) adhere to it. It is of an extra-legal nature and must be combined with the properly legal forces of the law (obligatory force, constraining force...), with these two types of force consolidating each other to allow the emergence of a normative force in the strongest meaning of the expression.

*From the normative forces of the codes of corporate governance to the normative power of the paradigm in organisational economics*

Céline CHATELIN-ERTUR and Stéphane ONNÉE

The aim of this contribution is the study of the codes of corporate governance. Their rise since 1992 (date of the first English Cadbury report) testifies to their statute of standard, true reference models for leaders and stakeholders, in particular the shareholders. The study of their normative force appears necessarily plural because it raises three central questions. Firstly, as a process, what are the creative forces of these codes? Secondly, which is their normative force understood as the degree of their efficacy on the behaviour of the targeted players? Thirdly, the answers which we provide in relation to the normative forces *on* the codes, as a process, and to their normative force as a state, inevitably lead us to the question of the normative *power* of the theoretical back-

grounds of the institutional economics on which these codes are based. Finally, we conclude, through these three levels of analysis, that the normative power of the values, of the models of thought carried by these standards determines the normative force of the codes of governance through the intermediary of the forces which inspire them.

*The dissuasive force of sanctions against trademark counterfeiting*

Alexandra GATTINO

Through the definition of the legal standard, the idea of a power of constraint seems to appear automatically. The standard shows the extent of its authority by means of legal sanctions, whose preventive, repressive and repairing functions apply in theory to all without distinction, in a spirit of command which is both intimidating and constraining. But behind each standard of prohibition however stand forces of resistance of various types, legal and extra legal, in particular social, economic, moral or psychological forces. These subjective forces, often dissimulated, suggest the attitude of the men, their action to do or not to do, in agreement with the standard or, on the contrary, in violation of it. The study of the dissuasive force of sanctions against trademark counterfeiting will enable us to discover to what extent these multiple forces direct the real force of the standard. We will be led to evaluate the concrete validity of the standard, apart from any reference to its sources, but in direct relationship to its social results, before concluding in the existence of forces receptive to the law, which are decisive for the effectivity of the standard.

*Normative force: a cyclotron experiment on standard company statutes*

Thibaut MASSART

By making various models of standard company statutes confront one another, the normative force reveals its two dimensions. On the one hand, there is an objective normative force, drawing its source in the transmitter of the norm, more precisely in its prescriptive capacity and its will to confer on the standard a certain normative force. But there is also a subjective normative force, largely dependent on the attitude of the recipients of the norm.

*The normative force of communications and guidelines  
in European competition law*

Catherine VINCENT

The normative force and influence of EU anti-trust guidelines is clear. They emanate from the European Commission and serve to regulate as well as to promote the efficient application of this branch of the law. The guidelines encourage certain types of business practices and discourage certain others. At the national level, they have a unifying force in that they promote the uniform application of Community regulations. Some of these are binding internally to

the extent that national authorities have adopted them. They have a notable influence on national law and they sometimes emerge as a harmonizing force. Finally, EU judges confer on certain guidelines a kind of obligatory force by considering that they bind their author and by examining the claim of illegality made against them. When this happens, the normative force of the guidelines acquires an evolutionary character.

### CIVIL PROCEEDINGS AND ALTERNATIVE MEANS OF RESOLVING CONFLICTS

#### *The forces of mediation, free variations*

**Nathalie DION**

Which force leads the parties to mediation? By which mysterious alchemy do they decide to restore broken communication, or even to conclude an agreement?

A force of attraction, both symbolic and pragmatic, coming from the mediation, is probably exerted on their mental representations and motivations. This force is subtle but essential, as it is the root of the mixed normative force of the mediation agreement. The first one, pre-judicial, about the ground prepared by the parties for their future relationship, and the other one, juridical, of the contractual commitment which has a variable normative intensity.

#### *Normative force and the execution of an arbitration award*

**Gwenhaël LE BRETON**

An arbitration award is a sentence in disputed matters and, as such, has the same characteristics as a state judgment, i.e. it has the authority of *res judicata*, the force of conclusive evidence, the power of enforceability, the force of *res judicata*, as well as the force of irrevocability. As for the normative force of an arbitration award, this should be understood as being the capacity to impose the individual legal norm concerned on the parties, and may thus be assimilated to the binding force of a sentence. The normative force of an arbitration award is materialized by its execution by the parties, there being two possible forms for this execution: forced or spontaneous. The arbitration award is therefore binding upon the parties. Still, they will not always execute it spontaneously. When this happens, forced execution is possible if an exequatur order, which will give enforceability to the award, is granted. The recognition of enforceability by the exequatur order allows forced execution. This execution is an expression of the normative force of the award. Nonetheless, the execution may take another form and be spontaneous. Indeed, the normative force of an award can be materialized by its voluntary and spontaneous execution which is dependent on exerting “commercial” or “moral” pressure. This form of execution implies that the said normative force is not of an exclusively

juridical origin and that it can be of non juridical origin when the award is executed spontaneously and voluntarily. It can therefore be said that, although an arbitration award has the same characteristics as a state judgment, its spontaneous and voluntary execution is a force which is particular to it, and which is additional to the force of state judgments.

*The normative force of the law tested by the weakening of the jurisdictional authority of the judicial power*

Vincent SIZAIRE

The contemporary forms of questioning of judicial power, in that they tend to call into question the very legitimacy of its decision-making capacity, affect the normative force of the jurisdictional decision. In view of the privileged role held by the judge in the application of the law, the normative force of the latter—both in its symbolic dimension of defining a standard of behaviour and in its regulating dimension as a framework for social relations—is, consequently, also under threat.