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Use of Social Norms in the Production of Legal Norms : A Genealogical and Critical Approach to Nudges

L'utilisation de normes sociales dans la production de normes juridiques : une approche généalogique et critique des *nudges*

El uso de las normas sociales en la producción de normas legales : Un enfoque genealógico y crítico de los impulsos

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Article abstract

The text looks into the conditions justifying the use of a social norm as the basis for establishing a legally binding rule. It starts with the definition of some key-terms (nudges, behavioural insights, social norms) before describing initiatives led by the UK Nudge Unit and other behaviourally-informed policies, such as default options, used in a legal context. This helps to highlight the type of problems related to the incorporation of social norms in legal norms, especially the importance of deviance to the social norm. Jeremy Bentham's and Michel Foucault's writings can be used to solve the problems raised. A framework can be devised to explain when a social norm can legitimately be incorporated in a legal norm. Indeed, beyond statistical evidence which identifies recurring patterns of behaviour, only a meta-norm can justify the choice of a legal norm. It is the efficacy of the norm which appears as a legitimising factor as it allows the promotion either of the productive forces in society (according to Foucault) or of utilitarian principles (according to Bentham). However, it seems that this meta-norm can be legitimately imposed only if it emanates from a strict deliberative discipline and is publicised. The article thus concludes that deliberation and publicity are the two means allowing to check that the legal norm complies with the meta-norm, thus legitimising the use of a social norm as a legally binding rule.

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Anne Brunon-Ernst*

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L'utilisation de normes sociales dans la production de normes juridiques : une approche généalogique et critique des *nudges*

L'article cherche à démontrer dans quelles conditions il est justifié d'utiliser une norme sociale moins contraignante comme fondement d'une norme juridique contraignante. Il commence par définir les termes-clés (nudges, connaissances issues des sciences comportementales (behavioural insights), normes sociales comme préalable à toute réflexion. Il se penche ensuite sur quelques expériences menées par la UK Nudge Unit *et par les politiques utilisant les options par défaut dans un cadre juridique contraignant, afin de mettre en lumière les problèmes liés à l'utilisation de la norme sociale comme fondement de la norme juridique. Ces études préliminaires permettent de montrer l'importance de la déviance à la norme sociale. À partir de l'étude de la manière dont des auteurs classiques et contemporains, en particulier Jeremy Bentham et Michel Foucault, traitent de cette question, l'étude propose un cadre permettant l'intégration de la norme sociale dans la norme juridique. Au-delà de l'observation des régularités du comportement, appréhendées par la statistique, seule une méta-norme peut justifier le fonctionnement de la norme juridique. L'efficacité de la norme apparaît comme son critère légitimant, en tant que capacité à promouvoir les forces productives de la société dans la biopolitique de Foucault ou à promouvoir les objectifs de la société utilitariste chez Bentham. En explorant le rôle et le fonctionnement des instances délibératives, l'article s'interroge en dernier lieu sur la manière dont cette méta-norme peut légitimement être imposée. La publicité et la discipline délibérative apparaissent comme les deux critères qui permettent de garantir que la règle se conforme à la méta-norme, et donc que l'incorporation de la norme sociale dans la norme juridique est légitime.*

El uso de las normas sociales en la producción de normas legales : Un enfoque genealógico y crítico de los impulsos

Este capítulo busca demostrar en qué condiciones se justificaría el uso de una norma social menos vinculante como fundamento de una norma jurídica obligatoria. El capítulo comienza con la definición de términos claves : — impulsos (nudges), percepciones de la conducta (behavioural insights) — y norma social, como requisitos previos a cualquier reflexión. Seguidamente, se examinan algunas iniciativas llevadas a

cabo por la UK Nudge Unit, y por las políticas que emplean las opciones por defecto en un marco jurídico vinculante, con el propósito de sacar a la luz los problemas relacionados con el uso de la norma social como fundamento de la norma jurídica. Estos estudios preliminares han permitido demostrar la importancia de la desviación hacia la norma social. Basándose en el estudio de la forma, en el cual los autores clásicos y contemporáneos (particularmente Jeremy Bentham y Michel Foucault) han abordado la cuestión, el capítulo plantea un marco que permite la integración de la norma social dentro de la norma jurídica. Más allá de la observación de las regularidades del comportamiento brindadas por la estadística, solamente una metanorma puede justificar el funcionamiento de una norma jurídica. La eficacia de la norma surge entonces como criterio legitimador, como la capacidad para promover las fuerzas productivas de la sociedad en la biopolítica de Foucault, o para promover los objetivos de la sociedad utilitarista de Bentham. En el examen del rol y del funcionamiento de las instancias deliberativas, el capítulo concluye interrogándose sobre la manera cómo esta metanorma se puede imponer legítimamente. La publicidad y la disciplina deliberativa surgen como dos criterios que garantizan que la regla se conforma a la metanorma, por lo que resulta legítima la incorporación de la norma social a la norma jurídica.

L'exercice du pouvoir consiste [...] à aménager la probabilité.

Michel FOUCAULT[1]

In the field of social control, the first decades of the 21st century have been marked by the explorations of increasingly efficient regulation policies[2]. There are many concepts on the marketplace of ideas to refer to these new regulatory tools : nudges[3], paternalism[4], choice architecture[5], contract design[6], or behavioural insights (BIs)[7]. These new regulatory tools do not use the traditional coercive legal tools of punishment, but rely on the input of behavioural sciences to devise policies which tap into the failings of the human mind in order to make individuals behave as is expected of them. As the threshold of infliction of punishments for lack of compliance is lower in "low-cost" regulation policies, such as nudges, than in "high-cost" initiatives, such as mandatory instruments, the approach to these policy tools should be adapted to the degree of compliance required from individuals to whom they are addressed[8].

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1. Michel FOUCAULT, "Le sujet et le pouvoir", in *Dits et écrits*, vol. 4, Paris, Gallimard, 1994, p. 222, at page 237.
2. See among others Anne BRUNON-ERNST, "Le gouvernement des normes. Jeremy Bentham et les instruments de régulation post-modernes", *Archives de philosophie*, vol. 78, nº 2, 2015, p. 309.
3. Richard H. THALER and Cass R. SUNSTEIN, *Nudge : Improving Decisions About Health, Wealth and Happiness*, New Haven, Yale University Press, 2008.
4. For a definition of paternalism, see Gerald DWORKIN, "Paternalism", *The Monist*, vol. 56, nº 1, 1972, p. 64. See also Conly who defines paternalism as : "a practice wherein people are forced to perform actions that bring about good consequences for themselves" (Sarah CONLY, *Against Autonomy. Justifying Coercive Paternalism*, Cambridge, Cambridge University Press, 2013, p. 48). What determines the paternalistic nature of the intervention on choice is the beneficent aim of the interfering initiative devised by the paternalist.
5. Sunstein explains that a "choice architect has the responsibility for organizing the context in which people make decisions". See R.H. THALER and C.R. SUNSTEIN, *supra*, note 3, p. 3.
6. Contract design is another more limited type of technique, which determines the use of certain contractual terms to circumscribe consumer options. See Oren BAR-GILL, *Seduction by Contract : Law, Economics and Psychology in Consumer Markets*, Oxford, Oxford University Press, 2012 and Anne BRUNON-ERNST, "The Fallacy of Informed Consent : Linguistic Markers of Assent and Contractual Design in Some E-Users Agreements", *Alicante Journal of English Studies*, vol. 28, 2015, p. 37.
7. Joana SOUSA LOURENCO and others, *Behavioural Insights Applied to Policy*, Publications Office of the European Union, 2016, p. 12,
8. Hart distinguishes social from legal norms on the grounds of the type of sanctions applied to individuals failing to conform to the norm. He writes in Herbert L.A. HART, *The Concept of Law*, 3rd ed., Oxford, Oxford University Press, 2012, p. 86 :

One of the human biases used by players in the field of behaviourally-informed initiatives is the "social bias". Social proof refers to the use of others and their actions to decide on the proper behaviour for ourselves. There are numerous examples of the use of this bias both by individuals, businesses and institutions, which will be developed in Section One.

The legal implementation of these social biases is validated by the positive outcome their use brings about, thus they go unchallenged. Their effectiveness legitimizes them. However, the integration of such social norms in law raises some fundamental issues. Indeed, the use of social proof as the basis of BI initiatives in law turns social norms into legal norms. Understandably, one may question the extent to which the social biases of the majority are necessarily welfare-promoting. This question points to two inter-related issues. First, any reference to a majority of rule-compliant individuals implies the existence of a minority of non-rule-compliant people. As a legal rule imposes higher sanctions for non-compliance, how can this higher level of constraint be justified ? Second, any reference to the legal use of social norms, by the higher standard of compliance it extracts from individuals[9] further raises the issue of the legitimacy of the norms selected for integration, as not all norms are "good". History has sadly exemplified these two points. Laws against Jews in Nazi Germany which originated in the widespread anti-Semitic feeling in Europe in the 20th century are an instance of the pitfalls of the integration of the "bad" social norms of the majority into legal norms. For the purpose of the present paper, we will assume that identifying "good" and "bad" norms does not give rise to any problems that can occur in theory and in practice.

The present research offers a genealogical approach to contemporary regulatory problems. It does so by a two-fold argument. The first step relies on the input of Michel Foucault's theory whereby BIs rooted in social proof are identified as instances of the present normalizing techniques in our biopolitical era. The law-centred form of regulation typical of the era

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When the pressure is [a general diffused hostile or critical reaction which may stop short of physical sanctions] we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligations. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law.

9. Hart notes the primacy of the "*seriousness* of social pressure" as a factor to determine whether a rule (or norm) is a social norm or a legal norm. See H.L.A. Hart, *supra*, note 8, p. 87.

of sovereignty has to redefine its relationship to these new initiatives. The second step investigates how Jeremy Bentham's theory can offer guidelines to determine the appropriate limits to the use of social norms in law-making. The identification of suitable existing social norms and the creation of utility-based social norms make use of both the public opinion tribunal (POT) and deliberative processes to challenge the selection of any social norms which would maximize short-term effectiveness rather than long-term utility. Nonetheless, for a clearer understanding of the issues raised later in this paper, section One thus opens (in characteristically Benthamic fashion) with a definitions section.

1 Theoretical and Practical Framework

1.1 Theoretical Framework : Definitions

Nudge is an umbrella concept, which is generally used interchangeably (and wrongly) with other types of initiatives. It is a catch-all concept for many different regulatory phenomena and acts as a short-cut to refer to them. It is customary to do so, but in doing so, one must be aware of the subtle distinctions made between nudges and other forms of regulatory phenomena[10].

A nudge is thus a very specific type of initiative. Three conditions need to be met to have a nudge. First, a nudge — as a wide range of initiatives whether behaviourally informed or not — is about modifying people's behaviour thanks to the redefinition of their environment through psychological insights. What distinguishes it from other similar initiatives, such as behavioural insights (BIs) more generally, is the next two conditions : reversibility and benevolence. Indeed, the second criteria states that individuals nudged are not forced to modify their behaviour. Even if the preferred option is more likely, they still have the choice to select another option, that is to reverse the nudge. The third criteria states that environments are designed to maximise choice according to certain goals (political, health-related, economic, etc.), which are seen as good for the person nudged (nudgee) by the person nudging him (nudger). Strictly speaking, this last condition excludes almost all business-related initiatives (private nudges), since businesses aim to increase profits at the expense of consumers, contrary to government-initiated policies (public nudges). In

10. Alberto Alemanno and Anne-Lise Sibony (eds.), *Nudge and the Law : A European Perspective*, Oxford, Hart Publishing, 2015. Alemanno and Sibony entitle their collection of essays "nudge", as it is a marketable and widely circulated concept, but they deal with behaviourally informed policies, more generally.

the present paper, the term nudge embraces a far more extensive terminological acceptation than the restrictive — but accurate — definition given above. Indeed, what is of interest to the study is not the nudge phenomena as a specific form of initiative, but as an instance among many other new regulatory tools which use scientific knowledge of the human psyche to devise policies.

To avoid these terminological pitfalls, the European Commission advocates the use of the concept of BIs to describe a certain number of initiatives, which are said to be either behaviourally-informed or behaviourally-aligned, depending on the level of behavioural awareness of policy-makers. BIs use the findings of economics, psychology and neuroscience to understand how people behave and make decisions[11]. The present paper agrees with these terminological guidelines, even though it recognises the widespread terminological use of nudges in a more general sense.

Behavioural economic studies show that the standard rational choice paradigm is both theoretically unable to account for predictable consumer biases, and practically unfitted to devise public policies accordingly[12]. Among those biases, there is the social bias, which can be identified in the cognitive biases of consumer overconfidence and of the herding effect[13], both of which are used by businesses to devise selling practices which will refer to peers to ensure consumers underestimate risks and follow the herd of uninformed consumers before them.

Social biases serve the interests both of manipulating businesses (private nudging) and counter-nudging policy-makers (public nudging). Indeed the latter will use social norms in two different ways : either in invoking accepted or prevalent behaviour among peers[14] ; and/or in assigning as default options a preferred option (approved by mandatory

11. J. Sousa Lourenco and others, *supra*, note 7, p. 12.
12. Catherine Régis, "L'approche psychologique du droit – Vers une meilleure compréhension des processus décisionnels", in Georges Azzaria (ed.), *Les cadres théoriques et le droit*, Cowansville, Éditions Yvon Blais, 2013, p. 301 ; Roger G. Noll and James E. Krier, "Some Implications of Cognitive Psychology for Risk Regulation", (1990) 19 *J. Legal Stud.* 747.
13. Emilios Avgouleas, "The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation : The Case for Reform", (2009) 6 *European Company and Financial Law Review* 440 ; Ian Ayres and Alan Schwartz, "The No-Reading Problem in Consumer Contract Law", (2014) 66 *Stan. L. Rev.* 545.
14. The tax letter example exemplifies the use of social norms invokes accepted or prevalent behaviour among peers. See Behavioural Insights Team, *Applying Behavioural Insights to Reduce Fraud, Error and Debt*, 2012, [Online], [38r8om2xjhhl25mw24492dir.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/BIT_FraudErrorDebt_accessible.pdf] (December 11th, 2017).

guidelines)[15], in order to tap into these biases to make citizens act in a way which is beneficial for themselves (*e.g.* undertake regular breast cancer screening) or others (*e.g.* paying taxes on time). In both cases, they rely on either a moral norm, but not (yet) a social norm[16], or an existing social norm to reinforce its use. The present paper does not explore the distinctions between moral and social norms.

The phrase "social norm" does not appear in the terminology used by the EU Foresights and Behavioural Insights Unit[17], as they prefer the concept of *status quo* bias. Indeed, the grounds for policy intervention are not rooted in social theory but in psychological categories. The *status quo* bias points to the preference for an existing state of affairs[18]. However, this existing state of affairs can be also construed as a social norm, a concept which is fleshed out in social theory and needs to be defined more precisely. Indeed, in social theory, the term "norm", takes on a different meaning from that found in legal theory. In social theory, a norm is understood as requiring first, a significant proportion of a group complying with the required normative attitude ; and second, the members of that group knowing that a significant proportion of members of their group complies with the required normative attitude[19]. A norm thus only exists if it is recognised as such by a given group and acknowledged as

15. Some initiatives also make use of a bias well documented by behavioural economists : loss aversion. If given the choice, people will prefer not to lose an item than to gain one. See the importance of loss aversion in the Prospect Theory devised by Amos Tversky and Daniel Kahneman in Daniel Kahneman, *Thinking, Fast and Slow*, New York, Farrar, Straus and Giroux, 2011.
16. When H.L.A. Hart investigate the meaning of the legal concept of obligation, he distinguishes moral norms from legal norms (H.L.A. Hart, *supra*, note 8, p. 85-91). However, he does not distinguish moral from social norms, which he calls "social rules". For him there is a continuum between social habits and social rules (*id.*, p. 85). See also Geoffroy Brennan and others, *Explaining Norms*, Oxford, Oxford University Press, 2013 who explain that "[m]oral norms are clusters of *moral judgments*. Social norms are clusters of normative attitudes of some others kind – *social judgments*, as we might say" (p. 58). Thus moral norms are in no way "grounded, even in part, in presumed social practices" (p. 71). As a consequence, what distinguished social norms from moral norms is that the former "instantiate normative principles that, in the minds of the relevant participants, are *essentially* practice-dependent normative judgments" (p. 72).
17. The concept of social norm appears in publications of the UK Nudge Unit, see Behavioural Insights Team, *supra*, note 14, p. 22.
18. The EU Foresights and Behavioural Insights Unit has identified three different applications of behavioural insights.
19. G. Brennan and others, *supra*, note 16, p. 29.

followed by a significant proportion of that group[20]. Generally, a social norm is defined as a set of informal rules that govern the behaviour of members of a group. As seen above, a social norm includes an additional requirement about people's expectations of significant compliance with the rule. Some academics also identify the need for sanctions (mirroring the legal sanctions in the legal norms), in terms of "internaliz[ing] [a] sense of duty, because of a fear of [...] non-legal sanctions, or both[21]" or of "third parties other than state agents diffusely enforc[ing] by means of social sanctions[22]". Another understanding of social norms is to view them in terms of the game theory interpretative frameworks. Indeed, Anomaly and Brennan define social norms as "emergent rules or behavioural regularities that arise as solutions to collective action problems of various kinds faced by individuals when they interact with each other[23]".

The concept of social norms is used in a large number of disciplines, ranging from philosophy and social theory to legal theory, experimental economics, game theory[24] and social psychology. Although each field will mould a definition instrumental to the ends of the study, there seems to be some common elements to social norms, which this paper will use as a working definition : (1) the existence of a prevalent normative behaviour, which (2) is recognised as such by members of a given group, and

20. Bicchieri agrees with this requirement when she writes : "the very existence of a social norm depends on a sufficient number of people believing that it exists and pertains to a given type of situation, and expecting that enough other people are following it in those kinds of situation" in Cristina Bicchieri, *The Grammar of Society : The Nature and Dynamics of Social Norms*, Cambridge, Cambridge University Press, 2006, p. 2.
21. Richard H. McAdams, "The Origin, Development, and Regulation of Norms", (1997) 96 *Mich. L. Rev.* 338, 340.
22. Robert C. Ellickson, "The Market for Social Norms", (2001) 3 *American Law and Economics Review* 1, 3. See also Richard A. Posner and Eric B. Rasmusen, "Creating and Enforcing Norms, with Special Reference to Sanctions", (1999) 19 *International Review of Law and Economics* 369.
23. Jonny Anomaly and Geoffroy Brennan, "Social Norms, The Invisible Hand, and the Law", (2014) 33 *U. Queensland L.J.* 263, 263.
24. Game theory can also be one of the ways in which the underdetermined term "equilibrium" can be given a precise and workable meaning in Posner's definition that a "social norm" is "just the label we attach to equilibrium behavior". See Eric A. Posner, *Law and Social Norms*, Cambridge, Harvard University Press, 2000, p. 58. On a game theory interpretation of social norms, see also H. Peyton Young, "Social Norms", in Steven N. Durlauf and Lawrence Blume (eds.), *New Palgrave Dictionary of Economics*, 2nd ed., London, MacMillan, 2008 and Ken Binmore, *Game Theory : A Very Short Introduction*, Oxford, Oxford University Press, 2007, p. 57.

which (3) can be enforced by social sanctions[25]. These social norms can be created or changed by arbitrary conventions or by the selection of an appropriate equilibrium to a given situation[26]. This definition shows that the psychological *status-quo* bias, which is understood as a preference for an existing state of affairs, *i.e.* an accepted prevalent behaviour, can be interpreted as the psychological effect wrought upon the individual by the use of social norms.

Social norms are essential to maintain the fabric of society[27]. Hume considered them as the origins of the idea of justice[28], from which all legal relations spring[29]. From very early on, the connection between social norms and legal norms has been established. However, these conventions[30] are often described as artificial means to arbitrate between competing

25. These three conditions are also present in Hart's definition of social norms : "a combination of regular conduct with a distinctive attitude to that conduct as a standard. […] The varied normative vocabulary […] is used to draw attention to the standard and to deviations from it, and to formulate the demands, criticisms, or acknowledgements which may be based on it", in H.L.A. Hart, *supra*, note 8, p. 85. On the issue of social sanctions, see also notes 8 and 9.
26. See Edna Ullmann-Margalit, *The Emergence of Norms*, Oxford, Clarendon Press, 1977.
27. See H.L.A. Hart, *supra*, note 8, p. 87 and John Rawls, *A Theory of Justice*, Cambridge, Harvard University Press, 1971, p. 3-5. Rawls defines society as : "a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them. […] [It] is a cooperative venture for mutual advantage, […] typically marked by conflict as well as by an identity of interests".
28. "[T]he sense of justice and injustice is not deriv'd from nature, but arises artificially, tho' necessarily from education, and human conventions ", in David Hume, *A Treatise of Human Nature*, Oxford, Clarendon Press, 1789, p. 483.
29. *Id.*, p. 490 and 491 : "*After this convention*, concerning abstinence from the possessions of others, is enter'd into, and every one has acquir'd a stability in his possessions, there immediately arise the ideas of justice and injustice ; as also those of *property*, *right*, and *obligation*. […] Our property is nothing but those goods, *whose constant possession is establish'd by the laws of society ; that is, by the laws of justice*" (our emphasis).
30. Hume does not use the term "social norms", but "conventions". However, Hume's conventions meets the three-fold criteria of norms established earlier : (1) prevalent normative behaviour ("It is only a general sense of common interest […] which induces [members of the society] to *regulate their conduct by certain rules*" : *id.*, p. 490 (our emphasis)) ; (2) recognised as such by members of a given group ("the sense of interest has become common to all our fellows, and gives us a confidence of the future regularity of their conduct : And 'tis *only on the expectation of this*, that our moderation and abstinence are founded" : *id.*, p. 490 (our emphasis)) ; and (3) enforced by social sanctions ("when we *require any action, or blame a person* for not performing it, we also suppose that one in that situation shou'd be influenc'd by the proper motive of that action, and we esteem it *vicious* in him to be regardless of him" : *id.*, p. 477 (our emphasis)). The examples of conventions given by Hume range from the establishment of gold and silver

interests[31]. They are implicitly considered as the theoretical optimal means to achieve the end to restrain self-interest and promote the common good[32]. Experience has shown that some of these conventions work against the common interest. Evolutionary theories state that bad norms are discarded by a selection process to be replaced by more effective norms[33]. This is an *a-posteriori* solution to the problem of bad norms. The present paper raises the issue of how to address this problem *a-priori*, and seeks to suggest procedures to identify good norms which can or should be incorporated into legal norms. The question therefore lies in bad social norms, and their connection with legal norms.

1.2 Practical Framework : Examples

Contemporary policies, which factor in social biases to inform their initiatives, help identify problem areas when trying to define the rules of legal integration of social norms. Indeed there are two types of behaviourally-informed initiatives : use of social norms invoking accepted or prevalent behaviour among peers[34] ; and assignment of a preferred option by default (approved by mandatory guidelines)[35].

The first type of behaviourally-informed initiative invokes social norms. The most common example is the UK Nudge Unit scheme relating to tax letters[36]. In this experiment, the UK Nudge Unit sent out two types of letters to remind people to pay their taxes on time : the old-style control letter and the localised social norm letters. The results of the tests show that saying "9 out of 10 people pay their tax on time" is more effective as it contrasts the recipient's behaviour to the social norm[37]. In this example, the social norm is used mainly as an enhanced communication tool, which

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as the measures of exchange, manners, language and rowing in a boat. All of which are norms, though finer distinctions could consider them to be either moral, social or legal norm.

31. *Id.*, p. 496 : "[T]hose impressions, which give rise to this sense of justice, are not natural to the mind of man, but arise from artifice and human conventions".
32. *Id.*, p. 497 : "But however single acts of justice may be contrary, either to public or private interest, 'tis certain, that *the whole plan or scheme is highly conductive, or indeed absolutely requisite*, both to the support of society, and the well-being of every individual" (our emphasis).
33. K. Binmore, *supra*, note 24, p. 117.
34. The tax letter example exemplifies the use of social norms. See Behavioural Insights Team, *supra*, note 14.
35. See the importance of loss aversion in the Prospect Theory devised by Kahneman and Tversky in D. Kahneman, *supra*, note 15.
36. Behavioural Insights Team, *supra*, note 14, p. 16, 22 and 32.
37. *Id.*, p. 24.

does not mandate any legal implementation. As our purpose here is to investigate how social norms can be incorporated into legal norms, the study will turn to default options as they can be used as mandatory options in law.

The second type of behaviourally-informed initiative uses default. The strength of default is that it relies on *status-quo*. Default options can also be used both to incite consumers to purchase certain goods or to promote health- or welfare-enhancing policies. As the focus of the present research is on government's use of social norms, our interest is on general-welfare-enhancing policies. One example of this is the Australian mandatory organ-donor default policy, wherefrom individuals can opt out. In devising such a policy, the Australian government relied on a consensus about the benefits of a policy (organ donations save lives), benefits which could not be achieved on account of human inertia. The studies made on the impact of such a policy show that setting a legal default helps to overcome this inertia and to promote the effective implementation of universal organ donation[38]. The default was not only implemented with an eye to the general welfare of patients in need of organ transplants, but to the popular support for such organ donations. The Australian default option was set to comply with an established consensus among the Australian population[39], that is a moral norm but not yet a social norm, to establish a legal norm.

The study of these examples have highlighted two different uses of social norms. They can be found either in the content of the message communicated to the citizen or consumer (as in the case of the tax letters trials), or they can underlie the choice of the initiative (as in the case of the choice of a *status-quo* default).

1.3 Problem Area

Nudges advocates are not unaware of the problems related with the use of social norms. Indeed, they state :

> There will be circumstances where it will not be appropriate to highlight a descriptive social norm, in particular where large numbers are engaged in non-compliant or problematic behaviour. Similarly, campaigns sometimes inadvertently give the impression that problematic behaviour is widespread, for example

38. Amber Rithalia and others, "Impact of presumed consent for organ donation on donation rates : a systematic review", *BMJ Research*, 2009, [Online], [www.bmj.com/content/bmj/338/bmj.a3162.full.pdf] (December 11th, 2017).
39. Surveys showed that 80 % of Australians indicated that, at least in principle, they would like to donate (The Conversation, "Opt-out organ donation in Wales : a model for Australia ?", July 14th, 2013, [Online], [theconversation.com/opt-out-organ-donation-in-wales-a-model-for-australia-15945] (December 11th, 2017).

> by displaying notices in doctors' surgeries explaining how many people missed their appointments in the previous year[40].

This statement identifies two problem areas. They relate to the use which needs to be made of non-compliant behaviour. The ethical guidelines set by the UK Nudge Unit is to avoid using descriptive social norms when there is an absence of widespread consensus in the community about the issue and/or a large number of non-compliant individuals. This begs the question of the ethical underpinnings of anti-smoking advertising campaigns which aim at raising awareness of the dangers of tobacco among large numbers of non-compliant individuals[41]. The second issue relates to the use of non-compliance. A descriptive social norm is not as neutral as it sounds, as the message presenting the social norm should be framed to focus on compliant behaviour rather than deviant behaviour[42].

This problem is all the more glaring in the use of default options. The case of mandatory organ donation default highlights the choice made by the government to identify a type of behaviour which would benefit society (*e.g.* increase the number of organ donations). Thus setting a default implies identifying a benefit which would be derived from the default. However, this benefit is very time sensitive. As Iati, Inoue and Kodama explain, nudges are affected by a scientism and a dominant culture bias[43]. Both can be interdependent, as, especially in the fields of health and food, the dominant culture bias can originate in scientific evidence which forms the basis of awareness campaigns (*e.g.* "5 a day[44]" or "Let's move[45]"). However, as scientific evidence evolves, activities which might have been

40. Behavioural Insights Team, *supra*, note 14, p. 17.
41. In 2014, 16,8 % of the US adult population smoked, compared to 34 % or 60 % depending on race and gender in 1965. See Office on Smoking and Health, "Appendix : Cigarette Smoking in the United-States, 1950-1978", [Online], [profiles.nlm.nih.gov/NN/B/C/P/H/_/nnbcph.pdf] (December 11th, 2017).
42. The term framing is used by psychologists and behavioural economists to describe the process by which the context (among which its formulation) of acts or options among which one must choose (decision problem) serves to influence the possible outcome of the decision. See Amos Tversky and Daniel Kahneman, "The Framing of Decisions and the Psychology of Choice", *Science*, vol. 211, nº 4481, 1981, p. 453, at page 453.
43. Hiroaki Itai, Akira Inoue and Satoshi Kodama, "Rethinking Nudges : Libertarian Paternalism and Classical Utilitarianism", *The Tocqueville Review*, vol. 37, nº 1, 2016, p. 81.
44. See NHS Choices, "Why 5 A Day", [Online], [www.nhs.uk/Livewell/5ADAY/Pages/Why5ADAY.aspx] (December 11th, 2017), which recommends five fruits and vegetables a day for a healthy diet in the UK.
45. See Let's Move, "Get Active", [Online], [letsmove.obamawhitehouse.archives.gov/get-active] (December 11th, 2017), which promotes physical exercise for a healthy lifestyle in the US.

considered healthy and thus have been promoted, can then be banned (*e.g.* health benefits of red wine or promotion of e-cigarettes). Here again, large numbers of non-complaint individuals are nudged into adopting a behaviour which conforms to a social norm produced by time-sensitive scientific evidence.

BI initiatives are generally used when there is consensus as to the best behaviour (moral/social norm) but a high number of non-conforming individuals (social norm). However, non-compliance is an element which undercuts the legitimacy of the initiatives. The rationale for using nudges is to reduce non-complaint behaviour. Descriptive social norms advocated in public communications and default rules are caught in a moral maze. At the centre of this maze lies the unaccounted for and unreducible non-compliant behaviour it aims to eradicate (*e.g.* late submission of tax[46] returns or ban on pre-ticked boxes in the airline industry[47]). Moreover, the method to identify "good" social norms for integration into public policies does not seem to give rise to any discussion, whereas it is obvious that the identification of "good" norms is far from unproblematic, on account of the scientific and cultural bias. Indeed, BIs do not have a framework to justify how a social norm is selected and how non-compliant behaviour is dealt with. Michel Foucault's and Jeremy Bentham's works on social norms and social deviance can help us out of this double conundrum.

2 Normalization

The question of a norm is therefore intertwined with the issue of deviance from the same norm. The work of Foucault can be of use as his concern for discipline[48] and biopolitics[49], originates in the question of how to tackle deviant and non-productive behaviour. The Foucauldian concepts are here investigated through the lens of their interpretation by Stéphane Legrand[50] and François Ewald[51].

46. See note 34.
47. See Anne Brunon-Ernst, "From the Letter to the Spirit of the Law. Exploratory Research on Language in Behaviourally-Informed EU Law", *ASp. La Revue du Groupe d'Étude et de Recherche en Anglais de Spécialité*, vol. 70, 2016, p. 87.
48. Michel Foucault, *Surveiller et punir : la naissance de la prison*, Paris, Gallimard, 1993 ; Michel Foucault, "La société punitive", in *Dits et Écrits*, *supra*, note 1, vol. 1.
49. Michel Foucault, *Histoire de la sexualité*, vol. 1 « La volonté de savoir », Paris, Gallimard, 1976 ; Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)*, Paris, Gallimard, 2004.
50. Stéphane Legrand, *Les normes chez Foucault*, Paris, Presses universitaires de France, 2007.
51. François Ewald, "Norms, Discipline and the Law", in Robert Post (dir.), *Law and the Order of Culture*, Berkeley, University of California Press, 1991, p. 138.

2.1 The Social Norm as the Average Norm

Deviance is at the heart of any discussion on discipline[52] and biopolitics[53]. Foucault's eras (sovereignty/discipline/biopolitics) are based on a shift from the law in its legal sense (*i.e.* as the expression of the power of the sovereign) to the law as a norm (*i.e.* as representative of the working of the law in the biopolitical era)[54]. As our purpose in the present paper is to investigate the incorporation of a social norm into a legal norm, the continued existence of the legal norm, encapsulating the social norm is central.

The law is manifested through the power of the sovereign in the era of sovereignty. Such power is about punishment, and reaches its highest degree with the sovereign's right to decide upon the life and death of individuals[55]. However, stating that laws are norms is saying that the law no longer originates in the will of the sovereign, but that it is produced by the common will without being wanted by any particular individual. This is possible because the norm is the result of society's observation of itself, and because no one has the power to proclaim it[56]. According to Foucault, this is what happens in the biopolitical era and to a certain extent in the disciplinary era.

Indeed, within the disciplinary space, the object of surveillance is not individuals *per se*, but their compliance, or not, to the norm[57]. What the disciplinary space punishes is the lack of compliance to or the deviation from the norm[58]. There are several norms which operate in the disciplinary field[59] : the model norm, which characterizes and classifies individuals after

52. See note 48.
53. See note 49.
54. Alan Hunt and Gary Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, London, Pluto Press, 1994 and Ben Golder and Peter Fitzpatrick, *Foucault's Law*, New York, Routledge, 2009. See also Anne Brunon-Ernst, "Bentham, Foucault et les normes", in Benoit Frydman and Arnaud Van Waeyenberge (dir.), *Gouverner par les standards et les indicateurs, de Hume au rankings*, Bruxelles, Bruylant, 2013, p. 357.
55. Agamben thinks that the power of the sovereign lies in the right to exclude. See Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1998, p. 8-28. See also Mika Ojakangas, "Impossible Dialogue on Bio-power : Agamben and Foucault", *Foucault studies*, nº 2, 2005, p. 5.
56. F. Ewald, *supra*, note 51, at page 155.
57. S. Legrand, *supra*, note 50, p. 58. See also Margaret A. Paternek, "Norms and Normalization : Michel Foucault's Overextended Panoptic Machine", *Human Studies*, vol. 10, nº 1, 1987, p. 97.
58. S. Legrand, *supra*, note 50, p. 60.
59. Ewald also takes an interest in the working of the norm in the disciplinary domain (F. Ewald, *supra*, note 51, at page 141).

they have been organized into a hierarchy ; the average norm, which determines the types of groups the individuals are allocated to ; the technical norm, which breaks down the movements of the body so as to maximize the workforce of the human-machine ; the regulating norm, which punishes and penalizes ; the psychopathological, psychiatric or biological norm, which qualifies or disqualifies individuals by marginalizing them[60].

The disciplinary functioning of norms as average norms is also to be found in a biopolitical context. There are three conditions for their operations. First, norms are based upon statistics and probabilities that objectivize them[61]. Second, contrary to the law, which has a universal and permanent purpose, norms are relative and temporary. They are only valid for a given group, at a given moment. Norms are therefore self-referential units of measure[62]. Third, norms suppose a dichotomy between what is normal and what is not, and that dichotomy ranks individuals on a graduated spectrum spanning from the least to the most normal[63]. Thus norms can only apply from the moment when the difference between what is the norm and what is not has been established[64].

The average norm is the result of society's observation of itself. It is *effective* as it triggers the expected response by individuals. Nudges, thanks to the use of the social bias, make use of the average norm[65], which is presented to individuals to guarantee their abeyance to it. Indeed, effectiveness is one of the criteria Nelken identifies to legitimize norms[66]. As a starting point, the present paper studies the social norm as relying on the

60. S. Legrand, *supra*, note 50, p. 73 and 74. Ewald distinguishes different logics in the normative process. The panopticistic logic of the disciplinary environment, the probabilistic logic of the insurance world and the communicational logic of technical standards (F. Ewald, *supra*, note 51, at page 154).
61. F. Ewald, *supra*, note 51, at page 156.
62. *Id.*, at page 157.
63. *Id.*, at page 158.
64. S. Legrand, *supra*, note 50, p. 135. See also F. Ewald, *supra*, note 51, at page 138 : "the counter law in which are relegated those who are not normal, those who are outside the normal order that the legal norms presuppose in order to be applicable, is the condition of existence of the law, at the same time as it is the outside by the exclusion of which the 'normality' establishes and insures itself". That divide is also that of the usefulness and uselessness of a social part of the population (*id.*, at page 141).
65. In Hart's theory, the norm-average stands for the external aspect of a rule. He explains : "After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict, with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment", in H.L.A. Hart, *supra*, note 8, p. 89.
66. See David Nelken, "The Legitimacy of Global Social Indicators ?", *Internormativité/ Internormatvity*, Université Libre de Bruxelles, September 29th and 30th 2016.

average norm, thus offering a possible objective justification to the imposition of additional pressure on non-compliant individuals to conform to the norm.

2.2 Deviance from the Social Norm : Meta-Norms beyond Average Norm

The average norm raises the issue of how the norm relates to those who are not in the average. We live in a society where each and every individual is potentially deviant from the utility-maximizing norm. This risk of deviance warrants governments, institutions, companies and other individuals to develop strategies to make compliance more effective[67]. Among those strategies, the use of the social norm appears as the determining factor to build compliance strategies through the social bias trigger. The social norm is never an aim in itself, but can be construed as legitimate if it contributes to reaching a certain number of predefined objectives. As seen above, it is its efficacy which seems to legitimizes it. However, Bentham and Foucault show social norms are not just about reaching benchmarks, but identifying which targets individuals and society agree to set themselves.

Resistance is coeval with the imposition of a norm, be it social or other. The Panopticon is the space devised by Bentham to make obedience to the utilitarian norm swift and efficient, but its very existence exemplify resistance to some norms set by society or the State. Indeed, it tackles forms of deviance to the legal norm (convicts or would-be convicts) as well as to the social norm (sex workers, beggars, welfare-dependent individuals).

However, legal and social norms are unable to account for the rationale underlying their implementation. One remedy for these defects is to supplement these norms with secondary or meta-norms[68]. The social norm will be used only if it is adequate in reaching utility-maximizing goals of a given community. Utility is the meta-norm of the legitimate enforcement of any norms, be it legal (thanks to the operation of the legal sanction) or social (thanks to the operation of the moral sanction). The panoptic project is designed to ensure compliance to the meta-norm of utility, however it is powerless to impact on all forms of deviances from its utility-maximising norm. To do so, the action of the utility-maximising norm must spread to

67. "We have then the conditions for the creation for a formidable body of legislation and an incredible range of governmental intervention to guarantee production of the freedom needed to govern" : Michel Senellart, François Ewald and Alessandro Fontana, "24 January 1979", in *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979*, London, Palgrave Macmillan, 2008, p. 64 and 65.

68. For a similar argument made about primary rules in a simple form of social structure, see H.L.A. Hart, *supra*, note 8, p. 94.

society as a whole, beyond limited pockets of acknowledged resistance to the norm. This utility-maximizing norm informs the politics of the living[69]. In his explanation of biopolitics, Foucault extends the use of the average norm beyond the disciplinary field to society as a whole. In the community at large, the average norm is ruled by other normative principles, whose aims are to create the appropriate conditions for the population to produce and reproduce. This is what could be termed the meta-norm of productivity in Foucault.

The average norm derives any prescriptive statement from the observation of society by itself, by means of the use of statistics, predictions and probabilities and other scientific instruments of measurement. However, on its own, the average norm is unable to provide legitimization for its use, as the standard of efficacy which is coeval to the norm is rooted in the policy objectives society sets itself. For Bentham, any norm-setting policy must comply with the meta-norm of utility. In Foucault's biopolitical structure, the average norm must be governed by a meta-norm which is that of its ability to enhance the productive capacities of a given population[70]. Thus, according to both authors, the average norm cannot operate legitimately without a secondary or meta-norm, be it utility or productivity-maximization.

A conception of social norms which is grounded in the average norm only misses the point of how norms are effectively enforced in society. HLA Hart refers to this approach as an external point of view on norms. He writes : "What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society[71]". The average norm used as an exclusive validating standard authorizing the use of social norms in a legal context seems to provide insufficient grounds, unless these average norms are endorsed by meta-norms.

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69. S. Legrand, *supra*, note 50, p. 65. See also Anne Brunon-Ernst, *Utilitarian Biopolitics. Bentham, Foucault and Modern Power*, London, Pickering & Chatto, 2012.
70. The norms of utility and of productivity are described as meta-norms. They could also be described as secondary rules of recognition, change and adjudication in Hart's theory. Indeed, secondary rules are "specify the ways in which primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined", in H.L.A. Hart, *supra*, note 8, p. 94.
71. *Id.*, p. 90. The internal point of view implies voluntary cooperation to maintain the rules, whereas the external point of view rejects the rules and attends to them only from the external point of view as a sign of possible punishment (p. 91).

3 The Appropriate Use of Social Norms

Is the existence of a meta-norm sufficient to guarantee the legitimacy of a social norm in the legal realm? If so, which of the two meta-norm systems above is appropriate to prescribe the legitimate incorporation of social norms into legal norms? The procedure by which a legal norm is produced is generally accompanied by a formal deliberative procedure in an assembly and an informal media-oriented debate in the community in the case of certain political, economic and social issues. We cannot fail to note that, in the Australian organ donation default case, implementation was decided after a parliamentary deliberative procedure. The social norm was then considered as fit for deliberation on the grounds of it being an average norm (not so much the social norm of a prevalent behaviour, but the moral norm of a type of behaviour to be promoted). Nonetheless, there does not seem to be any discussion as to the appropriate way to deal with these social norms, especially regarding the legitimacy of the ways, means and aims set for any legal incorporation.

3.1 Norm-setting and the Public Opinion Tribunal

Bicchieri describes norms as unwritten and implicit common practices which hold a group together. As she is not interested in norms designed, imposed and enforced by way of administrative incentives, she states that social norms are not the result of deliberative processes[72]. Conversely, the present paper focuses on the way in which norms, which were not deliberatively designed, are then intentionally incorporated in legal norms by exogenous authority. Political deliberation contributes to the production of norms, the reliance of any legislative instrument on a social norm, as a social norm, is not discussed at the incorporation stage.

As many other writers, Bicchieri agrees that bad norms[73] exist[74]. They originate from what she calls "pluralistic ignorance[75]", that is a combination

72. C. Bicchieri, *supra*, note 20, p. x.
73. A bad convention is a socially undesirable convention (K. Binmore, *supra*, note 24, p. 62). A convention is a social norm. C. Bicchieri, *supra*, note 20, p. x and xi identifies 3 types of social norms: informal norms (*i.e.* norms which emerge through the decentralised interaction of agents and which are not designed, imposed and enforced by exogenous authority), descriptive norms (*i.e.* norms which emerge in a context in which people desire to coordinate with or imitate others and prefer to do what others do on condition that a sufficient number of people will follow them) and conventions (*i.e.* descriptive norms that have endured the test of time).
74. K. Binmore, *supra*, note 24, p. 62-66 develops Shelling's solitaire game to show how a bad convention can be established.
75. C. Bicchieri, *supra*, note 20, p. 3.

of elements : the existence of a strong incentive to conform, the absence of transparent communication and people's belief that, by their observation, the actions of others reflect their true preferences. The present paper relies on the assumption that bad norms can be given increased enforcement powers through incorporation into any legal order. It contends that deliberating on the incorporation of social norms in the legal order is an effective way to avoid bad norms becoming entrenched in (bad) laws. In this context, deliberation can only be with an eye to the meta-norm or the secondary rule, so that the selected average norm or social norm can be assessed as to its ability to achieve the ends set by the meta-norm. Section 1.2 gave two practical examples of social norms : the use of social norms to invoke accepted or prevalent behaviour among peers ; and the use of default. Only the second instance seems to be the type of norm used in a legal context.

Bentham believes that deliberation, in representative institutions as well as among the Public Opinion Tribunal (POT), is key to identifying legitimate utility-promoting social norms (but the same could be said of welfare-promoting social rules)[76]. The POT is a fiction[77], *i.e.* it is not an institution that exists in society as such. Although there is no tangible group or institution which can be pointed out as the POT, its operations are real and can be felt by officials, thanks to the sanctions at the disposal of the POT. The POT can lay public blame on any official, thereby leading to his/her removal from office (dislocation). The punishment applied is not necessarily legal, but mainly derived from the moral (popular) sanction, since the POT steps in when legal punishment is unwarranted[78]. It can also shower praise[79]. In all points, the POT acts as a tribunal. It gathers and

76. Bentham defines the POT as : "By the term *Public Opinion Tribunal*, understand a fictitious entity – a fictitious tribunal the existence of which is, by the help of an analogy, feigned under the pressure of inevitable necessity for the purpose of discourse to designate the imaginary tribunal or judiciary by which the punishments and rewards of which the popular and moral sanction is composed are applied". See Jeremy Bentham, "Constitutional Code Rationale", in *First Principles Preparatory to the Constitutional Code*, in *The Collected Works of Jeremy Bentham*, Oxford, Clarendon Press, 1989, p. 227, at page 283.
77. Bentham defines a fiction in his legal writings. See *id*., at page 267.
78. *Id*., at page 291.
79. On Bentham's arguments against factitious honours in the shape of titles and annuities, see *id*., at pages 299-305. For a discussion on honours, see Cesare Beccaria, "Of Honour", in *On Crimes and Punishments*, Indianapolis, Bobbs-Merrill, 1963. See also Philippe Audegean, *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire*, Paris, J. Vrin, 2010.

examines evidence, hears parties, and hands down a judgment, which it then publicizes and executes[80].

The POT is not one body with one interest. Sectional interests are alive in the POT. The first division is along territorial lines[81]. The second division is among the members of the POT, as the holders of political and economic power are opposed to those who are deprived of it. The decisions of the POT are said to coincide with the general interest, which Bentham defines as the aggregate of individual interest[82]. In a given group, add the individual interests of each member, and the majority will represent the general interest[83]. Of course this arithmetic of interest cannot fail to raise serious doubts as to the protection of minorities and the representativeness of individual opinion in issues where there are more than two predefined outcomes : to agree or to disagree[84]. The last division is along the lines of the ownership of the means of production[85] : the ruling and influential few are the non-productive class, as opposed to the productive classes of the many subjects[86]. Divided interests also means competing interests and conflicting interests[87]. How can these interests be reconciled to give effect to the public will, expressive of the general interest ?

Publicizing proceedings triggers a debate, which promotes the emergence of the public will. By winning over individuals to a cause the public opinion forms itself, and it thus contributes to the identification of interests. Thus publicity will circulate knowledge, improve understanding, and promote useful debates. Publicity operates at two levels — at the level of

80. Jeremy Bentham, "Securities Against Misrule", in *Securities against Misrule and other Constitutional Writings for Tripoli and Greece*, in *The Collected Works of Jeremy Bentham*, *supra*, note 76, p. 23, at pages 60 and 61.
81. *Id*., at pages 36, 37 and 121.
82. Jeremy Bentham, "Identification of Interests", in *First Principles Preparatory to the Constitutional Code*, *supra*, note 76, p. 123, at page 133 ; J. Bentham, *supra*, note 80, at page 56.
83. For Habermas, a decision conforms to the general interest if it is a majority decision. See Jurgen Habermas, *L'espace public*, 17th ed., Paris, Payot, 2010, p. 148.
84. In *Political Tactics*, Bentham makes provisions for three types of votes in the Assembly : ayes, noes and neuters. See Jeremy Bentham, "Political Tactics", in *Political Writings*, in *The Collected Works of Jeremy Bentham*, Oxford, Clarendon Press, 1999, at page 153. However, except in a referendum or in a vote on a bill, functionaries and constituents are not asked to decide along these lines, but to devise a system which will enable to reach a given outcome.
85. Contrast with Karl Marx, *Le capital*, vol. 1, Paris, Editions sociales, 1976, p. 675, note 58.
86. Jeremy Bentham, "Economy as Applied to Office", in *First Principles Preparatory to the Constitutional Code*, *supra*, note 76, p. 1, at page 69.
87. *Id*., at page 70.

deliberative assemblies and at the level of the POT. The question at issue is how is it possible, for an assembly composed of individuals naturally interested in promoting their own happiness, to come to a decision expressive of the will of the people, that is the general interest ? Debate is the key.

3.2 Norm-setting and Deliberative Procedures

How is the deliberative debate different from any debate in the public space of the POT ? The latter labours under the structural inconvenience of what Bentham calls "local distance[88]", that is the fact that the POT cannot be gathered in the same room. Being in the same room allows the enforcement of a deliberative discipline, a procedural principle organising debates, which is instrumental to the emergence of the true will of the people. As Bentham fights against misrule, so does he struggle against what he calls "falsifying the will[89]". The instruments available are: the disposition of the assembly (to enhance communication), rules of speech[90], and the display of rules and motions (to avoid ambiguity)[91]. Once the true purpose of each member can be communicated accurately, staying clear of false misrepresentation[92], the public will shall emerge from the debates among members.

A deliberative environment will operate in a way conducive to a debate which will allow for the emergence of legitimate utility — or welfare — promoting social norms. Orators will communicate their knowledge of the case and venture an opinion on this basis. Speeches allow the circulation of knowledge and opinion. Answers, questions, and comments on this first speech will increase the information at the disposal of the audience, as well as give them new angles to consider on the issue[93]. The debate is the time when the individual and general will takes shape incrementally. This implies that members with different, even diverging, opinions will concur at some stage. This is possible through the process of influence. The debate should ensure the influence of mind upon mind, which is

88. J. Bentham, *supra*, note 80, at page 71.
89. J. Bentham, *supra*, note 84, at page 122. In J. Bentham, *supra*, note 76, at page 261, Bentham opposes two different types of arguments : those which apply to the will (*e.g.* in cases of corruption) and those which apply to the understanding (in the shape of delusion). It is the latter Bentham wishes to fight though deliberative discipline.
90. J. Bentham, *supra*, note 84, at page 131.
91. *Id.*, at page 116. The content of the rules is of course typified, the language used, the number of words etc. See *id.*, at pages 121 and 139.
92. *Id.*, at page 47.
93. *Id.*, at page 94 and 101.

necessary to the emergence of the public will[94]. Each speaker in the debate will use arguments to convince the rest of the assembly of the validity of his/her opinion[95]. The influence of mind over mind, as exercised in debates, leads to the formation of the will, which is expressed in the final vote on the motion. Because the public is to be consulted before the passing of the bill, the time between each reading allows for public debate in the public space thanks to the POT, and for the influence of the public, as mediated by the press, to act upon the minds of the legislative agents[96], and vice-versa.

In deliberative assemblies as in the POT, Bentham views ways in which consent for a decision can be obtained through influence. This consent is obtained without violence, but through persuasive arguments. Bentham, through disciplinary mechanisms, tries to put aside the idea of consent obtained under duress, which would vitiate true consent. The operations of will upon will are key to identifying social norms that are acceptable, and that can thus form the basis of a legal norm which can be used to promote utility-maximizing (or welfare-maximizing) norms to benefit society as a whole.

Deliberation appears in Bentham's work to be the key to identifying legitimate rules to be enforced upon the population. This deliberation takes place in two different and mutually supportive fora : first, among the population, thanks to the POT and the praise/ blame it can pass on policies it approves or disapproves of ; second, in a parliamentary setting, thanks to deliberative discipline which protects representatives from undue influence. This analysis also identifies the crucial need for publicity, as it forms the groundwork for deliberation, and thus the only legitimation of any norm, be it social, or other.

The stress laid by Bentham on publicity and deliberative discipline of the POT and assemblies makes it possible to identify two other criteria Nelken uses to legitimate norms : procedure and source[97]. When vetted by a source operating with procedural safeguards which guarantee compliance of the rule to the meta-norm, and when the effectiveness of the rule to achieve the goals set by the meta-norm is established, the social norm incorporated in a law becomes legitimate.

94. This is opposed to undue influence, which leads to the sinister sacrifice, as in the case of the undue influence exercised by the oligarchy. See *id*., at page 109.
95. *Id*., at page 127.
96. *Id*., at page 130.
97. D. Nelken, *supra*, note 66.

3.3 Identifying a Single Supra-norm : Utility, Production, Autonomy or Justice ?

If deliberation helps identify legitimate aims, it does not indicate how to set any meta-norm. One of the pitfalls of establishing a social norm as a legal norm was the use of time-sensitive scientific evidence. Time needs to be incorporated into the deliberative process, to allow for changes in scientific knowledge. As with the issue of the average norm, the effect of mandatory deliberation is to ensure that the people remains in charge of deciding which laws will rule their community. Even if data from statisticians or scientists might be one element of information used in the deliberative process, the decision has to be taken by representatives of the people, and regularly reviewed by them to ensure the bases for decisions are legitimate, transparent and accountable.

As seen previously, Bentham and Foucault identify different meta-norms which should guide the deliberative process when allowing the incorporation of social norms into legal norms. There are many meta-norms which are available on the marketplace of ideas. Rawls, for example, criticizes the utility-based approach to meta-norms. He states :

> In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of its permanent effects on its own basic rights and interests. Thus it seems that the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage[98].

This discrepancy relies on Rawls's notion of society, which is rooted in the idea of "cooperative venture for mutual advantage[99]".

Similarly, JS Mill's discussion of autonomy[100], as critical of the primacy of utility-maximizing rules of action, can also be considered as another meta-norm which could be used in policy-making.

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98. J. Rawls, *supra*, note 27, p. 13.
99. *Id.*, p. 4.
100. John Stuart Mill, "On Liberty", in *Essays on Politics and Society*, part 1, in *Collected Works of John Stuart Mill*, vol. 17, Toronto, University of Toronto Press, 1963, p. 213. On the issue of autonomy, see, for instance, Isaiah Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty*, Oxford, Oxford University Press, 1969, p. 118 ; Joseph Hamburger, *John Stuart Mill on Liberty and Control*, Princeton, Princeton University Press, 1999, p. xi, where he criticises a tradition of interpretation which stresses Mill's unequivocal advocacy of liberty ; Dudley R. Knowles, "A Reformulation of the Harm Principle", *Political Theory*, vol. 6, nº 2, 1978, p. 233 ; Joel Feinberg, *Harm to Self. The Moral Limits of the Criminal Law*, Oxford, Oxford University Press, 1989, p. 11 ; Madison Powers, Ruth Faden and Yashar Saghai, "Liberty, Mill and the Framework of

The present paper is unable to arbitrate between different meta-norms offered by a wide range of writers. It only seeks to highlight the fundamental part played by meta-norms in the legitimizing process of social norms to be applied to all.

Conclusion

The aim of the present paper has been to identify how social norms operate in a new regulatory regime. Social norms on account of being prevalent, recognised as such and already enforced by social sanctions seem the most legitimate rule for quasi-automatic incorporation in legal norms. However, proponents of these initiatives point out the problems related to the use of the social bias in devising policies or legislative acts. They raise two connected issues : first, any reference to a majority of rule-compliant individuals implies the existence of a minority of non-rule-compliant people ; second, any reference to the legal use of social norms, by the higher standard of compliance it extracts from individuals, raises even more strongly the issue of the legitimacy of the norms selected for integration, as not all norms are "good".

Foucault answers these issues by referring to an average norm : what individuals and institutions deem good, legitimate, acceptable is what corresponds to wide-spread practice or patterns of behaviour. This concept of average norm is also used in Bentham's disciplinary institutions. The use of the average norm implies that decision-makers are bound to follow the recommendations of statisticians and scientists. By highlighting the shortfalls of the average norm and evidence-based data, it appears clear that a meta-norm is needed to set benchmarks of efficiency to social norms.

Indeed, the stress on the average norm fails to take into account the need for meta-norms. Bentham and Foucault refer to different meta-norms : Bentham advocates the use of utility-maximizing meta-norms and Foucault describes the production-enhancing meta-norm, both of which should originate from public deliberations thanks to an open and disciplined deliberative process. To identify "good" social norms, *i.e.* rules that are utility-compliant and that can therefore be imposed on a minority or majority of non-conforming population, deliberation is needed. The deliberative process takes place either in the Public Opinion Tribunal of the world at large, or in deliberative assemblies (Parliaments amongst others) and are publicized in various ways. Bentham's utility meta-norm sets the

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Public Health Ethics", *Public Health Ethics*, vol. 5, n° 1, 2012, p. 6, at pages 10 and 11 ; J. Joseph Miller, "Forced to Be Free : Rethinking J.S. Mill and Intervention", *Politics and Ethics Review*, vol. 1, n° 2, 2005, p. 119, at page 122.

general targets to be reached by any norm, and thus helps to identify good norms.

The present paper has offered guidelines for incorporation of social norms into legal norms. They discard the contemporary hallmark of efficiency, to determine the conditions under which the use of social norms in law can be deemed legitimate. This does not mean that issues of efficiency, widespread practice and scientifically-based recommendations are not part of any legitimizing process. However, it strongly indicates that the source of legitimacy for the incorporation of social norms into legal norms is enshrined in public opinion and deliberative assemblies. Indeed, procedure and efficiency are ancillary to an efficient and informed public debate, which guarantees that the source of the norm can be relied on to produce legitimate norms.

The present study also challenges the concept of biopolitical law as a social law without any legislator and without any obligation or punishment[101]. This theory contends that individuals who make up the community infer the norm from what they observe and abide by it, as long as it is not imposed upon them from outside[102]. Nudges share common normative functions with social law[103]. Looking at one of the instruments used by nudges, the present paper has made the case for introducing a deliberative system of norm selection, thus re-affirming the importance of the legislator, alongside the wider public, in setting rules for society. In doing so, it also does away with the distinction between high-cost and low-cost norms alleging that both need to be vetted by a deliberative procedure.

101. F. Ewald, *supra*, note 51, at page 155.

102. *Id.*

103. In Hart's theory, the norm-average stands for the external aspect of a rule. He explains: "After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict, with a faire measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment", in H.L.A. Hart, *supra*, note 8, p. 89.