



Opportunities and Challenges for the Rule of Law and Democracy
Strasbourg, 15 February 2021
Roundtable on Regulation

A. The normative relevance of soft law: legal effects short of bindingness

1. Internationalisation

Soft regulation internationalises the matter and cuts off the objection that the topic lies within the *domaine réservé*.

2. Guideline for the interpretation of national and international hard law

a) Interpretation of national law

The soft rules will be drawn on by domestic authorities and courts, for the interpretation of national law.

Example:

Authorities and courts deciding on refugee status draw on pronouncements of the high commissioner on refugees when interpreting the national asylum laws, for example when it comes to the meaning of non-refoulement.

b) Interpretation of international law

Example:

The Migration Compact might add some detail to obligations flowing from conventions on nationality (cf. objective 4), and from the UN Convention on Transnational Organized Crime (cf. objective 10).

The adoption and application of soft law is also “subsequent practice” in terms of Art. 31(3) lit. b) VCLT

“3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (...)”.

3. Guides the exercise of discretion

Soft law may factor in as a parameter for the exercise of discretion by national administrative agencies and by international bodies.

4. References/ incorporation into national and international law

Examples:

- Tort law normally prohibits negligent behaviour. What negligence means is often defined with a view to professional standards, e.g. in medical malpractice.

- Art. 7 of the Swiss law on private security services delivered abroad oblige the firms to accede the private code of conduct for security service providers of 2013.

- The Swiss regulation on recognised standards on accounting (SR 221.432) mentions the "recognised standards" of the International Accounting Standards Board.

5. Obligation to take into account in due faith

All law-appliers are arguably obliged to take soft instruments into account in good faith (a general principle of law, also in the sense of Art. 38 (1) lit. c) ICJ Statute).

6. Retorsions are possible

If a state „breaches“ a soft law instrument, other states may react with lawful measures, i.e. in form of a "retorsion".

7. Forerunner of customary law

Soft law can give rise to the crystallisation of customary international law.

This would of course need an *opinio iuris* and concomitant practice over some time. When signing states explicitly say that the commitments are not legally binding, it is difficult to deduce any legal opinion from this.

Examples

The United Nations Declaration on the Rights of Indigenous Peoples 2007 which is not legally binding. Australia, a country with a history of discrimination and extermination of its indigenous population, voted against this declaration in the United Nations General Assembly, but two years later (in 2009) decided to adopt the text. A process of customisation of some of the provisions of that declaration is ongoing.

Universal Declaration of Human Rights of 1948, some of whose rights meanwhile have the force of customary international law.

8. Soft law paves the way to hard treaty law

- The Universal Declaration of Human Rights of 1948 was the basis for the adoption of many subsequent human rights treaties.

- The Rio Agenda 21 paved the way to many environmental treaties.

B. Legitimacy problems of soft law

1. Soft law may be a fig leaf

Governments and other actors can tell their public that something has been done and then rest on this. Soft regulation may be a sham activism.

2. Power asymmetries play out

Formalities and formal procedures (e.g. public hearings, equal voting rights, equal speaking times) always protect the weaker actors.

It is no coincidence that great powers like soft law and memorandums instead of formal treaties.

3. Less rationality and deliberation

The swiftness of the processes comes at a price: The instruments are adopted in processes with less deliberation and discussion; this reduces their rationality.

4. Legal insecurity

There is sometimes an uncertainty and controversy among states whether an instrument is hard law or soft law.

Example: The Hong Kong Declaration (China-UK) of 1984.

Therefore, e.g. Brazil recently undertook an initiative to establish criteria for distinguishing "memorandums of understanding" from international treaties.

Legal insecurity runs counter to the rule of law.

5. Intransparency and overlap

The soft instruments are not registered and documented like treaties.

The multiplicity of soft instruments creates overlaps.

The expectations regarding transparency have much changed in the last decades. While it used to be a diplomatic prerogative to conduct secret negotiations, an actual transparency turn has taken place.

The current trend is to involve the public more in the processes of elaborating international law – both hard and soft.

For example, the adoption of the **Paris Agreement** was fully under public scrutiny. Transparency politics need to strike a delicate balance. Too early or too much transparency (participation of the public and participation of civil society organisations) can bring negotiations to fail.

But too little transparency can also lead to non-acceptance. The **Transatlantic Trade and Investment Partnership (TTIP)** was negotiated behind closed doors between the United States and the European Union. When the text was leaked in 2016, a public uproar was heard in Europe. The stalling of the TTIP-negotiations was, however, less due to misapprehensions of the public than a decision of the new U.S. presidential administration.

6. The integration of non-state actors, both civil society and business (for profit)

The integration of those actors creates new legitimacy:

Inclusion, participation; more transparency.

But it has drawbacks:

- 1) It favours northern NGOs and business and thus increases the North South inequality.
- 2) It may lead to "blue washing" by conferring a spurious, doubtful legitimacy on those actors who are not elected and not accountable.

7. The democratic deficit

The executive branches like soft law not only for acting swiftly and flexibly, but also for keeping out national parliaments.

A famous case illustrating this question is the so-called new Strategic Concept of NATO of 1999. Here, NATO member states had adopted a text which foresaw an extension of treaty operations both in geographical scope and in substance. Upon the complaint of a political faction in the German parliament (the *Bundestag*), the German Constitutional Court (BVerfGE 104, 151, judgment of 22 Nov. 2001 - 2 BvE 6/99) had to determine whether the new strategy was a formally binding treaty (an amendment of the NATO treaty) or not. In this case, the Constitutional Court focused on the will of the parties to bind themselves, to be gathered from indications as mentioned above. It concluded that the new strategy was no binding treaty. Therefore, the German constitution was not violated by not involving the *Bundestag*. (Had it been a formally binding treaty, then the Strategic Concept would have had to be domestically ratified by adopting a formal parliamentary statute).

C. Participation/involvement of parliaments (or parliamentary committees)

1. General observation

Participation/involvement of parliaments or other democratic bodies is necessary to counteract the scooping out or "hollowing" of domestic democracy.

But this requirement should not lead to blocking unwanted instruments/ad hocish, as it occurred with the migration compact of 2019. The involvement of parliaments should be based on criteria.

2. Triggers /threshold: Which types of soft regulation need parliamentary involvement ?

- Only when states are participants?

- Especially when an instrument established bodies which are empowered to adopt further regulation ("an instrument on wheels").

- **Principle of "parallelism": Parliaments should be involved when (under domestic constitutional law) a domestic statute would be necessary for a purely domestic regulation on the matter.**

3. Forms of involvement

a) How? The main question is: vote or voice

- Mere consultation (notice and comment) = "voice".

or

approval = "vote" = veto.

- Who must take the initiative? Must governments be proactive? Parliaments cannot ask for what they are not aware of.

b) When?

Should parliaments be involved before there is a text, in the negotiating stage ? In this phase, the type of involvement can reasonably only consist in a hearing (voice).

c) Which bodies?

- Parliamentary committees on foreign affairs?

However, the topics concern all matters: financial, environment, security, and so on.

- The plenary? Should there be public debates in very important cases?