

THEORETICAL REGULATION OF INTERSTATE RELATIONS BASED ON "SOFT LAW" AND "HARD LAW" NORMS IN INTERNATIONAL LAW VIEWS

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Abstract: International law is a complex and evolving system that governs relations between states, international organizations, and individuals. Within this framework, two distinct types of norms emerge: soft law and hard law. Soft law refers to non-binding principles and guidelines, while hard law consists of legally binding rules and treaties. This article aims to explore the concept of soft and hard law in international law, examining their theoretical foundations and their practical implications. Soft law and hard law norms are essential components of international law, each with its own theoretical underpinnings and practical implications. Soft law provides flexibility and adaptability, while hard law ensures enforceability and accountability. Understanding the interplay between these two types of norms is crucial for comprehending the dynamics of international law and its ability to address complex global challenges. As international relations continue to evolve, the balance between soft law and hard law will remain a topic of ongoing debate and exploration.

Key words: International law, Hard law, Soft law, norms.

Аннотация: Международное право — сложная и развивающаяся система, регулирующая отношения между государствами, международными организациями и отдельными лицами. В рамках этой структуры возникают два различных типа норм: мягкое право и жесткое право. Мягкое право относится к необязательным принципам и руководящим принципам, тогда как жесткое право состоит из юридически обязательных правил и договоров. Целью данной статьи является исследование концепции мягкого и жесткого права в международном праве, изучение их теоретических основ и практических последствий. Нормы мягкого и жесткого права являются важными компонентами международного права, каждая из которых имеет свою теоретическую основу и практические последствия. Мягкое право обеспечивает гибкость и адаптируемость, а жесткое право обеспечивает соблюдение требований и подотчетность. Понимание взаимодействия между этими двумя типами норм имеет решающее значение для понимания динамики международного права и его способности решать сложные глобальные проблемы. Поскольку международные отношения продолжают развиваться, баланс между «мягким» и «жестким» правом останется темой постоянных дискуссий и исследований.

Ключевые слова: Международное право, Жесткое право, Мягкое право, нормы.

Interstate relations play a crucial role in the global arena, shaping the dynamics between nations, and affecting various aspects of society, including politics, economics, and culture. These relations are governed by international law, which consists of both "soft law" and "hard law" norms. The subject of soft law has always been an uncomfortable for international legal scientists. On the one hand, honestly speaking, it is not "law" at all. Under traditional approaches, as Professor Weil states, these commitments "are neither soft law nor hard law: they are simply not law at all"¹

¹ Prosper Weil, *Toward Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 414-417.7(1983)

On the other hand, substantially all legal scientists would agree that they are not simply politics either. Language included in the Universal Declaration of Human Rights, the Helsinki Final Act, the Basle Accord on Capital Adequacy, decisions of the UN Human Rights Committee, and rulings of the International Court of Justice (ICI)², are thought to impact states because of their quasi-legal character. However to say that soft law rules are quasi-legal is simply to beg the question of what parts the quasi-legal from the non-legal, on the hand, and the legal, on the other hand. The discommodity of legal commentators with soft law stems in noticeable part from this ambiguity. Soft law is a residual category, defined in opposition to clearer categories rather than on its own terms. Thus, soft law is most commonly defined to include hortatory, rather than legally binding, obligations.³ The focus of this definition usually on whether or not something that looks like a juridical obligation in some ways (e.g., it is a written exchange of promises between states) nevertheless falls short of what is required to formally bind states. This definition, then, is a doctrinal one - things that fall short of international law are called soft law. Soft law instruments account for more than 10% of EU law.⁴ The use of soft law in European law dates back to 1962, when the European Commission issued the 'Christmas notices', a notice on exclusive dealing contracts with commercial agents and a notice on patent licensing agreements. Until 1968, recourse to soft law instruments was exceptional. Since then, and especially after the accomplishment of the internal market, they became quite frequent in the activity of the European Commission.⁵ An early example of soft law includes the Communication on the Cassis de Dijon judgment⁶ restating the principle of mutual recognition previously laid down by the Court of Justice (CoJ). Moreover, the 1985 White Paper of the Commissions expressly envisaged the increasing recourse to soft law. Soft law comes in an 'infinite variety,' which presents a challenge for any attempt at defining, classifying, or developing a framework of analysis. It is considered by different denotations as weak and fragile by Baxter, toothless by Dupuy (droit mou), muffled by Rigaux (droit assourdi) in other words, devoid of any power. Some authors prefer to use words such as "non-treaty agreements" and "informal instruments" in order to differentiate this type of norm from traditional forms of law. Others go even further and use terms such as "pseudo" and "quasi" legislation⁷, or "extralegal" and "non-legal", which suggest the idea of a lesser form of law. For several French authors, it represents an immature version of true (hard) law, a body of norms in the process of transformation: droit vert⁸ and pre-droit⁹ in the writings of Dupuy and Virally. The uncertainty surrounding soft law is exemplified by the notion of droit vague, used by Pescatore.¹⁰ Other French translations follow the English expression

² Rulings of international tribunals are not traditionally considered under the heading of soft law, but for reasons explained below we define the term to include them.

³ Kal Raustiala, Form and Substance in International Agreements, 99 AM. J. INT'L. L. 581, 586 (favoring a distinction based on legality).

⁴ In completing literature review, the research assistance of Maria Kendrick and Zuzanna Bobowiec is gratefully acknowledged. Besides Jean Monnet funding, this paper benefitted from financial assistance from King's Undergraduate Research Fellowship scheme. Parts of this literature review draw heavily on Oana Stefan, Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union (Kluwer Law International 2013).

Rene J Dupuy, "Droit declaratoire et droit programmatore: de la coutume sauvage a la 'so ft law'" in societe Francaise de Droit International, Collo que de Toulouse, L'elaboration du Droit International Public (Pedone 1975) 132-148/140.

⁵ F.Rigaux, Annuaire de l'Institut de Droit International (Ped one 1983) vol. 60-II 147, quoted in Karel C Wellens and Gustaaf M Borchardt, "Soft law in European Community Law" (1989) 14 ELR 267, 271-279.

⁷ Jan Klabbers, "Informal Instruments Before the European Court of Justice" (1994) Common Market law Review 997.

⁸Dupuy 140.

⁹ Michel Virally, "La distinction entre textes internationaux de portee juridique in sessions

¹⁰ Pierre Pescatore, Annuaire de l'Institut de Droit International (Pedone 1983) vol. 60-II 146, quoted in Wellens&Borchardt (n15) 271-279.

more faithfully, for example *droit doux*, which can be contrasted with *droit dur*, while German offers a literal translation in *weiches Völkerrecht* or - depending on the area covered - use an entirely different terminology, such as "*Verwaltungsvorschriften*" when addressing the inner working of the administration. The lack of legal procedures for the adoption of soft law in the EU Treaties has prompted some to describe EU soft law as atypical, *sui generis* acts or EU tertiary norms.

The conception of "soft law" is generally contrasted, in the international relations literature, with that of "hard law", defined by Baxter as "treaty rules which States expect will be carried out and complied with".¹¹ The basic differentiating features lie in the comprehensibility of the norm to prescribe legally binding commitments, the clarity and precision of its terms, and its enforceability. Abbott et al. synthesized these characteristics in the rationalist concept of legalization, a concept designed in order to create a bridge between the legal thinking and the political science thinking, by rejecting the understanding of law as requiring implementation by a coercive sovereign. Legalization is understood as a particular form of institutionalization characterized by three elements: obligation, precision, and delegation. Obligation implies that the international actors are legally bound by a certain provision; precision requires inaccuracy with respect to the department to follow; and delegation means that the realization, explanation, application of the rules and conflict resolution were entrusted to third parties. Abbott and Sindal¹² define hard law as the form of legalization characterized by high levels of obligation, precision, and delegation, whereas they consider that soft law occurs whenever one or more of the three dimensions are weakened. Thibierge offers a identical view of *droit souple*, while considering the intersections between three facets: content (*droit flou*, characterised by the lack of precision), legally binding force (*droit doux*, or law without obligation), and enforcement (*droit mou*, or unenforceable law)¹³. In a recent development of Abbott et al's theory, Terpan introduces enforcement as a defining characteristic of soft law instead of delegation, and eliminates the precision criterion. While conceptualising soft law as a continuum, Terpan sees soft law as instruments where the intensity of obligation or enforcement is weak. With regards to enforcement, Terpan characterises hard enforcement through courts or supranational institutions, such as the WTO mechanisms of implementation, monitoring and dispute settlement. On the other hand, soft enforcement entails non-constraining mechanisms such as surveillance and monitoring. Enforcement thus becomes a defining feature of soft law, but it can vary across soft law instruments, with some being enforced softly while others are enforced the hard way. This categorization is not free from criticism. For some authors, the legal character of a norm cannot be a matter of degree; either a norm is law or it is not law at all.¹⁴ More importantly, some other authors pointed out that the three criteria obligation, precision, and delegation cannot contribute to an understanding of soft law, since the possible combinations between them are multiple. Also, and more importantly, from a constructivist point of view, the categorization understates the mechanisms through which a sense of obligation might be generated. In particular, it disregards the concept of legitimacy, a constitutive element that has to be taken into account when determining the degrees of obligation. The legitimacy of rules is linked to the observance of principles such as non-retroactivity, clarity, constancy and consistency.¹⁵ Moreover, legitimacy signifies that the agents need to understand and assume the rules. This is accomplished by their participation in the rule-making process.¹⁶ Thus, the sense of obligation

¹¹ Baxter(n11) 549.

¹² Kenneth Abbott and Duncan Sindal, *Hard and Soft Law in International Governance'* (2000) 54 International Organization 421, 422.

¹³ Thibierge (n26)

¹⁴ P.Weil, "Vers une normativité relative en droit international (1982) *Revue Generale de Droit International Public* 5-47.

¹⁵ See Albert V Dicey, *Lectures on the relation between law and Public opinion in England in the Nineteenth century; The Morality of Law* (Yale university Press 1964).

¹⁶ Finnemore&Toope (n40) 749.

is generated only when the rules are enacted by properly constituted bodies, as underlined by Wellens and Borchardt: The binding requirement of a certain conduct or omission, whatever the circumstances, is formulated by subjects who are vested with the necessary competence and according to pre-established procedures' (emphasis added).¹⁷ It follows that a certain degree of legitimacy and procedural formality is required in order to speak of binding international norms, imposing obligations, and thus of hard law. Studies on the European Union, took on board the soft law concept from international relations literature, in order to catalogue those instruments that have an uncertain legal status, and to define the concept in contrast to the notion of hard law.

Hard law consists of the norms which come with hard obligation and are equipped with hard enforcement.¹⁸ More recently, Fabien Terpan, Sabine Saurugger and Miriam Hartlapp define a continuum from hard law to soft law, where "Soft law includes:

- legal obligations that are either not precise enough to be considered hard law, or not controlled by an independent authority (such as a tribunal);

- non-binding objectives, guidelines, incentives that are combined with soft enforcement such as monitoring or peer-review processes. Depending on the way these elements are combined, a norm, a legal act or an entire policy-area, can be placed at different points on the continuum of EU norms that ranges from non-legal norms over soft law to hard law." Moreover, Kenner suggests that while hard laws create rules that Member States are bound to comply with, soft laws are essentially methods of Community guidance or rules which create an expectation that the conduct of Member States will be in conformity with them, but without an accompanying legal obligation. While not legally binding, soft laws are "impulses for integration", a "basis of interpretation of hard laws" and may result in the "desired legal effects. The Community Charter of the Fundamental Social Rights of Workers 1989, for example, was a "bold statement" to usher "activism", while other types of soft law could be Commission or Council recommendations that reflected an "unfulfilled ambition"; recommendations that would supplement existing hard law; or statements of political principle that subsist while binding legislative proposals had no realistic prospect.

In contrast to the above perspective on EU soft law, OMC research is interested in the distinct governance nature of soft instruments (which might take the form of law, but more typically do not). Trubek and Trubek note that some people prefer to classify the open method of coordination as soft 'governance, rather than laws, which might become "hard' through judicial interpretation. "Soft" law accompanies rather than replaces "hard" law. The only novelty is, according to certain views, the fact that such mechanism is now also implemented at the EU level and that linking soft steering in social policy with stricter economic governance under the European Semester gives the EU options to also strengthen employment and social policy coordination.

Other authors conclude that, the EU is not experiencing with new forms of governance but with "new-ish governance" while the focus of the new governance in the EU is largely on governing without law". In conclusion, Steven Tup put forward the idea: "If conditional binding rules are often ineffective in practice, informal, non-binding rules can shape practice very effectively". In other words, soft international law can also be effective in a multilateral trading system, where immediate compliance may be trivial and usually happens over time. Thus, hard rules play a significant role in guiding the behavior of WTO members, but they can also be influenced by soft law rules that perform a coordinating or subsidiary function.

¹⁷ Wellens&Borchardt (n15) 280.

¹⁸ Ibid 25.

The regulation of interstate relations relies on a combination of soft law and hard law norms. Soft law is generally developed and adopted relatively quickly. It is also commonly less time-consuming and thus less costly, more flexible, and more ambitious than hard law. Soft law serves as a stepping stone to the development of hard law norms, while hard law ensures the validity and stability of the international legal system. It is thanks to the delicate balance between these two approaches that effective regulation of interstate relations can be achieved. Although soft law and hard law are different concepts in terms of their legal nature, they are related to each other from a governance point of view. Hard law provides a legally binding framework that obligates states to adhere to certain rules and principles. This creates a more structured system that ensures compliance and resolves conflicts. Hard law norms define certain obligations and rights for states. They provide a basis for predictable behavior and stability in interstate relations. Therefore, states need to recognize the importance of soft law and hard law in promoting cooperation, conflict resolution, and maintaining international peace and security. By leveraging the strengths of each approach, states can overcome the complexities of interstate relations and contribute to the development of a just and harmonious global order.

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