Soft Law and New Modes of EU Governance – A Democratic Problem?

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Introduction

This paper draws on a recently published edited volume on soft law and regulation/governance in different international organizations, from various academic scientific perspectives. The paper will entail a general assessment of soft law in the EU, especially from a democratic perspective. [1]

In recent years a wider academic interest has emerged that focuses on European and global governance and how this type of steering system opens up for new types of legitimate authority, that is institutionalised forms of power recognised by those who are regulated (Hall et al 2002; Shelton 2000; Goldstein et al 2000; Herititer 2003). State actors have to share authority with international organisations, on the one hand, and with multinational companies and representatives of civil society, on the other (Börzel and Risse 2000; Hall et al 2002). Authority is not only found in systems of government – the traditional system of command and control – but also in governance. Traditional authority is characterised by the domination of hierarchy and monopoly for the rule-setters that in most cases are state and other public actors. Governance rests upon multiple authorities, that are not necessarily public and state-centered, and that is based upon a fluid system of power sharing (Mörth 2004). In systems of government the law is hard whereas it is soft in systems of governance. The crucial difference between these two types of legal norms is that soft law lacks the possibility of legal sanctions. It is, therefore, not considered to be legally binding.

The question of governance in world politics is not a new phenomenon. The regime literature on international cooperation has for several decades studied how world politics is based upon another steering system than is the case within the nation state. In line with the bulk of that literature I characterise governance as horizontal networks and authority relations, flexibility and voluntary rules (Ruggie 1975, Krasner 1983, Rosenau and Czempiel 1992; Rosenau 1992; Hasenclever et al 1997; Rhodes 1997;Young 1999; Hirst 2000; Pierre 2000). Thus, I

[1] The title of the book is *Soft Law in Governance and Regulation – An Interdisciplinary Analysis*, ed, Ulrika Mörth, Edward Elgar 2004. The book is part of a research programme at Score – The New Regulation – and explores how new regulatory forms, networks, non-state actors and organizations, challenge traditional state-centered and hierarchical forms of regulation (financed by the Bank of Sweden Tercentenary Foundation).

treat governance as a special type of steering system and not as a general concept for steering (cf Kohler-Koch and Eising 1999).

The aim of the book project was to explore the relationship between soft law and governance from four different scientific approaches: legal, sociological, political and organizational. When I started the book project I was rather frustrated by the rather weak and shallow literature on the use of soft law, especially in the EU. Although we had no ambition to explain the existence of soft law I believed that soft law cannot be analyzed only from a rational choice perspective – that is that politicians choose soft law when this is considered to be more convenient – that it has to be studied from a broader political, legal, social and organizational perspective that takes into account the importance of an institutionalized governance authority and how soft law changes traditional structures of authority and traditional law making. I was especially interested in Brunsson's and Ahrne's argument that meta-organizations identify themselves with voluntary rules because they make them 'modern' and flexible (2004). National and international organizations are less prone to use their hierarchical authority, and so become advisory rather than directing. Even organizations like the European Union with the potential and the ability to use hard law seem to follow this trend toward soft law.

The overall question in the project is how soft law is linked to governance. To what extent can soft law be seen as a transitional mode of regulation, that is linked to government and to what extent it can be seen as an independent form of regulation, that is governance? How you answer these questions has important normative implications. This is especially the case if you find that soft law is an independent form of regulation.

I address five questions in the paper:

-What is soft law and why is it important to talk about law instead of soft governance or soft regulation?

- In what ways does soft law challenge the traditional concept of law and is soft law always soft?

- What are the important research questions for political scientists on soft law?

- How does soft law evolve and what are the more sociological aspects of having soft modes of regulation? Do processes of soft law-making generate more of deliberation and learning?

- Can soft law be accommodated with liberal democracy and its emphasis on accountability or can soft law only be legitimised by efficiency?

**What is soft law and why is it important to talk about law instead of soft governance or soft regulation?**

For decades soft law has been an important concept in order to characterise and describe the well-known phenomenon in global politics – governance without government. I wanted to explore this concept analytically and empirically and go beyond its traditional hemisphere of law. Soft law raises fundamental questions of power, authority, legitimacy, social practices, democracy and of how organizations work. It raises also questions about the boundaries between law and politics and between the public and private spheres.

Interestingly, soft law came about at a time when new kinds of global power structures emerged which changed the legal analysis and above all, the analysis of political scientists on international politics (Keohane and Nye, 1977). This academic change of the view of world politics – from a realist and a military based view of power – to a more interdependent and civil view of power – was heavily influenced by real world events, for example the oil crisis in the beginning of the 1970's. This time the debate is more about the borders between politics and law (Shelton 2000) and the political choice of soft law over hard law (Goldstein et al 2000). The interest in the late 1990's and in the early 2000's also reflects the increasing awareness of globalisation and the importance of non-state actors but also how globalisation makes traditional law making more problematic when states are embedded in various formal and informal organisations. The concept of soft law fits nicely with the notion of international regimes and with the analysis of the EU as a system of multilevel governance (Haas 2000; Cini 2000; Herititer 2001).

The literature on the origins of the concept of soft law indicates that it has been used in close connections to real world events and processes. One interpretation is therefore that it was created at a time when political scientists and international legal scholars needed new concepts in order to make sense of a changing world. Another interpretation is that soft law was created in order for the academics to raise the status of their studies so they could show that they were studying important things such as law in a governance structure that otherwise was seen as incomprehensible in contrast to the order within the nation state. My belief is that it was important to create new concepts that made sense of changes in world politics which does not exclude the fact that the concept of soft law also legitimised and helped to 'normalise' international politics and international law into its two academic disciplines political science and law. In this sense the concept of soft law does not differ from other academically used concepts in how they 'travel' and develop between theory and practice (Giddens 1990).

How did we then treat the concept in the book? We kept a broad definition of soft law which I believe is less of a problem in our explorative book than it would have been if we should have had more explanatory ambitions. Soft law can be conceptualised in multiple ways but the common theme in various forms of soft law is that the rule is non-legally binding which means the lack of legal sanctions in the case of non-compliance. Soft law is therefore "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects" (Snyder 1993, p. 198). A more thorough definition is presented by Wellens and Borchardt (1989), for whom soft law is:

"the rules of conduct that find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which according to the intention of its authors indeed do possess legal scope, which has to be further defined in each case. Such rules do not have in common a uniform standard of intensity as far as their legal scope is concerned, but they do have in common that they are directed at (intention of the authors) and do have as effect (through international law), that the conduct of States, international organisations and individuals is influenced by these rules, however without containing international legal rights and obligations" (1989:274).

You could of course ask whether the concept is empirically fruitful when almost every rule can be considered as soft law. The problem with concept definition is a classical one – either you define the concept very precisely or you leave the concept more open. In the former case you have no problem with the empirical operationalisation but you could end up with a rather weak and shallow analysis of complex empirical processes. In the latter case you will have difficulties in the operationalisation phase but end up with a rather thick and rich analysis. The choice between these two concept definitions depends to a large extent on where you are in the research process. In the explorative phase of a project you need to be rather open and flexible whereas in a more explanatory and causal project you need to be more precise on how to define the concept.

Furthermore, some of the authors were reluctant to use soft law as an analytical concept since it is considered to be an empirical term and not an analytical concept. Others in the book had a more analytical approach toward soft law and regarded it more as being an analytical concept rather than as merely an empirical term that is used by various actors. The lawyers were more inclined to treat soft law as an analytical concept whereas the social scientists treated it as an empirical phenomenon. My position was somewhat ambiguous. I realised that soft law was in many ways an empirical phenomenon that needed to be explored from a social scientist approach – what does soft law stand for in terms of steering, power, authority etc? I was also convinced that soft law is not always presented as soft law in the empirical material. The actors involved in various regulatory processes often presented the rules as agreements, partnerships, standards and other rather harmful descriptions. Paradoxically, we seldom talk of soft law when we are analyzing voluntary rules. Instead we tend to choose less politically sensitive concepts that are not linked to political systems and democracy. I argue that voluntary rules, for instance standards, should be analyzed as soft law and the main reason for this is that it raises important questions on the traditional boundaries between the public sphere, that is systems of government, and the private sphere. By analyzing standards as new forms of law, namely soft law, you challenge the traditional perception that law can only be decided by parliaments and other democratically legitimated actors in a representative and liberal democratic system. Law can be regarded as the very essence of public authority. But law is also decided by other actors and if we label these regulations as non-law we tend to only reproduce the traditional dichotomisation between the public sphere and the private

sphere. To me this is important because I believe that important regulations are decided by private actors or by a mix of private and public actors, and that this development should be analyzed as law-making. It is convenient to describe standards as non-law in order to avoid a discussion of the democratic implications of important decision-making outside the traditional and formal state-centric system. Once again, we should not invent concepts that we cannot link to fundamental political and normative questions, instead we should use concepts that are more politically sensitive and that allow us to identify and analyze how private and public authority changes and how this affects our traditional understanding of democracy.

**In what ways do soft law challenge the traditional concept of law and is soft law always soft?**

The concept of soft law is the subject of great debate among the legal scholars. This is not surprising since the very concept concerns the heart of the discipline, namely law. The problem is not so much how to distinguish it from hard law but from law itself. When does soft law stop being law? Legal critics of the use of soft law claim that law cannot be conceptualized along a continuum. According to the binary position there must be a strict distinction between law and non-law. The main reason for this posture is that soft law is considered to be dangerous because the relativization of normative values in international law raises illusory expectations of compliance with which no one is obliged to comply (Sztucki 1990). The use of soft law therefore tends to blur the distinction between what is legally binding and what is not and thereby erodes international law as a whole – 'gliding bindness' (Chinkin 2000:23). Bothe argues that the term 'law' is confusing when we speak of gentlemen's agreements, because they are considered to be politically binding rather than legally binding (Bothe, 1980). There is sometimes reluctance even among legal scholars who are positive toward soft law to talk about the concept! This disinclination could be explained by many factors, not least the fact that the concept is contested in the discipline which always requires a more careful use of a concept. A more pragmatic factor is the difficulty in determining whether a legal norm is legally binding.

Furthermore, our discussion on the concept among the group of authors showed that some of us would call soft law voluntary rules or legal norms. The difference in conceptualisations can

be explained by our various academic disciplines, especially between social science and legal studies. From a social scientist perspective soft law has to do with explicit and voluntary rules. They are not about implicit and institutionalised rules that we tend to follow without having to reflect on them, that is social norms (Brunsson and Jacobsson 2000). Another question is whether soft law evolves into social norms or if social norms generate soft law. From a legal scholar's perspective the concept of norm is more relevant than rule and the reason for this is that legal rules are considered to be linked to hard law. A lawyer would, therefore, talk of soft law as legal norms since that implies that the law is non-formal and non-legally binding[2]. Another discussion we had in the group was whether soft law always is soft? We agree with Abbott and Snidal that the "choice between hard law and soft law is not a binary one" (2000, p. 422). The meaning of soft law and its legal effects must therefore be decided from case to case (Snyder 1993). The literature on soft law also incorporates an effort to be more precise in the empirical analysis of law. In a special issue of *International Organization* (Goldstein *et al.* 2000) the authors use a continuum in which the level of legalization is determined depending on the level of obligation, precision and delegation. At one end of the continuum the level of obligation, precision and delegation is high (= hard law) and at the other end the level of obligation, precision and delegation is low (= soft law) (2000). We believe that these criteria do not contribute to clarifying the concept of soft law, because the possibilities of combinations across these two extremes are multiple. Hard law is not always attached to legal sanctions and it can often be as vague as soft law. Soft law, like standards, can on the other hand be specific and detailed (Brunsson and Jacobsson 2000).

The criterion of delegation implies that hard law agreements delegate "broad authority to a neutral entity for implementation of the agreed rules, including their interpretation, dispute settlement, and (possibly) further rule making" (Goldstein *et al*. 2000, p.387). This criterion is also problematic because soft and hard law often depend on each other, making the question of a third and neutral party difficult to apply. Indeed, soft law lies somewhere between general policy statements and legizlation (Cini, 2001). We, therefore, adhere to Snyder's (1993) definition of soft law quoted above. For the explorative purposes of the book, however, there was little point in being more precise than Snyder's definition. Soft and hard

[2] I would like to thank Sia Spiliopoulou Åkermark for making this point.

law can instead be positioned on a 'continuum that itself is constantly evolving' (Chinkin 2000:32). We should, instead, be interested in the relationship between these two ideal types of law.

**What are the important research questions for political scientists on soft law?**

I have already mentioned that soft law raises questions of power, authority, legitimacy and democracy. I believe that it is important that political scientists are interested in law-making from a political perspective and do not leave this research area to lawyers only. Academics who are not legal scholars sometimes claim that we should completely avoid the term 'law' and speak instead of soft policy, soft regulation, or soft instruments (Zito *et al*. 2003). Considering the broad definition of soft law that is used in this volume, these alternative concepts are, in fact, similar to soft law. Indeed, there seems to be a reluctance to talk about voluntary rules in terms of law. 'While it is an important and dynamic area in the EU governance picture, soft law does not encompass all the new instruments present in the system" (Zito *et al*. 2003:511). A hesitancy to use soft law can also be a function of a narrow view of law and politics. It is not necessarily the institutional base that decides whether the activity is legal or political. For instance, courts can be highly political in their rulings and political institutions engage in legal activities. The crucial criteria must instead be the effects of the activities in the spheres of law and politics rather than the source of the activities.

In the next two sections of the paper I address the sociological aspects of soft law and how soft law can be democratically legitimate. During recent years there has been a huge literature on the virtues of the Open method of coordination (OMC) in the EU. It is argued that this method is characterised by inclusiveness, learning and deliberation (Jacobsson 2004). It has therefore been argued that these types of horizontal networks can decrease the democratic deficit in the EU (cf Eriksen and Fossum 2005). In the first section below I also mention two other examples of soft law in international organisations – the OECD and the Global Compact initiative in the UN. In the last section of the paper I present a normative assessment of the OMC in the EU. My argument is that the OMC can be regarded as a democratic problem rather than as the solution to the democratic deficit in the EU.

**How does soft law evolve and what are the more sociological aspects of having soft modes of regulation? Do processes of soft law-making generate more of deliberation and learning?**

Kerstin Jacobsson argues that it is not the guidelines and recommendations within the OMC that are important but the accompanying social practices and institutional structures. The OMC should therefore be analysed as a cognitive and normative process in which confidence-building, exchanges of experience and deliberation in the committees and policy networks play a critical role. An emerging European employment discourse forms the participants' views on the causality of important political and economic issues. Discourses also consist of myths and stories. Rather than dismissing soft law as symbolic politics consisting only of talk, we can analyse it as creating meaning. The importance of symbols and rituals helps to create a common understanding of how the political and economic order is conceptualized (Jacobsson 2004).

Myth and story making is also central in the OECD. Martin Marcussen analyses how soft law in the OECD can be interpreted as cognitive and normative governance in order to change social behaviour among Member States and among the OECD's non-members. Cognitive governance is the regular production of discourse about the OECD and its Member States throughout the world. An important mode of governance is to create myths and stories about past and future challenges. Normative governance entails the diffusion of shared knowledge and ideas through a cyclical peer review process, which has been a successful mode of governance because the OECD is regarded as an ideational authority in the Member States. The OECD applies various surveillance mechanisms with the aim of making its Members States comply with common rules and standards. As in the case of OMC there are no legal sanctions, so it must rely upon political and social pressure to compel its members to follow the rules. There is a moral force in the organization that can be described in terms of the logic of appropriateness: Member States follow the rules because of peer pressure.

Kerstin Sahlin-Andersson's case of the Global Compact suggests that globalization has eroded the traditional command and control and increased the need for network governance. Soft law processes create a close relationship between public and private spheres, which are

dependent upon each other in order for the agreement to function. These close relationships between public and private actors open the door to intersectional agreements that do not make it clear who is regulating whom. Instead, states, international organizations, business corporations and non-governmental organizations may be simultaneously involved in the formation of regulations and be subject to regulations that are formed in networks.

In summary, several chapters in the volume point to the fact that soft law is related to social practices. Whereas hard law can have virtually immediate effects, soft law is more closely related to socialization, identity-building and other social practices. The use of soft law often aims at turning rules into norms, which could be far more effective than legal sanctions in making actors comply. With soft law, rules are followed because social activities establish causal linkages and guidance for future action is presented. It is, however, too early to conclude what the kind of long-term effects the OMC may have on deliberation and learning. We need longer time series for this kind of assessment and evaluation.

**Can soft law be accommodated with liberal democracy and its emphasis on accountability or can soft law only be legitimised by efficiency?**[3]

In EU practice soft law is often discussed in terms of the OMC. We can identify three different policies in which the OMC is used. The first group consists of policies in which the OMC is the preferred method: broad economic policy guidelines, European employment strategy, social inclusion and pensions (Radaelli 2003a). In some of these areas, such as pensions, the use of the OMC is embryonic (Radaelli 2003a). The second group includes policy areas in which the OMC could be and is intended to be used in the future: innovation and Research and Technological Development (RTD) policies, education, information society, environmental policy and health care (Radaelli 2003a). During recent years new forms of policy instruments such as NEPIs (new environmental policy instruments) have been used in environmental policy (Jordan et al. 2003). The third and last group is characterized by Radaelli as ‘open coordination in disguise’, because the OMC has been used in the direct taxation policy area but without any ‘deliberate intention to use the method’ (Radaelli 2003a,

[3] This section is based on a study in the book that was conducted by me and a master student, Henrik Frykman.

p. 32; Radaelli 2003b). As Radaelli has pointed out the use of the method within these different policy areas is seldom treaty-based, as in the areas of innovation and taxation. In fact it is 'being used both in policy areas where there is a solid treaty base (employment) and in areas in which the treaty base is thin or non-existent' (Radaelli 2003a, p. 32). One might well ask, therefore, how deviations from the community method are perceived by the EU institutions and how and when the OMC should be used. I am, however, less focused on special policy areas than on the general principle of the EU institutions' discussion of soft law.

Normative arguments for and against soft law consist of different conceptualizations of democracy. A good starting point in the conceptual jungle of democracy is Habermas's (1995) distinction between liberal, republican and deliberative democracy. These terms are not mutually exclusive, but they represent differences in emphasis. The liberal tradition emphasizes accountability in a problem-solving entity; the republican tradition emphasizes participation by actors within a value-based community; and the deliberative trait of democracy emphasizes deliberation in a rights-based entity (see Table 8.1)

*Table 8.1 Three conceptualizations of democracy*

| Notion of democracy | Conception of rationality | Democratic standard | Type of entity |
|---|---|---|---|
| Liberal-aggregative | Instrumental/strategic | Accountability | Problem-solving |
| Republican-communitarian | Social context | Participation | Value-based |
| Cosmopolitan-discourse/deliberative | Communicative | Deliberation | Rights-based |

*Source:* Eriksen and Fossum 2002.

Furthermore, liberal, republican and deliberative democracy stand for different views on democratic legitimacy in the EU and on the kind of reforms that are viewed as necessary. The liberal view is that of constitutionalism and of a federal political order with strong supranational institutions. A more intergovernmental order of the EU is also part of a liberal

democratic view. The crucial source of democracy is representative democracy and its parliamentary institutions. The overall description of this vision of the EU is that it should be governed *by* the people.

The republican and communitarian view on democracy is another trait of government *by* the people, although it is ideationally and philosophically rooted in a different tradition than is liberal democracy. This tradition emphasizes the importance of a national source for the EU's democratic legitimacy. The reason for this intergovernmental stand is the lack of a European demos, which is seen as a necessary condition for establishing participatory democracy. More federal visions are also presented within this tradition, in the hope that common European institutions will evolve into a common European identity. This trickle-down argument is especially salient among the early European federalists and within the neofunctionalist research tradition (Haas [1958] 1968).

The deliberative democratic tradition is focused to a lesser degree than are the other two traditions on the parliamentarian systems of governance at the national or at the European level. It has therefore been labelled as a tradition that emphasizes government *of* the people. There are, however, different understandings, depending on whether deliberative democracy is part of the system of representative democracy or if it challenges the more traditional way of organizing democracy (Dryzek 2000; Eriksen and Fossum 2000). Indeed, the deliberative turn in contemporary democracy is sometimes linked to representative institutions and is sometimes seen as part of idealized deliberations among people (Goodin 2003; see also Dryzek 2000).[1] David Held's (1995) vision of a cosmopolitan democracy has been partly replaced by non-hierarchical and less state-centred visions of a global democratic order. Concepts like associative democracy (Hirst 1994, 1997, 2000; Zurn 2000), post-sovereign global governance (Scholte 2000) and reflexive democracy (Barnett 1996) entail a more societal and deliberative democracy than that offered by the traditional model of representative and majority-based democracy. The lack of a traditional chain of command and control makes communication and participation even more important than majority rules and the aggregation of preferences at elections. Majoritarian decision-making is often regarded as impossible to achieve outside the nation-state, as it requires some form of collective identity that includes trust and solidarity (Zürn 2000).

One further rationale for replacing representative democracy is the fact that the political issues change. ‘We are less concerned with growing enough food, or producing enough houses, than with the effect of modern agri-business and the consequence of urbanisation’ (Barnett 1996, p. 171). Drawing from Beck’s argument of the risk society the party politics of representative democracy was constructed to deal with non-reflexive issues and not with the new modernity of how the risk society is reflexive. ‘Humans have left the cycle of fate and entered a world whose parameters are now man-made’ (Barnett 1996, p. 172; Dryzek 1999)

Do the processes of deliberation require a collective and ethnic community, as is argued by the republican and communitarian understanding of democracy, or is a sense of political community enough to establish systems of argumentative consensus-building? Drawing from the Habermas notion of *verfassung patriotism* it is often claimed that a political community does not need to be based upon ethnic and cultural values. Indeed, deliberative democracy is not considered to require a European demos. Deliberative democracy therefore gives hope to those who wish that the EU should build structures of direct democratic legitimacy and want to avoid an EU that is only occupied with market-making and output legitimacy (Eriksen and Fossum 2002).

How then could soft law be accommodated with these three notions of democracy? Liberal democracy emphasizes the role of parliaments and grants that ‘policy-making consists in the aggregation of individual preferences by governors held accountable before the citizens in regular free and fair elections’ (Goldmann 2001, p. 143). Democracy requires a clear division of authority, transparency, accountability and public debate. One problem with accommodating soft law to liberal democracy, therefore, is that the essential participants in policy formulation, based on soft law or measures that will result in soft law, are officials and other experts and not elected politicians. Inherent in soft law, furthermore, is a vagueness, both in form (who is accountable) and in substance (the political commitments) that could impair accountability, transparency and a public debate. The conclusion is, therefore, that there could be a misfit between soft law and liberal democracy unless the delegated power to officials and other non-elected actors is closely monitored and unless lawmaking is transparent and open for public scrutiny. A principal-agent relationship also requires that the powers delegated from the principal to the agent are well defined, which is seldom the case

with soft law. The difficulty of predictability is also a problem from the perspective of rule of law.

However, there could be a fit between soft law and liberal democracy if there were an emphasis on efficiency rather than input legitimacy. One important reason for choosing soft law is that it is considered to be more effective in output legitimacy and that one can escape from political deadlocks in politically controversial issues. During political controversy, the arena shifts from political decision-making to technocratic decision-making, which makes it easier to reach agreement on politically controversial issues (Héritier 1999; Scharpf 1999). It could also be the case that soft law is the only possible regulatory instrument, as in policy areas where the EU has limited treaty-based competence.

The relationship between soft law and a communitarian/value-based community is a complex one. Policy-making is, according to a communitarian theory, an expression of a common identity. One assumption is, therefore, that the development of soft law requires a common understanding of crucial values in order to be able to understand each other's arguments and reasoning and to be able to reach any common decision. Moreover, a successful implementation of rules that are not based on legal sanctions is probably also dependent on a common understanding of essential values. Consequently, hard law is important when there is a lack of common cultural and social values, whereas soft law is only possible and effective if common cultural and social values exist in the decision-making system.

Soft law could easily be accommodated in a deliberative democracy that is weakly linked to the traditional representative democracy (Dryzek 1999, 2000). It is more difficult, however, to see how soft law can fit in into a deliberative democracy that is thought to require more procedural regulations and legal requirements (Habermas 1997). The view of soft law differs, then, depending on the interpretation of deliberative democracy.

How can we empirically establish the type of democratic principles that are expressed by the actors? We use the distinction between government *by* the people, and government *of* the people in order to categorize the empirical statements. Government *by* the people includes

both the liberal and the republican/communitarian models, both of which focus on a representative (national or European) democratic model, even though they emphasize different democratic standards. Statements that entail participation of the civil society and other forms of deliberative qualities are interpreted as government *of* the people. I am aware that the deliberative aspects in the empirical analysis can be interpreted both in terms of representative democracy (deliberative 'light')[2] and in terms of a more radical break with the traditional state-centred democratic model.

Furthermore, we make a distinction between statements that consider soft law as a form of pre-law and statements that view soft law as a more independent form of rules. A pre-law view of soft law can be interpreted as belonging to government *by* the people because soft law will eventually become hard law and be part of the traditional community method in the EU. In contrast, statements emphasizing the view that soft law is a more independent form of rules and rule-making activity can be interpreted as belonging to the tradition of government *of* the people. Hence, soft law is part of a deliberative understanding of democracy.

In the empirical section of the chapter we studied how the European Commission, the European Parliament, the European Council and the EU's draft of a Constitutional Treaty submitted by the European Convention discuss soft law and democracy. We found that the issue of soft law and democracy is more or less a non-issue in the EU documents. Why is this so? Is soft law regarded as harmless – a marginal problem in regard to the broader question of the EU's democratic deficit? Or are the limited references to soft law and democratic values a typical reaction on the part of the EU institutions when they are confronted with a politically sensitive issue? Do they avoid the issue with a wait-and-see strategy until there is no way back? Or is the lack of discussion a sign of a tacit approval of soft law and its positive effects on EU decision-making that will enhance the Union's democratic legitimacy?

In the texts that we have found on soft law, it is clear that the EU institutions do not regard soft law as part of a more governance-like policy and decision-making system. Instead, they emphasize how soft law complements the community method and the traditional steering mode of command and control. Does that also mean that the institutions focus on efficiency and problem-solving capacity rather than on participation and deliberation? Yes and no. The

Commission and the Parliament express the view that soft law can be a good alternative to hard law for reaching decisions. The documents speak less of deliberation in reference to soft law and more of how soft law complements traditional representative democracy. The question of accountability is also crucial when the European Parliament criticizes the use of soft law by the Council. However, it also seems to emphasize other values in using soft law – deliberation light, although this is only vaguely formulated. Thus, we are dealing with government *by* the people – a system of representative democracy – and its emphasis on accountability; rather than government *of* the people and its emphasis on deliberation and societal democracy.

Our empirical study suggests that the virtues of the OMC – its inclusiveness and deliberation – have been put forward more often by academics than by practitioners. Have academics made a virtue out of a necessity that will be taken up by the practitioners in order for the latter to legitimize the use of guidelines and peer review that otherwise would have been criticized from a democratic perspective? Or does the academic analysis point to the fact that soft law will result in long-term effects as suggested by Kerstin Jacobsson (2004)?

The answer to these questions depends on how one perceives change in the European Union. It can be argued that changes in the EU are not at the history-making level. The practice influences the constitutionalization level and not vice versa, as we are often taught in textbooks on the Union. In that case it can be argued that the use of soft law will begin as a complement to the community method and that it will develop into a more deliberative and knowledge-sharing process. Indeed, the cognitive effects take time. The strategic and instrumental rationality will evolve into a more communicative rationality (see Figure 1). Can this process of change occur without a common identity consisting of common values? There seems to be no assumption in the official EU documents that the use of soft law requires a common cultural identity. In line with the argument by Eriksen and Fossum, it is possible that actors in soft law-developing processes will create a value-based Union from below rather than from above (Eriksen and Fossum 2002).

Moreover, in some cases in which voluntary rules are used it is the very fact that members of the EU discuss common concerns that is interesting. One case in point is tax policy. ‘For the

first time in history', says Radaelli (2003b; p. 15), 'the members of the EU have accepted the idea that reciprocal discussion of domestic tax regimes is acceptable, legitimate and useful. What was considered as utterly inconceivable' is a few years later a central activity. We can therefore detect the emergence of a discourse in various policy areas and more generally, that soft law is a legitimate way to co-operate. Radaelli (2003b) argues that in the case of tax policy a convergence of language has occurred among policy-makers. The next question, then, is whether this change in discussion has also resulted in a change in actions?

Moreover, what if soft law making becomes an important and independent way of regulating policy areas that will not evolve into hard law as the EU institutions seem to assume? Drawing from Héritier's (1999) work on subterfuge and EU creativity in reaching decisions it is possible that the gap between the formal constitution and the day-to-day activities will increase. The ambition to escape from deadlock can legitimize a system that relies on guidelines, recommendations and other types of soft law. The democratic problem with this system is that the EU's constitutional level categorizes such rules into the traditional steering system of command and control which has a very weak monitoring role over rules that are not decided according to the community method. We could therefore end up with two parallel systems: government and governance. The former system is democratically legitimate, although not without its problems, but the latter system will have a much weaker, democratic base, if any.

Concluding remarks

Is soft law a transitional mode of regulation? In reviewing the book I have come to six general conclusions:

- soft law may precede hard law
- soft law has the potential for independence
- soft law can be disguised
- soft law is closely linked to politics
- international organizations can modernize themselves through the use of soft law
- soft law provides room for flexibility and unintended consequences.

Further research should focus more on how soft law

- empowers private actors
- challenge the liberal and representative democratic model.

To avoid making this paper too long I will develop my conclusions at the seminar in Darmstadt!

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NOTES

[1]. When deliberative democracy is a form of participatory democracy it is interpreted differently than when it stands for something new in democratic thinking. John Dryzek makes the distinction between liberal constitutionalist deliberative democracy and discursive democracy that seems to capture the important distinction between a light version of deliberation and a more profound break with state-centred democracy (Dryzek 2000).

[2]. We would like to thank Kerstin Jacobsson for suggesting this term, even though we believe that we use it in a different sense.