

Soft Law Never Dies

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‘Soft law’ is a fact of public life. Cast in terms of competing demands for flexibility and responsiveness, and consistency and coherence, official business could not sensibly be carried on without, to adopt a generous working definition, rules of conduct or pointers and commitments which are not directly legally enforceable but which may be treated as binding in particular legal or institutional contexts.¹ While the phenomenon is commonly associated with international governance, it has increasingly resonated in public law scholarship if under different labels. An uncodified constitution, famous since Victorian times for conventions of the constitution bearing on the behaviour of, and relations between, principal organs of the State,² is a natural habitat.

Examining a range of usages, this essay looks at soft law as an instrument for, and barometer of, constitutional and administrative development over the course of a lifetime. Reflecting and reinforcing the notion of legalisation in contemporary society,³ commonly observed in terms of more legislation and more jurisprudence, as well as more lawyers, it pursues the idea of ‘soft law abounding’. While naturally vulnerable to the growth of formal legal norms, soft law techniques are also apt to be stimulated by it, in part by way of supplement and/or experiment, in part by way of counter-reaction.

The pervasive sense of ambiguity, as also the broad spectrum of rules, agreements, communications, etc. familiarly in play, is the other main starting point. Putting to one side the simplistic view of polar opposites, an influential institutionalist model references different dimensions to legalisation, whereby law is characterised as ‘harder’ or ‘softer’ according to the degree and precision of the obligations created, as well as the extent of involvement by a court or tribunal.⁴ Factors which point in a particular direction, a strong demand for authoritative interpretation and/or the constitutional symbolism of formal law perhaps, or conversely a preference for experimentation or ‘learning by doing’,

¹In enlarging on rules of conduct while up-fronting legal or institutional relevance, this formulation is wider and stricter than the well-known definition from which it is adapted: F. Snyder, ‘Soft Law and Institutional Practice in the European Community’ in S. Martin (ed.), *The Construction of Europe* (Kluwer Academic, 1994), p. 198.

²A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, E. C. S. Wade (ed.) (Macmillan, 10th edn., 1959); G. Marshall, *Constitutional Conventions* (OUP, 1984).

³M. Galanter, ‘Law Abounding: Legalisation around the North Atlantic’ (1992) 55 *MLR* 1.

⁴K. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organisation* 421.

may then be identified in functionalist fashion.⁵ It is well to remember however that while the choice of soft law technique will often be mundane, it may on occasion be a matter of significant political and/or legal dispute.

A chief theme of the essay is the way in which in different periods and different policy contexts certain types of soft law take on a new importance. Normative concerns relating to the creation and deployment of soft law technique are raised accordingly. As well as the classic bureaucratic modalities of rule formulation and application, particular attention is paid to the need for co-operative and co-ordinating arrangements associated with latter-day dynamics of constitutional and administrative fragmentation and multi-level governance. While the UK is the chief focus, consideration must also be given to the EU, where the use of soft law scales new heights.

1. Extended State

Going back forty years or so, we find public law scholars in the UK making determined efforts to rebalance the discipline with bottom-up perspectives. Taking inspiration from the United States,⁶ this meant focusing on, in American terminology, ‘bureaucratic law’;⁷ and, more particularly, on the division between ‘rules’, ‘principles’ and ‘standards’,⁸ and the potential for better forms of rule-making. The twin-sided nature of internal guidance and policy instructions, low down in the formal legal hierarchy but typically the first port-of-call for officials, commanded close attention.⁹ Intimately bound-up with demands for entitlements to public provision, emphasis was duly placed on structuring, confining and checking the exercise of official discretion. The less pleasant areas of the extended post-war administrative State were a major target: policing of course, and then on through the seeming vagaries of, for example, social security administration and immigration control.¹⁰

In fact, some relevant themes had already been identified. Take the close interplay of hard law in general, and delegated legislation in the form of statutory instruments in particular, with suitably Weberian or internal hierarchical exercises of control through instruction, advice and guidance. While noting that classification depended on which definition of law is adopted,

⁵ G. Shaffer and M. Pollack, ‘Hard and Soft Law’ in J. Dunoff and M. Pollack, *Interdisciplinary Perspectives on International Law and International Relations* (CUP, 2013),

⁶ K. Culp Davis, *Discretionary Justice* (Greenwood Press, 1969).

⁷ J. Mashaw, *Bureaucratic Justice: Managing social security claims* (Yale University Press, 1983).

⁸ J. Jowell, ‘The legal control of administrative discretion’ [1973] *PL* 178.

⁹ R. Lister, *Justice for the Claimant: A study of Supplementary Benefit Appeal Tribunals* (CPAG, 1974).

¹⁰ See e.g., C. Harlow and R. Rawlings, *Law and Administration* (Weidenfeld and Nicolson, 1984), Chs. 16-19.

an issue which has duly morphed into never-ending theoretical dispute wherever the label ‘soft law’ appears,¹¹ the first English administrative law text of the post-war period made the practical importance of bureaucratic rules abundantly clear. As this determinedly functionalist account explained, both the control of administrative authorities and the ways in which they exercised their powers were ‘very often ... more a matter of administrative practice’. Readers should beware ‘the fallacy of forcing a contrast between law and practice at the point where the two meet’.¹²

Then there is the typically ad hoc and piecemeal nature of the development in the UK Constitution, which bears directly on this functional mix. As a means of promoting efficiency and consistency in the administrative process, while avoiding technical language, and also the elements of cost, delay and rigidity associated even with statutory instruments, particular soft law usages often have much to commend them. On the other hand, as the inter-war Donoughmore Committee on Ministers’ Powers lamented, ‘constitutional practice’ on the making (or otherwise) of delegated legislation had ‘grown up gradually ... without any logical system’.¹³ Part of, and inevitably reflected in, the mass of paper circulating in government offices, this was the ragbag of rules, regulations, orders, etc.

Although historically blighted by wild claims of ‘administrative lawlessness’,¹⁴ a healthy scepticism about executive practices with law-like effects has deep roots in the common law. Bureaucratic rules bearing on the relation of the State and the individual are apt to court controversy and, not least on a ‘thin’ version of the rule of law, rightly so. Seemingly beneficent administrative practices may be objectionable on grounds of preferential treatment and, depending in part on the extent to which the judicial review system is geared to protection of the individual, be more difficult to challenge. Such themes reached the august pages of the *Law Quarterly Review* some seventy years ago.¹⁵ ‘Administrative quasi-legislation’ was the phrase coined to point up the significance of extra-statutory arrangements such as tax concessions. The analysis was more prescient than the

¹¹ Not least in its early terminological home: M Goldmann, ‘We need to cut off the head of the king: past, present and future approaches to international soft law’ (2012) 25 *Leiden J. of Int. Law* 335. See also, R Creyke and J McMillan, ‘Soft Law v Hard Law’ in L. Pearson, C. Harlow and M. Taggart (eds.), *Administrative Law in a Changing State* (Hart Publishing, 2008).

¹² J.A.G. Griffith and H. Street, *Principles of Administrative Law* (Pitman, 1952), p. 6. See further, C. Harlow and R. Rawlings, ‘Administrative Law in Context: Restoring a Lost Connection’ (2014) *PL* 28.

¹³ Report of the Committee on Ministers’ Powers, Cmnd 4050 (1932), p. 16.

¹⁴ Lord Hewart, *The New Despotism* (Ernest Benn, 1929).

¹⁵ R. Megarry, ‘Administrative quasi-legislation’ (1944) 60 *LQR* 125. See also, C. K. Allen, *Law and Orders* (Stevens, 1945).

author might have imagined in this age of the card index. On from a world largely bounded by statutes, statutory devices and case law, ‘administrative quasi-legislation’ was part of ‘an expanding universe’ confronting the legal practitioner.

Codes and circulars, policy notes and guidance, official notices and practice statements, etc. – succeeding decades would indeed witness ‘an exponential growth’ of quasi-legislation ‘in a plethora of forms’. The term itself became part of the English public law vocabulary.¹⁶ And the more that was seen, the more blurred things looked. Just as statutes might acquire an official gloss by policy statements, so it was realised that soft law could have varying degrees of legal force short of direct enforceability through judicial proceedings. Or as might now be said, ‘steering’ the behaviour of others through means such as interpretative guidance, designating relevant criteria, and evidence of good practice, is all part of the ‘practical effects’. In this age of FOI and ICT, however, it is hard to convey how much digging was required from public lawyers in a UK polity typified by official secrecy. A chief normative concern informing bottom-up approaches was the inaccessibility of much soft law material. In turn, reflecting concerns familiarly bound up in many constitutional systems with separation of powers, this underscored the lack of legislative - democratic - control. Perhaps hopefully, a dose of ‘government in the sunshine’ might not only broaden horizons but also serve as a valuable discipline.¹⁷

Fitting with a broad post-war consensus over the welfare state and mixed economy,¹⁸ much was still heard of ‘voluntarism’. Take central-local government relations, where the commendable notion that voluntary acceptance of rules is preferable to legal enforcement or justiciability held much sway.¹⁹ As an instrument for co-operation and co-ordination in a burgeoning sector, ‘government by circular’ was something of a leitmotif of British public administration in the mid-20th century. Across the broad spectrum of persuasion and compulsion, things could hardly remain static however. As epitomised by the rise of statutory codes of practice, in particular delivering different government policies in the workplace, a trend developed of harder-edged forms of quasi-legislation. Evidently, trust was in increasingly short supply.

¹⁶ G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, 1987), p. 1. See also, R. Baldwin and B. Houghton, ‘Circular arguments: the status and legitimacy of administrative rules’ (1986) *PL* 239.

¹⁷ Notwithstanding the absence in the UK of an American-style Administrative Procedure Act; see W. West, ‘Administrative rule-making: An old and emerging literature’ (2005) 65 *Pub. Admin. Review* 655.

¹⁸ A. Shonfield, *Modern Capitalism* (OUP, 1965).

¹⁹ J. Griffith, *Central Departments and Local Authorities* (Allen and Unwin, 1966).

A muted role for the courts in the constitution had also benefited the many architects of quasi-legislation. There was the occasional judicial grump or expression of puzzlement about circulars for example,²⁰ but for many years little more than that. The totemic case of *British Oxygen*²¹ furthered the cause of bureaucratic rules by confirming that statutory discretion included discretion to make them as an expression of policy. Provided then the official mind was not entirely closed to exceptional circumstance, coherent and consistent guidance for dealing with multiple applications passed judicial muster. This was welcome recognition of the practical realities of modern administration.

2. Shake-up time

It is during the long years of Conservative government from 1979 that the now standard vocabulary of ‘soft law’ replaces that of ‘quasi-legislation’. No doubt this reflects a growing internationalisation of public law;²² and, more particularly, the burgeoning forces in this period of European integration. Rendered against the backdrop of a more globalised economy, and pointing up important means for aiding processes of convergence, the determinedly ductile term thus became standard currency in these related spheres in the 1980s.²³ Further however, it could encompass wider usages associated with the fashion for New Public Management (NPM) and the ‘hollowing out of the state’²⁴ or passage of central government functions sideways to agencies and business as well as upwards to the EU. Surprising as it may sound, soft law then was an important component of the ‘Thatcher Revolution’.

Take the flag-ship enterprise of sharpening policy performance by carving out executive bodies from monolithic central departments. Originally formulated in terms of ‘next steps agencies’, in the long view it constituted a standard twin-track methodology of formalising administrative arrangements and, by denying a separate statutory base, avoiding justiciability. Behind this lies the rise of ‘pseudo-contract’, which denotes the use in public administration of contract-type arrangements which are not true contracts in the legal sense of agreements enforceable in the courts.²⁵ Another example of soft law as a means of

²⁰ See e.g. *Blackpool Corporation v Locker* [1948] 1 KB 349 and *Patchett v Leatham* (1949) 65 TLR 69.

²¹ *British Oxygen Co Ltd v Ministry of Technology* [1970] 3 WLR 488.

²² D. Feldman, ‘The Internationalization of Public Law and its Impact on the UK’ in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (OUP, 7th edn, 2011).

²³ C. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *ICLQ* 850; K. Wellens and G. Borchart, ‘Soft Law in EC Law’ (1989) 14 *EL Rev* 267.

²⁴ R. Rhodes, ‘The hollowing out of the state: The changing nature of the public service in Britain’ (1994) 65 *Pol. Q.* 138.

²⁵ Harlow and Rawlings, ‘Law and Administration’, 2nd edn 1998, ch. 8. See further, A. Davies, *Accountability: A public law analysis of government by contract* (OUP, 2001).

modelling institutional relations, it is the realm of published framework documents establishing mandate, budget, targets, etc. Nor could the constitutional significance be gainsaid, as some sharp controversy about ministerial accountability in relation to these arm's length bodies demonstrates.²⁶ Predictably, the issue rumbles in light of the UK constitutional fundamental of parliamentary government; and the more so, in view of newly assertive parliamentary committees.²⁷

Alternatively, take privatisation and the establishment of the 'Ofdogs', a new breed of statutory agencies effectively tasked with light-touch regulation and/or promotion of competition for the utilities. There is again a dual dynamic: not only the challenge to pre-existing informal means of 'club government' in vital sectors of the economy,²⁸ but also an attempt to avoid the disruptive potential of litigation, even perhaps American-style 'adversarial legalism', in the regulatory process.²⁹ Designed against the backdrop of a strengthening role for judicial review in the Constitution, the statutory template was highly permissive in character: broad mandate and bare statutory requirements on which it was difficult to hang claims of unlawfulness. Conditions then were ripe for a vigorous growth of soft law through the exercise of agency discretion to make procedural rules; in particular, when Ofdogs sought to bolster regulatory legitimacy by trumpeting good governance values of transparency, participation and accountability.³⁰ Nonetheless, concerns about a lack of firm and consistent process and insufficient accountability especially to Parliament continued to dog this highly-personalised model of small agencies headed by a Director-General.³¹ Chief vehicle of a strong market ideology, it could not survive the more rounded quest for 'better regulation' eventually inaugurated under New Labour, which notably included clarification of key duties and heightened process requirements.³²

Soft law as a barometer of institutional relations is further illustrated in the Conservatives' dealings with local government. On from voluntarism: just as market disciplines should be unleashed, so competing sources of political power

²⁶ HC Deb, 19 March 1997, cols 1046–47.

²⁷ See e.g., Constitution Committee, *The Accountability of Civil Servants*, HL 61 (2012/13).

²⁸ M. Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (OUP, 2004).

²⁹ R. Rawlings, 'Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory' in D. Oliver, T Prosser and R Rawlings (eds.), *The Regulatory State: Constitutional Implications* (OUP, 2010).

³⁰ C. Foster, *Natural Justice and the Process of National Monopoly Regulation* (CIPFA, 1994).

³¹ Report of the Commission on the Regulation of Privatised Utilities (Hansard Society, 1996).

³² T. Prosser, 'The Powers and Accountability of Agencies and Regulators' in D. Feldman (ed.), *English Public Law* (OUP, 2nd edn., 2009).

were to be reined in. Though the transformation of persuasive guidelines into statutory provision was hardly new, the 1980s clearly mark a step-change in this assertion of central control, concentrated round, but not confined to, compulsory competitive tendering and local government finance.³³ A not insignificant part of the story, however, concerns the capacity of soft law to regenerate in different forms. In the light of ever more elaborate ‘hard law’ intervention, interpretive guidance, advice, and best practice statements abounded, further serving in the hands of the Audit Commission as a major conduit for the bracing functional values of efficiency, economy and effectiveness through the sector.³⁴ The intimate connection with the evaluative paraphernalia of benchmarking, performance indicators and league tables, which so shaped public service provision in this period,³⁵ is made apparent.

At one with broader dynamics of ‘juridification’, the discernible tendency to formalise and encapsulate social relations in terms of law,³⁶ it is also in this period that ‘tertiary rules’ becomes familiar in the public law lexicon.³⁷ Once more highlighting the grey zone beyond the exercise of secondary legislative power conferred under statute or prerogative, the usage testifies to a still-expanding range of soft law techniques with ‘the purpose or effect of influencing bureaucratic decision-making in non-trivial fashion’.³⁸ This particular development fits with the premium placed on NPM methodology, very dependent on rules for measuring, evaluating and controlling the work of subordinates.³⁹

Given an additional boost by the harnessing of self-regulatory systems, most obviously in the professions,⁴⁰ the trend of agencification is again relevant. Tertiary rule-making would be closely associated with the burgeoning range of bodies exercising statutory – public – power. Standing for specialisation grounded in multiple sources of rule-making authority, the process is indicative not only of great variety, but also heralds a leitmotif of our contemporary, commonly fragmented and less bounded, system of governance: inter-

³³ M. Loughlin, *Local Government in the Modern State* (Sweet & Maxwell, 1986).

³⁴ M. Radford, ‘Auditing for Change: Local Government and the Audit Commission’ (1991) 54 *MLR* 912.

³⁵ M. Power, *The Audit Explosion* (Demos, 1994).

³⁶ G. Teubner, ‘Juridification: Concepts, aspects, limits, solutions’ in G. Teubner (ed.), *Juridification of Social Spheres* (de Gruyter, 1988).

³⁷ R. Baldwin, *Rules and Government* (Clarendon Press, 1995). See also, C. McCrudden, ‘Codes in a Cold Climate’ (1988) 51 *MLR* 409.

³⁸ L. Sossin and C. Smith, ‘Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government’ (2003) 40 *Alberta Law Rev* 867, p. 871.

³⁹ C. Hood and C. Scott, ‘Bureaucratic regulation and new public management in the United Kingdom: Mirror-image developments?’ (1996) 23 *JLS* 321.

⁴⁰ R. Baggott, ‘Regulatory reform in Britain: The changing face of self-regulation’ (1989) 67 *Pub. Admin.* 436.

institutional soft law in the form of all those Memorandums of Understanding (MoUs).

Leading authorities in the process of widening and deepening the ambit of judicial review, a pair of cases sees the House of Lords chipping away at executive freedom of manoeuvre in relation to soft law. Effectively sanctioning the general practice in the *National Federation* case,⁴¹ the court accepted that a discretionary tax concession challenged by third parties was reasonable and realistic. Liberalising standing to sue in accordance with the public interest in administrative legality also sent the message of no blank cheque. The *GCHQ* case⁴² is twice relevant. A prime site for soft law technique, prerogative power would no longer constitute an entire judicial no-go area.⁴³ Boosted, the doctrine of legitimate expectation would give some usages of soft law a harder edge. Indeed, when subsequently extended to substantive expectations of service delivery,⁴⁴ it would prove particularly troublesome for public administration because of an inchoate jurisprudence.⁴⁵ The judicial contribution, however, must be kept in perspective. Amid the tough use of statutory provision, central-local relations duly became a ‘litigation hot-spot’. On the other hand, illustrating that much in the broad constitutional development passed the courts by, ‘judge-proofing’ the new modalities of regulation proved highly successful.

3. Speeding on

By the beginning of the century, visualisations of ‘soft law’ were becoming more and more stretched; the ‘expanding universe’ sometimes appeared to have no outer limit! One well-known account referred, for example, to ‘rules, manuals, directives, codes, guidelines, memoranda, correspondence, circulars, protocols, bulletins, employee handbooks and training materials’.⁴⁶ Practical effects yes, but not all of this documentation is quasi-legislation as previously conceived. Future historians will surely fasten on the fundamental changes in public decision-making and service delivery brought about by the introduction of ICT and the evolution of e-governance. On again from ‘tertiary rules’, such is the dizzying era of ‘fourth generation legislation’ in the form of computer programs or all those algorithms, decision-trees and checklists increasingly used in mass administrative systems.⁴⁷ Multiplying the problems of democratic – let

⁴¹ *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617.

⁴² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁴³ *R(Bancoult) v Secretary of State for Foreign Affairs* [2008] UKHL 61 benchmarks the subsequent development.

⁴⁴ *R v North and East Devon Health Authority, ex p. Coughlan* [2000] 2 WLR 622.

⁴⁵ Though see now *R(Patel) v General Medical Council* [2013] EWCA Civ 327.

⁴⁶ Sossin and Smith, ‘Hard Choices and Soft Law’, p. 871.

⁴⁷ R. de Mulder, ‘The digital revolution: From trias to tetras politica’ in I. Snellen and W. van de Donk (eds.), *Public Administration in an Information Age* (IOS Press, 1998).

alone judicial – control, the very precision denotes hard-edged forms of soft law. Computers, after all, speak the language of rules.

The seemingly unstoppable rise in public law of ‘risk regulation’⁴⁸ is another main driver. Such is the logic of a wide-ranging methodology predicated on setting regulatory standards via an assessment of risks of particular sectors and ordering regulatory activities by reference to the risks which particular operators pose to an agency’s goals. For confirmation, one need only look at the burgeoning websites of powerful public institutions like the Environment Agency and the Health and Safety Executive. In the guise of information for stakeholders, these are replete with examples of soft law ranging, along one axis, from the highly prescriptive to the indicative and voluntary; and, along another axis, from internal operational advice to guidance for the regulated and the public. Behind this lies the world-wide quest for so-called ‘better’ and/or ‘smart’ regulation,⁴⁹ founded on principles of proportionality, consistency and targeting, and transparency and accountability. Sometimes legislatively mandated, more often as in the case of the legislative process administratively so, impact assessment has rapidly emerged as a chief analytical device in the UK.⁵⁰ This is the stuff of templates geared to more or less expansively defined costs and benefits, as well as input and output processes of consultation, monitoring and compliance. Glossing over the functional limitations of measurement, IA thus stands for a (pseudo-)scientific pursuit of rational policy development - one which epitomises the strong enabling role of soft law technique in administrative procedure.

Building on the foundations laid in the Thatcher years, techniques of contractual governance are today so mainstreamed in UK public administration that they frequently go unremarked. All the more reason to point up the way in which, as a repository for rules, principles and standards, contract-style technique functions as a major source of regulation.⁵¹ The recent Supreme Court case of *New London College*⁵² is a useful touchstone, concerning as it does private provision of international educational services regulated by a system of licensing that mandates much regulatory activity by the market actor. Again sanctioning the widespread use of soft law forms, the Court rejected the argument that published guidelines setting out the requirements for the retention

⁴⁸ E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007).

⁴⁹ R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy and Practice* (OUP, 2nd edn. 2012).

⁵⁰ As in many other countries: OECD, *Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers* (2008).

⁵¹ Harlow and Rawlings, ‘Law and Administration’, 3rd edn. 2009, Ch. 8. See further, C. McCrudden, *Buying Social Justice* (OUP, 2007).

⁵² *R(New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51.

and grant of licences required express legislative authority. In adopting a broad view of the minister's ancillary and incidental powers, the majority fastened on her general statutory responsibility to administer the system of immigration control. Perhaps more worryingly in terms of effective judicial protection, the majority did not rule out the existence of substantial, residual, executive power analogous to the power of natural persons to do that which is not prohibited.⁵³

In reworking the relation of State and individual in open-ended and horizontal fashion, the Human Rights Act 1998 and the Equality Act 2010 neatly illustrate the propensity of particular types of statutory provision to foster large growths of soft law. Such is the never-ending struggle to 'mainstream' principles and values in the administrative process, as initially by a 'human rights task force' with special responsibility for producing core guidance for public bodies,⁵⁴ and subsequently through the 'guidance for all' made available on the website of the Equality and Human Rights Commission. It is also in the nature of the enterprise that wide-ranging public sector duties on eliminating discrimination and promoting equality of opportunity give a particular push to bureaucratic rule-making. Conversely, we see how soft law technique takes on additional (political) salience as a means of combatting (concerns about) mistaken compliance: so-called 'myth-busting advice' on how rights should be balanced.⁵⁵

Reflecting the great contemporary demand for transparency, and hence for writing things down, a further dynamic sees soft law technique gaining in prominence in terms of conventions and the place of the Executive in the Constitution. First published in the 1990s, the UK Government Ministerial Code is a textbook example of soft law as a medium for constitutional continuity and change. Buttressing and elaborating conventions through an informal process of codification is of the essence of the enterprise.⁵⁶ At one and the same time, the ground rules of ministerial responsibility in the Westminster system are rendered more specific and detailed; and, with optional assistance from an independent adviser, the Prime Minister's position as 'ultimate judge' of ministerial behaviour is reasserted.⁵⁷ 'A guide to laws, conventions and rules on the operation of government' finalised in 2011, the UK Government Cabinet

⁵³ See House of Lords Constitution Committee, *The pre-emption of Parliament*, HL 165 (2012/13), Ch. 3.

⁵⁴ Human Rights Task Force, *A New Era of Rights and Responsibilities: Core guidance for public authorities* (Home Office, 2000).

⁵⁵ Ministry of Justice, *Guidance on the Human Rights Act for Criminal Justice System Practitioners* (2007).

⁵⁶ N. Barber, 'Laws and Constitutional Conventions' (2009) 125 *LQR* 294. See further, D. Feldman, 'Constitutional Conventions' in M Qvortrup (ed.), *The British Constitution: Continuity and Change* (Hart Publishing, 2013).

⁵⁷ UK Cabinet Office, Ministerial Code (2010), paragraph 1.

Manual suitably illustrates the often intricate interplay between different types of legal, political and administrative instruments in the Constitution.⁵⁸ Highlighted by a controversial attempt to declare a convention on government formation, the Manual also serves to demonstrate the innate insider – Executive – advantages of soft law technique (and hence the particular importance of public consultation).⁵⁹ In seeking to provide an authoritative but necessarily brief sketch of the complex business of government, it further points up both the force and the descriptive limitations of soft law writing.

We are living through a crisis of trust, or so it is said.⁶⁰ Once more demonstrating the innate capacity of soft law technique for multi-tasking, one of the more attractive features of the contemporary constitutional landscape is the spread across the public sector of clearly articulated codes of behaviour - ethics - designed both to buttress institutional legitimacy and give public accountability a sharper cutting-edge. As one might expect, much in the development is events-driven, as notoriously in the case of parliamentarians. Key elements include the fact of multiple sources, older-established bodies like the Parliamentary Ombudsman⁶¹ as well as specially created ones such as the Committee on Standards in Public Life,⁶² the mutually supportive use of overarching principles of objectivity, impartiality, integrity and honesty; and the evident scope for statutory underpinning as latterly in the case of the Civil Service.⁶³ If it goes too far to speak, as one leading commentator does, of a politics-free dimension to the Constitution,⁶⁴ this characteristically earnest development well-illustrates the pioneering and colonising attributes of soft law technique.

Overshadowing everything in the UK Constitution today is the troubled state of the Union. An ‘Edinburgh Agreement’⁶⁵ positing a possible break-up was hardly what the architects of the 1998 ‘devolution settlement’ had in mind. Against this backdrop, the heavy premium placed on soft law in intergovernmental relations is all the more noteworthy. Further illustrating how particular usages take on a new importance in changing constitutional and

⁵⁸ UK Cabinet Office, *Cabinet Manual* (2011).

⁵⁹ House of Lords Constitution Committee, *The Cabinet Manual*, HL 107 (2010/11), Ch. 3. See also, A. McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71 *MLR* 853.

⁶⁰ O. O’Neill, *A Question of Trust* (BBC Reith Lectures, 2002).

⁶¹ Parliamentary and Health Service Ombudsman, *Principles of Good Administration* (2007).

⁶² CSPL, *Seven Principles of Public Life*, Cmnd. 2850, 1995.

⁶³ Constitutional Reform and Governance Act 2010, Chapter 1.

⁶⁴ D. Oliver, ‘The Politics-Free Dimension to the UK Constitution’ in ‘The British Constitution: Continuity and Change’.

⁶⁵ *Agreement between the United Kingdom Government and the Scottish Government on an Independence Referendum for Scotland* (October 2012); and see A. Tomkins, ‘Scotland’s Choice, Britain’s Future’ (2014) 130 *LQR* 215.

political climes, devolution to Scotland, Wales and Northern Ireland thus spawned another major species of ‘pseudo-contract’, so-called ‘concordatry’.⁶⁶ In a typically pragmatic approach to constitutional development, the demand to maintain good working relationships finds expression in myriad documentation on principles, structures and processes. There is even a hierarchy of sorts: the principal MoU⁶⁷ on basic desiderata of co-operation, consultation, co-ordination and respect for confidentiality and on essential political machinery (the Joint Ministerial Committee); overarching concordats with large multilateral elements, most notably on EU policy coordination; and bilateral concordats between individual UK departments and their counterparts centred on functional policy issues. Ad hoc and piecemeal development, lack of transparency, organisational skews in favour of the UK Government: major concerns originally raised continue to be voiced.⁶⁸ However, practical workings also confirm that considerations of administrative necessity and convenience play a major role in this sprawling field of parallel and interlocking powers, even in the face of political discord. Periodic review of the soft law construction underwrites processes of institutional learning and fine-tuning; disruptive forms of intergovernmental litigation have largely been avoided.⁶⁹ Looking forward, the hard-fought campaign and eventual ‘no’ vote in the Scottish independence referendum heralds a looser form of Union in which more is devolved to the Celtic lands (and perhaps in England). Primarily in bilateral fashion, but also increasingly perhaps under the auspices of the British-Irish Council,⁷⁰ soft law as an instrument of intergovernmental co-operation should continue to flourish in this cluttered Isle.

4. EU governance

The EU abounds in soft law instruments, ranging from declarations attached to treaties and high-level inter-institutional agreements to influential Commission recommendations and opinions, and on through to the much ‘softer’ mass of internal guidelines and instructions.⁷¹ In fact many of the purposes remind one of national as well as international practice: hierarchical control of a

⁶⁶ R. Rawlings, ‘Concordats of the Constitution’ (2000) 116 *LQR* 257.

⁶⁷ *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (current version, October 2013). For the original version, see Cm. 4444, 1999.

⁶⁸ A. Trench (ed.), *Devolution and Power in the United Kingdom* (Manchester UP, 2007).

⁶⁹ Though see on the complex Welsh model of conferred powers, *Local Government Byelaws (Wales) Bill 2012 - Attorney General Reference* [2012] UKSC 53; *Agricultural Sector (Wales) Bill – Attorney General Reference* [2014] UKSC 43.

⁷⁰ Established under strand 3 of the Belfast Agreement, Cm. 3883, 1998.

⁷¹ H. Hofmann, G. Rowe and A. Türk, *Administrative Law and Policy of the European Union* (OUP, 2011), especially Ch. 16.

bureaucracy, policy recommendations or guidelines, codes of practice for multiple actors, etc.⁷² Changing patterns again command attention as particular usages are accentuated in different domains and, referencing the expanded competence, in the EU context at large. Special mention must be made of attempts at the turn of the century to revivify the European project, associated with the Commission's famous White Paper on European Governance.⁷³ Representing a boost for soft law technique, much would be heard of an equally flexible rubric, 'new governance method', and hence the potentials for ranging beyond an official 'Community method' premised on formal legislative procedures and institutional balance.⁷⁴

The way in which soft law is shaped by situation is powerfully illustrated in the case of EU administration, which is to an unusual degree fragmented, not least in the light of Enlargement. A heavy premium is placed on so-called 'network governance'; committees to represent Member States, more or less informal arrangements of regulatory bodies and experts, and increasingly EU agencies, clutter the landscape. While apparent in all kinds of constitutional systems, the demand for effective means of communication, cooperation and coordination is magnified. Another luxuriant growth of soft law technique is identified, with as a natural habitat myriad forms of administrative procedure.⁷⁵ Again, there is no better example than the EU of the role of institutional politics. Take the question of hard law consultation requirements; transparently keen to impose them on Member States, the Commission unsurprisingly insists on the grave disadvantages of 'an overly-legalistic approach' in respect of its own procedures.⁷⁶ Duly pressed by the European Parliament,⁷⁷ the further question arises of introducing some kind of European Law of Administrative Procedure at Union level. Whether by way of compromise the Commission is tempted to accept a systematised set of 'Model Rules'⁷⁸ remains to be seen.

⁷² P Craig, *EU Administrative Law* (OUP, 2nd edn. 2011), Part 1.

⁷³ COM(2001) 428 final.

⁷⁴ J. Scott and D. Trubek (eds.), 'Law and New Approaches to Governance in Europe' (2002) 8 *ELJ* special issue.

⁷⁵ C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014).

⁷⁶ European Commission, Towards a Reinforced Culture of Consultation and Dialogue, COM(2002) 704 final, 10.

⁷⁷ European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the EU.

⁷⁸ H Hofmann et al (eds.), *Model Rules on EU Administrative Procedure* (Research Network on EU Administrative Law (ReNEUAL), 2014).

Normative debate over the uses and abuses of soft law technique has been particularly sharp in the EU context, and understandably so.⁷⁹ From the standpoint of the Commission, historically determinedly integrationist, soft governance forms hold out the prospect of avoiding legislative procedures it does not control, of pressing forward in areas of joint or limited competence, and, via procedural convergence and all that dissemination of best practice, working towards stronger forms of harmonisation. Conversely, for critics of the enterprise, there are clear and present dangers of disguised EU expansionism, coupled with major problems of democratic scrutiny, not least by national parliaments, and civil society. Then again, for those of us concerned to promote the values of pluralism and diversity in the European construction, soft law technique continues to offer solid advantages in terms of innate respect for difference in and among the Member States.

The Open Method of Coordination commands attention as a flagship of decentralised process. Officially hailed as ‘a means of spreading best practice and achieving greater convergence towards the main EU goals’, more particularly economic growth and social progress, OMC involves techniques familiar from NPM: benchmarks and performance indicators for the Member States, backed up with periodic monitoring, evaluation and peer review designed as mutual learning processes.⁸⁰ General objectives and guidelines for policy development and implementation underwrite this. As a way of ‘learning by doing’, and paying due respect to the principle of subsidiarity, OMC has much to commend it. Conversely, concerns about efficacy or practical results, as well as limited involvement by the Parliament and restricted participation by sub-state and non-state actors, are par for the course.⁸¹

Other important elements are highlighted here. The weak adjective cannot disguise the potentials for soft law with ‘sticks’ and ‘carrots’, for example through ‘naming and shaming’ or, more tangibly, financial resources. Beyond *imperium* or the formal command of law, we touch here on the great power of *dominium*: the deployment – or otherwise – of wealth in aid of policy objectives. Then there is the manifold scope for hybrids or mixes of forms: as, simply, when making guidelines is mandated. OMC has taken soft forms of governance to new heights; treaty articles and sector specific legislation helped

⁷⁹ For a sense of the wider discussion, see successively, T. Christiansen and S. Piattoni, (eds.), *Informal Governance in the European Union* (Edward Elgar, 2003); and T. Christiansen and C. Neuhold (eds.), *International Handbook on Informal Governance* (Edward Elgar, 2012).

⁸⁰ Lisbon European Council, Presidency Conclusions, 23 - 24 March 2000; and see E. Barcevičius, J. Weishaupt and J. Zeitlin (eds.), *Assessing the Open Method of Coordination* (Palgrave Macmillan, 2014).

⁸¹ A Harcourt, ‘Participatory gains and policy effectiveness’ (2013) 51 *JCMS* 667.

to provide a framework.⁸² Not before time, EU literature increasingly emphasises the complementarity of ‘new’ modes of soft governance and formal legal methods.⁸³

Major EU regulatory frameworks serve to illustrate significant soft law contributions. A thoroughgoing reform of competition procedures sees national bodies like the UK’s new Competition and Markets Authority actively engaged in enforcement of EU rules, while the Commission concentrates on big cases. While naturally providing powers, procedures and sanctions, the governing legislation⁸⁴ cedes space to the European Competition Network. Stretching across Union and Member State levels,⁸⁵ and designed for efficient case allocation and exchange of information and evidence, this grouping of enforcement bodies is increasingly seen taking on policy issues and generally promoting a common competition culture. Operating through countless meetings and a secure intranet and database, it is grounded in a Commission notice; the ECN has no formal legal personality. Evaluation is typically mixed: high scores for efficiency and effectiveness; good governance concerns over lack of transparency and external accountability. In *France Telecom*,⁸⁶ the General Court resisted the temptation to interfere in internal workings. In establishing the criteria for case allocation, the notice properly excluded individual rights to have a particular national authority investigate.⁸⁷

Multiplying soft law guidance is the natural concomitant of reform prioritising self-assessment; a feature underscored by the demand to explain the economic analysis now critical in competition enforcement. As against the adversarial legalism familiarly associated with antitrust, the Commission rightly prizes the potential of informal rules to ‘enhance the efficiency of investigations and ensure a high degree of transparency and predictability’,⁸⁸ Procedural soft law has both innovative and defensive roles to play in a regulatory domain long associated with ‘rights of the defence’ in a jurisprudence now extending to the EU Charter of Fundamental Rights. Echoing and commonly expanding on the formal legal protection, Commission best practice has burgeoned, together with

⁸² D. Trubek and L. Trubek, ‘Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination’ (2005) 11 *ELJ* 343.

⁸³ M Dawson, ‘Three waves of new governance in the European Union’ (2011) 36 *EL Rev* 208.

⁸⁴ Council Regulation 1/2003/EC on the Implementation of the Rules on Competition OJ L 1 (04.01.03).

⁸⁵ D. Gerardin, ‘Public Enforcement: The ECN’ in I. Lianos and D. Gerardin (eds.), *Handbook on European Competition Law*, Vol. 2 (Edward Elgar, 2013).

⁸⁶ Case T-339/04 *France Telecom v Commission* [2007] ECR II-521.

⁸⁷ See further, I. Maher and O. Stefan, ‘Competition Law in Europe: The Challenge of a Network Constitution’ in ‘The Regulatory State: Constitutional Implications’.

⁸⁸ European Commission, Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU C 308/06 (2011), [1].

more in-house checks for testing proposed enforcement action.⁸⁹ In the leading case of *Schindler*,⁹⁰ the Court of Justice sensibly rejected a challenge to the Commission's fining guidelines, which structure the exercise of discretion through mathematical formulae geared to the gravity and duration of infringements. The Regulation provided the legal basis for sanctions; no Treaty provision prohibits an institution from adopting such 'rules of practice'. Nor, in view of the dose of clarity, was the fact of broad discretion inconsistent with the rule of law.

Alternatively, take the recent drive for 'Banking Union', the realm of the much vaunted single supervisory mechanism (SSM), a complex set of institutional arrangements centred on the Eurozone. The European Central Bank (ECB) has dual responsibility for supervising big banks and for the general health of the system, while national authorities supervise other institutions.⁹¹ Testimony to the level of political concern, the governing legislation⁹² is full of provision in favour of co-ordination and co-operation across the tiers; thick procedural forms of soft law will follow on naturally. Two usages stand out however. The key constitutional issue of the ECB's accountability to the European Parliament (EP) for its new role is classic territory for an inter-institutional agreement.⁹³ Cast in terms of competing demands for confidentiality and transparency, it is certain to be tested. The UK meanwhile, enjoying the biggest share of EU financial services business through the City of London, famously shows no intention of joining the Eurozone/SSM. Close cooperation between the ECB and the Bank of England will be vital for effective prudential supervision in the Single Market. Denoting the inconvenient truth of a dual supervisory system, this will rest on MoUs.⁹⁴

Conclusion

Enough has been said to show why public lawyers, or at least those interested in the real world of public power, should take soft law seriously. At one level, the day-to-day functioning of the constitutional and administrative law system can only properly be understood with reference to the broader mass of soft law usages. Notably, the scale and continuing importance of the soft law contribution in the UK gives the lie to the monochrome view of change from, in

⁸⁹ Harlow and Rawlings, 'Process and Procedure', Ch. 8.

⁹⁰ Case C-501/11 P *Schindler Holding and Others v Commission* (judgement of 18 July 2013).

⁹¹ E Ferran, 'The European Single Supervisory Mechanism' (2013) 13 *J. of Corporate Law Studies* 255.

⁹² Regulation 1024/2013 conferring specific tasks on the European Central Bank relating to prudential supervision OJ L 287/63 (29.10.13).

⁹³ EP and ECB, Inter-Institutional Agreement on the cooperation on procedures related to the SSM (2013).

⁹⁴ Regulation 1024/2013, Art. 3; see further, Harlow and Rawlings, 'Process and Procedure', Ch. 11.

the language of that most familiar contemporary debate,⁹⁵ a ‘political’ to a ‘legal’ constitution. At another level, soft law technique can so easily put in issue good governance principles: the classic trio of transparency, participation and accountability. This is especially troubling when, as is frequently the case with European integration, it is used in determinedly instrumentalist fashion. Self-serving usages by particular groups of actors or institutions, however, should not obscure major attributes of flexibility and responsiveness, institutional efficiency, and accommodation of difference. Context is by no means everything, but in the case of soft law it goes a long way! At another level again, soft law technique is a useful prism through which to view the uses and – yes – functional limitations of standard hard law techniques. Amid the rich complexities of contemporary society, it is not only the efficacy of soft law methodology which is in issue.

While it does not do to ignore differences from directly enforceable legal rules, both in terms of legitimacy and practical effect, the many different forms of hard(er) and soft(er) law must not be overly compartmentalised. A recurring theme of the essay is the scope for creative mixes of technique, sometimes as a functional necessity and on other occasions as part of a sophisticated governance framework or direction of travel. Soft law forms may now be said to demonstrate a strong kaleidoscopic quality: complex, dynamic, variegated. Ranging beyond the indelible association with internal administrative rules as part of the lifeblood of bureaucracy, a long but sometimes thin strand of public law scholarship has rightly engaged with external usages and effects, not least in terms of the challenges for traditional constitutional means of legislative and judicial control. Expanding on this, another key message of the essay is the place of soft law as a chief vehicle for, and measure of, the changing relations of citizens with public authority, the burgeoning elements of regulatory and technocratic power, and the successive constructions of inter-institutional relations.

A major set of contemporary drivers for soft law technique is identified. As regards formal legal and regulatory usages for example, specific factors include both the style and substance of legislation and recent fashions in ‘better’ or ‘smart’ regulation and audit. In somewhat paradoxical fashion, the evident demand to bolster transparency and public trust also sees soft law technique increasingly applied. Partly it is a matter of supply, where the digital revolution opens up whole new lines of soft law development. Constitutionally-speaking, however, it is the twin drivers of devolution and European integration which command attention, as also diverse forms of agencification. In the form especially of pseudo-contract, soft law usages are shown taking on another lease

⁹⁵ G. Gee and G Webber, ‘What is a Political Constitution?’ (2010) 30 *Oxford J Legal Studies* 273.

of life in the cause of co-operation, co-ordination etc. Indeed, when viewed in historical perspective, the broad dynamics of soft law development show little sign of slackening: quite the reverse. It is the multiple capacities for regeneration, reinvention and reproduction displayed in different periods and policy contexts which shine through. Soft law always has tomorrow.

Suggestions for further reading

R. Baldwin, *Rules and Government* (Clarendon Press, 1995)

C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *ICLQ* 850

R. Creyke and J. McMillan, 'Soft Law v Hard Law' in L. Pearson, C. Harlow and M. Taggart (eds.), *Administrative Law in a Changing State* (Hart Publishing, 2008)

G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, 1987)

R. Rawlings, 'Concordats of the Constitution' (2000) 116 *LQR* 257

L. Sossin and C. Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government' (2003) 40 *Alberta Law Rev* 867

D. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination' (2005) 11 *ELJ* 343