



Soft law implementation in the European Union and in China

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Yi Ma

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YI MA

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Yi Ma

Department of Political Science

University of Copenhagen

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Soft law implementation in the European Union and in China: Frame

1 Introduction

Numerous legal systems, both international and domestic, make use not only of legally binding norms but also of soft law, measures that normally are not legally binding but which nevertheless may have practical and even legal effects (Snyder, 2010, p. 1). Some of the most typical forms of soft law are advice, recommendations, white papers, plans, opinions, and guidelines. International organisations have long been using soft law (Abbott & Snidal, 2000; Chinkin, 1989) in sectors like global trade (Kirton & Trebilcock, 2017), finance (Brummer, 2010), environment (Dupuy, 1990), and human rights (Barelli, 2009). A prominent current example is the World Health Organisation (WHO), which frequently sends out technical and travel advice to member state governments that are grappling with the coronavirus pandemic. This advice is not legally binding, but nevertheless plays an important role in coordinating public health efforts across countries.

Soft law is also an important component in many domestic legal systems. For instance, China's central government often issues broadly-framed guidelines, plans, and opinions (Luo & Song, 2013) with the expectation that they will be implemented by provincial governments. Soft law plays an important role in many other countries, such as in Spain (Arroyo Jiménez & Rodríguez de Santiago, 2020), Sweden (Fredriksson et al., 2012; van der Sluijs, 2017), Australia (Weeks, 2016), the US (Posner & Gersen, 2008), Switzerland (Flückiger, 2012), France (Lavergne, 2013), and Germany (Knauff, 2010). Again, during the current corona crisis, many national governments have issued important health guidelines intended to help subnational governments to cope with the challenge. For instance, the US federal government issued Guidelines for *Opening Up America Again* (White House, n.d.), and the Danish national government regularly issues new and evolving guidelines and instructions for regional governments to handle the crisis, such as how to open schools or to conduct tests.

However, both international and domestic soft law face a potential challenge in terms of implementation. By design, soft law's elements of enforcement or obligation are weak (Saurugger & Terpan, 2020; Terpan, 2015). When soft law lacks hard enforcement, such as judicial control or other forms of sanctions, implementation

becomes difficult, because soft law relies largely on the willingness of the recipients to comply. In other words, why should one care about soft law when there is no or weak enforcement behind? Implementation also becomes a challenge when soft law lacks hard obligation, either because it has a weak or non-existent legal basis or because it is imprecisely framed and leaves much room for manoeuvre. Without a strong legal basis, the obligation to follow soft law may be low. Similarly, even if soft law has a solid legal basis, its imprecision or ambiguity may cause confusion during implementation since there is no clear interpretation or expectation.

Therefore, although it is clear that soft law plays an important role both internationally and domestically, its implementation can often be put into doubt. Then the question becomes: what strategies influence soft law implementation in national or provincial (sub-national) governments? Here, a strategy is understood as the approach employed by an international institution or a national government, with a goal to influence soft law implementation in national or provincial governments. It should be emphasised that various formal and informal approaches are available for an international organisation or a national government, ranging from different forms of sanctions for non-implementation to managerial tools such as persuasion and capacity-building that facilitates implementation.

The question is important to address for two reasons. First, answering this question helps bridge a gap on soft law research. Most existing literature on soft law focusses on its conceptualisation, its relations to hard law, and typological discussions of soft law in international or domestic legal systems (e.g., Abbott & Snidal, 2000; Chinkin, 1989; Luo & Song, 2013; Senden, 2004; Snyder, 1993; Stefan, 2017; Terpan, 2015). Implementation is different. While there is already much research on soft law implementation (e.g., Fredriksson et al., 2012; Hartlapp, 2019; Heidenreich & Zeitlin, 2009; Zeitlin et al., 2005), these studies often focus on the strategies of member states or sub-national governments to use or resist soft law, but the strategies that are employed by international organisations or the national government to influence soft law implementation have not yet been sufficiently researched.

Second, the challenge of implementation is not merely a theoretical concern. Indeed, it is already exemplified by the existence of implementation deficits of soft law instruments (e.g., Copeland & Haar, 2013; Darvas & Leandro, 2015; Deroose & Griesse, 2014; Efstathiou & Wolff, 2018). Again, the current coronavirus gives a good

illustration of this challenge. Internationally, WHO has been frustrated by member states that have chosen not to follow its guidelines to cope with the crisis (Buranyi, 2020; Gebrekidan, 2020; McCarthy, 2020). Domestically, one good example is the US, where the federal government finds it challenging to make state governments follow its guidelines. For instance, it was reported in June that more than 28 states were not following the US Centers for Disease Control and Prevention guidelines on reporting new Covid-19 cases (Holcombe, 2020). In this regard, a deeper understanding of soft law implementation may even contribute to our handling of such an unprecedented crisis.

Still, reasonable people are likely to wonder: why should one look into soft law implementation both internationally and domestically, rather than just focus on international soft law or domestic soft law? My answer is simple: the challenge of implementation, does not concern international institutions or national governments alone. On the contrary, this challenge is shared by both levels, due to the nature of soft law. Plausibly, some strategies may work well both internationally and domestically, while others may only be suitable at one or the other level. However, investigating soft law implementation at both levels is the first step towards a deeper understanding of those strategies.

In order to investigate those strategies, two critical cases of soft law were selected. At the international level, the focus is on European soft law. Soft law is by far most developed in the EU, where it occupies an important place in the EU legal system (Saurugger & Terpan, 2020; Snyder, 1993; 2010). Still, while much research has been done on EU soft law, the strategies used by EU institutions to influence member states' soft law implementation have not been thoroughly studied.

At the domestic level, the focus is on soft law in China. On the one hand, scholars have long focussed on soft law in western countries, so there is a need to investigate soft law in non-western contexts. In addition, there is a general recognition of the important role of soft law in China, as well as a continuing effort from Chinese scholars to apply theories related to soft law to make sense of Chinese legal development (e.g., Jiang, 2006; Luo & Song, 2006; 2013; Luo & Zhou, 2013; Tian, 2007). Further, as China becomes an increasingly important international actor, China's use of soft law also has huge implications for the rest of the world, such as issues on climate change, healthcare, and trade policies. Thus, understanding soft law

implementation is a major step towards a deeper understanding of legal development in China.

There is no doubt that the EU and China are different in many critical aspects. First, the EU is a supranational organisation that consists of 27 democratic member states. In contrast, China is a unified authoritarian state with 31 provincial governments.¹ Second, despite the competences in areas such as competition, monetary or common fishery policies, the EU has relatively weak supranational institutions, with the European Commission (hereafter referred to as the Commission), the Council of the European Union, the European Council, and the European Parliament competing for influence. China, by contrast, has a much stronger central government that has authority over all provincial governments, and it is controlled largely by the Communist Party of China. Last but not least, the EU is founded on a strong rule of law, with the European Court of Justice playing an important role in the EU integration (Martinsen, 2015). In contrast, China is an authoritarian state where the rule of law is weak; the formal legal system is largely overshadowed by the Communist Party (Minzner, 2009).

However, a closer investigation of the policy implementation process indicates that the EU and China share one surprising similarity, namely the challenge to ensure proper implementation of higher-level policies. This challenge stems from a similar policy implementation process in the EU and in China, as shown in Figure 1. In general, the EU is marked by a highly decentralised implementation structure. It does not have its own administrative machinery to implement its legislation, but has to rely on the member states to fulfil this task (Treib, 2014, p. 6). While regulations and decisions become binding automatically, directives need to be transposed into domestic legislation by each member state, before they can be further applied and enforced by regional and local governments. During this process, non-transposition, delay in transposition, and other forms of non-compliance often happen, despite the monitoring from the Commission and the enforcement of the European Court of Justice. Indeed, there is a huge amount of literature devoted to a better understanding of whether, when, and why EU law is (or is not) properly implemented (e.g., Börzel & Buzogány, 2019; Börzel et al., 2010; Börzel et al., 2012; Hartlapp, 2007; König & Mäder, 2014; Linos,

¹ Hong Kong, Macao, and Taiwan are excluded from this study.