Roundtable on 'Regulation in the 21st Century'

15 February 2021

Boriss Cilevičs

Bullet points

Advantages of regulation by "soft law"

- flexibility and adaptability to new circumstances - scientific and technological progress in several fields where many potenatila effects are not yet clear, such as AI or genetic engineering;

- easier to pass, especially at the international level, as consensus needed for binding instruments is increasingly difficult to reach;

- allows activist courts to develop existing "hard law" by taking inspiration from "soft law" for the interpretation of "hard law" - in particular, general clauses or broadly-drafted provisions in laws or treaties.

Disadvantages of regulation by "soft law"

- The last advantage can become the main disadvantage - if courts are "unreasonably" activist. The "rule of judges" could undermine the rule of law, breach the division of powers put into question the democratic legitimacy and authority of both "hard" and "soft" law;

- Soft law can be much easier ignored by e.g. big corporate players – in particular, when they pay lip service to "corporate social responsibility" whilst continuing to exploit labour and pollute the environment, and retaliate against whistleblowers when relevant rules are not enforcable in practice;

- "Soft law" as an easy way out of the difficulty of seeking consensus or majorities may in fact delay or even prevent the adoption of much-needed "hard law";

- Soft law is often elaborated in negotiations among bureaucrats (and experts). Parliamentary bodies do not get to have their say at all - or only pro forma, at a very late stage, when it is practically impossible to "undo the package deal" reached in protracted negotiations at intergovernmental level. Parliamentary representatives must be involved at an early stage, before there is a "fait accompli". In turn, this raises the issue of the democratic representativity of (individual) parliamentarians delegated to participate in such talks.

As to concrete examples of "soft law", besides AI or genetic engineering already mentioned, I would also single out the creation of a new "***right to a safe, clean, healthy and sustainable environment***" which is nowadays one of the most topical issues in our Assembly.

The formulation of this right is rather "soft", the terms used are typical indeterminate legal notions that requiring much interpretation.

Depending on which legal technique shall be used to introduce such a right, the borderline between hard and soft law in the human rights field risks being blurred, at the expense of the authority of existing "hard law" in the human rights field.

This is why our Committee on Leagl Affairs and Human Rights has traditionally been somewhat reluctant to support the creation of such a right (see e.g. the 2009 Opinion by Chris Chope, UK). However, the committee's views may well have evolved since then, but the doubts arguments remain.