



Research

What Policymakers Need to Know About “Soft Law”

RYAN HAGEMANN, NISKANEN CENTER | JANUARY 14, 2019

Many grade schoolers’ first introduction to the law begins with Hammurabi, the Babylonian king renowned for his codification of the law in the Code of Hammurabi. The stele into which those legal tenets were carved was notably displayed in the public square so that all might know the law — and the punishments to be borne by those who violated it. But for all its notoriety in creating legal certainty, the *type* of certainty Hammurabi’s laws established was harsh, exacting, and foundationally retaliatory. This is one of the core tensions of any social structure: providing for a legal regime that balances the need for certainty and stability against rules that offer a framework of reasonable and fair penalties for infractions.

Moving forward some 1500 years, those same tensions were on full display in the declining age of Republican Rome. Although the Romans are often celebrated as the great law-exporters to the wider Western world, the certainty with which those laws were applied was largely a function of informal adherence to traditional expectations. As Mike Duncan notes in his book *Storm Before the Storm*:

What truly bound all Romans together, though, were unspoken rules of social and political conduct. The Romans never had a written constitution or extensive body of written law — they needed neither. Instead the Romans surrounded themselves with unwritten rules, traditions, and mutual expectations collectively known as *mos maiorum*, which meant “the way of the elders.” Even as political rivals competed for wealth and power, their shared respect for the strength of the client-patron relationship, the sovereignty of the Assemblies, and wisdom of the Senate kept them from going too far. When the Republic began to break down in the late second century it was not the letter of Roman law that eroded, but respect for the mutually accepted bonds of *mos maiorum*.

Throughout history, legal regimes have been defined along this spectrum of certainty — from the informally enforceable and evolutionary rules of *mos maiorum*, to the unambiguous and punitively draconian commandments of Hammurabi’s Code. For many decades, the American system of administrative law occupied a space somewhere between these two extremes. In recent years, however, the rapid pace of technological change has significantly outpaced the ability of regulators and bureaucrats to adjust to the changing expectations of an increasingly digital, interconnected world. The result has been a paradigmatic shift in administrative law practices in autonomous vehicles, commercial drones, the Internet of Things, and advanced medical technologies that has come to rely more and more on a modern variation of the Roman *mos maiorum*: soft law.

COLLABORATIVE REGULATORY GOVERNANCE

As legal scholars Gary Marchant and Braden Allenby describe the term, soft law is a set of “instruments or arrangements that create substantive expectations that are not directly enforceable, unlike ‘hard law’ requirements such as treaties and statutes.” In a forthcoming article in the *Colorado Technology Law Journal*, my co-authors — Mercatus Center senior research fellow Adam Thierer and legal fellow Jennifer Huddleston — and I expand on this definition by identifying and categorizing the specific outputs of the soft-law system,

which we call “soft criteria.” As we note in our law journal article:

If soft law is generally defined as the implementation of those “arrangements that create substantive expectations that are not directly enforceable,” then “soft criteria” refers to the corpus of “nonbinding norms and techniques” that serve as the instruments of soft law’s implementation. In short, soft criteria are the means by which the soft law end is achieved — a skeletal structure that provides a governance foundation that can be built upon.

This “corpus of ‘nonbinding norms and techniques’” includes things such as green papers, advisory circulars, guidance documents, interpretive rules, policy statements, opinion letters, voluntary standards, best practices, and much more. These deliverables can emanate from many different quarters of society, from industry consortia and trade associations to academic centers and think tanks. However, the essential feature of the soft-law system that legitimizes the “substantive expectations” established by these soft criteria is the multistakeholder process.

Multistakeholderism is a governance process by which a set of soft criteria (or other objectively measurable outcome or deliverable) is produced or reviewed and then legitimized (or discarded) via a deliberative, consensus-based dialogue involving a broad range of actors from government, civil society, industry, academia, and elsewhere. In developing governance responses to the challenges posed by emerging technologies over the past two decades, these proceedings have usually been convened by federal agencies — in particular, the National Telecommunications and Information Administration, which has become something of a general clearinghouse for multistakeholder meetings focusing on new technologies. This governance approach has recently come under fire from both right-of-center and left-of-center ideological quarters: [Conservatives lament](#) soft law’s role in expanding the deference afforded to administrative agencies; [Progressives decry](#) its failure to both guard against self-regulatory excess and inability to actualize their preferred policy priorities. While the concerns regarding these informal approaches to rulemaking are not to be taken lightly, there are also many benefits of a more collaborative rulemaking process — [especially for emerging technologies](#).

As Ian Ayres and John Braithwaite articulated in their 1992 book *Responsive Regulation: Transcending the Deregulation Debate*, these types of deliberative proceedings possess three distinct benefits over more traditional regulatory rulemaking processes:

First, it grants the [public interest group] and all its members access to all the information that is available to the regulator. Second, it gives the [public interest group] a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the [public interest group] the same standing to sue or prosecute under the regulatory statute as the regulator.

Opening the door to more substantive engagement with both civil society and industry, agency-convened multistakeholder processes, Ayres and Braithwaite note, can “produce more efficient regulatory outcomes because bad arguments and bad solutions are less likely to go unchallenged. And genuine communication means that when challenges are advanced, they are listened to.” These processes are especially adept for dealing with fast-paced technologies.

ALL ROADS LEAD TO SOFT LAW

In many ways, these soft law pathways are an inevitable byproduct of the modern bureaucratic state. As the German sociologist Max Weber noted in *The Theory of Social and Economic Organization*, all socio-economic

systems of political organization inevitably trend toward some degree of bureaucratization. “The question,” Weber notes, “is always who controls the existing bureaucratic machinery. And such control is possible only in a very limited degree to persons who are not technical specialists.”

However, nothing preordains that a society’s “bureaucratic machinery” must be centralized under the sole control and oversight of a state authority. Weber argues that bureaucratic administration plays the “crucial role in our society as the central element in any kind of large-scale administration,” conceding only “by reversion in every field — political, religious, economic, etc. — to small-scale organization would it be possible to any considerable extent to escape [the bureaucratic machinery’s] influence.” But in many ways, soft law is creating the space within the administrative state for these small-scale organizational structures (i.e., multistakeholder governance proceedings) to flourish. Although he didn’t explicitly foretell the emergence of soft-law systems, Weber did recognize that one class of individuals within society was more likely than others to escape the gravitational pull of a centralized bureaucracy:

The capitalistic entrepreneur is ... the only type who has been able to maintain at least relative immunity from subjection to the control of rational bureaucratic knowledge. All the rest of the population have tended to be organized in large-scale corporate groups which are inevitably subject to bureaucratic control. This is as inevitable as the dominance of precision machinery in the mass production of goods.

This makes sense, as bureaucratic cultures tend to focus on rules and processes that address known problems created by emergent industries. In contrast, emerging innovations that lack historical precedent confound administrative agencies with missions and objectives predicated on the application of institutional knowledge to observed market failures. In other words, bureaucrats, like generals, are always fighting the last war.

In an age of rapid advancements in technology, the limitations of regulators’ knowledge are perhaps more apparent than ever. As such, soft law offers an ideal compromise: it allows agencies to more effectively balance their statutory missions to protect the public interest without imposing undue hardships on the entrepreneurs whose work helps drive economic growth and societal well-being. By leaning more heavily on the use of informal rules and exporting authority to self-regulatory governance mechanisms, regulators can capture the benefits of a more responsive, flexible, and adaptive governance culture without sacrificing their statutory oversight functions. In *The Promise and Pitfalls of Co-Regulation: How Government Can Draw on Private Governance for Public Purpose*, Edward J. Balleisen and Marc Eisner echo similar sentiments:

Legislators and administrative agencies should view nongovernmental regulation as a policy instrument that can make sense in many, if by no means, regulatory contexts. The key challenge is to design systems that provide that benefits of self-governance without sacrificing the high levels of accountability that one expects from public regulation.

AUTONOMOUS VEHICLES: AN APPLICATION

The development of the Department of Transportation’s (DOT) guidance on self-driving cars, *Preparing for the Future of Transportation: Automated Vehicles 3.0* (commonly known as AV Guidelines 3.0), best exemplifies the soft-law approach in action. In just a few short years, autonomous vehicles have been developed and deployed. Large car manufacturers have entered the market, often working in conjunction with tech upstarts to bring this technology to market. [While there have been setbacks](#), development quickly outpaced the ability of legislators to make rules. The DOT has managed this change by relying on multistakeholder processes and agency workshops that include working groups, researchers, state and local actors, industry specialists,

advocates, and policy experts. At the core of this process has been the creation of a flexible regulatory framework, the Guidelines, that encourages entrepreneurship while still maintaining regulatory clarity for everyone involved. In the process, the Guidelines have helped to avoid a state or federal patchwork of regulations while also promoting safety.

On the whole, soft law tends to strike a reasonable balance between the flexibility and adaptability of a self-governance regime with the legitimizing power of administrative oversight ensuring a backstop against egregious excesses that self-regulation may fail to effectively address. Policymakers confronting the realities of rapid technological progress should take notice of soft law, and seriously consider how they can take advantage of its benefits.