

MAPPING THE HARD LAW/SOFT LAW TERRAIN:  
LABOR & ENVIRONMENTAL PROTECTION  
IN CORPORATE CODES AND PUBLIC-PRIVATE INITIATIVES

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A. OVERVIEW

The purpose of this conference is to probe the interface between debates about the nature of soft law – its sources, status and enforceability – among legal scholars and the debates concerning private social regulation of issues such as labor relations, human rights and environmental protection. But instead of drawing on theoretical and conceptual analyses, what we would like to do at the workshop is conduct an in-depth inquiry into corporate codes of practice/conduct and other forms of private and private/public partnerships, observing their evolution and effects in the two major fields to which they apply: labor rights and environmental protection. In the framework of the inquiry, we hope to study the impact of these codes, how the impact findings are of help in assessing the move from hard to soft legal measures, how the move has reshaped the fundamental premises of each field ("within"), and the impact studies' significance in understanding the difference and similarity between these two fields ("between").

B. BACKGROUND

Over the last decade interest in 'soft law' has surged. The term is used to designate a diverse range of phenomena, including means of international law that are not enforceable and informal coordination among states and between state and non-state actors. To allow an in-depth discussion of real institutional design and a high level of resolution, in the workshop we seek to emphasize one form of soft-law – corporate codes of conduct.

The idea that commercial actors have social obligations that go beyond those prescribed in national legislation has long been part of the capitalist endeavor, covering a wide spectrum of practices and ideas from philanthropy and good-neighbor displays to managerial theories of the workplace. Moreover, in principle the phenomenon of commercial actors (e.g., corporations) acting in the capacity of private authorities and engaging in norm-creation and norm-enforcement has many historical precedents (e.g., the *lex mercatoria*). In the past, however, such norm-creation was almost exclusively concerned with ordering the relations of economic exchange and with establishing the rules of commerce. The new developments that this workshop addresses involve commercial entities that actively promulgate social and environmental norms that were heretofore thought to lie outside their mandate, namely in the domain of national and international law, prescribed by governments and intergovernmental institutions

The new forms of regulation have attracted the interest of scholars in both law and the social sciences. The former tend to study the status of the new legal forms in-between the public and private, as well as in-between legal and non-legal norms. The latter emphasize the questions of governance associated with private regulation. The basic premise of the workshop is that under governance, the traditional means by which governmental authority is deployed, namely laws, rules and regulations, are partially replaced by a variety of 'guidelines', 'principles', 'codes of conduct', 'standards' and 'framework agreements', which do not necessarily enjoy the coercive backing of the state.

Authority is deployed not by legislating and enforcing, but through shared 'problem-solving' processes'; it is coded by notions such as 'multi-party cooperation', 'constructive dialogue', 'multi-stakeholder consultation', 'task sharing', and 'democratic participation'. At the same time, governance also facilitates and legitimizes the deployment of such 'guidelines' and 'soft laws' by non-state authorities such as commercial actors and civic non-governmental organizations.

The discussion on these matters thus far has made progress in characterizing the new forms of regulation and conceptualizing some of the differences and similarities between soft law and hard law, and between new and old forms of soft law. The discussion has pointed out that many forms do not fall neatly into one distinct category and that hybrids prevail. Moreover, it has pointed to the multiple objectives of the new forms of regulation. Some scholars have emphasized the development of private regulation as a means of avoiding state (hard) law, while others have pointed to the advantages of soft law as an instrument that addresses the needs for flexibility, local adaptation, discretion, responsibility and political legitimacy. Moreover, the current literature, which describes the manifold facets of soft law/hard law hybrids, indicates that seemingly unrelated developments add up to create a spider web-like system that spans both domestic and international markets, is situated in both commercial and public authorities, and arguably provides an alternative to the traditional form of command-and-control regulation.

It is our hope to advance this debate by looking at these new forms of regulation in two particular contexts – prescribing, raising and enforcing standards in the areas of **environmental protection** and **labor rights**. The assumption is that in these two fields traditional command-and-control regulation at both state and international levels has been supplemented or replaced by the new forms of regulation. Focusing on these two particular fields may be of help in assessing in a more detailed manner the relationship between the objectives that have traditionally been used to justify regulation in each of the fields, as well as to compare them. One question, then, is whether the process of infusing new forms of regulation conforms to traditional objectives, undermines them, or replaces them altogether with new objectives. For example, the discourse underlying new forms of regulation sometimes suggests replacing distributive objectives of the past with such goals as achieving coordinated learning, problem-solving in light of collective action problems, diffusing best practices and promoting a 'race to the top'. Second, focusing on these two fields also accommodates a comparison of the way each is handled by the new forms of regulation. In global standardization processes, environmental issues enjoy greater legitimacy than labor standards (e.g., in the WTO). Looking into each of the two fields separately and together can help in identifying whether such priorities can also be found in soft-law forms of industry-based regulation, and account for the different treatment each field receives. Together these two avenues of inquiry can aid in identifying the relationship between the structure of new regulatory forms and the substantive objectives of regulation.

The positions in the current debate have already settled into familiar 'camps' – those in favor of maintaining the traditional system and those who view the new one as a promising development. Much of the discussion is based on stylized facts and theoretical analyses. However, there has been little reference to actual cases of soft law/hard law hybrids: *Why* have they come about? *Who* has designed and implemented them? *What* are their asserted objectives and to what extent are they being fulfilled? These are the questions that should guide the participants of the conference. While hopefully participants may come from both 'camps', we believe that the answers regarding the new soft-law system are not a simple yes or no, but rather a more careful reading that distinguishes between different forms of soft-law arrangements and between similar forms with varying institutional designs.

### C. THE RESEARCH QUESTIONS

Here are some avenues of inquiry to begin with, although invited scholars may suggest refinements and additional questions within the proposed general framework.

1. Mapping the historical transition from hard forms of regulation to the new "soft" versions – causes for the shift, agents of change, the current state of the art, diversity of forms, and future prospects for development.
2. How have these changes affected the two fields (or 'systems')? This can refer to the change in agents, discursive changes, and changes in agents' perception of the objectives of the field.
3. How are these changes perceived and assessed by those impacted by them – employers/producers, workers/communities, states/NGOs?
4. What is the 'hard impact' of these changes (e.g., protection of labor standards, reduction of environmental hazards)?
5. What is the 'soft impact' of these changes, including the effects of private-public partnerships, awareness, cross-border cooperation and structures of solidarity?
6. Is soft-law a stable alternative, or a temporary phase that is likely to be re-juridified (or 'hardened') yet again? Do current attempts to juridify soft law suggest a return to the old hard law or a path for newer forms of hard-soft hybrids?
7. Is similarity in the two fields (e.g., two fields that are strongly nested in a new global order) leading to convergence of the regulatory means being used? And, conversely, are the differences between the two fields (e.g., the subjects – labor force or the environment – or the nature of the problems addressed) shaping distinct regulatory approaches? More generally, is the common clustering of these issues in corporate codes a means of convergence or divergence? These questions can be tested with regard to particular issues, such as the audit processes, other means for observing compliance, the nature of partnerships that are being forged, or the level of consumer awareness.

#### D. THE WORKSHOP FORMAT

We assume that many specialists in labor and environmental studies will choose not to cover both fields and prefer to adhere to a study of the area with which they are more familiar. However, any proposals for covering both fields and comparing them will be welcomed. Preference will be awarded to proposals that seek to provide a detailed institutional analysis rather than merely a conceptual comparison.

It is assumed that most of the workshop sessions will be based on a parity structure (environment-labor) with a discussant/s for each session. The discussant will be asked to emphasize the lessons learned from the juxtaposition of the two fields. In addition, we hope to hold one session for a meta-review of the theoretical implications for the current and future state of the soft-law alternative that are to be drawn from the comparison.