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on

INTERNATIONAL SOFT LAW AND THE ROLE OF PARLIAMENTS

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1. Introduction

In recent years, a growing number of international policy endeavours that fall under the heading of 'soft law' have spurred controversial debates. The most heated discussions to date took place in the run-up to the adoption of the United Nations' Global Compact on Migration. In several countries, including Switzerland, the Global Compact was criticised for lacking sufficient national political support and political and democratic participation in its drafting.

In the Swiss parliament, there were several attempts to prevent the adoption of the Global Compact. As our (Federal) Department of Foreign Affairs (i.e. our foreign ministry) played a leading role in drafting the document, these parliamentary interventions highlighted the extent to which the views of the government (represented by the Department of Foreign Affairs) could diverge from Parliament's more inward-looking assessment of foreign policy matters. It is perhaps not entirely surprising that the subject of this particular soft law project - migration - would generate controversy, since international migration policy is traditionally a field in which the interests of the sovereign state clash with global policy efforts.

However, international migration is by no means the only topic addressed by international soft law. In fact, according to a Swiss government report, soft law projects have multiplied in recent years, and cover a multitude of topics. Examples include private security companies (e.g. the Montreux document), international taxation law (e.g. the OECD guidelines on tax assistance and corporate taxation), and money laundering (such as the recommendations of the Financial Action Task Force on combating money laundering and terrorist financing).¹ Some of these codes, or guidelines, play a considerable role in international law. This is particularly the case in terms of international trade law with the Unidroit Principles.

2. What is 'soft law'?

The term 'soft law' is contradictory. Law, in its dominant positivist sense, is a set of mandatory norms, which leaves little room for flexibility or softness. Soft law is an oxymoron, which blurs this definition and consequently the respective fields of competence of Parliament and Government.

What is the definition of soft law? Practice in this area is particularly volatile and makes systematisation difficult.

According to the government report, there is no clear and agreed definition (p. 4-6). In fact, soft law can only be described as the sum of international agreements and regulations that do not fall under international (hard) law, which includes binding legal sources such as international custom or treaties. However, there appear to be two elements that are generally constitutive of soft law:

- 1) Soft law contains a normative character, it is not merely a declaration of intent (the law element);
- 2) However, soft law is not legally binding and may therefore not be sanctioned by the courts or the international community if violated (the soft element).

The Swiss government concludes that soft law should be understood as a distinct category of instruments used to shape international relations (p. 7). In an environment in which binding multilateral agreements are increasingly difficult to obtain, soft law can therefore serve as a means of enhancing dialogue. The underlying assumption is that states will be more willing to discuss non-binding soft law issues than binding multilateral agreements. Moreover, it is easier to conclude soft law agreements than international

¹ Consultation and participation of Parliament in the field of soft law, Federal Council report of 26 June 2019 in response to postulate 18.4104, Foreign Affairs Committee of the Council of States, 12 November 2018

treaties that require long and complicated negotiation and ratification processes.

However, the government also highlights a number of challenges that can be encountered in the drafting of soft law (p. 4). First, given the non-binding nature of soft law, there is a greater risk of inconsistent implementation in the different states. Second, soft law negotiations are more likely to be influenced by the interests of great powers than more formalised procedures of international treaty-making. Finally, and most importantly in the parliamentary context, soft law negotiations challenge domestic politics. In some cases, the political opinion-forming process is not fully exploited in the creation of soft law, which means that the opportunity to conduct extensive political debates that otherwise take place during the legislative process and when approving international treaties is applied to a lesser extent.

In Switzerland, these issues have been debated in Parliament. They have led to questions being raised about how Parliament's rights in foreign policy can be better taken into account with regard to soft law instruments. More generally, what role can parliaments play in the creation of international soft law?

3. The participation of the Swiss parliament in foreign policy in general: legal situation and challenges in practice

The rights of Parliament (and the cantons) to participate in Switzerland's foreign policy have evolved over time. They were explicitly enshrined in the Federal Constitution in 1999², thereby formalising a cooperative relationship between the executive and the legislature on foreign policy. Under this relationship, the government continues to have the strategic and operational lead on foreign policy; however, Parliament is able to participate in the overall shaping of foreign policy and be involved in conceptualising foreign policy opinions in important fundamental decisions. The underlying idea is that foreign policy should enjoy greater democratic and federal support, and that there should be a stronger link between domestic and foreign policy.

Specifically, the Parliament Act provides for a duty to consult. The government is required to consult the foreign affairs committees on 'important plans' as well as on 'guidelines and directives relating to mandates for important international negotiations' (before determining or amending them).³ At the same time, the government must provide information on the state of implementation of these projects and negotiations. However, the criterion of 'importance' is central here, as it is difficult to assess in practice and offers space for different and conflicting interpretations.

The Global Compact on Migration was neither the first nor will it be the last to lead to heated debates on Parliament's participation rights. In the late 2000s, Parliament wanted to have a greater say on international banking agreements. The OECD regulations subsequently adopted by the government were viewed critically by some groups within Parliament for being in conflict with domestic law. More recently, the government's decision to abandon negotiations on an Institutional Agreement with the EU, gave rise to the question of whether Parliament's rights (or the people's referendum rights) – had been violated in a field of utmost national importance. Admittedly, the Institutional Agreement with the EU does not fall under the category of soft law, but its example points to the larger question of Parliament's participation rights in foreign policy.

In response to parliamentary procedural requests calling for greater parliamentary involvement, the government amended the Ordinance on the Organisation of Government and Administration in 2016 to specify the term 'important plans'.⁴ According to this definition, the parliamentary foreign affairs

² See Art. 166 para. 1, Federal Constitution

³ See Art. 152 para. 3, Parliament Act

⁴ Government and Administration Organisation Ordinance, 25 November 1998,

committees are consulted. This is the case if the implementation of recommendations or decisions of international organisations and bodies require the enactment or a significant amendment of a federal law. Further, it includes cases, in which, refraining from doing so, would entail the risk of serious disadvantages or sanctions or damage Switzerland's reputation (see newly inserted Art. 5b of the Ordinance). This definition of "important plans" is not exhaustive; other instruments, including soft law issues that are of comparable political relevance and significance for Switzerland may also be subsumed under it (see also p. 15 of the government report quoted in footnote 1).

In an international comparison, the Swiss parliament's participation rights in foreign policy are extensive and explicitly include soft law projects. However, the abovementioned conflictual examples of the migration pacts *et al.* point to the fact, that despite extensive legal rights, Parliament has not always been able to contribute satisfactorily to the shaping of foreign policy in practice. This has led to a number of activities and mandates on the part of both Parliament and the government.

4. Ongoing projects to strengthen the role of the Swiss parliament in soft law projects

In response to the case regarding the Global Compact on Migration and the abovementioned government report, the foreign affairs committees of both chambers of Parliament set up a sub-committee with the mandate to analyse the role of Parliament in the drafting of soft law. Apart from assessing whether the legal bases should be adapted to strengthen Parliament's role, the sub-committee focuses in particular on the committee's rights regarding participation, information and consultation. This also includes reflections on having Parliament explicitly approve soft law projects under certain conditions, or the idea of parliamentary veto rights.

The sub-committee also commissioned a legal opinion and an evaluation to be carried out by the Parliamentary Control of the Administration (the Federal Assembly's evaluation service), which examined whether the assessment of 'important plans' on the part of the Federal Administration was expedient and systematic.

The respective documents were recently published⁵ and draw the following conclusions, *inter alia*:

- The Swiss parliament's participation rights are extensive in international comparison. The Swiss parliament holds a strong and unique position by international standards; it has greater participation rights than parliaments in most other countries.
- The federal acts defining the participation rights leave space for interpretation. Some legal acts are imprecisely worded, which has the effect of restricting participation rights in practice.
- Soft law projects are handled differently in the various Federal Administration offices, so there is no systematic or uniform approach to deciding whether Parliament must be consulted or informed about a particular project. The right timing for consulting parliament seems to be particularly difficult to assess, as soft law projects tend to be more fluid than processes aimed at creating more formal legal instruments.
- Also within Parliament, the responsibilities of the parliamentary committees with regard to participation on foreign policy are not always clear.

Overall, the evaluation concludes that the way in which Parliament is involved in the field of soft law is only partially appropriate. The parliamentary sub-committee's work is currently ongoing; it remains to be

[RS 172.010.1](#)

⁵ Evaluation by the Parliamentary Control of the Administration, February 2022
[Summary](#), [Full report](#) (only in French), [External legal analysis](#) (only in German)

seen how the results of the evaluation will be taken into account.

On the government's side, a working group has been set up to produce a soft law guide for Federal Administration offices and so as to harmonise procedures on creating soft law and involving Parliament in the process. This guide should certainly help to ensure that a more systematic approach is taken regarding soft law projects, but the practical situation remains complex for both the government and Parliament.

5. Implications and questions for parliaments

The Swiss example shows that while participation rights of parliaments in foreign policy can be extensive, putting them into practice is challenging.

Overall, there are several questions that could be addressed by parliaments:

- In view of the steady rise in foreign policy projects, how can parliaments best organise themselves to ensure they are able to participate in the creation of soft law, and international law in general? Should there be dedicated parliamentary bodies, and if there are several, how can their work best be coordinated?
- What are the particular methods through which parliaments can keep up-to-date and have an overview of the various foreign policy projects? According to which criteria and priorities should topics be ranked?
- How can parliamentary staff contribute to these efforts? In order for Parliament to be in the driving seat in terms of prioritising its own participation rights, it appears to be crucial that it can rely on independent assessments of these priorities.

Soft law is likely to play a growing role in the coming years. It therefore appears to be crucial for parliaments to define their rights and responsibilities, in order to avoid being marginalised by governments, or even deprived of influencing foreign policy.

6. Sources and further information

6.1. *Legal sources on parliamentary participation rights in foreign policy*

Federal Constitution of the Swiss Confederation

Art. 166 Foreign relations and international treaties

¹ The Federal Assembly shall participate in shaping foreign policy and supervise the maintenance of foreign relations.

² It shall approve international treaties, with the exception of those that are concluded by the Federal Council under a statutory provision or an international treaty.

Art. 184 Foreign relations

¹ The Federal Council is responsible for foreign relations, subject to the right of participation of the Federal Assembly; it represents Switzerland abroad.

² It signs and ratifies international treaties. It submits them to the Federal Assembly for approval.

³ Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.

Parliament Act, ParIA

Art. 152 Information and consultation on foreign policy

¹ The committees responsible for foreign policy and the Federal Council shall have regular contact with each other in order to exchange views.

² The Federal Council shall inform the Presiding Colleges of the Councils and the committees responsible for foreign policy regularly, comprehensively and in good time of important foreign policy developments. The committees responsible for foreign policy shall also pass on this information to other committees involved in foreign policy related matters.

³ The Federal Council shall consult the committees responsible for foreign policy on important plans, on planned changes to the number of Switzerland's diplomatic and consular representations abroad, and on the guidelines and directives relating to mandates for important international negotiations before it decides on or amends the same. It shall inform these committees of the status of its plans and of the progress made in negotiations.¹⁵⁰

^{3bis} The Federal Council shall consult the committees responsible before it:

provisionally applies an international treaty that must be concluded or approved by the Federal Assembly; or

urgently withdraws from an international treaty when any withdrawal should be approved by the Federal Assembly.¹⁵¹

^{3ter} If the committees of both chambers are against provisional application or immediate withdrawal, the Federal Council shall refrain therefrom.¹⁵²

⁴ In urgent cases, the Federal Council shall consult the presidents of the committees responsible for foreign policy. The presidents shall inform their committees without delay.

⁵ The committees responsible for foreign policy or other relevant committees may request that they be informed or consulted by the Federal Council.

Government and Administration Organisation Ordinance

Art. 5b

¹ The committees responsible for foreign policy shall be consulted on important plans in the sense of art. 152, para 3 and 4, of the Parliament Act of 13 December 2002 (ParlA)¹¹ when:

- a. the implementation of recommendations or decisions of international organisations or multilateral bodies requires the adoption or significant amendment of a federal act, or if
- b. foregoing the implementation of such recommendations or decisions would expose Switzerland to the risk of significant economic disadvantage, sanctions or isolation due to its divergent position, or to reputational harm, or other serious disadvantages.

² A consultation in the sense of para 1 is conducted based on a draft Federal Council mandate. In the event of urgent consultations under Art. 152, para 4, ParlA, the consultation may take place based on provisional positions that Switzerland plans to take during negotiations.

6.2. *Parliamentary interventions (selection)*

- [18.4104](#) s Po. FAC-CS. Consultation and participation of Parliament in the field of soft law
- [18.466](#) n Pa. Iv. Parl. Group. Allow approval of soft law by the Federal Assembly
- [18.4112](#) n Ip. Group C. Parliamentary participation in decisions concerning soft law. Absence of clear line by Federal Council
- [18.3378](#) n Mo. National Council (FAC-NC). Reports on Switzerland produced by int. organisations. Involvement of Parliament in consultation procedure
- [14.433](#) n Iv. pa. Aeschi Thomas. Recommendations and decisions of the OECD and its special bodies. Obligation to inform and consult the relevant legislative committee
- [14.474](#) n Iv. pa. Romano. Safeguarding the competences of Parliament in terms of foreign policy and legislation
- [16.456](#) s Iv. pa. CIP-CS. Withdrawal from and amendment of international treaties. Allocation of competences
- [10.3366](#) n Mo. National Council (CER-NC). Revision of legal bases governing the conclusion of an international treaty by the Federal Council
- [09.3361](#) n Mo. National Council (FAC-NC). Double Taxation Conventions. Consultation of foreign affairs committees
- [08.3677](#) n Mo. Fehr Hans-Jürg. Switzerland's role within int. financial organisations. Consultation of Parliament
- [08.3637](#) s Mo. Maury Pasquier. Switzerland's role within int. financial organisations. Consultation of Parliament

6.3. Government documentation

- Government report in response to postulate 18.4104, 26 June 2019 : <https://www.news.admin.ch/news/message/attachments/57589.pdf>
- Press release, 26 June 2019: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-75590.html>
- Press release, 8 November 2019: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-77005.html>

6.4. Parliamentary sub-committee on participation rights in soft law

- Foreign Affairs Committee of the Council of States, press release, 14 January 2020 <https://www.parlament.ch/press-releases/Pages/mm-apk-s-2020-01-14.aspx>
- Foreign Affairs Committee of the National Council, press release, 21 January 2020 <https://www.parlament.ch/press-releases/Pages/mm-apk-n-2020-01-21.aspx>
- Foreign Affairs Committee of the National Council, press release, 1 February 2022 <https://www.parlament.ch/press-releases/Pages/mm-apk-n-2022-02-01.aspx?lang=1033>
- Evaluation by the Parliamentary Control of the Federal Administration, February 2022
Summary, https://www.parlament.ch/centers/documents/_layouts/15/DocIdRedir.aspx?ID=DOCID-1239417530-311
Full report (only in German and French), https://www.parlament.ch/centers/documents/_layouts/15/DocIdRedir.aspx?ID=DOCID-53009006-8757
External legal analysis (only in German), https://www.parlament.ch/centers/documents/_layouts/15/DocIdRedir.aspx?ID=DOCID-1-10739