L'IRCOCERVO
PRIMA RIVISTA ELETTRONICA ITALIANA DI METODOLOGIA GIURIDICA - TEORIA GENERALE DEL DIRITTO E DOTTRINA DELLO STATO
FIRST ITALIAN DIGITAL JOURNAL OF LEGAL METHODOLOGY - GENERAL THEORY OF LAW AND DOCTRINE OF THE STATE

Legal Normativity of Soft Law

Tanel Kalmet

Tallinn University

Abstract: **Legal Normativity of Soft Law**
This article argues that soft law functions as a normative legal device despite a lack of binding force. The author proposes a framework where soft law instruments may be given legal effect, to fill the gaps in the legal system, if it is considered right and necessary, and provided its use remains lawful and consistent with binding norms, pursuant to the principle of correctness.

Keywords: Soft Law, Legal Realism, Normative Fact, Correctness, Legal Effect.

Summary: 1. Introduction – 2. Examples and preliminary discussion – 3. The normative whole around soft law – 4. Conclusion.

1. Introduction

The notion of *soft law* has emerged over the past fifty years, particularly in public international law. It is used as a general concept denoting vague or weak norms in documents that are formally legally binding, and norms of documents without formal legal binding force[1]. I will use the term 'soft instruments' for the latter category[2]. Soft instruments may be unilateral or multilateral (including bilateral), and appear in various formats, being analogous to statutes (general unilateral

[1] D. Shelton has claimed that "[s]oft law comes in an almost infinite variety" (D. Shelton, "Soft Law", in D. Armstrong (ed.), *Routledge Handbook of International Law*, Routledge, London, 2009, p. 69). R.R. Baxter has analysed several types of documents as belonging to the first class, with the common characteristic of not creating legal obligations susceptible of enforcement. He also found that "it is excessively simplistic to divide written norms into those that are binding and those that are not" (R.R. Baxter, "International Law in 'Her Infinite Variety'", in *International and Comparative Law Quarterly*, 29 (1980), n. 4, p. 554 and p. 564).

[2] J. d'Aspremont has distinguished between soft *instrumenta*, created by parties who "decide to resort to an instrument other than a formal treaty or a binding unilateral declaration", and soft *negotia*, that are non-normative legal instruments, which fail to provide any precise directive which behaviour its authors are committed to (J. d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials", in *The European Journal of International Law*, 19 (2008), n. 5, p. 1082 and p. 1084).

© L'Ircocervo, 25 (2026) n. 1 ISSN 1722-392X
Special issue: G. Calabrò, L. Franzese, A. Incampo (eds.),
Philosophy of Law Today,
https://doi.org/10.57581/LIRCOCERVO.25.2026.1.14

instruments), treaties (general multilateral instruments), or decisions (singular instruments), distinguished from the hard law analogues primarily by lack of legal binding force and enforceability[3]. Soft instruments may also be primary (autonomous) or secondary (derivative)[4]. These classifications are not exhaustive.

The divide between hard and soft instruments is by no means clear. R.R. Baxter has concluded that "each 'weak' or 'soft' or 'fragile' norm in written form will carry a different legal impact, falling short of obligation in the strict sense"[5]. The European Court of Justice has considered that since recommendations cannot be regarded as having no legal effect at all, national courts are bound to take them into consideration in order to decide disputes submitted to them[6]. This paradoxical legal impact or effect of soft instruments is a point of interest in this paper and I will return to it shortly. Before proceeding some limitations should be considered.

Qualifying vague norms (J. d'Aspremont's soft *negotia*) and weak norms as soft law is problematic. First, if a *negotium* has no precision at all, it can hardly be classified as norm; if it is not a norm, it cannot be normative. On the other hand, it is common for legal documents to contain norms that are vague or imprecise, for example in constitutional law, and to consider them soft law does not seem sound. Imprecise norms may have directive function (by stating lawful aims or motives of acts) and therefore legal effect[7]. Such norms are comparable to principles, often explicitly considered to be sources of law[8]. In fact, they seem to be coinciding with

[3] How these concepts are defined depends on the concept of law used. Other criteria besides (or instead of) binding force and enforceability may also be relevant. It seems reasonable to understand binding force as the ability to obligate in an imperative manner (without objections). Other explanations have linked binding force confusingly with other qualities such as validity, recognition by a court, or enforceability. By enforceability I mean the legal (not always factual) quality of a norm, an obligation, or a right, to be subject to a decision *on the merits* by a court or another comparable authority. It may be held to be a quality that typically distinguishes legal norms and relations from other normative areas. However, there are norms, obligations and rights that are not enforceable. Coercion and execution of the judgment or decision are accidental to enforcement in the meaning provided. Justiciability (German *Judiziabilität*) could be considered a synonym of enforceability in the meaning provided. These preliminary definitions are intended to start the discussion. Some cited authors may use the notions with different meanings.

[4] D. Shelton, *op. cit.*, p. 70.

[5] R.R. Baxter, *op. cit.*, p. 565.

[6] Despite the recommendations cannot create rights upon which individuals may rely before a national court (13/12/1989, C-322/88, *Grimaldi v Fonds des maladies professionnelles* (retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61988CJ0322).

[7] One can retroactively judge from the aim or motives, if the acts have been lawful, and is proactively obligated to act according to theses aims or motives.

[8] E.g., "the general principles of law recognized by civilized nations", as in Article 38(1)(c) of the Statute of the International Court of Justice, retrieved from https://www.icj-cij.org/statute. Indeed, not all principles are general; there are also special principles of different branches of law, and some principles are technical though vital for the application of law; for instance, interpretive canons. See "A Dozen Canons of Statutory and Constitutional Text Construction", [an excerpt from A. Scalia, B. Garner, *Reading Law: The Interpretation of Legal Texts*, West, St. Paul, MN, 2012], accessed at https://judicature.duke.edu/wp-content/uploads/sites/3/2022/04/Lastly-scalia.pdf.

principles expressing aims and values, in some occasions holding a prominent position in the hierarchy of norms[9]. O. Weinberger has considered principles to be a special kind of normative rules, norms of "so abstract a content that subsumption cannot be realised, or of teleological meaning with the same effect"; norms are "applied by weighing different possibilities for resolving hard cases"[10]. Abstract and vague, such norms have clearly legal effect.

Weak norms in formally legally binding documents may be recognised by the absence of sanctions[11] or non-enforceability. Sanctions are, indeed, not always a feature of legal norms – even if we use a very broad meaning of the concept. From a historical perspective, law need not be perfect (*lex perfecta*) to be considered law; imperfect and less-than-perfect laws are laws[12]. Norms without sanctions have been considered to have an expressive function: instead of stipulating legal sanctions, "criticism by others for failure to obey" the law, even "ostracism, shame, and

[9] Articles 2 and 3(1) of the Treaty on European Union express such values of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights", and the aim "to promote peace". The fundamental treaties of the European Union are accessible at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html. Are these soft law norms? For example, E. Ebikake has found that "rules are specific and principles less specific or vague, and therefore soft law" (E. Ebikake, *International Anti-Money Laundering and Soft Law. Approaches to Regulation*, Routledge, London, 2024, p. 7.)

[10] O. Weinberger, "The Role of Rules", in *Ratio Juris*, 1 (1988), n. 3, pp. 233-234. Sometimes a distinction has been made between norms and rules. Some see them as synonymous (*e.g.*, L. Passerini Glazel, "Normative Experience: Deontic Noema and Deontic Noesis", in *Phenomenology and Mind*, 13 (2017), p 98). Others see norms as a subset of rules (A. Marmor, "Norms, Reasons, and the Law", in K.E. Himma, M. Jovanović, B. Spaić (eds.), *Unpacking Normativity. Conceptual, Normative, and Descriptive Issues*, Hart, Oxford, 2018, p. 96). Yet others see it the other way round (E. Ullmann-Margalit, *The Emergence of Norm*s, Clarendon Press, Oxford, 2015, p. 12; she mentions other distinctions, not relevant here). Else, "Ordinary language distinguishes between rules as explicit demands for action and norms as implicit, or habituated demands for action" (C. Bispinck-Funke, "On the Question of How Social Rules and Social Norms Exist", in *Phenomenology of Mind*, 12 (2017), p. 111).

[11] By sanctions I mean unpleasant consequences, in law or fact, that follow non-compliance with a norm. They may be applied by enforcement, but not necessarily. The content may vary from punishments and legal disqualification to missing pleasant consequences that would be expected in the case of compliance. *E.g.*, defects of a contract may result in its invalidity or non-enforceability, which are considered sanctions. The opposite meaning of sanction (an authorisation) is not meant here.

[12] This distinction has been credited to Roman jurist Ulpian, though its history is obscure. Perfect laws are those which are sanctioned by nullity; less-than-perfect laws are those sanctioned by a penalty (they do not affect validity); imperfect laws are those that lack sanctions – their enforcement depended on the decision of the magistrate (F. Vering, *Geschichte und Pandekten des römischen und heutigen gemeinen Privatrechts, zum academischen Gebrauch*, Verlag von Franz Kirchheim, Mainz, 1875, p. 18). Imperfect laws seem to have the minimal effect that any breach against them is considered *merely* illegal. Such a direct consequence may have further consequences. Also, interested parties might initiate legal proceedings to have the act declared illegal, though not necessarily invalid. The phenomenon is present also in European Union law: see R.A. Wessel, "*Lex Imperfecta*: Law and Integration in European Foreign and Security Policy", in *European Papers*, 1 (2016), n. 2, pp. 439-468, doi: 10.15166/2499-8249/52.

humiliation" have been anticipated by the legislator[13]. We may call them soft sanctions; nevertheless, the norm expressed in *weak* form may have effect, and if the norm has been expressed in a formally legally binding document, this is a legal effect. Because both vague and weak norms in formally legally binding documents belong to law in a formal sense, and also by their effect (through a directive function, as principles, or an expressive function), there is no need to focus on them here, or consider them as soft law.

It is well established that the motives and purposes of soft instruments vary, and they may have variable effects. D. Shelton has counted eight functions[14], some of which have more direct legal effect[15], for instance filling in gaps in existing treaties, and forming state practice that can be used to interpret treaties. The legal impact of some other functions is more indirect (*e.g.*, codifying existing, or preceding new customary law, consolidating opinions on creation of norms). The problems related to the formation of soft instruments (and motivation behind it), and the indirect legal impact (and the extra-legal impact) will be outside of the scope analysed here.

Before moving on, I need to make an observation. When I referred, in the first paragraph, to its *emergence,* I did not mean that soft law is a recent invention. Rather, what is now designated as soft law is a phenomenon with historical precedents and parallels. It is probable, that throughout history, most law has been soft. Thus, the notion is new, not the concept. Its novelty is context-bound because it is new in the currently dominant paradigm of law constituted by territorial and exclusive legal orders (states), and their international agreements duly recognised according to national laws[16]. In the dominant paradigm, law is expected to be *hard*:

[13] T.A.J. McGinn, "The Expressive Function of Law and the *Lex Imperfecta*", in *Roman Legal Tradition*, 11 (2015), p. 5. This *peer pressure* has been considered an important factor to warrant compliance with soft instruments, without asking for their legal effect: "While there are no direct legal sanctions for non-compliance the incidental effects may include diplomatic and moral pressure. This is in practice a major enforcement mechanism for all international law and may well prove to be effective" (C.M. Chinkin, "The challenge of soft law: development and change in international law", in *International and Comparative Law Quarterly*, 38 (1989), n. 4, p. 866).

[14] D. Shelton, *op. cit.*, p. 72. The list may not be exhaustive and does not include political functions without legal impact. Maybe this is the explained by the fact that we are talking about soft law; this contrasts with K. Raustiala's position that "'soft law' texts are political commitments that can lead to law, but they are not law, and thus give rise only to political consequences" (*ivi*, p. 68).

[15] By direct legal effect I mean (here preliminarily) any consequences of legal import, that is affecting rights and obligations, which may vary from their constitution, abolition, and alteration to rather indirect interpretive impact.

[16] The model of the *state-sovereigntist* view is constituted by "state legal orders, each of them claiming exclusive jurisdiction within its respective territorially defined social space, and international law, confined to regulating external relations among sovereign states […,] both […] treated as self-contained and self-sufficient normative wholes"; whereby "public international law does not interfere in the domestic legal order" (K. Tuori, "Transnational law. On legal hybrids and perspectivism", in M. Maduro, K. Tuori, S. Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge, 2014, pp. 12-13).

valid[17], binding, enforceable and preferably enacted by the states and warranted by state sanctions (this list is not exhaustive)[18]. Soft law, as sometimes argued, with problematic validity, ambiguous content, defective bindingness, and questionable enforcement, is something that simply does not seem to belong to the paradigm[19].

I maintain that while soft law has some deficiencies compared to *hard* law, these deficiencies are not decisive enough to exclude it from functioning as part of the law[20]. Soft instruments, attempting to influence future behaviour, are normative devices. They may function with legal effect, as elements of legal normativity. My purpose here is to understand, from a theoretical perspective, how it takes place and under which conditions. By *theoretical* perspective, I mean an analysis not confined

[17] By validity, I primarily mean the institutional fact of being accepted, especially as an element of a legal system (though it applies to other institutions such as currency). This understanding is close to Hartian rules of recognition (H.L.A. Hart, The Concept of Law, Oxford University Press, Oxford, 2012, p. 100), but rather a matter of fact than one of norm. Formal validity of a norm in Kelsenian sense – being issued on the basis of a hierarchically higher norm – is a different, however appealing concept. As will be argued, factual or formal validity of soft law may strengthen its position and likelihood of having legal effect, but is inherently not a condition for its existence. Some legal realists have altogether questioned the need for validity as a metaphysical concept.

[18] This doctrine, in its current form, has been usually credited to J. Austin, H. Kelsen and H.L.A. Hart and designated as legal positivism (see L. Green, T. Adams, "Legal Positivism", in E.N. Zalta, U. Nodelman (eds.), *Stanford Encyclopedia of Philosophy*, winter 2025 edn., Retrieved from https://plato.stanford.edu/archives/win2025/entries/legal-positivism/; R. Cotterrell, *The Sociology of Law. An Introduction*, 2nd edn., Butterworths, London, 1992, pp. 8-10). It is not obvious that 'positivism' has a similar meaning as in philosophical positivism of A. Comte and subsequent paradigms in science. The notion has been used for a long time before A. Comte, and 'positive' might better refer to posited (fixed, assumed, postulated) law (as by Thomas Aquinas, *jus positivum* comprising human-made law and paralleled to natural law); see T. Burns, "Aquinas's Two Doctrines of Natural Law", in *Political Studies*, 48 (2000), p. 936.

[19] For instance, P. Weil has found that "the blurring of the normative threshold" is a pathological phenomenon, and contended that positive law, *lex lata* as law in force, either posited or spontaneous, should be rigorously distinguished from *lex ferenda* (as he saw it). He opposed graduated normativity on both ends: both soft law and norms on the top of the normative system, including the theory of *jus cogens* (P. Weil, "Towards Relative Normativity in International Law?", in *American Journal of International Law*, 77 (1983), n. 3, pp. 416, 421, 431, 433). J. Klabbers has argued, in brief, that agreements between states with a normative nature – attempting to influence future behaviour – ought to be concluded as treaties (A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2007, p. 49; J. Klabbers, "The Undesirability of Soft Law", in *Nordic Journal of International Law*, 67 (1998), pp. 381-391; J. Klabbers, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, 1998, particularly pp. 4, 18 ff., 157-164.

[20] Though a much-used notion, law has been considered ever ambiguous. Á. Núñez Vaquero has noted that "much of the theoretical debate of the last half century has placed the concept of law at the core of the discussion. If what we mean by 'science of law' or 'legal science' depends on which concept of law is assumed, the risk of misunderstanding seems to multiply exponentially" (Á. Núñez Vaquero, "Five Models of Legal Science", in *Revus*, 19 (2013), pp. 53-81, https://doi.org/10.4000/revus.2449, *no.* 15; '*no.*' refers to the number of the paragraph in the cited work). It is fascinating to notice that L. Petrażycki has quoted I. Kant stating that lawyers are still searching for their concept of law (Л.И. Петражицкій, Введеніе въ изученіе права и нравственности. Основы эмоціональной психологіи, С.-Петербургъ, 1910, p. 11).

to any particular legal system, nor aimed primarily at practical application of the norms deemed valid within any specific legal system[21]. If that were the case, the point of view would belong to the science of particular positive law and would be necessarily dogmatic[22].

It is indeed possible to discuss soft law from the viewpoint of particular positive legal systems. Soft law may be attached to (or rather, be explicitly or implicitly recognised to belong to) the legal system of the European Union[23] or to any particular treaty-based subsystem of public international law[24]. Some

[21] Á. Núñez Vaquero has elaborated on the ambiguity of *legal science*, defining legal science *ampio sensu* as "the activity and/or the method used […] by those involved in determining the content of law (from this point 'legal scholars'), and to which no legal value is recognized by any legal system" (Á. Núñez Vaquero, *op. cit.*, *nos.* 8 ff., 23). My theoretical point of view is well described by his definition, however, I consider critically his distinction between legal science and other disciplines with law as their object of study (such as sociology or anthropology of law), insofar as he considers the latter to "pursue different objectives than those […] whose aim is to determine the content of law, that is, to establish which is the legal qualification of a certain conduct in a legal system" (*ivi*, *no.* 21). In my view, the last explanation is too restrictive: determining the content of law does not equate with establishing legal qualifications of certain conducts. It is possible and may be meaningful to study legal concepts even in one legal system without aiming at qualifying any certain conduct; it may also be done diachronically or comparatively, or with a higher level of generality, *i.e.*, on a more or less theoretical level, though aiming at determining the content of law (to the opposite, Á. Núñez Vaquero, *op. cit.*, *no.* 10). Indeed, the theory of legal science has a separate existence (see *ivi*, *no*. 68).

[22] Á. Núñez Vaquero has offered also the following definitions. By legal science *stricto sensu* he understands "the method recommended by those who believe that legal scholars should devote themselves solely to describing the content of positive law". By legal dogmatics he understands "the method proposed by those who believe that legal scholars […] must propose solutions to the judges for resolving hard cases." (Á. Núñez Vaquero, *op. cit.*, *no*. 27). The functions performed by *operators of law* (*ivi*, *no*. 22), such as judges and officials, are considered practical but also dogmatic, as they are expected to follow the norms of a particular positive law as valid.

[23] Literature on the topic includes: L. Senden, *Soft Law in European Community Law*, Hart Publishing, Oxford, 2004; J. Iliopoulos-Strangas, J-F. Flauss (eds.), *The Soft Law of European Organisations. Proceedings of the 7th Congress of the Societas Iuris Publici Europaei held June 10-12, 2010 in Strasbourg, France*, Societas Iuris Publici Europaei Series n. 7, Nomos, Stämpfli Verlag, Ant. N. Sakkoulas, Baden-Baden, 2012; M. Eliantonio, E. Korkea-aho, O. Ştefan (eds.), *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence*, Hart Publishing, Oxford, 2021; P.L. Láncos, *The Many Facets of EU Soft Law*, Pázmány Press, Budapest, 2022; P.L. Láncos, N. Xanthoulis, L. Arroyo Jiménez (eds.), *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, Edward Elgar Publishing, Cheltenham, 2023; M. Eliantonio, E. Korkea-aho, U. Mörth (eds.), *Research Handbook on Soft Law*, Edward Elgar Publishing, Cheltenham, 2023. I have written on some aspects in T. Kalmet, "Common Practices of the EU Intellectual Property Network as Soft Law and Beyond", in *Athens Journal of Law*, 11 (2025), n. 3, pp. 353-378, https://doi.org/10.30958/ajl.11-3-11.

[24] More general literature about international soft law includes: A. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", in *International and Comparative Law Quarterly*, 48 (1999), pp. 901-913; G.C. Shaffer, M.A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", in *Minnesota Law Review*, 94 (2010), pp. 706-799; T. Gruchalla-Wiesierski, "Framework for understanding soft law", in *McGill Law Journal*, 30 (1984), n. 1, pp. 37-88.

illustrative examples drawn from positive legal systems will be provided in the next section. However, I will not delve into details; each of these legal systems is autonomous, based on and constituted by international treaties, themselves framed within the broader sphere of public international law[25]. Autonomous systems result in variable dogmatics with possibly varying forms and meanings of soft law. Therefore, detailed examination of any particular system falls outside the scope of this paper.

I hold a hermeneutical attitude, seeking what "challengingly new" the past or other contexts may reveal to the present, thereby enabling us to transform our horizons of meaning and permitting us to see novel paths for the future[26]. In *hermeneutical holism* particulars can be understood via the general, and *vice versa*[27]: hence the need to address the normative whole. This open attitude is conditioned by the need to ground arguments, in order to attain an adequate, though not necessarily decisive result[28]. Although plurality of perspectives and experiences is welcome, *pluralitas sine necessitate* is to be avoided; thus, a monistic principle will be applied, except when dichotomies and discords are necessary and have value. This is the case as disciplines dictate different methodologies: *correctness* rather than truth is conceivable in the context of dogmatic disciplines[29]. This *dogmatic exception*, as it might be called, does not apply to legal theory, a non-dogmatic science, as it considers norms as observed facts rather than axioms.

[25] Although core treaty law has been codified in the Vienna Convention on the Law of Treaties (accessible at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), this Convention does not regulate the operation of treaty-based organisations. Article 5 stipulates that the Convention applies to treaties constituting and adopted within such organisations without prejudice to any relevant rules of the organisation.

[26] D. Liakos, "Attitude Isn't Everything: Hermeneutics as an Unfinished Project", in *Analecta Hermeneutica*, 13 (2021), p. 163.

[27] Also, 'circularity of knowledge' (L. Tomkins, V. Eatough, *op. cit.*, p. 3).

[28] "The ongoing dialogue permits no final conclusion. It would be a poor hermeneuticist who thought he could have, or had to have, the last word". L. Tomkins and V. Eatough have used this quote from H.-G. Gadamer to (un-)finish their article "Hermeneutics: Interpretation, Understanding and Sense-making", in C. Cassell, A.L. Cunliffe, G. Grandy (eds.), *The SAGE Handbook of Qualitative Business and Management Research Methods*, Sage, London, 2017, https://doi.org/10.4135/9781526430212.n12.

[29] See, regarding bindingness of a norm, L. Passerini Glazel, *op. cit.*, p. 99. K. Olivecrona's position that "legal dogmatic statements are incapable of truth, but capable of correctness" has been developed by E. Fittipaldi's article "Leon Petrażycki's Conception of Legal Dogmatics as a Science at the Service of the Principle of Legality: A Critical Defense", 2013, p. 5. Retrieved from https://www.researchgate.net/publication/263301634_Leon_Petrazycki's_Conception_of_Legal_Dogmatics_as_a_Science_at_the_Service_of_the_Principle_of_Legality_A_Critical_Defence.

Correctness as a criterion of law has been emphasised by R. Alexy. His argument from correctness "[…] says that individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. A system of norms that neither explicitly nor implicitly makes this claim is not a legal system." He includes within the claim both moral and conceptual aspects of the content of law; it may in fact be even wider, including procedural and epistemological aspects. R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism*, Clarendon Press, Oxford, 2002, pp. 35 ff.

A theorist is external to the normative system, seeking to describe law "by reference to the insider's point of view"[30].

In the next section, I will give examples of how soft law is used in different autonomous legal systems, discuss some arguments made, and propose conditions for using soft law in the legal sphere. In the third section I will give an account of the normative context in which various norms, including norms with legal effect operate, and how the legal effect of soft law could be evaluated in this context. In the fourth section I will proceed to a conclusive discussion on the conditions for soft law to have legal meaning.

2. Examples and preliminary discussion

To start the discussion, I will give the following examples to collect experiences to build an argument for how the legal effect of soft law can be dynamically established within the legal process.

I start from the European Union (hereinafter EU) law: though *sui generis*, still a subsystem of the international law. Within EU law soft instruments have been used extensively, and court practice has been formulated to address questions related to their use. The practice of one part of law may serve as an example for the whole. The Treaty on the Functioning of the EU (TFEU; Article 288) mandates the institutions of the EU – as defined in Article 3(1) of the Treaty on the EU – to adopt regulations, directives, decisions, recommendations and opinions, specifying that recommendations and opinions shall have no binding force; however, they have been classified in the treaty structure as 'legal acts of the Union'. The European Court of Justice has interpreted the status of both 'formal' soft law (though avoiding the use of this notion) referred to in Article 288 TFEU, and several other types of soft law instruments, by recognising, in variable degrees, their legal effect without binding force, taking into account their legal basis, agency and addressees, and other factors.

The palette of soft law in EU law is not exhausted by 'formal' soft law. The court has discovered, first, that in some cases what appears to be soft law is in fact hard. A binding act may have been mistitled as a recommendation. Also, informal agreements between institutions and other entities, including Member States, are considered binding if stipulated in hard law and under a duty to cooperate. Under

[30] S.J. Shapiro, "What Is the Internal Point of View?", in *Fordham Law Review*, 75 (2006), p. 1159. L. Embree has claimed that a legal sociologist can proceed "independently of normative considerations and thus purely theoretically" (L. Embree, "The Appeal of Alfred Schutz in Disciplines beyond Philosophy, *e.g.* Jurisprudence", in M. Endress, G. Psathas, H. Nasu (eds.), *Explorations of the Life-World. Continuing Dialogues with Alfred Schutz*, Springer, Dordrecht, 2005, p. 92). A legal theorist is in a comparable position. Whether an external observer understands the normative beliefs of the insiders, may affect the quality of the analysis, but sharing the beliefs of the insiders is not recommended for the sake of objectivity. On the other hand, if a dogmatist or, even worse, a legal operator has not internalised the norms he applies, it seems hypocritical.

such circumstances the instruments are, despite formal informality *incidentally* binding[31]. Second, genuine soft law may be created by agents who intend to bind themselves, making unilateral 'promises' to act in a certain way; the court has then confirmed the duty to keep their promises due to considerations of legal certainty, legitimate expectations, and equality, but not if it would contravene hard law; such promises do not create obligations to other parties[32]. Third, every instrument of soft law may (or may not) have interpretive effect – thus, affect the law by providing guidelines of interpretation. The effect is likely to be stronger if the other agents concerned have expressed their consent to be bound[33].

The Convention on the Organisation for Economic Co-operation and Development[34] (OECD; Article 5) provides that the Organisation may, *inter alia*, make recommendations to Members. The OECD has made hundreds of recommendations in several policy areas, some of them being highly influential[35].

There are also few international treaties hosted by OECD, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[36]. This Convention requires, *inter alia*, that its Parties criminalise certain acts effectively; the Parties have agreed to carry out a programme of systematic follow-up to monitor and promote the full implementation of the Convention (Article 12). In order to ensure "vigorous and comprehensive implementation of the […] Convention, […] and reaffirming member countries' commitment to robust enforcement", and recognising that "achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, as well as rigorous and systematic monitoring and follow-up", the Convention has been supplemented by a Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. This Recommendation uses language that on some occasions is rather imperative[37]. The monitoring programme includes evaluation of effective compliance with the provisions of the Convention and the Recommendation through a peer review mechanism, and results, by unanimous procedure, in particular recommendations addressed to the monitored state; their implementation is then monitored in turn. Thus, there are secondary soft law instruments of several levels, and a certain soft *acquis* has been developed, following the principle of equal

[31] L. Senden, *op. cit.*, pp. 150 ff; T. Kalmet, *op. cit.*, pp. 367-368.
[32] The conclusions are, however, not clear-cut. T. Kalmet, *op. cit.*, p. 367.
[33] A synopsis has been provided in T. Kalmet, *op. cit.*, p. 369.
[34] Accessible at https://www.oecd.org/en/about/legal/text-of-the-convention-on-the-organisation-for-economic-co-operation-and-development.html. See also R.R. Baxter, *op. cit.*, giving account of several examples of OECD soft law.
[35] A list of recommendations may be retrieved at https://legalinstruments.oecd.org/en/instruments?mode=advanced&typeIds=2. It is remarkable that the webpage considers them to be legal instruments.
[36] Accessible at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293.
[37] *E.g.*, Recommendations XVIII, XX, Annex I:B. Accessible at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378.

treatment of the members. Indeed, the OECD may, to achieve its aims, *inter alia*, "take decisions which, except as otherwise provided, shall be binding on all the Members"[38]. If it may take decisions that are presumed to be binding, then it may logically do less than that, and issue recommendations that have effectively imperative content.

Sometimes a substantial link between an existing structure of positive law and (primary) soft law is missing. An example is the Anti-Money Laundering (AML) and Anti-Terrorism Financing recommendations made by the Financial Action Task Force (FATF), an *ad hoc* body without clear legal status or a formal treaty basis, established by the G7 and operating under the auspices of the OECD[39]. Another example of a weak link to binding law is the expansion, beyond treaty-based borders, of the Anti-Corruption standards by the Group of States against Corruption (GRECO, Council of Europe)[40]. Those bodies also follow, in principle, a unanimous procedure.

Though I did not consider soft *negotia* as genuine soft law (and it is not incidentally, but intendedly and genuinely, binding, if only normative), I find rather pertinent here J. d'Aspremont's argument that the Vienna Convention on the Law of Treaties "does not elevate the normative character of a conventional act into a condition of its validity"[41]. A vague *negotium* might be valid, though not normative and without legal effect[42]. The point is that the expectations for legal character (validity, bindingness, *etc.*) are thus not equally constitutive.

In the context of EU law A. Peters observed that "law can have a variety of legal impacts and effects, direct and indirect ones, stronger and weaker ones", and there is a continuum between different qualities of law[43]. V.R. Feguš has analysed

[38] Article 5(a) of the Convention on the OECD.

[39] Literature on this topic includes: V. Mitsilegas, N. Vavoula, "The Evolving EU Anti-Money Laundering Regime. Challenges for Fundamental Rights and the Rule of Law", in *Maastricht Journal of European and Comparative Law*, 23 (2016), n. 2, pp. 261-293, https://doi.org/10.1177/1023263X1602300204; G. Pavlidis, "Financial action task force and the fight against money laundering and the financing of terrorism: Quo vadimus?", in *Journal of Financial Crime*, 28 (2021), n. 3, pp. 765-773, https://doi.org/10.1108/JFC-09-2019-0124; E. Ebikake, *op. cit*.

[40] Though the two treaties basic for its work have no stipulations on these topics, GRECO has launched in 2025 a new evaluation round focused on the prevention of corruption at the sub-national level ("GRECO Launches Sixth Evaluation Round", in *Anti-Corruption Portal*, 22/04/2025, Retrieved from https://anticor.world/en/main/news_page/greko_zapuskaet_shestoy_raund_otsenki_en).

[41] *Ivi*, p. 1085.

[42] Due to considerations of legal certainty (a principle, and therefore somewhat soft consideration) only norms "sufficiently clear, precise and unconditional" may impose obligations, in particular, by direct effect doctrine as recognised in EU law (P. Craig, "The Legal Effect of Directives: Policy, Rules and Exceptions", in *European Law Review*, 34 (2009), p. 353. Retrieved from http://ssrn.com/abstract=1433782).

[43] A. Peters, "Typology, Utility and Legitimacy of European Soft Law", in A. Epiney, M. Haag, A. Heinemann (eds.), *Challenging boundaries. Festschrift für Roland Bieber*, Nomos & Dike, 2007, pp. 405-428.

the validity of soft law in terms of the theories of H. Kelsen and H.L.A. Hart, and found that it is valid according to these theories; however, "validity, normativity and bindingness […] are three different concepts", they are "not dependent on the 'hardness' or 'softness' of rules per se: a rule does not need to be binding to be valid or normative in nature"[44].

I propose the following conditions for how soft instruments may function with legal effect, as elements of legal normativity.

If a soft instrument, as one may pragmatically assume (and, if relevant, also the act expressing consent to it), has been expressed (in written form, unilaterally or multilaterally) and/or is explicitly or implicitly expected to be followed, it is an act of communication and expression of expected behaviour, not just merely rhetorical or aspirational statement[45]. To give due respect to such expectations, even if not reciprocated by legally binding obligations, they (a) need first to be taken into consideration, with a view to evaluating its possible legal effect. Rights – even softly grounded – need to be taken seriously.

To sum up at this stage: issuance of, consent to, acceptance of, and expectations regarding soft law are certain facts (normative facts, to be precise, as will be explained *infra*), which even with no formal legal quality, may still have legal effect and should therefore be taken into consideration and under evaluation.

Let us follow, by analogy[46], the *Grimaldi* case, cited *supra.* In that case the legal effect consisted in the obligation of the national courts to take those facts (recommendations of the institutions) into consideration. This obligation, indeed, is rather soft due to its vagueness, but a national court would act contrary to the Union law, if it did not consider those facts. In other circumstances the effect and the entity affected may be different. In any event, we talk about applying soft law, by giving it some effect.

Now to the following steps: if the evaluation of the legal effect is positive – it is a belief or assumption to be backed by arguments – it is up to the legal operators to apply it, under the condition of the respect for the claim of correctness. This

[44] V.R. Feguš, "EU soft law: Validity, normativity and 'bindingness' reviewed", in P.L. Láncos, N. Xanthoulis, L. Arroyo Jiménez (eds.), *op. cit.*, pp 53-74. Thus, beliefs that law ought to have certain predicates to be considered law in the dominant paradigm, may be questioned.

[45] D. Shelton has referred to "expressed preferences", though not obligations (D. Shelton, *op. cit.*, p. 69). In due Holmesian spirit, L. Claus wrote: "Law is words, only words […] that people use to communicate with each other. Words in themselves cannot have purposes, goals, perspectives, rights, or duties. Only people can [… T]he people who directly contribute to law's evolution [are not] necessarily better than anyone else at thinking […] about what is actually the right thing to do. What lawyers distinctively offer us is prediction [… W]e consult lawyers when we want to know what other people in law's community will likely do and expect in relation to what we might do." (L. Claus, *Law's Evolution and Human Understanding*, Oxford University Press, Oxford, 2012, pp. 1-2).

[46] The judgment has been made by a court having exclusive authority to interpret relevant law; this is not the case with other legal systems, differing from EU law, or other agents. Also, the soft law instruments under question have been formal: their issuance had been mandated by law. Thus, they had a strong plausibility of having some legal effect. This is not always the case.

function of correctness may be expressed by two norms: (b) only soft law that is not illegal could be applied; (c) soft law could be applied in situations where it is not contrary to binding norms. Although these conditions seem similar, the first of them is a static condition and the second one a dynamic one: lawful soft law could be applied as far as it is not contrary to binding norms.

The last two conditions (b) and (c) do not appear to be difficult; critical appraisal of entities (norms, contracts, acts, *etc.*) as to their lawfulness is an ordinary part of legal practice. The same applies to the application of norms in a legal hierarchical system where higher norms and principles are preferred for application. From a practical point of view, it is a matter of detail whether the norm that shall not be applied is disregarded due to invalidity or non-enforceability, or because of the primacy of one legal system over another (or else supremacy, or preferred applicability: directly effective EU laws have interpretive priority over any domestic laws[47]). The first condition (a) is more challenging. Evaluating possible legal effects is a matter of normativity, and that is to be discussed in the next section.

Before that we ought to turn our attention to *soft law arithmetic*. Namely, some of the functions of soft law include filling in gaps in existing treaties, and forming state practice that can be utilised to interpret treaties. In both scenarios there are two *addends*: a binding instrument (it does not necessarily have to be a treaty), and a soft instrument that is suitable for filling gaps or providing interpretation; we may say that the latter is contentful. This quality of the second addend is relevant when the binding instrument is somewhat vague or imprecise (if both are precise, there is no need for the soft instrument's application). However, the binding instrument is binding, and the contentful instrument is not. Addition of both addends results in a sum that is both binding and contentful[48]. The binding addend may be also a principle, such as the duty to cooperate (such as expressed in Article 4(3) TEU), legitimate expectations, or equal treatment. It could be a contractual obligation to combat crime in general, but in such a case a contentful soft addend is not sufficient to indict and punish criminals. It would go against the principle *nullum crimen sine lege*, and not be correct. There is, thus, a risk that the operation is wrong. In a situation where the binding addend is too vague and the

[47] P. Eleftheriadis , "The Primacy of EU Law: Interpretive, not Structural", in *European Papers*, vol. 8 (2023), n. 3, p. 1291, doi: 10.15166/2499-8249/717.

[48] D. Sarmiento has expressed this relation without arithmetic: "[S]oft provisions that are not posited, but recognized by the system as rules of its own that hold interpretative effects, are introducing a new and autonomous source of law: interpretative mandates that must be taken into account, complementing the content of formal sources and, at times, determining their sense. Soft law thus becomes something equivalent to principled rules in laws or regulations that have no specific normative basis or consequence, with the substantial difference that soft law is formally unconnected, but interiorized, by the legal system" (D. Sarmiento, "European Soft Law and National Authorities: Incorporation, Enforcement and Interference", in J. Iliopoulos-Strangas, J-F. Flauss, *op. cit*., pp. 288-289).

values at stake are high, then it would not be correct to fill the gaps of binding law with soft content[49].

3. The normative whole around soft law

Some hermeneutical principles presented in the introduction resemble, in my view, the mechanism by which norms of law are correctly applied. Namely, from the plurality of legal arguments (based on normative facts) those critically appropriate to the topical case (composed of juridically relevant facts) are applied. This is effectively done by an entity authorised on the basis of other legal arguments to carry out this process; the entity methodically eliminates ambiguity and unnecessary plurality during the process, to reach a correct and conclusive result.

Those legal arguments authorising (or mandating) the entity mentioned – a legal operator – to carry out the process of applying legal norms, resemble Hartian secondary rules of adjudication[50]. There is no compelling reason to distinguish them here from so-called primary rules. The difference is just accidental – in one case the perceived addressee of the norm is a legal operator, and in the other – everyone. Indeed, such a rule may require a judge not to apply a certain rule or, in other words, not to accept certain legal argument. The same applies for Hartian *rules of change* – the entity authorised to create norms (involving logically the right to modify and annul them) is just another specific legal operator. As regards the third type of secondary rules distinguished by H.L.A. Hart (rules of recognition) – *vide infra*.

By a *legal argument* I understand here a set of premises intended to justify a (suggested or reached) conclusion[51], if *at least one premise refers to a legal norm*. Legal norms exist insofar as they are grounded by appropriate normative facts. By a *normative fact* – a notion I owe to L. Petrażycki[52], even if I have modified its meaning – I understand here a fact (or state of affairs) based on which one has a reason to believe that a norm exists[53]. In order to be used in legal arguments the

[49] Soft law implies softness. It is possible to imagine, metaphorically, another object with a typically hard nature, if qualified by softness. Iron is useful because it is hard; it can be sharpened only when hard, and it is solid only when hard. Yet, to give iron a desired shape, it must be softened to the extreme. Similarly, when an object made of iron has been broken, it can usually be remade by melting, filling its gaps with soft iron, or joining its broken parts together with a soft substance. During all these procedures, soft iron is still iron, though not of the same practical use. Once hardened, its use becomes the same. Alas, not all substances can be joined with iron. Soft law can be used to make law, repair law, fill its gaps, make connections – but not always.

[50] H.L.A. Hart, *op. cit.*, p. 97; G. Brennan, L. Eriksson, R.E. Goodin, N. Southwood, *Explaining Norms*, Oxford University Press, Oxford, 2013, p. 42.

[51] I have adjusted the definition given in W. Sinnott-Armstrong, R. Fogelin, *Understanding Arguments. An Introduction to Informal Logic*, 9th edn., Cengage Learning, Boston, 2014, p. 3.

[52] Л.И. Петражицкій, Теорія права и государства въ связи съ теоріей нравственности. Томъ II, С.-Петербургъ, 1910, pp. 325 ff.

[53] As L. Petrażycki (Л.И. Петражицкій, Теорія, cit., pp. 517 ff.), I find that the common notion of *source of law* is unfit. It is metaphorical (creating an image of a norm flowing out of it), ambiguous

normative fact is expected to ground a legal norm. For other types of arguments, the grounded object could be a theological norm (*regula fidei*[54]), norm of politeness, *etc*[55].

Normative facts may be both brute and institutional facts[56], but one may also believe that a norm is grounded by an imaginary mental fact that someone conceives to be real, including myths or revelations[57]. The normative fact used to ground a legal norm is usually an external empirical fact, truth-apt and thus outside the normative realm of ought. The relation between the fact and the norm is not causal[58]. Whether the normative fact is used to ground a legal norm, depends on the belief of the relevant subject and is not determined; such a belief belongs to doxastic attitudes[59]. External coercion and sanctions in general have no direct relevance in this context and should not be used to define legal norms[60].

(formal sources such as statute, custom, *etc*., and material sources such as popular will, legislator, religious beliefs, *etc.,* have been mixed up; in the case of formal sources, types of source and concrete instances of sources may also be confused; sometimes one speaks of sources in the epistemological sense, referring to the place where the knowledge about the norm has been acquired, such as EurLex), and therefore misleading.

[54] The normativity of the statements contained in the Nicaean Creed is grounded on the historical-empirical fact that the Fathers of the First Council in 325, believing (on the ground of other normative facts) to have authority to do so, decreed the creed to be a binding expression of Christian faith. The norms of religious morality, however grounded, are rather moral than religious norms.

[55] Normative facts are not limited to law. Л.И. Петражицкій, Теорія, cit., p. 520.

[56] See a typology of physical and mental facts in J. Searle, *The Construction of Social Reality*, The Free Press, New York, 1995, p. 121. See L. Mommers, "On the Ontological Status and Representation of Legal Concepts", in H. Jaap van den Herik, H.G. Sol, N.J. Huls (eds.), *Legal Knowledge and Information Systems. JURIX 1998: The Eleventh Annual Conference*, Koninklijke Vermande, Lelystad, 1998, pp. 80-81. Retrieved from https://jurix.nl/pdf/j98-06.pdf. L. Mommers has explained the mechanism of law by a hierarchy constituted by brute, deontic and constitutional facts, in this order upwards. O. Weinberger has defined norm creating facts as "not brute facts, but institutional facts which embrace normative understanding as an element of identifying the respective act" (O. Weinberger, *op. cit.*, p. 231). I doubt whether this applies to customary law.

[57] See Л.И. Петражицкій, Теорія, cit. p. 520.

[58] L. Mommers, considers deontic facts, linking brute and institutional facts, to express purely constitutive relations (L. Mommers, *op. cit*., p. 81).

[59] C. Bispinck-Funke, *op. cit.*, pp. 114-118. Thus, it is primarily a matter of psychology, though not immune to socio-external circumstances.

[60] See Петражицкій, Теорія, cit., pp. 667 ff. E. Fittipaldi has considered fear for sanctions to be a selfish, economic and thus non-normative motivator (E. Fittipaldi, "Norms, Rights, Obligations: An Attempt at Empirical Reduction", in R. Redaelli (ed.), *Moral Normativity in an Interdisciplinary Perspective. Humans, Animals & Artificial Intelligence*, Verlag Karl Alber, Baden-Baden, 2023, p. 61). I tend to think now that fear is among the emotions that may be considered normative. I will not elaborate on the question here. See, however, A. Ross, *Introduction à l'empirisme juridique. Textes théoriques*, Bruylant L.G.D.J., Paris, 2004, pp. 24-25. The fear of sanction seems to be overrated.

In a society (in the dominant paradigm, let us suppose), socialised people[61] believe that certain normative facts (*e.g.*, legislative decisions) ground sets of legal norms (*viz.* statutes) that are considered to be valid (under certain conditions) and thus binding. Such beliefs, widespread in the relevant society, in the context of a multitude of norms on all aspects of life, result in a belief in the existence of a legal system. It is vital for the operation of the system (taking into account that several legal relations need a third party to resolve disputes, *etc.*) that legal operators share these beliefs. The shared beliefs among people and, in particular, among legal operators may be understood as the recognition of the norms in Hartian terms. Crucially, the operators' beliefs include the beliefs about the hierarchy of norms; otherwise, it would be unthinkable to talk about a system of legal norms. Institutional knowledge is socially objectivated, "as a body of generally valid truths about reality, any radical deviance from the institutional order appears as a departure from reality"[62]. As H. Kelsen has done[63], I see a *state* as nothing but an operating (functioning) territorial legal system. However, there is no obvious reason to deny that other types of legal systems exist[64].

A *norm* may be used and understood in a descriptive and a prescriptive sense. The notion may *describe* something (*e.g.*, the first snowfall, behaviour) that is (much) more likely to take place than not; I try to avoid '*normally*' or 'regularly' in this context, but the way these words are used in common language conveys the meaning[65]. The majority ratio enables us to talk of both normal and abnormal (and, regular and irregular); however, it is not misleading to describe something as normal even if it always takes place (though it is not the only conceivable way for a thing thing to be, or unavoidable). Thus, it is about probability, not necessity. On the other hand, it is more than just contingency or possibility, or a balance of probabilities.

In a human and social context, descriptively normal behaviour has been considered a *habit*. Certain consciousness or intentionality may be required to distinguish habits from merely mechanical repeated actions or subconsciously or physiologically conditioned actions, however regular they are. Sometimes the

[61] As argued, socialisation takes place through interaction (usually starting in childhood) within the same culture with shared values and beliefs, *etc.*, and thus constitutes society. Sharing the same beliefs about valid legal norms is an important factor in socialisation.

[62] P.L. Berger, T. Luckmann, *The Social Construction of Reality. A Treatise on the Sociology of Knowledge*, Penguin Books, London, 1991, p. 83.

[63] M. Pelegrino da Silva, "Kelsen's Thesis of the Identity of State and Law, Constitutional Replacement and Legal Continuity: Some Challenges", in *Rechtstheorie*, 54 (2023), n. 3-4, pp. 319-341.

[64] See M.C. Locchi, "Brief Reflections on Legal Pluralism as a Key Paradigm of Contemporary Law in Highly Differentiated Western Societies", in *Revista Brasileira de Direito*, 10 (2014), n. 2, pp. 74-84. L. Petrażycki also accepted a wide plurality of legal orders.

[65] See C. Bicchieri, *The Grammar of Society. The Nature and Dynamics of Social Norms*, Cambridge University Press, Cambridge, 2006, p. 29. Regularity, I believe, has an additional element of frequency or systematicity.

border is blurred; especially destructive habits seem to have a tendency to become irrational vices (*e.g.*, smoking, scrolling, perhaps xenophobia). A habit may be practiced individually or by any group of individuals. The motivation behind a habit, or its post-hoc reasoning, may be present or absent, conscious or subconscious. There is nothing normative about habits[66]. O. Weinberger has stated that

> In the law, or in morals, only habit which is combined with the *opinio necessitatis*, namely, with the conviction of people in the respective society that this form of behaviour is to be followed in the spirit of the normative system, produces valid norms[67].

This principle draws a line between what is normal and what is normative (despite a wish for something normative to become normal and habitual). Again, in a social context, certain behaviour may be repeated because of the belief that it is normal in the society and therefore expected. On one side, such norms are descriptive, but due to the response to expectations, they have also a prescriptive element. Two cumulative kinds of expectations have been mentioned in this context by C. Bicchieri: empirical and normative. Empirical expectation refers to the belief that most people in their reference network conform to it; normative expectation – to the belief that most people in the network believe they ought to conform to it and may react to non-conformity by negative sanctions[68].

L. Petrażycki would have considered norms that involve somebody's *rights* or *claims*[69] to expect some type of behaviour, to be legal norms (as mentioned, legal norms are in his (or mine) perspective not limited by state-sovereigntist view, and the use of sanctions is of secondary relevance). The same applies for B. Malinowski's anthropological definition of law: "The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another"[70]. In any case, this kind of compelling normality has been called *social norms* (*strictu sensu*, as most norms under discussion here are

[66] To the opposite: C. Bicchieri has defined descriptive norm as "a pattern of behavior such that individuals prefer to conform to it on condition that they believe that most people in their reference network conform to it (empirical expectation)" (C. Bicchieri, *Norms in the Wild. How to Diagnose, Measure, and Change Social Norms*, Oxford University Press, Oxford, 2017, p. 19). Similarly, C. Bicchieri sees *customs* to be conformed to because of meeting the individual's needs (*ivi*, p. 15). I find it hard to agree with.

[67] O. Weinberger, *op. cit.*, p. 239. Unfortunately, the definition is circular. O. Weinberger also emphasises rightly that sometimes habits are able to constitute or change rules.

[68] C. Bicchieri, *Norms in the Wild*, cit., p. 35.

[69] I use simplified terminology here; I also assume operatively that prescriptive norms are institutional reality, though they may really be just mental projections.

[70] B. Malinowski, *Crime and Customs in Savage Society*, K. Paul, Trench, Trubner & Co., London, 1932, p. 55; quoted *via* M. Ossowska, "Moral and Legal Norms", in J. Gorecki (ed.), *Sociology and Jurisprudence of Leon Petrażycki*, University of Illinois Press, Urbana-Chicago-London, 1975, p. 108. On social pressure as an indicator of law, also M. Ossowska, *op. cit*., p. 110.

social); as this designation is ambiguous, I prefer here the notion of *conventional norms* (where *convention* does not refer to international treaties or constitutional conventions, in this context; rather, it refers to stability[71]). This class comprises good manners and norms of politeness, customs (to be distinguished from customary law), and also traditions with no visible ethical reason except facilitating social communication. Linguistic norms belong to this category; in their case the need to enable communication is obvious.

I do agree with C. Bicchieri in regard to the following category, *moral* norms. Namely, they lack a link to descriptive normality; moral norms may be followed "irrespective of what others do"[72], even if others do not behave in such a way and consider it abnormal and sanctionable. This is not to claim that there are no such phenomena as socially accepted morality or even posited morality in the form of professional ethic codes, lists of religious precepts, *etc.* So, what is the reason to behave morally, if it is at the same time socially abnormal? I believe it is some respective normative fact which, as said, may also be imaginary. This solution does not exclude the possibility of rational morality akin to the one elaborated by E. Ullmann-Margalit[73].

A lot has been said already on *legal* norms that, I reiterate, constitute corresponding obligations to comply and rights to demand compliance. Descriptiveness is in this case accidental[74] (except, *e.g.*, in the case of customary law where constant practice is one of two main constituents of the normative fact), and empirical and normative expectations, as formulated *supra*, are relevant; if only for prudential reasons (I do not find them contradictory to *pure* selfless normativity)[75].

Nevertheless, legal *norms* may have various forms, including rules (if distinguished from norms) and principles (as explained in the first section). Norms, in my view, are primarily law-thoughts, that can be expressed by law-sentences[76]. Thus, although statutes, international treaties and other written rules are nowadays the most widespread expression of law, it does not diminish the weight of principles, customs and other norms to be induced to propositional form. Indeed,

[71] C. Bicchieri, *Norms in the Wild*, cit., pp. 29, 34. Conventions have been elaborated on in D. Lewis, *Convention. A Philosophical Study*, Blackwell Publishers, Oxford, 2002.
[72] C. Bicchieri, *Norms in the Wild*, cit., pp. 41, 59.
[73] E. Ullmann-Margalit, *The Emergence of Norm*s, cit.; E. Ullmann-Margalit, *Normal Rationality. Decisions and Social Order*, Oxford University Press, Oxford, 2017.
[74] Some authors consider effectiveness of law to be relevant: "The external aspect of a norm consists in the regularity of compliance with the norm and/or the imposition of a sanction for non-compliance" (R. Alexy, *op. cit.*, p. 14).
[75] In dogmatic theology imperfect contrition – *e.g.*, from fear of hell – is sufficient for salvation (E.J. Hanna, "Attrition (or imperfect contrition)", in Catholic Answers. Retrieved from https://www.catholic.com/encyclopedia/attrition-(or-imperfect-contrition)). As mentioned *supra*, to the opposite E. Fittipaldi, "Norms, Rights, Obligations", cit., p. 61.
[76] L. Passerini Glazel, *op. cit.*, p. 97.

written rules are linear, and the law is multidimensional; judging by written rules may be misleading, *inter alia* by their perceived accessibility.

From this point, at least, the scepticism towards formal law, expressed by some representatives of legal realism, is acceptable. We do not know, what the top legal operators will ultimately believe – and judge – about law. The propositions of legal science can be "predictions about how judges will decide future controversies"[77], especially in hard cases. In the absence of disputes, it is the general public whose beliefs about law shape the society[78].

Also, legal norms may be grounded on a variety of normative facts, official or unofficial. Among the latter, L. Petrażycki mentioned, for example, lawbooks (that is collections of customs or *Rechtsbücher*), *communis doctorum opinio*, [what could be identified with the] Teachings of Highly Qualified Publicists[79], opinions of legal experts, religious authoritative statements and practices, contracts, promises and admissions of obligations, "programmatic law" (that is authoritative statements about future actions), precedents and judicial decisions, jural maxims and proverbs, universally accepted law, *etc*[80]. It is not difficult to find parallels between this list and historical or anthropological examples, or the palette of what is meant by soft law. Perhaps the most influential example is the status of Roman law in Mediaeval and Early Modern Europe – though not valid in any technical sense it had immense practical legal effect, and shaped the legal cultures of modernity.

Although not a traditional or unofficial source, the post- or suprapositive principle (and, thereby norm) of correctness defines, according to R. Alexy[81], law as "a system of norms that lays claim to correctness […]". Being a principle, its meaning is utterly abstract; it is at the same time complex and pervading.

The process of application of legal norms, described in the beginning of this chapter, is also circular or holistic. The relevance of facts depends on legal arguments, and in turn the choice of relevant legal arguments depends on the facts. For example, paternity is a matter of biological fact but has been traditionally presumed by legal norms referring to another fact – the married status of the parents – which in turn depends on norms conditioning the validity of marriage, *etc.* It is essential that the norms to be applied to the case apply to the time when and space where the juridically relevant facts take place. Therefore, it is necessary to know the *normative facts – inter alia*, when the relevant norms have been adopted, as is usually the case, in what form, and that they have not been rendered inapplicable

[77] Á. Núñez Vaquero, *op. cit.*, *no.* 42.
[78] See E. Fittipaldi's and L. Petrażycki's criticism on the prediction theory in E. Fittipaldi, "On Leon Petrażycki's Critical Realism and Legal Realism", in B. Brożek, J. Stanek, J. Stelmach (eds.), *Russian Legal Realism*, Springer, Cham, 2018, p. 94. See also L. Claus, *op. cit*.
[79] I refer to the analogous concept mentioned in Article 38(1)(d) of the Statute of the International Court of Justice, as a subsidiary source of international law as applied by the Court.
[80] Л.И. Петражицкій, Теорія, cit., pp. 579-612.
[81] R. Alexy, *op. cit.*, p 127.

by another compelling fact. The facts are a matter pertaining to empirical evidence and truth. The understanding of the legal meaning (including the normative content and value of norms evidenced by normative facts), however, belongs to the realm of legal dogmatics, as does the question of how the norms are to be applied correctly. The latter questions are an example of the *dogmatic exception*, to be construed restrictively, in my view. The former, as matters of facts and truth, are akin to scientific problems. There is a remarkable similarity between how scientific theories are falsified by contradictory evidence, and how norms are rendered inapplicable in law by normative facts evidencing their invalidity or illegality, or proving the existence of a higher contradictory norm. Those similarities are relevant for the previously mentioned conditions (b) and (c).

For the challenging condition (a) – how to evaluate possible legal effect of soft law so as to take it into consideration when solving a legal dispute – the procedure should, in my view, start in some regard similarly to that applied for customary law. Two normative facts are relevant at this initial stage (a1). First, the existence of the soft instrument needs to be established; without this there would not be any need to consider it.

Second, a parallel to the *opinio juris sive necessitatis*, namely the conviction of the relevant agents that the behaviour according to the established soft instrument is *right*, needs to be ascertained. As soft law is not binding, it would be fruitless to ask about the conviction that there is an *obligation* to behave in a certain way. It is critical here that the conviction is about *right* behaviour, not merely useful, agreeable or normal behaviour[82]. I do not believe that the rightness needs to be the cause, reason or motive to behave in a certain way; it should suffice that this is the explanation given *post factum*[83].

The second stage (a2) should follow if the opinion that the behaviour is right has been confirmed. Not everything considered to be right has an impact on law. It should also be considered objectively necessary to fill the gaps (directly or by interpretation) or to protect important values (particularly legitimate expectations and equal treatment) or interests that otherwise would not be protected. In this regard the procedure is similar to how principles are applied in law.

[82] For international customary law, the respective consideration has been characterised by several sources quoted: "In ascertaining whether a rule of customary international law exists it ought to be established […] that the relevant practice was not motivated (solely) by considerations such as 'courtesy, good-neighbourliness and political expediency' as well as 'convenience or tradition'. [... '] and not merely as a matter of reciprocal tolerance or comity'. [...] Nor may practice motivated (solely) by the need to comply with treaty [...] By contrast, where States act in conformity with a treaty by which they are not (yet) bound [...] the existence of 'acceptance as law' may indeed be established [sic!]" M.C. Wood, "Second report on identification of customary international law", United Nations, International Law Commission, New York, 2014, pp. 46 ff. Accessed at https://digitallibrary.un.org/record/774305?v=pdf.

[83] I believe this step corresponds, in general terms, to the Mediaeval understanding of the ideal nature of the non-binding Roman law, that legitimised its reception.

It is important to emphasise at this stage that the principles of law[84] have been considered both hard and soft law; the latter classification arises from its vagueness, the former for its fundamental import. Principles of law are indeed abstract and, in most cases, not directly able to be subsumed; they may also be contradictory. However, principles are often referred to, either explicitly or implicitly and both by legislators and judges, in their *legal* documents. This may be seen as an endeavour to make the rules or their application more general, and to unify the legal system. On the other hand, legal documents sometimes refer to more concrete, technical or administrative norms and regulations that *eo ipso* are not contained in *legal* documents. Also, they refer explicitly to unambiguously extra-legal norms such as best or good practices, standards, morality *etc.* This method incorporates such referents into law, in some sense, giving them legal effect. There are instances where international treaties not having entered into force (and not expected to in the future) have been incorporated into other international treaties by reference[85]. Thus, this renders non-binding norms binding and validated. Conceptually the same happens to soft law when its legal effect is recognised and applied.

4. Conclusion

The meaning of words sometimes depends on the belief concerning the correct way to understand them. For example, the Constitution of the Republic of Estonia stipulates that "Justice shall be administered solely by the courts" (§ 146)[86]. In English, the meaning of the article is explicit. However, in Estonian – "Õigust mõistab ainult kohus" – the phrase admits two different interpretations. It may be understood (as in translation) that (x) "Only a court can administer justice"[87], or, more literally, (y) "Only a court can understand law" (or, "Law is to be understood only by the court"). If we understand the article in the second meaning, there is little hope that law is the guiding principle in the society: nobody but a court can understand it (and, due to the imperative language, the opposite is disallowed)! It is a matter of opinion or belief as to which of the meanings is correct. This ambiguity is why it is necessary to interpret the article in the meaning (x), as defined by correct

[84] I refer also to P. Weil's criticism on supralegal norms, cited *supra*.
[85] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15/04/1994, has incorporated in Article 35 some provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits, done at Washington, D.C., on 26/05/1989. The latter treaty (accessible at https://www.wipo.int/wipolex/en/text/295136) has not entered into force (https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=29). TRIPs is accessible at https://www.wto.org/english/docs_e/legal_e/31bis_trips_04c_e.htm#6.
[86] *Eesti Vabariigi põhiseadus* (The Constitution of the Republic of Estonia), 1992, retrieved from https://www.riigiteataja.ee/en/eli/523042025002/consolide. The translation is provided by the State Gazette, but it is not official; only the Estonian text is valid.
[87] DeepL [online translation website], retrieved from https://www.deepl.com/en/translator .

opinion, and to ensure that no one understands it differently from the court, and at the same time ensure that everyone understands the law (in a correct way).

This engagement with language has practical implications in the context of soft law. Legal operators must recognise the legal effects of soft instruments, if this is to be believed, insofar as it respects the principle of correctness. I have held that this function of correctness may be expressed by two norms: (b) only soft law that is not illegal may be applied; (c) soft law may be applied in situations where it is not contrary to binding norms.

From the illustrative examples provided in the second section of this paper, certain soft law instruments would not be applicable in courts operating under the rule of law, where the principle *nullum crimen sine lege* applies. This principle is a binding norm that renders unlawful any policies and acts contrary to it. Soft law instruments that specify what must be criminalised have no legal effect on law enforcement or courts until statutes have been enacted by the legislature. However, such soft law may influence legislators. Similarly, soft law relating to priority-setting and due diligence in preventing and combating transnational crime affects government and law enforcement actions, insofar as it does not contradict binding norms. These are legal effects.

The question whether soft law should be considered at all – given its possible legal effect (condition (a)) – has been analysed separately, as it is more a matter of policy than ordinary legal practice. This issue, addressed in the third section, concerns the normative nature and legal effect of soft law, identified through its impact on legal norms or relationships. Briefly, I propose that soft law merits consideration when it exists, is believed to be right (a1), and is objectively necessary (a2). The procedure may, I admit, follow different scenarios.

In summary, throughout the paper I have argued that soft law may function within the legal domain. Soft law belongs to the normative whole and has the capacity to produce legal effects. The legal sphere is sufficiently ambiguous to accommodate soft law sources with a legal effect; however, the law retains primacy, as soft law may be given legal effect only under conditions established by law, particularly the principle of correctness.

From the illustrative examples provided, it is evident that soft law instruments may take unilateral, quasi-contractual or other forms. Although the issuance of soft law was beyond the scope of this paper, it merits further study.[88]

[88] The author expresses sincere gratitude to the reviewers for their impact on the development of the discussion.