

Soft Law in Domestic and International Settings

Eric A. Posner

I. What Is “Soft Law”?

- A. Definition
- B. Examples
- C. Distinctive Characteristics of Social Norms
- D. Mechanisms
- E. Evaluation of Social Norms
- F. Legal Regulation

II. International Law

- A. What Is International Law?
- B. Parallels with Social Norms
- C. Differences Between International Law and Social Norms
- D. Mechanisms of International Law
- E. The Normative Force of International Law
- F. Optimal Design of International Law and Institutions

Conclusion: Some General Comments About Soft Law

I. What Is “Soft Law”?

A. Definition

When we talk about “normal law,” we mean a set of rules that are created and enforced by a central authority that has the power to force people to comply. The central authority also must be recognized by the people as the source of lawmaking authority.

The central authority has three functions. It creates law; it interprets law; and it enforces the law. In the American system, these functions are formally divided: the legislature creates the law; the courts interpret the law; and the executive enforces the law. But in many settings the functions are combined. For example, common law courts both make and interpret law. The president has, under certain circumstances, the power to create, interpret, and enforce the law – for example, in foreign relations.

“Soft law” also refers to a set of rules, but what is special about soft law is that no central authority creates, interprets, and enforces these rules. And what is striking is that soft law nonetheless seems to be quite significant, often a more important influence on people’s behavior than normal law is.

B. Examples

Let me provide some examples. I start with soft law in domestic settings, what I will call “social norms.” I will use mainly American examples, although I am sure you can think of similar examples in Japan.

Commercial relations. People frequently enter into business relationships that are not regulated by legally enforceable contracts. Some relationships are not contractually enforceable because they are illegal. The underground economy in the United States and other countries is vast; an important component are illegal credit relationships, whereby debtors take on debt in violation of usury laws, reporting requirements, and other regulations. Other relationships are not contractually enforceable because the parties fail to comply with some formality – for example, the contract is not in writing. Yet people frequently comply with these contracts despite the absence of legal enforcement.

Social relations. People maintain important social relationships with each other despite the absence of legal enforceability. Married couples share household chores; friends help each other out in time of need; adult children support their aged parents. Of special interest is the importance of gift exchange in the creation and maintenance of such relationships, a topic about which I will have more to say later.

Law compliance. People appear to comply with the law for reasons other than the fear of legal sanctions. For example, exhaustive studies show that Americans normally pay their taxes even though enforcement of the tax laws is lax, and the penalty for violating the tax laws is extremely low. At the same time, it must be noted that people violate some laws quite frequently – for example, laws against speeding.

General morality. People appear to comply with certain general norms that appear to benefit society at large. Often, these norms are quite new. For example, in the United States many people recycle garbage, avoid eating meat, buy fuel efficient automobiles, donate money to charity, and so forth, even though they have no legal obligation to do any of these things. We should also add “manners” – that is, rules that have more to do with personal conduct than with reducing harm to others – including how we eat food in public, how we dress, how we greet people and say goodbye to them. All kinds of complicated rules govern these behaviors.

C. Distinctive Characteristics of Social Norms

The striking characteristic of social norms is that they exist, and influence people, even though the central authority – the government – does not create, interpret, and enforce them. The question arises, then, Who creates, interprets, and enforces them?

Creation. The origin of social norms is obscure. Sometimes, they seem to be very old – gift-giving rituals are like this – but sometimes they are new, like recycling norms. One theory is that particular authoritative people – politicians, entertainers, writers – advance a new idea (such as, We should recycle), and eventually it “catches on.” But why does it catch on? Whatever the role of the “norm entrepreneur,” the ordinary person must

eventually be convinced that he should comply with the social norm. Thus, the creation of social norms is decentralized.

Adjudication. No court decides whether a person complied with a gift-giving ritual or instead gave offense. Instead, people decide for themselves, sometimes asking wise or experienced people for their advice, but not always. Because there is no authoritative interpreter, the content of social norms shifts constantly, in light of new events.

Enforcement. No police officer or sheriff forces people to comply with social norms. A person who violates a social norm might be scolded or avoided by other people. Close knit communities will sometimes ostracize people who violate social norms. Enforcement can be very weak or very strong. If you are, for example, a Korean immigrant living in the United States, you don't speak English, and you depend on other Korean immigrants in your community for advice, support, and business relations, then ostracism is an extremely serious harm. Thus, in immigrant communities in the United States, social norms are very strong.

D. Mechanisms

There are many theories about why social norms exist, and how they are enforced. I will briefly mention two such theories, and then spend much more time on a third.

Internalization. One theory is that people comply with social norms because they internalize them. For example, one's table manners are automatic: people don't think about whether to use proper manners or not. Some people might obey the law simply because they believe they should. An economist would say that complying with a social norm is a "preference" that people have.

Although internalization theories probably reflect some of the truth, they are not very illuminating. They do not provide an account of why social norms are internalized; why some social norms are internalized but not others; and so forth. So I will move on.

Retaliation. Another theory is that people comply with social norms because they fear that, if they do not, other people will retaliate against them. For example, suppose I sell goods to various buyers. I comply with a norm or business custom – say, selling only high quality goods – because I fear that if I do not comply with this custom, people will stop buying from me, and I will go out of business.

My view is that the threat of retaliation best explains this type of bilateral relationship – between a buyer and seller, or a husband and wife, or two friends. But it can't explain more general norms – such as gift-giving, recycling, table manners, and so forth.

Reputation. The theory I want to advance is related to the retaliation theory but is a little more complicated. The theory has two stages. Imagine a group of people. The group could be a small community, a large city, a whole nation – or it could be based on some

other characteristic, like a group of real estate brokers, or construction workers, or law professors.

At stage 1, the people either have, or try to establish, reputations that show that they are desirable partners – that is, social or business partners. They do this by “signaling.” A person sends a signal by engaging in a costly action that shows that he has some desirable characteristic. The action has to be costly, or else people without that characteristic would be able to engage in the action; but it is less costly for people who have that characteristic than for people who do not.

One such characteristic is time preference. Everything else equal, a person who is patient – who values long-term payoffs – is a better business or social partner than a person who is impulsive because that person is more likely to cooperate in long term relationships. I claim that all kinds of behavior governed by social norms – gift-giving, greeting rituals, honesty, and even general law-abidingness and compliance with ethical norms like the norm in favor of recycling – can be signals of patience and other desirable character traits that are otherwise invisible.

At stage 2, people match up into pairs or small groups and try to cooperate with each other. People marry, establish friendships, create business partnerships, enter long-term contracts, hire employees, and so forth. During these long-term relationships, people who are more patient are more likely to cooperate, and people who are impatient are more likely to cheat. Thus, patient people do better if they match up with other patient people.

And then this process repeats itself indefinitely. People who signal, and who refrain from cheating, build up reputations and become increasingly sought after partners. Others may achieve a middle level reputation. The worst are ostracized, and may even become criminals.

This theory is very simple, and it misses a lot of important characteristics of social norms; nonetheless, it is a first approach to understanding a complicated phenomenon. And it has definite implications for how we should think about social norms.

Creation. Patient people are constantly looking for ways to show that they have are patient, and impatient people are constantly looking for ways to imitate the patient people. This creates a kind of arms race problem. One simple way of showing that you are patient is to spend a lot of money in a highly overt way – on elegant clothes, fancy meals, elaborate gifts, and so forth. These are all a part of normal business practice. Less patient people will try to imitate this behavior – for example, buying clothes that look fancy are not really. And businesses cater to this demand. Often, what becomes a focal point for this competition is arbitrary – it could be some passing fashion or fad – because of the way that the less patient furiously imitate the more patient people.

Interpretation. The absence of an authoritative interpreter of social norms – that is, the absence of anything like courts – creates a great deal of anxiety, and demand for services

that can provide such interpretations. Thus, there is a whole industry of protocol and etiquette experts, best sellers that tell you how to give gifts, and intermediaries who can help bridge differences among cultures.

Enforcement. The enforcement of social norms is endogenous. People comply with social norms because if they do not, they will have trouble finding other people to cooperate with them. By the same token, people who are highly valued have the power to violate social norms. Thus, we read about the boorish behavior of celebrities, business leaders, tycoons, and politicians – they can be boorish because other people need them more than they need other people.

E. Evaluation of Social Norms

Robert Ellickson famously argued that social norms are welfare-maximizing. His argument was, essentially, that a group of people who cooperate without relying on the law have the right incentives to structure their cooperation using rules that maximize their welfare.

My account is different, in part because I use a broader definition of social norm. Let me make a few quick comments.

Initially, I agree with Ellickson that when people cooperate with each other, they will often choose welfare-maximizing rules. For example, two farmers who share a fence are likely to determine the best way of allocating between themselves responsibility for keeping the fence in repair.

However, it's not clear that it's useful to think of these rules as social norms. What makes a social norm a social norm is that a larger community is involved.

Consider now the recycling norm. Here, the temptation is to say that a social norm solves or mitigates a collective action problem. The problem is pollution; the solution, or partial solution, is recycling. People comply with the recycling norm because they fear being thought to be bad people if they do not.

This idea also seems suspect. There is no particular reason to think that people are able to act this way; usually, we depend on government to create public goods. One might fear that people recycle not because recycling is good, but because recycling has become a kind of gift-giving, an arbitrary type of signal that catches on for cultural reasons but is not necessarily desirable. People might recycle too much, or not enough; there is no reason to think that their behavior is optimal right now.

This brings us to gift-giving. It seems to me that gift-giving practices provide us with the most vivid example of inefficient norms. People give gifts in order to signal their time preferences, but there is no reason to think that the right amount of gift-giving occurs. Plenty of evidence suggests that gift-giving is excessive. In the United States, people buy gifts for each other, but then supply "gift receipts," which do not reveal the price of the

gift but enables the recipient of the gift to return to it to the store where the gift was bought, and in the process learn the price. I'm told that in Japan, there are businesses that purchase, at a steep discount, gifts that people do not want to keep.

Other types of social norms are even more obviously detrimental. Consider classic social norms that direct people to discriminate – against racial and ethnic minorities, against illegitimate children, against women. These norms help people to maintain cooperative relationships with each other, but they also result in harms to third parties.

The bottom line is that if social norms are the result of signaling behavior in the way that I have described, then there is no reason to think they are welfare-maximizing. They produce costs as well as benefits. The benefit is that they help people cooperate with each other; but the cost is that people may incur excessive costs, or impose costs on third parties.

F. Legal Regulation

In Ellickson's world, one might argue that the government should, as much as possible, defer to the social norms that emerge out of small group interaction. Although I am sympathetic with Ellickson's view, I am more pessimistic.

The main point is to recognize that many social norms may be socially harmful, and the fact that a social norm exists and is longstanding does not mean that it is good.

I have already mentioned gift-giving norms, which might seem minor, but one should recognize the pathological manifestations such as dowry competitions in India and other countries.

I have also mentioned norms of racial, ethnic, religious, and sexual discrimination, which can be quite harmful

Historically, there has been a longstanding concern with conspicuous consumption, including consumption of expensive clothes, jewelry, homes, and cars.. The modern equivalent of this is cosmetic surgery and, I suspect, excessive physical exercise.

Having said all this, I am not arguing that the government should always intervene. All of these norms have good effects as well as bad effects: they are the means by which people cooperate. And history suggests that attempts to eliminate inefficient norms are rarely successful. The history of sumptuary laws is an example. On the other hand, efforts to eliminate discrimination against racial and ethnic groups have made some progress.

There is also the question whether the government can try to generate good norms. All things equal, it is better if people signal by recycling than if they signal by discriminating against racial minorities. The question is whether the government can try to get people to signal in socially productive rather than socially wasteful ways; or, at least, whether the

government can get people to signal in ways that are not too wasteful. In the United States, the government has tried to persuade people not to use tobacco, and to the extent that people signal by smoking, this is perhaps a good thing. On the other hand, the government doesn't necessarily have the authority to persuade people to act in one way rather than another.

II. International Law

A. What Is International Law?

International law has two main sources: the treaty and custom. Treaties are agreements between two or more states. Custom, or customary international law, are rules that evolve in a decentralized fashion, without any explicit agreement, and yet that appear to bind states.

People today mostly focus on treaties – including the UN charter, the WTO, the Law of the Sea treaty, the Geneva Conventions, and so forth, plus thousands of bilateral treaties that adjust fishing rights, divide mineral resources, control pollution, and so forth – but customary international law is equally important. Rules or norms of CIL have now mostly been codified in treaties, but they continue to exist as independent entities. Many laws of war and human rights norms are the product of CIL; historically, many of the rules that governed the treatment of ambassadors and aliens, that fixed borders, that established norms of war and peace, that established how unoccupied territory was claimed and governed, were norms of CIL.

B. Parallels with Social Norms

You will immediately see the connection between CIL and social norms. Both are decentralized; both lack a central authority that creates, interprets, and enforces the norms. And yet both exist, and are powerful influences on behavior of the relevant agents – people in the first case, states in the second.

But it would be a mistake to think that treaties are like “hard law,” or indeed that the UN is like a government. No central authority enforces treaties, not even the UN. And so treaties are more like nonbinding agreements between friends – or, say, letters of intent between businesses – than legally enforceable contracts. I would call the treaty one type of soft law, and not different in kind from CIL.

Consider now the three elements of law, as I have discussed:

Creation. Norms of CIL, like social norms, arise in a decentralized fashion, the result of states interacting with each other over time, rather than formal agreement. Treaties do not usually change this. Most treaties are akin to agreements; they no more change international law than an agreement between two friends not to exchange gifts would change general gift-giving norms. States do, from time to time, try to negotiate multilateral treaties that will change norms of CIL, but these efforts tend to be partial, and

often merely codify CIL rather than changing it in larger measure – the problem being that CIL can't change without a consensus, which is extremely difficult to achieve.

Interpretation. International laws and norms, like social norms, have no authoritative interpreter, with the result that there is enormous confusion about what they are. Governments rely to a large extent on the writings of scholars, whose treatises take the place of etiquette books. Over the last few decades, states have increasingly tried to create international tribunals with the power to interpret international laws and norms, but these have had limited impact because, unlike domestic courts, international tribunals cannot force parties to comply with their judgments.

Enforcement. No world policeman exists, and so states comply with international law only when the fear of retaliation or concerns about reputation cause them to. Again, this is like social norms. As a result, compliance is weak and partial, and powerful states have more freedom than weak states to disregard international law.

Putting these together, we see another parallel. International law evolves when states violate it, just as social norms evolve when people stop complying with old social norms and start complying with new ones. Thus – a point to which I will return – a violation of international law, like a violation of a social norm, is normatively ambiguous: it can be interpreted as disregard for other states or as a proposal to change the rule because the existing rule is undesirable. By contrast, we say that people should comply with ordinary domestic hard law; if the law is bad, then rather than violate the law, they should ask the legislature to change it.

C. Differences Between International Law and Social Norms

Although the parallels are powerful, it would be a mistake to take them too far. There are three main differences between the two systems of law.

First, the relevant agent in the international setting is the state; the relevant agent in the domestic setting is the individual. States have governments; governments have bureaucracies; this means both that states have more information about each other, than people have about other people; and that states can act in a more sophisticated way. Because states have more information about each other, signaling is not as important, and we needn't worry so much about international analogies to gift-giving competitions. Protocol is where most signaling occurs, and that is relatively minor. States are driven much more by their immediate interests than by concerns about maintaining reputation, although reputation does remain important.

Second, social norms are intrinsically complex in a way that is not true about international law; this has to do with the complexity of society. People are all members of different, overlapping groups – family, friends, ethnic community, coworkers, nation – all of which have their own complex and overlapping social norms, and with different observers, partners, sanctioners, and so forth. By contrast, the international setting is relatively simple. There are fewer than 200 states, and although there are regional blocs,

and the like, international law is more uniform. At the same time, it must be remembered that these states are all composed of thousands or millions of citizens, all of whom might have their own idea about what international norms are, so this increases complexity.

Third, social norms always coexist with domestic hard law in any normal state, and the government can always use hard law and other mechanisms to control social norms, to try to prevent them from being too dysfunctional. By contrast, there is no international hard law: all of it is soft. Thus, it is much more difficult for states to correct dysfunctional international law than for individuals to correct dysfunctional social norms.

All of this is just to suggest that we shouldn't draw wooden analogies from one to the other.

D. Mechanisms of International Law

Why do states comply with international law? Roughly for the same reason that people comply with social norms. Rational governments cooperate with other governments in order to generate mutual gains. For example, governments jointly reduce crossborder pollution, cooperate in capturing absconding criminals, protect tourists and ambassadors, and so forth.

As I noted above, signaling plays a much smaller role in international relations than in the domestic settings. Because governments have a great deal of information about each other, they need not send signals to each other. Most signaling comes in the form of diplomatic protocol, by which states disclaim formal control over each other.

But if my views are correct, they suggest that states are not likely to be able to generate large scale public goods. Two states may be able to preserve a small fishery, but it is doubtful that 20 or 30 or 100 interested states will be able to preserve an ocean-sized fishery; the problem of free riding is too difficult to overcome.

Many people argue that states can overcome collective action problems by delegating power to international institutions such as the UN and the WTO. However, states have no way to commit themselves to such delegations and thus the decisions of such institutions are always vulnerable to opportunism by states. Indeed, the evidence suggests that the UN accomplishes very little. The WTO is a more impressive achievement, but I suspect it functions because there are only three important actors – the U.S., Japan, and the EU. The WTO is a device that these three use to cooperate with other; it is not clear that it generates a public good that benefits the world as a whole.

I can't go into detail here, but, as I have written elsewhere, many international legal regimes – including trade law, human rights law, and the laws of war – can be decomposed into bilateral relationships. Bilateral cooperation does occur within the general structure of the treaty framework; but it is hard to find evidence of true multilateral cooperation.

E. The Normative Force of International Law

If I am right, then we need to be skeptical about claims that are often made about international law. Many people argue that international law has normative force; this means that it is wrong for states to violate international law. For example, currently many people criticize the U.S. for refusing to apply the Geneva Conventions to al Qaeda terrorists, and for launching the invasion of Iraq, which violated the UN charter.

However, as I noted above, because there is no authoritative world legislator or court, international law cannot be changed the way domestic law can, when it no longer serves the interests of states. Thus, international law mainly changes when states violate old law and assert new norms. Given that international legal change is legitimate, a state cannot be taken to task for violating international law unless it can also be shown that the old law is good and the new asserted norm is bad.

In sum, we should think of international law in purely instrumental terms, as a device by which states cooperate with each other for good or for ill. States have no moral obligation to comply with international law.

F. Optimal Design of International Law and Institutions

Then, how should international law be designed? The answer is that it should be designed in a way that (1) enhances the well-being of people, and (2) is realistic – that is, that is consistent with the incentives of self-interested states.

The latter constraint suggests that most ambitious multilateral institutions do not deserve any special respect from the United States, Japan, or any other country. The UN, for example, is entitled to our respect only as long as it can serve useful functions, but there is no theoretical reason that this institution can accomplish much, and little evidence as well.

Optimal design is most likely achieved when laws and institutions hew closely to the interests of states that they affect, and are not too ambitious, but attempt thin form of mainly bilateral cooperation.

Conclusion: Some General Comments About Soft Law

Some general comments:

1. The most important lesson is to avoid extremes. Social norms do not solve all problems, but they are not always bad either. International law is neither a solution to the world's ills, but it is also not meaningless. Both phenomena have good and bad attributes; the challenge for scholars and governments is to determine how to exploit the good and minimize the bad.

2. Social norms play an important role in social cooperation, but they also may be costly. The challenge for government is identifying the truly pathological social norms – racial discrimination, dowry competitions, and so forth – and coming up with ways to modify them. At the same time, because social norms are often deeply entrenched, it will be difficult to change them.

3. International law plays an important role in global cooperation, but, again, international law has bad effects rather than good effects. The challenge for states is to reshape those aspects of international law that, over the years, have proven to be dysfunctional, without trying too ambitiously to reshape the international order.

4. One important lesson, then, is that we should be extremely cautious about appeals to soft law. People have a tendency to think that because things are the way they are, and have been so for a long time, they are good, and are entitled to respect. This logic is often applied to social norms, which are said to reflect important things about our culture when in fact they are more often than not arbitrary, and to international law, which is said to be the basis of international order, when in fact it shapes the international order only on the margins. It is better to look at soft law as an instrument for controlling people's behavior in such a way as to enhance their well-being.