Questionable aspects of "soft law" in Swiss foreign policy

Undermining democracy in international agreements

by Ueli Meister

For some time now, the Swiss Federal Council has been signing international treaties of major importance on its own without the involvement of Parliament and the people. It describes these agreements as so-called "soft law", which is not legally binding and therefore falls within the remit of the Federal Council.

In recent years, there have been several parliamentary initiatives to strengthen the rights of the federal parliament again. For example, on 12 November 2018, the *Foreign Affairs Committee of the Council of States* (FAC-S) submitted *postulate 18.4104,* "Consultation and participation of Parliament in the area of soft law":

> "The Federal Council is instructed to report within six months on the growing role of so-called soft law in international relations as well as on further international developments as a result of global interconnections and the resulting creeping weakening of the democratic rights of parliaments to participate in such issues in a timely manner before they lead to a legislative procedure that has not been decided in principle. In particular, the report should analyse the consequences of this development for Switzerland and discuss any need for reform of Article 152 of the Parliament Act."

On 26 June 2019, the Federal Council published its report on *Postulate 18.4104* of the APK-S. The Federal Council writes in it:

> "'Soft law' has increasingly developed into its own instrument for shaping international relations in recent years."

These are agreements that are "not legally binding ('soft') but prescribe a certain behaviour ('law')".

> "In contrast to International Law, soft law therefore does not create any obligations under International Law, which is why states cannot be held legally responsible for its violation." In the event of violations and non-compliance with soft law, there is the possibility of "taking political action with so-called retorsions". "This can also include sanctions or the threat of sanctions, for example as a result of a state being included on a (black) list."

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Excerpt from the article "Megalomania reigns in Strasbourg" by Katharina Fontana, published in the "Neue Zürcher Zeitung" on 25 April 2024

[...] "Soft law is largely created in international organisations; it is negotiated by functionaries and diplomats whose political agenda is unknown. Although not democratically legitimised in any way, these regulations have a political and increasingly also a legal effect, because judges declare them binding and derive claims from them. As a result, parliaments and citizens sooner or later find themselves caught up in a web of rules and obligations that have been drawn up in a non-transparent manner and passed over their heads.

In the federal parliament, this unfavourable development now seems to be given somewhat more importance than before. For example, the National Council is rightly insisting on having a say in the controversial WHO pandemic treaty and does not want to simply leave the matter to the Federal Council. The same applies to the UN migration pact. Parliament should not put too much stock in the administration's assurance that the migration pact is 'only' soft law, and that Switzerland will not be subject to any new obligations." [...]

(Translation «Swiss Standpoint»)

Commentary

Soft law is therefore not legally binding, but serious sanctions must be expected in the event of non-compliance. There is no legal jurisdiction that those affected can appeal to.

In the last 25 years, Switzerland has signed numerous pacts, declarations, and treaties, which are now referred to as "relevant soft law instruments" and were mostly concluded without the involvement of parliament or the people. This is how the *Bologna Declaration* of 1999 and the *Bologna Process* came about, which turned the universities and thus the entire education system in Switzerland and throughout Europe upside-down – without any democratic debate!

In autumn 2018, it was possible to prevent the Federal Council from single-handedly approving the *UN migration pact* at the last moment. The Federal Council justified its unilateral action by claiming that the migration pact was so-called soft law – a legally non-binding obligation. However, the pact would have had far-reaching consequences for Switzerland and non-compliance with the pact could have been penalised with serious consequences.

The soft law instruments relevant to Switzerland also include the *Global Health Security Agenda* (GHSA) of 2014 and the *2030 Agenda for Sustainable Development*. The GHSA is intended to support the implementation of the WHO's *International Health Regulations* (IHR), which are binding under international law. This includes topics ("Action Packages") such as antibiotic resistance and vaccinations.

The WHO pandemic treaty and the new health regulations, which are due to be adopted in May of this year, are therefore not far away. Here, too, the agreements seem to run under the heading of "soft law", as information on this issue is also scant.

The WHO pandemic treaty contains new rules that would take precedence over national laws. For example, the WHO could make health measures *mandatory* worldwide.

"Soft law" is issued by *intergovernmental organisations* (IGOs), which also prepare international treaty law. As a rule, soft law agreements are also adopted by the representatives of IGOs, sometimes at intergovernmental conferences.

According to federal judge *Monique Jametti,* the IGOs have maximum influence in that they can initiate, issue, and apply soft law and cannot be controlled by any courts. In addition, it can be continuously amended and adapted to new requirements via the secretariat. Mrs Jametti writes:

> "In this way, not only the regular legislator but also the judiciary is undermined by soft law: it is no longer the courts that say what the law is, but the secretariats of the IGO decree what is to be regarded as right – and on the basis of non-law." And further: "Since it is a matter of soft law, disruptive opponents can be ignored by referring to the non-legally binding character." (Guest commentary in the NZZ, 8 September 2021)

Unpleasant developments in the Federal Palace in Bern. (Picture jpv)

Commentary

"Soft law" can be used as a steering instrument to:

- exert "internationally legitimised" political pressure on smaller, weaker states.
- outsource national decisions to unelected, sometimes private international organisations.
- abolish the separation of powers and thus weaken nation states and democracies.
- to force domestic political reforms by shifting political and social issues to the international level via "foreign policy".

Conclusion

Especially in the current global situation, honest, dignified, and peaceful behaviour between states is of great urgency. The "soft law construct" only creates new centres of conflict and does not contribute to sustainable solutions. Our world needs honest dialogue and negotiations at eye level – also as a contribution to world peace. Switzerland could contribute more to this.

Sources:

Konsultation und Mitwirkung des Parlaments im Bereich von Soft Law (26 June 2019), Bericht des Bundesrates in Erfüllung des Postulates 18.4104, Aussenpolitische Kommission SR, 12 November 2018.

Portal der Schweizer Regierung, *Parlament soll bei Soft Law-Vorhaben stärker eingebunden werden,* Bern, 27 June 2019.

Monique Jametti, *Soft Law – ein politisches Druckmittel gegen kleine Staaten,* Gastkommentar, NZZ, 8 September 2021.