Soft Law as Government

Soft Law in the Public Administration

In my short presentation I'd like to formulate three central questions and to elaborate the third one.

Three questions concerning soft law

Soft law in the public administration concerns all kinds of non-legislative rules in favour of governmental or administrative decision-making. These rules are known as quasi-legislation, guidelines, protocols, codes, models, covenants, instructions, norms for standardisation, et cetera. There is a natural need for rules. Rules contribute to equal treatment, legal certainty, transparency, efficiency, et cetera, and democracy (partly) and legitimacy. These functions of rules, which are the rationale the principle of legality, can be attributed to soft law, too. It is for this reason that legislation and soft law rules more or less can be seen as alternatives and communicating vessels. As a consequence, deregulation in the sense of a decrease of legislation usually is accompanied by an increase of soft law rules.

Q1 To what extent fulfil different types of soft law which functions (in comparison with legislation)?

Instead of an alternative for legislation, soft law can supplement and fill in legislation, especially where individual justice or "Individualgerechtigkeit" was aimed for. Rules imply an abstract of reality through which special elements of the individual case are neglected. Discretion gets too fettered, decision-making over-rigid; custom-made decisions are not feasible. This can only partly be compensated by the use of exception clauses. To what extent the loss of "Individualgerechtigkeit" is regrettable, depends from one's opinion about equal treatment and transparency and simplicity.

Q2 To what extent the use of soft law rules frustrates individual justice and how must this be appreciated?

Q1 primarily concerns the relation between legislator and administration, Q2 primarily the relation between administration and judge, nevertheless the predominant aim of the legislator. This last mentioned element deals with the distinction between discretionary and non-discretionary powers and between policy and law, both a matter of the Trias Politica, the Division of Powers, and of checks and balances. Traditionally the distinction between discretionary and non-discretionary powers is treated as an absolute and static one. However, it seems to be more realistic that in general this distinction has a more relative and dynamic character. Courts cannot in all cases know for 100% sure how to interpret a vague legal norm. Through the years, experience and knowledge about relevant aspects can result in more precise interpretation. Consequently, the extent of discretion is decreasing. The settlement of sharp soft law rules can contribute to this.

Q3 To what extent the idea of discretion and non-discretion as a relative and dynamic phenomena is adequate? What is the meaning and function of soft law rules in this context?

Legislation and three types of soft law rules

For centuries soft law rules in the public administration were seen as a sort of internal instructions within the public bureaucracy. Their enforcement was possible via what today is called civil servants law. In the middle of the last century is was recognised that these internal rules have external two questions arose. The first question was: Is there any power to settle soft law rules? And the second one: Have these rules any legal binding? The answers are clear. An implied power to settle soft law rules was accepted, namely a power implied in the power for which exercise the rules are aimed for. To a certain extent, a legal binding was accepted, too. This binding is based on the principle of equal treatment and principles such as legal certainty and transparency. All modern European and American legal systems have this soft law theory build on implied powers and fundamental principles in common. For soft law in the Dutch public administration, the doctrine is more complicated because of legislative regulation of this soft law in the General Administrative Law Act (Awb). As a consequence, in the Dutch administrative law some soft law is to be qualified as a legal act, where other soft law is lacking this status.

General rule → Aspects ↓	Legislation	Official administrative rule (Awb-beleidsregel): *legal act-construction*	Other own soft law: *consistent practise-construction*	Other soft law from other body: *advice-construction*
Power to settle rules	specific power in legislation	4:81	implied power	none (nb Aanwijzing regelgeving 5a)
Legal binding, extent	to comply	4:84: to comply, unless special circumstances and disproportional effect	to comply, as a consequence of principle of equal treatment, consistency	none, unless expertise, which has tot be taken into into account (3:2, duty of care; 3:46, justification principle
Legal binding, who	self and others	self binding	self binding	no binding
Judicial review, substance	obviously unlawful (onmiskenbaar onrechtmatig)	*discretion*: unreasonableness (Wednesbury, Doetinchem) *fact-finding*: **full?** *interpretation*: **full?** *qualification*: **full?** *severity penalty*: **full?**		

The intensity of judicial review of soft law rules about fact-finding depends from the rules about evidence and fundamental characteristics of administrative procedural law

and the function of the judge. Is this procedural law about substantive truth and is the judge in this respect an active one? At least it is for sure that soft law evidence rules can be refuted. In theory, as a consequence of full jurisdiction, interpretation soft law rules, legal qualification soft law rules and soft law rules about the severity of penalties like administrative fines are to be reviewed by courts integrally, so without any deference. Concerning administrative fines, however, the Dutch case law shows that the soft law involved is tested rather superficial. Only the individual administrative decisions are reviewed integrally. The explanation for his is quite simple: regarding proportionality, it is very difficult, even useless, to draw a line between in soft law incorporated and not incorporated circumstances. And interpretation and legal qualification soft law rules? Of course, judicial review of such rules is a matter of law, not of discretion. Nevertheless, an assumption is that courts are not always able to fulfil an integral review of interpretation or legal qualification rules. Sometimes a margin of appreciation for the administration is unavoidable. It is worth studying whether this is also a consequence of tendencies in the framework of procedural law. At least there seems to be a similar development. In essence, these development is an increase of interaction and cooperation in favour of decision-making between administration and court. It seems that administration and court are not complete opposite institution anymore, but institutions which in some respects are supporting each other. This development can underline the existence of a margin of appreciation for the administration even where interpretation or legal qualification soft law rules are involved. On the other hand a more intense judicial review in case of discretion soft law rules cannot be excluded, e.g. in case of drastic decentralisation as an instrument to realise heavy financial short cuts.