Why Do We Obey Soft Law?

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Introduction

Compliance with law

"What explains this singular habit of respecting laws, which only a few 'abnormal' people obey only when compelled to do so?" Can this habit be explained by coercive sanctions? The fear they instil, or the threats they represent? The guilt and shame they evoke? In short, do we respect laws because of the emotions they stir within us?

This is certainly part of the answer, though not the entire answer. The authority of law stems not from coercion alone. Explanations vary depending on the point of view: neuroscientists cite the activation of cerebral zones specific to compliance with norms, psychologists the emotions, sociologists social norms, ethicists the sense of values, theologians morality, economists efficiency, psychiatrists the superego, and so on.

Compliance with soft law

If compliance with hard law is not easy to explain, compliance with soft law is even more complex. It is astonishing—to a legal mind at least—that certain non-binding instruments, such as recommendations, declarations, information and persuasion activities, gentlemen’s agreements, charters and other incentive instruments, compel respect. The rules of soft law may, in practice, be respected regardless of whether or not they are of a legal nature. The rate of compliance does vary, as it does widely with binding instruments: "In some instances, compliance with non-binding norms and instruments is extremely good and probably would not have been better if the norms were contained in

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1 This text is the short version of an article published in the Revue européenne des sciences sociales, 2009, 144, p. 7388 entitled “Pourquoi respectons-nous la soft law? Le rôle des émotions et des techniques de manipulation.”


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The Joint Declaration of the European Ministers of Education convened in Bologna on June 19, 1999 (Bologna Declaration), a non-binding instrument, is an example of the potentially powerful effects of soft law. This text was followed and implemented much more effectively and quickly in universities than the rule imposing a fine on pedestrians who use a bicycle path when a sidewalk is available. This is a remarkable phenomenon for a jurist: rules of law, though compulsory, are sometimes less respected than rules of soft law, although clearly rules of hard law are often more effective than rules of soft law taken in isolation, and soft law is by far not always as effective. The most marked effect certainly results from a combination of rules of law, their enforcement and soft law instruments. Neither a compulsory nature nor a penalty alone is a determining factor in the analysis of compliance with rules.

The need to legitimize the State's non-normative action

Since a non-compulsory rule may be enough to change individuals' behaviour, the State has made a habit of using such rules in addition to, or instead of, conventional legal instruments. This circumvents the burdensome legal processes that apply to rules of law and contributes to strengthen the State's hold. The phenomenon is not a new one. There are traces of it, for example, in Michel Foucault's concept of governmentality. However, its originality resides in jurists' awareness of the power of these "weak" instruments, with the legal system conveniently brandishing their non-legal nature as an excuse to avoid addressing the legality or constitutionality of such instruments. The challenge, then, is to convince the State to develop appropriate legitimation mechanisms. Constitutional law did so in the past by democratizing law and subjecting it to requirements of precision and the control of constitutionality, while administrative law did so by requiring procedural guarantees for the adoption of administrative decisions or certain plans.

With this end in mind, we will explore how soft law exerts its influence. We will detail these mechanisms from a psychological perspective. The role of emotions in persuasion techniques as well as manipulation techniques that affect individuals' behaviour without their knowledge will then be examined.

The role of emotions in persuasion techniques

The concept of emotion is not easily defined. Still today, many references are made to the six basic emotions identified by Paul Ekman: anger, fear,
disgust, joy, sadness and surprise. Research in the field has only made the concept more complex by distinguishing emotions from other affects such as feelings, passions or moods by categorizing and broadening them to such an extent that it is impossible to find a unanimously recognized definition today.

**Emotion and reason: Two readings of the same reality**

Emotion is not opposed to rationality, but interwoven closely with it. Far from interfering, emotion helps us make rational decisions in situations of uncertainty, for example. Emotion can also be described as rational. It follows, therefore, that it is more appropriate to imagine different ways of reading the same reality: while it is reasonable to drive on the right side of continental roads, an emotional reading of the issue might focus on the fear of an accident (not to mention a fine). The rational choice theory might lead someone to prefer a solution that involves deliberately breaking the law, if this is less costly in terms of both money and image, as studies in law and economics have theorized. On the other hand, an emotional reading would show that desire for wealth, greed or fear of impoverishment would weigh more than pride and honour in compliance with law or the embarrassment that guilt stemming from a violation might evoke. The opposition between reason and emotion is in fact used for persuasive purposes in all decision-making processes, whether legal, political, economic or other: an individual who calls another to reason is actually trying to show him that his decision may be based on other emotions that could prevail or that certain emotions can be appeased.

As such, the intention is not to oppose reason and emotion, but to probe the emotional variable in the mechanisms at work with observation of rules. Although this perspective is restrictive, it opportuneely completes more conventional political, sociological and economic analyses.

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8 See Deonna, Julien/ Teroni, Fabrice, Qu'est-ce qu'une émotion? Paris 2008.
Emotion at the service of compliance with hard and soft law

To improve compliance with soft law, the State can use various persuasion techniques by appealing more or less strongly to emotions. This approach is not original, to the extent that the role of emotions can be shown easily in the application of conventional law: criminal law, in its primitive punitive aspect (confineement, exclusion, impoverishment, humiliation, suffering and death), is designed to inspire fear, anxiety and terror in the public, as well as evoke shame, embarrassment or guilt among those found guilty, and assuage the anger, rage and desire for vengeance felt by victims in order to impose compliance with the rule of law. The justiciable obey law because of an emotional tie, which for some involves fear of punishment or the resulting shame, and for others, positive emotions such as respect for or commitment to the public good. Fear of punishment, however, is far from the only explanatory factor.

In the context of soft law, research on compliance with social norms and persuasion techniques are of great interest. Observance of non-binding rules cannot be explained solely by the rational choice theory, but is attributable essentially to emotional mechanisms, particularly anticipation of shame, guilt or embarrassment in the event of violation as well as pride in compliance, with shame being evoked by others’ disgust or scorn.

The emotional reading is but one possible reading of rule compliance mechanisms. Although it has a high potential to explain changes in attitude, consideration must be given to other levers that a purely emotional approach only partially explains. That is why, in the second part, we will examine manipulation techniques that prompt individuals to unwittingly change their behaviour. Some research also gives less importance to the effect of emotion (in this case, fear of punishment) in compliance with law. According to this

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18 Elster 1999 [note 17], p. 149.
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work, law is observed when individuals believe in its legitimacy—defined procedurally—by complying spontaneously with it. Moral, ethical and justice-related explanations find in this type of work a welcome foundation: I personally don’t kill other humans, not because I fear the criminal penalty, but from a personal conviction of the correctness, fairness and legitimacy of that rule. Hence, there is no point in the legislator escalating implementation mechanisms to distil fear, instead of making the legal system more worthy of respect by improving its legitimacy.

The emotional motives for obeying soft law

The non-compulsory effect of soft law

Because soft law is not a legal norm, it has no binding effect. Its effect is rather to modify the behaviour of the targeted groups without legally requiring them to do so. Yet, it retains its normative nature, since the norm is not necessarily imperative. In fact, normativity must not be confused with imperativity: "The normative is a genus with two main species: the imperative and the appreciative." The behaviour of soft law’s targeted audience is left to their own appreciation. As such, the normative nature of soft law is appreciative rather than imperative. It arises not from "Sollen" (must be), but "Sollen" (should be).

Obedience of authority

The first effect stems from the ascendancy or prestige of the author’s figure and the emotions thus evoked (diffuse fear, desire to please or need for recognition, admiration). A recommendation from a public authority has more weight than the same advice from an unknown person or an obscure association. This is the case, for example, with recommendations by the Competition Commission or the Surveillant des prix, which "at least has a certain moral weight.

A bet is made on the author’s influence when authorities deliberately adopt an exemplary behaviour as part of public policy (sorting waste, renovating

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19 Tyler, Tom, Why People Obey the Law, Princeton 2006 (2nd Ed.).
20 Tyler 2006 [note 19], p. 272.
21 Killias, Martin, Précis de criminologie, 2nd Ed., Berne 2001, p. 457s et 467ss for whom fear of police officers is less important overall than most people’s spontaneous compliance with law.
22 Tyler 2006 [note 19], 46 from cover.
23 [Trans.] Lalande, André, Vocabulaire technique et critique de la philosophie, Paris 1993 (1st Ed.1926), under the entry for "normatif." See also Amselek 1991, p. 143.
25 Flückiger 2004 [note 6], p. 190.
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Research in social psychology on obedience shows the importance of the weight individuals give to a figure of authority, regardless of whether there is a mandatory legal relationship. Credible sources are more convincing. For example, experts have proven to be influential within the framework of anti-smoking campaigns.

Some non-binding instruments are adopted, drafted and formulated like binding instruments, resulting in a bluff effect on the intended audience. Here, obedience is the product of a transfer, as it were, where secret hopes are invested in the normative power of the written word or where the solemnity of the adoption procedure is impressive, as with some non-binding international declarations like the Rio Declaration (environment) or the Bologna Declaration (education).

In other cases, respect for authority is strategic. It may arise from the need to foster a climate of trust by maintaining harmonious relations with the administration, a determining factor in non-binding arrangements (or gentlemen’s agreements). The fear of a deterioration in relations leads to compliance with non-binding instruments. This motive is particularly strong in public international law, where the necessity of maintaining good relations among States means that violating a purely political commitment may result in a range of retaliatory measures.

29 Milgram’s experiment where subjects were pushed to obey inhumane orders must be understood from the perspective of hard law, to the extent that the experimenter gave them direct orders (Milgram, Stanley, "Behavioral Study of Obedience," Journal of Abnormal and Social Psychology 67, 1963, p. 371).
32 Flückiger 2004 [note 6], p. 247.
Tschannen, Pierre, Der Richtplan und die Abstimmung raumwirksamer Aufgabe, Bern, let. e, p. 325.
This effect is so wide-ranging that the legislator itself sometimes feels bound by soft law, at least politically. In public international law, "recommendations can be highly restrictive from a political standpoint. They are an undeniable means of political pressure." There is also a similar psychological basis for the model law and model treaty technique, in which a higher authority proposes to follow a model law to standardize a practice in areas where it may not be competent.

Fear

Fear and anxiety are powerful vectors of obedience. A State has only to wield them in soft law instruments to strongly encourage the target audience to modify its behaviour. While it is generally true that the greater the fear, the more persuasive the message, psychologists and criminologists in particular have attempted to show the limitations of this approach.

Fear can be related to other negative emotions that strengthen its impact, such as disgust, aversion, indignation, anger or sadness. For example, fear of global warming’s effects can lead to sadness or anger, while in anti-smoking campaigns, fear of disease can be accentuated by revolting images. These other negative emotions alone can certainly influence behaviour: I refrain from spitting because I feel disgust when I see spittle on the ground, not necessarily because I fear disapproving looks or other social penalties. In other words, my own aversion to behaviours that offend my sensitivities and sense of justice and fairness keep me from adopting them.

This is the case with many information campaigns in the area of public health: the fear of death, disease, decline or shame in AIDS prevention; fear of the shortage of organs in campaigns to promote organ donation; fear of cancer in anti-smoking campaigns; fear of endangering the health of the elderly, the sick and babies in information campaigns during heat waves; fear of dying forests and global warming in environmental protection campaigns; fear of accidents in awareness campaigns for road safety or occupational safety;


38 See Flückiger 2004 [note 6], p. 200s.


40 See the reproduction of authorized images in schedule 1 of the order of the Département fédéral de l’intérieur concerning combined warnings on tobacco products (RS 817.064).

41 Some philosophers have inferred from it an “heuristic method” (see the heuristics of fear according to Hans Jonas, Le principe responsabilité: une éthique pour la civilisation technologique, Paris 2003 [transl. [1979]].
fear of disease in prevention campaigns against obesity; fear of the enemy revealing its ferocity in military propaganda, etc.

In fact, these primal fears are not the only emotions that prompt individuals to follow the behaviours advocated by such campaigns. Reality is not as clear-cut. Effectiveness must be understood in combination with other tools, including legal instruments. The effect of anti-smoking or anti-drinking information campaigns is thus reinforced with special taxes on cigarette packets and strong alcohol. Parallel motivations sometimes meet, as with the rate of protected sexual intercourse, a part of which can be attributed directly to AIDS prevention campaigns while another part may stem from competing motives such as a desire to assuage the fear of unwanted pregnancy, other sexually transmitted diseases, or a criminal penalty.

The images used in such campaigns indisputably enhance their emotional impact, as illustrated with anti-smoking and road accident prevention campaigns. Nevertheless, the influence of images in a propaganda context is controversial today.

Finally, more generally, an individual may feel pressure to change from the social group to which he belongs, if he fears conflict with the group. Social psychologists call this attitude conformity.

Regret is also at play in obedience mechanisms, especially the anticipated fear of regret or remorse that may arise from behaviour contrary to a recommendation. Economists have even proposed a "theory of regret," according to which the fear of regret (e.g., for an investor to miss a future increase or sustain a later loss) leads to irrational decisions. Other examples of regret or remorse include that felt after failing to wear a condom for risky sexual intercourse or an earlier failure to sign one's organ donor card when awaiting a transplant.

Legal mechanisms of using fear in soft law instruments

The legal order may provide for legal mechanisms intended to strengthen observance of soft law rules. This does not mean they become legally binding.

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63 See, for example, the effect of the alcopop tax on consumption of these beverages (Feuille fédérale 2003 1984).
Yet the psychological mechanisms the law evokes can be similar to those of binding instruments. There is a fine line between legal sanctions and the "pressures" that encourage non-mandatory behaviours.47

This is the case of the financial pressure behind incentive taxes. These involve non-mandatory recommendations, as well as payment of a sum of money. They consist of dual components, imperative and non-imperative. The advocated behaviour is not compulsory, but simply recommended. However, the intended audience may perceive this instrument as a financial penalty very similar to regular legal penalties: individuals who fail to sort their waste must pay a tax.48 The difference is that in the recommendational variant, the payment of a tax does not have the same symbolic scope as in the legal variant where a fine is imposed. Fear of impoverishment or a desire to not waste money, generated in both hypotheses, are doubled in the second variant of anxiety that is specific to the commencement of a criminal trial symbolically related to feelings of shame and guilt. In practice, however, the difference tends to fade each time small sums are at stake, to the extent that the legal process is then simplified. The penalty is then perceived as "just a tax"49

The pressure may also be regulatory, decisional or jurisdictional in nature. The targeted audience will obey from fear that the authorities will carry out the threat to adopt regulations, render a decision or institute proceedings. The greater the credibility of executing the threat imminently, the greater the effect.

At one end of the spectrum, this pressure may be very diffuse, political in nature, like non-binding, informal arrangements intended to avoid a regulatory act. Examples include the gentlemen's agreements60 used by the Banque nationale as of the 1930s61 or the industry-wide agreements62 used in environmental law since the 1970s.63 At the opposite end of the spectrum, the pressure may be "juridicised", while remaining a fact, when there is a Damocles' law. This type of law institutionalises the part of the agreement binding the State to individuals by legally guaranteeing that the public body will not adopt state regulations in a given area in return for the "voluntary" adoption of autonomous private regulations.64 Although individuals are not legally obligated to adopt a self-regulated solution, in reality, their behaviour is dictated by fear that the State will enact less favourable regulations. There are

48 Flückiger 2004 [note6], p. 249s.
51 Zufferey, Jean-Baptiste, La réglementation des systèmes sur les marchés financiers secondaires: contribution dogmatique et comparative à l'élaboration d'un droit suisse des marchés financiers, Fribourg 1994, p. 318.
53 Examples in Flückiger 2004 [note6], p. 218s.
examples of this in environmental law, energy law, film law, and consumer law.\textsuperscript{56}

Fear of \textit{a trial} is also an instrument that encourages parties not only to reach a non-binding arrangement, but also to respect it.\textsuperscript{56} Effectiveness is greater when the chances of success are high and the feared proceedings are long and costly. The effectiveness of the right of recourse of environmental protection organisations is based on this psychological mechanism. The effectiveness of this right does not depend on its actual use, which is extremely infrequent, but on the concrete threat of the right in the eyes of manufacturers, due to its judicious and successful use.\textsuperscript{57}

When a court finds, or may find, that a given public or private recommendation is applied in determining the limits of negligence or carelessness, the fear of liability for unlawful acts, or even lawful acts, is a powerful factor in encouraging an individual or an authority to respect a non-binding instrument. Yet the intended audience remains free to choose another behaviour and will only be affected \textit{a posteriori}, that is, if damage occurs.\textsuperscript{58}

\textbf{Shame}

Evoking shame and guilt is commonplace in criminal law. Similarly, soft law has the greatest effect in relation to the \textit{fear} of experiencing these emotions. Because damage to a company’s reputation may cost it dearly, the corporate image and an impeccable reputation must be maintained to avoid shame, embarrassment or humiliation.\textsuperscript{59} The private economy can achieve this through soft law instruments, like the \textit{Swiss Code of Best Practice for Corporate Governance}\textsuperscript{60} or the many codes of ethics and good conduct adopted by certain professions (lawyers, physicians, journalists, etc.), including the public administration.\textsuperscript{61}

So-called \textit{naming and shaming} processes, which consist of publicly denouncing individuals, organisations or States in order to provoke

\textsuperscript{55} Flückiger 2005 \textit{[previous note]}, p. 239ss; Flückiger 2004 \textit{[note 6]}, p. 216.


\textsuperscript{60} Adopted March 25, 2002, by the apex organisation economiesuisse, setting a line of conduct and formulating recommendations. Regarding codes of conduct for multinationals, see Roth, Monika, \textit{Soft law: Ordnungsvisionen in flux: eine Standortbestimmung mit Fokus auf compliance relevante Fragestellungen}, Berne 2006, p. 18ss.

indignation, anger, rage or disgust, play on these same motives. The effect of such processes for individuals can be far more painful than recourse to binding legal instruments, as the example of warnings against hazardous products shows: the necessary advertising is clearly more detrimental to the manufacturer than a simple notice of prohibited distribution, since the manufacturer’s image is tarnished. Their effectiveness is questioned, especially as regards government stakeholders, as illustrated by the implementation of the open method of coordination in European law (non-compulsory method of coordinating public policy).

Information campaigns that play on the fear of deadly disease or accidents often provoke shame or guilt in their targeted audience, as do organ donation promotions that make non-donors feel guilty for not wanting to save the lives of others.

Joy

Joy and other resulting positive emotions like pride, self-esteem, desire and pleasure are emotions that can change the behaviour of individuals without forcing them to do so.

This is the intent of all redistributive economic instruments that play on the pleasure of winning money and the desire for profit. Thus, when a recommendation is supported by state funding, the economic incentive strengthens the recommendation’s appreciative nature commensurate with the sum at stake.

By awarding prizes and distinctions to reward exemplary attitude (see, for example, the order on the Prix du cinéma suisse), authorities are indirectly recommending the adoption of a specific behaviour. This kind of


64 Implementation of the open method of coordination in European law is based on a peer pressure system that ”has not functioned correctly, partly due to the fact that members do not wish to ‘name and shame’ their peers. Stakeholders are not very motivated to engage in this type of process: the various members fear they will make enemies and reap the negative consequences in other political areas where they show little progress.” (Collignon 2006 [note 62], p. 10).

65 RS 448.116.
recommendation plays on the recipient's joy, pride, pleasure, and even the desire, envy or jealousy that such an award may arouse in others.

Information campaigns may also aim to excite feelings of joy and happiness: the pleasure of eating healthily to counter obesity; the joy of watching a young athlete with a heart transplant promote organ donation; the magic of a stroll in the shaded woods to prevent the death of forests.

Finally, we can revisit the phenomenon of social conformity discussed in the section on fear. Conformity motivated by complacency—in which an individual who fears conflict with the group prefers the pleasure of peace—must be distinguished from conformity motivated by identification. The latter is based not on fear but on joy, pride or desire for recognition when the individual conforms in order to establish his or her place in the group and maintain positive relations with it in the hope of eventually obtaining prestige and visibility.66

Finally, it should be noted that pleasure is an ambiguous emotion in this context, since it is often a factor opposed to the implementation of soft law rules. The individual is constantly required to balance the fears raised by an anti-smoking or AIDS prevention campaign with the pleasure of smoking or lovemaking without a condom.

Surprise

Soft law presents an interesting characteristic in this regard in comparison with hard law, in that the former often has an experimental function to test a potential future rule of law.67 This allows the State to study the reaction of the intended audience and either withdraw the tested measures or make them permanent, depending on the observed impact. Soft law thus accustoms citizens, or gradually acclimatizes them, to a new regime by avoiding any surprise on the day it evolves into hard law (smoking is first discouraged, then prohibited in public places; helmets and seatbelts are first encouraged, then imposed; etc.). We find a variant of this process when non-imperative planning progressively creates accomplished facts that become increasingly difficult to counter over time.68 Certain manipulation techniques, like the door-in-the-face technique or deceit, knowingly make use of the surprise effect.


68 Regarding such effects in planning, see Flückiger, Alexandre, Le régime juridique des plans: l’exemple du plan de gestion des déchets, Berne, 1996, p. 117ss (ref. cit.).
Soft law creates a gradual habituation that foils any subsequent surprise and any potential rejection that may result from surprises.

**Empathy**

Empathy is the psychological mechanism through which an individual understands another's feelings and emotions, without feeling them himself. More specifically, it is the ability to feel emotions in general rather than an emotion per se.

Without doubt, empathy is indispensable to the success of non-legal dispute resolution processes like mediation. It is also at play, with compassion, sympathy or pity, in the use of biographic stories that facilitate emotional expression by stirring the reader, thereby encouraging him to act in a specific way. This technique is currently used in promotion campaigns for organ donations in which the testimonies of transplant recipients add a human, palpable aspect to the suffering of those awaiting organs, giving an emotional face to the shortage of organ donors. In terms of the relationship between medical staff and the donor's family, the rate of consent is higher when doctors show empathy and lower when they behave coldly.

**Manipulation techniques**

Instead of creating public awareness with emotional arguments that modify behaviour without the rule of law, social psychologists have shown that certain techniques are effective in manipulating individuals without their knowledge and in making them choose to act in ways they otherwise would not.

These techniques include commitment theories, strategic use of cognitive dissonance, and context effects (contrast and compromise).

**Commitment theories**

Commitment theories show an efficacy, some say, that is potentially greater than awareness and information strategies.

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73 See the compared effectiveness of awareness, persuasion and commitment strategies in AIDS prevention as concerns condom use (Joule, Robert-Vincent;
Such practices do not make direct use of individual emotions, but condition emotions at the unconscious level, particularly through deceit, deception and surprise. Contrary to hard law but like soft law, the subject is placed in a situation that gives him a feeling of free choice. This perception of freedom is a determining factor in the success of manipulation techniques. The individual must believe he is making a free, informed decision without being influenced, despite behaving differently than he would have without the unseen manipulation. Commitment theories are the basis for such processes. The principle is that the subject's conduct is determined by one or more earlier behaviours that are elicited without his knowledge. Subjects become caught up in the process, one that is increasingly difficult to halt as time advances.

Several methods can be used:
- The foot-in-the-door technique, which consists of making an initial trivial request before the main request. The trivial request involves little cost and is not necessarily related to the main request (for example, asking the time); the subject is then asked to perform the desired action, which he likely would have refused had it not been preceded by the initial request.
- The door-in-the-face technique, which on the contrary consists of making an initial excessive, though not abusive, request before the main request in order to obtain less; in fact, the "less" is exactly what the requestor wants. The effect of calming surprise gives the subject an illusion of gain that makes him statistically more likely to consent.
- Priming, which consists of getting an individual to agree to an action, the true cost of which is initially concealed and revealed fully only at a later time.
- Deception, a variant of priming, in which the requestor asks the subject to perform an attractive behaviour the requestor knows to be impossible, then informs him of that fact and proposes an alternative that is more costly and that the requestor initially had in mind.

In order to achieve the desired effect, the individual must believe himself to be free. Empirical research in social psychology has shown that explicitly telling someone they are free to choose significantly increases the rate of a proposal's acceptance. The "sense of freedom" thus becomes an elegant manipulation technique in itself. Soft law is based on exactly this type of reaction because it is defined as not legally mandatory. Equally relevant is the concept of psychological reactance, in which individuals, who believe their
behavioural freedom is being diminished, manage to resist attempts at persuasion.\textsuperscript{81}

These techniques tend to be used to support information and persuasion campaigns. They have been tested successfully in the area of energy efficiency in encouraging people to turn lights off when no longer needed and to turn down heating instead of opening windows when they are hot,\textsuperscript{82} as well as in the area of occupational health and safety to encourage workers to wear hearing protectors in noisy environments,\textsuperscript{83} in the area of AIDS prevention to encourage use of condoms\textsuperscript{84} and undergo testing,\textsuperscript{85} and to promote organ donation.\textsuperscript{86}

The ethics of authorities using such techniques is highly debatable, particularly those techniques based on deceit and deception, since they may be contrary to the constitutional principles of good faith and proportionality.

**Strategic use of cognitive dissonance (effect of the duty to state reasons)**

According to the cognitive dissonance theory, an individual feels uncomfortable when faced with contradictory "cognitions," where cognition refers to a person's knowledge of self, behaviour and environment.\textsuperscript{87} This state of unpleasant tension motivates the individual to reduce dissonance in order to achieve cognitive balance (or consonance).

Some methods of reducing cognitive dissonance have been used strategically to modify individuals' behaviour. This is the case when a person is asked to explain a solution he does not support, in which case he tempers his final position in an effort to harmonize his behaviour with his ideas.\textsuperscript{88}

**Context effects (contrast and compromise effects)**

Context effects (contrast and compromise effects) introduce biases into the decision-making process. These effects have been used in marketing since its inception\textsuperscript{89} and have been tested recently in the legal decision process.\textsuperscript{90}

\textsuperscript{81} Baggio [note 66], p. 668ss.
\textsuperscript{82} Joule/Beauvois 2006 [note 73], p. 95ss.
\textsuperscript{83} Joule/Beauvois 2006 [note 73], p. 110ss.
\textsuperscript{84} Joule/Beauvois 2006 [note 73], p. 127ss.
\textsuperscript{85} Joule/Beauvois 2006 [note 73], p. 142ss.
\textsuperscript{86} Eyssartier, Chloé, Du don de sang au don d'organes: une recherche appliquée, Université d'Aix-Marseille (http://slhs.univ-fcomte.fr/rech/psycho /colloque/social/resumes.htm#c).
\textsuperscript{87} Festinger, Léon, A Theory of Cognitive Dissonance, Evanston [etc.] 1957, p. 9.
\textsuperscript{88} Baggio [note 66], p. 62ss.
\textsuperscript{90} Schweizer, Mark, „Kontrast- und Kompromissseffekt im Recht am Beispiel der lebenslänglichen Verwahrung,” ZStrR 4/2005, p. 438ss; Kelman, M./ Rottenstreich, Y./
With the contrast effect, the same option is assessed more positively in the presence of similar, less favourable alternatives than in the absence of such choices. This effect exists optically with the Ebbinghaus Illusion: a circle of the same diameter is perceived as being smaller when surrounded by larger circles.

The compromise effect results from the observation that the same option is assessed more favourably when seen as the middle solution in a group of alternatives than when presented as an extreme.

A first American experiment showed that, based on the same established facts, the probability of being found guilty of murder rose from 38% to 55% when capital murder is among the choice of offences. This compromise effect means that the accused risks receiving a higher sentence when the law provides for capital murder, even if he is not found guilty of that offence.

The experiment was repeated with similar results with 250 civil and criminal judges in the cantons of Bâle, Berne and Graubünden. Their rulings based on the same established facts were compared depending on whether life imprisonment was among the available criminal penalties. Introducing an extreme option among the range of potential solutions increases the proportion in favour of the median solution.

91 Kelman et al. 2000 [note 90], p. 61.
92 Kelman et al. 2000 [note 90], p. 61; Simonson 1989 [note 89].
93 Kelman et al. 2000 [note 90], p. 67.
94 Schweizer 2005 [note 90], ch. V, lit. A.
95 Schweizer 2005 [note 90], ch. VI.
96 Schweizer 2005 [note 90], ch. VI, lit. C.
These conclusions can be transposed to the area of soft law. This type of reaction is counted on with Switzerland’s new organ donor card, which offers three options: authorization for removal of all organs, non-authorization and, as the intermediate alternative, selective donation with boxes to check for various organs (heart, lungs, liver, kidneys, small intestine, pancreas, cornea, skin and other tissues and cells). Although not confirmed by a study, one can reasonably hypothesize that the presence of an intermediate option will be considered more favourably.

## Conclusion

States have long been aware that conventional legal instruments are occasionally ineffective in piloting public policy. Soft power is rediscovered, thematised and used with sometimes startling effectiveness, particularly in synergy with conventional legal means. Soft law has an even greater impact because its persuasive strategies involve skilful use of emotions, and even manipulation techniques.

The question is this: To what degree can authorities use emotions to increase the rate of compliance with soft law instruments, knowing that, in a constitutional state, they are less democratically legitimate than legislative and regulatory means? As such, the State cannot employ just any manipulation method to develop transplant medicine. However, as we see in road safety communication campaigns, it can certainly bank on the heuristics of fear by showing an hypothetical catastrophe leading to an accident, in order to make it more probable in the eyes of the targeted audience.

Soft law’s effects, as measured by the emotions they evoke, show that non-legally binding instruments can compel obedience. An absence of legal effects in the conventional sense would therefore not exempt them from the adoption of an adapted legitimation and control system, like that which has applied to the rules of hard law in constitutional states for a long time. Consequently, soft law instruments should be subject—relatively speaking and based on their effects, including emotional effects—to the material principles of the constitutional state, such as legality, action in the public interest, good faith and proportionality, the requirement of fair and non-discriminatory treatment, the prohibition of arbitrary action, as well as formal rules like the definition of specially adapted procedural guarantees like recourse to mediation or, in certain cases, legal processes. Public consultation and participation mechanisms should also be developed when adopting soft law rules, like citizen forums and consensus conferences, so as to establish a true "administrative

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97 See www.swisstransplant.ch
100 In detail on this proposal, see Flückiger 2004 [note 6], p. 262 ss.
101 Flückiger 2004 [note 6], p. 270 ss.
democracy.\textsuperscript{102} Greater legitimacy for such instruments would make them more effective, as research in social psychology has shown.\textsuperscript{103}

This conclusion in no way detracts from the legitimacy of soft law's use of emotions, or even certain non-problematic, well targeted manipulation techniques. It simply requests a legal framework suited to the specificities of non-binding state instruments in order to avoid circumventing the principles of a constitutional state. Otherwise, soft law's very effectiveness would simply be challenged, given the importance and scope of its emotional effects.

\textsuperscript{102} Flückiger 2004 [note 6], p. 275ff.

\textsuperscript{103} See the work of Tyler 2006 [note 19] regarding compliance with law, but whose conclusions may be transposed to soft law in our opinion.