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The influence of soft law on environmental protection: Insights and recommendations

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Abstract
Soft international law is an emerging branch of law. It refers to agreements or principles that are meant to influence individual nations to respect certain norms or incorporate them into national law. Soft international law by itself is not enforceable, however it serves to articulate standard widely shared or aspired by nations. It nonetheless can have a powerful influence on the development and implementation of specific legal provisions. Countries across the world do not want to make it binding because of their concerns over sovereignty. Nations are generally reluctant to surrender their control over their territory and peoples to external international authorities. But all the member states of the UNO do have obligation under charter of UNO as well as international human rights instruments. This research aims at finding out the role of soft law in protecting environment

Keywords: Agenda 21, Biodiversity, Environment, International Instrument, Domestic Law, Obligation

Introduction

In some last decade world has faced many problems in implementing law and regulations. State parties are afraid of the bindingness of law. Thus arise the necessity of Soft Law which is not binding to state party (Alan,1999). At present time Soft Law has become one of the main sources of international law. Soft Law is playing a very vital role to deal with sensitive matters like human rights, the protection of the environment and bioethical issues (Chinkin,1989) It has rapidly developed in recent decades which include a great variety of instruments: declarations, recommendations, charters, resolutions, etc. Even though soft law documents are not legally binding, they establish what are accepted by states as standards of behavior, and they promote some policies that can benefit traditional communities. Soft Law norms developed in the protection of the human environment immediately after the Stockholm Conference by creation of UNEP (Gunther,1986) [4]. In the last decades UNESCO has worked in the elaboration of international standards which aimed to encourage and guide states (Lachs,1990). The state parties are now urging for the use of "Soft Law" instead of "Hard Law", because soft law is of interest stems from the very fact that governments undertake moral obligations when they sign such agreements, and some may be influenced by moral suasion (Sands,1994). In my research, I have tried to give an overall idea about "Soft" law, its creation, and implementation and how it is playing role in protecting environment.

Theory of Soft Law

1. Definition

The term "soft law" refers to quasi-legal instruments which do not have any binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law, often referred to as "hard law", in this context. The term "soft law" initially appeared in the area of international law, but then it has been transferred to other branches of law (Paul,1992). In the context of international law, the term "soft law" usually refers to agreements reached between parties (usually states) which do not amount to international law in the strict sense. In the context of international law soft law consists of non-treaty obligations which are therefore non-enforceable (sun *et al*.1995) [16]. The term "soft law" in the international law context also includes certain types of resolutions of international organizations (e.g. resolutions of the UN General Assembly). The term "soft law" is also often used to describe various kinds of quasi-legal instruments of the European Communities: "codes of conduct", "guidelines", "communications" etc. In the area of law of the European communities, soft law instruments are often used to signalize, in what way will the European Commission use its competencies, how shall the Commission perform its tasks within the area of its discretion. Soft law agreements are often defined, by opposition to treaties, as "nonbinding instruments". This characterization is not entirely wrong but may be misleading because although soft law does not have per se binding effect, it is conceived to have such effect in the long term. This means that while treaties are actually binding (after ratification by states), soft law instruments are only potentially binding. Soft law is indeed conceived as the beginning of a gradual process in which further steps are needed to make of such agreements binding rules for states (Liaquat,2001). It should be noted that if the binding effect were totally absent from such instruments, then they would not be "law" at all, because one of the main distinctions between "ethics" and "law" is precisely that law is made up of enforceable norms while ethics is not enforceable."

Emergence and Development of Soft Law

In practice, the development of "soft" law norms with regard to the protection of the human environment began immediately after the Stockholm Conference, one of the consequences of which was the creation of a special subsidiary organ of the UN General Assembly devoted to the promotion of both universal and regional environmental law. This body, the United Nations Environment Program ("UNEP"), has played a leading role in the promotion of regional conventions aimed at, for example, protecting seas against pollution. Although it was not supposed to develop in such a manner, UNEP has also evolved into a standing structure for negotiating draft resolutions sent, after their elaboration, to the General Assembly, where their contents have been either passed as is or expressly referred to in

resolutions. A prime example of this phenomenon is provided by the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (Islam,2002). At the regional level in general and in Europe in particular, several international institutions have engaged in important activities related to environmental protection: the Organization for Economic Cooperation and Development (``OECD''), which, in particular, has adopted a series of recommendations conceived of as a follow-up to the Universal Stockholm Declaration regarding the prevention and abatement of Transfrontier pollution; the EEC which has adopted Programmers of Action for the Environment, on the basis of which "hard" law is later established, mainly by way of ``directive''; and the Council of Europe, which, even before the recent, intense international cooperation in this field, was perhaps the first international intergovernmental institution to bring to the attention of States the necessity of protecting the environment(Marie,1991).

Creation of Soft Environmental Law

1. International Institutional Framework

The primary function assumed by international institutions in the international "soft" law-making process has already been illustrated. In practice, the development of "soft" law norms with regard to the protection of the human environment began immediately after the Stockholm Conference, one of the consequences of which was the creation of a special subsidiary organ of the UN General Assembly devoted to the promotion of both universal and regional environmental law (Schachter,1991). [12]" This body, the United Nations environment Program ("UNEP"), has played a leading role in the promotion of regional conventions aimed at, for example, 'protecting seas against pollution'. At the regional level in" general and in Europe in particular, several international institutions have engaged in important activities related to environmental protection: the Organization for Economic Cooperation and Development ("OECD"), which, in particular has adopted a series of recommendations conceived of ash follow-up to the Universal Stockholm Declaration regarding the prevention and abatement of Transfrontier pollution, the EEC which has adopted Programmers of Action, for the Environment, on the basis of which "hard" law is later established, mainly by way of "directive"; and the Council of Europe, which, even, before the recent, intense international cooperation in this field, was perhaps the first international intergovernmental institution, to bring to the attention of States the" necessity of protecting the environment In this context, the regional commissions of the United Nations play a role that could become more important in the near future. This is reflected in the recent Bergen Declaration adopted on May 14, 1990, by thirty environment ministers at a meeting convened jointly by the United National Economic Commission for Europe -and the government of Norway. One can find in the terms of this declaration different considerations, guidelines and principles which choose those of other contemporary declarations such as the Declaration on Human Responsibilities for Peace and Sustainable Development proposed a year earlier by Costa Rica" or the Declaration of Environmental Interdependence adopted by the Inter parliamentary -Conference on the Global Environment in Washington, D.C. on May 2, 1990.

Soft Law for The Protection of Environment

1. International regime

In International arena soft law is playing a very vital role. There are many soft laws in International Human Rights, International Trade law, international peace and security law, International Environment law and in so many fields.57 Declaration of the United Nations Conference on Environment and Development (Rio Declaration) provides a comprehensive set of principles for sustainable development. Until now it has not come to be accepted as customary international law in the same way as the Universal Declaration of Human Rights. Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests -these Principles provided the foundation of the future IFF/IPF Proposals for Action. The principles seek to combine the objectives of sustainable forest management and conservation. This challenging combination continues to be on the agenda at most international forest related flora." Agenda 21 was reaffirmed at the World Summit on Sustainable Development (2002). Chapter 11 provides a focus on forests, including conservation and restoration, minority rights and production within sustainable limits.

UNESCO has produced a number of nonbinding documents of relevance to indigenous peoples. For example, the 1966 Declaration on the Principles of International Cultural Cooperation states: Each culture has a dignity and value which must be respected and preserved. Every people have the right and duty to develop its own culture. The importance of this statement is that it can be interpreted to uphold collective rights as opposed to individual rights.

2. Municipal Legal Arena

In domestic space international law is often described as either "hard" or "soft". Soft law refers to agreement to a principle or conduct that is not ostensibly implying any binding obligation. Such measures are often not provided for in a treaty but may form an annex. Soft law is also often a precursor to hard law and is significant because of the extent to which it may provide normative guidance to legal actors. In some case, a provision will be seen as reflecting a 'soft obligation' if the language of the treaty does not clearly specify states obligations and is couched in any language other than 'shall'. In other cases, the nature of the obligation itself is "soft". For example, in the case of the United Nations Framework Convention on Climate Change, the commitments clause reads: "All Parties, taking into account their common but differentiated responsibilities and their specific and regional development priorities, objectives and circumstances shall" (United Nations, 1992), undertake a number of specified commitments including to Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems(Sands,1994). However, as the emergence of "soft law" also has to do with the fact that states in agreement frequently do not (yet) wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law. This often facilitates consensus which is more difficult to achieve on 'hard law'

instruments, also, critical to the influence of soft law in domestic or supranational governance is the extent to which soft law is recognized under legal and political regimes (Sands,1994).

3. Soft Law and International Responsibility

A "soft" norm can help to define the standards of good behavior corresponding to what is now-a-days to be expected from a "well-governed State" without having been necessarily consecrated as an in-force customary norm. Among those standards of good behavior which constitute the type of due diligence that can be expected from a State. In the context of international cooperation are: prior consultation before enforcing a regulation or empowering a private person to undertake an activity which might create a significant risk of trans frontier pollution, early international notification of a polluting accident, due recourse to procedures of impact assessments and non-discrimination between and equality of access for victims of both national and international. These and other standards of behavior were recognized in the context of a due diligence definition by the arbitrators in the famous Alabama Case.

Practical Implementation of Soft Environmental Law: Environmental Sectors

1. Forest

A number of "Soft Law" was created to protect the Forest. Through inter-governmental cooperation, many soft law institutions devoted to addressing deforestation have been developed, and, at the same time as, non-governmental efforts such as forest certification have attempted to avoid this process in pursuit of greater change. In fact, forest-related soft law instruments have been said to fall "100% short of providing even the most elementary basis for an international regime for the protection of the world's forests". Although the Rio Earth Summit failed to produce a legally-binding convention, a number of voluntary instruments were created, including Chapter 11 of Agenda 21 and the "Forest Principles" Notably, the concept of preservation of state sovereignty figured notably in the text This set the stage for constant negotiations on forests under the UN Commission on Sustainable Development (CSD). All these "softening" factors contribute to the increased likelihood that states will be willing to become a signatory to the agreement. However, this comes at the cost of decreasing Obligation, Precision and delegation, and may result in the loss of support from the "demandeurs". The norm is "internalized", so widely accepted that it is not considered an alternative view.

This process is often initiated by "norm entrepreneurs", actors who actively promote the adoption of these emerging norms. Constructivists would argue that nations comply with international rules not because they are threatened with sanctions, but because of the persuasive dynamic that develops during the process of creating regimes, and the consensus that is created surrounding these norms. However, there are several emerging principles which, if widely adopted, may be able to provide the impetus needed to create an IFC which goes beyond confirming national sovereignty over forest resources.

2. Biodiversity

Rules of soft-law are not binding per se but they have played an important role in the field of International environmental law, where they point to the likely future direction of formally binding obligations. They can also be considered as the manifestation of a broad consensus of the world community. There are four soft-law instruments which inspire biodiversity legislation. Firstly, there is the Stockholm Declaration which was adopted in 1972 at Stockholm United Nations Conference on the Human Environment. It is a set of 26 principles which inspired to a great extent the development of international environmental law. In relation to biological diversity, Stockholm Declaration calls for the safeguarding of the natural resources of the earth, including the air, water, flora and fauna and especially representative samples of natural ecosystems for the benefit of present and future generations through careful and appropriate planning or management". Secondly, the World Charter for Nature (WCN) adopted by United Nations General Assembly Resolution 37/7 in 1982 recognizes the uniqueness of every form of life and calls for respect for nature and its essential processes. The WCN affirmed that special protection shall be given to unique areas, to representative samples of all the different types of ecosystems, and to the habitat of rare or endangered species. It also called for the sustainable management and utilization of ecosystems, organisms, the land, marine and atmospheric resources. The third soft-law instrument is Rio Declaration adopted at the Rio Conference on Environment and Development in 1992. It is important as concerns biodiversity conservation for sustainable development requires restraint in the use of natural resources, which need to be wisely used". The fourth soft-law instrument is Agenda 21 promulgated in 1992 at Rio de Janeiro. It is a programme of action consisting of forty chapters covering many issues. Specifically, it contains a chapter whose objectives and activities are intended to improve the conservation of biological diversity and the sustainable use of biological resources, as well as to support the CBD. In addition, it endorses a chapter on environmentally sound management of biotechnology".

Impacts

1. Positive Impacts

Soft law is an emerging branch of law. It is understandable from the history of international Environmental law. As far as Bangladesh is concerned, it can be stated that soft law has already played a vital role. For instance, Bangladesh has already enacted some direct enactment. Such as the Bangladesh Environment Conservation Act, 1995; Conservation Rules, 1997; Environment Court Act, 2010." More importantly, Bangladesh has incorporated a new provision in the constitution of the Peoples Republic of Bangladesh by 15th amendment of the constitution that is article 18A. It provides positive obligation towards the Govt. to protect environment. It cannot be said that this is sufficient but this is great achievement of soft law in implementing at national level. Now the question is how Bangladesh can make it more effective or binding. The answer is Bangladesh can incorporate the provision of environment in part (iii) of the constitution. So, the right of filing writ petition can be available. In this way Bangladesh can make this unenforceable branch of law enforceable or binding.

As far as international community is concerned, it can be said that they can make it binding by making some law-making treaty. Such as universal treaty, regional treaty,

bilateral treaty, as there is a universally accepted principle that is Pacta Sunt Servanda that means treaty must be observed. Moreover, as per article 38 of the ICJ statute it is source of international law." There is another way of binding this branch of law that is principles of International Environmental law. If we repeatedly follow these principles, they will be treated as customary international law. As per the provision 38 of the ICJ statute it is also the source of international law. In this way they car can have binding force. The countries those remain to enact any law regarding environment they have both legal and moral obligation to make such enactment. All the member states of the UNO have the obligation to make such enactment under the preamble of the charter of UNO. They have also obligation under the international human rights instruments. Such as UDHR, ICCPR, ICESCR etc.

2. Negative Impacts

Why countries across the world do not want to make it hard international law. The answers are related to the concerns over sovereignty. Nations are generally reluctant to surrender their control over their territory, peoples and others affairs to external international authorities. Even when nations have joined in international agreements, many of them have added reservations. “They do not want to stop the development at the cost of environment. They do not want to take any direct responsibility so that other state or any international body can make them bound to follow any treaty or obligation.

Findings

Soft" law seeks to involve business in social responsibility voluntarily and by mutual understanding, as it sees business as a private enterprise that has as its aim profit maximization with or without voluntary social responsibility. It encourages transparency and accountability in the investment process through persuasion and the mobilization of shame. It is non-binding, persuasive at most; non-compliance attracts no penal consequences. It creates blue-washing, green-washing, and free-rider problems, which may lead to the mobilization of shame and result in reputation risks. It may aggravate social and political risks. Noncompliance with "soft" laws, which are not penalized, can result in complicity in human rights abuses, environmental degradation, and corruption.

"Soft" law increases the social cost of investment when implemented by IOCS but also improves business bottom lines and mitigates project social risks. There is no monitoring and enforcement body, so "soft" law does not impact the cost of government. "Soft" law may persuade change but encourages innovation when implemented. It creates a loosely defined framework and tends to cede to industry the traditional role of government. The merit of "soft" law is seen in the fact that it not only helps in addressing project social risks, which no law can mitigate, but is also capable of enthroning a regime of transparency and respect for environmental and human rights.

Recommendations

Monitoring and follow-up are crucial in fulfilling the purpose of soft law. Regional mechanisms work better than global mechanisms, especially in the case of human rights and the environment. Therefore, the implementation of soft law should begin at the national level. We should raise public awareness about the characteristics of soft law. If any issues arise during the implementation process of soft law, it is crucial to inform more state parties about them. Leadership is an important factor in fulfilling the purpose of soft law. It has been seen in many environmental norms, which ultimately fail because no state party took a leadership role in the protection of environmental issues. To ensure compliance with soft law, the equal participation of all state parties is crucial. To utilize soft law effectively, it should be made transparent. The state party should be aware of its loopholes and weaknesses. We should enhance financial incentives to ensure the equitable implementation of soft law at all levels. The naming of a soft law is an important factor in improving its implementation and thus creating higher expectations for people. To implement soft law properly, norms of abstention are more effective than norms that require action. To legitimize soft law, it should link with hard law. In most studies, hard law helps implement soft law. Creating a connection with the subject matter can also legitimize soft law. Regulation of soft actors is easier than regulation of non-state actors. Therefore, the implementation of soft law should begin with non-state factors. Soft law should be implemented first in common areas. Common area norms are easier to comply with than intrusive domestic regulations. For better compliance with soft law, specific obligations should be imposed on state parties. Vague agreements do not work properly. Soft law should not be considered a normative sickness but rather a symbol of contemporary times and a product of necessity.

Concluding Remarks

Soft law tools play a crucial role in creating universal standards in bioethics, despite not providing legally obligatory regulations. Their indirect operation relies on persuasion rather than force, but they significantly impact state practices by pushing them to implement common standards. In the long run, they can develop legally enforceable norms through trade agreements or recognition as customary law. Soft law agreements are currently the only practical approach to addressing bioethical concerns globally. In the modern era, soft law has overflown traditional legal categories used by academics to define international standards and legal power. New "soft" regulation has evolved significantly in areas like international economic law and human environment protection. The misconception that "soft" law is only a characteristic of international law is misguided. The current body of international law is partly based on "soft" standards, making it easier to observe the broad sociological and juridical phenomena of "soft" law. However, it is also an essential factor in putting domestic legislation into effect.

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