



Rethinking the Concept of Soft Law: Passing from Norm's Frames to Norm's Effects in International Law

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ABSTRACT

Background

In the traditional approach, the relation of the subjects of law is either lawful or unlawful. In light of this approach mathematical logic governs the field of law. As a result, the norms governing the relations of the subjects either comes from the field of law or from outside this field.

Materials and Methods

This is a theoretical inquiry and its methods are descriptive-analytical and the gathering of data is done by the library method and referring to documents, book and articles.

Ethical Considerations

In all steps of writing this inquiry, while observing the authenticity of the texts, honesty and fidelity have been observed.

Findings

By passing of time and postmodernism prevailing on the relations of the subjects of law, the traditional approach faces fundamental challenges, because in postmodernism, fuzzy logic is governing. This caused the raising of the following problem amongst jurists: it is possible that the behavior of the subjects of law influenced by postmodernism and fuzzy logic is contained in a spectrum of different modes and the gap between the lawful and the unlawful is filled with the concept of soft law.

Conclusion

In the field of law, norms are of two elements, binding and adherence. The norms of soft law, while are not binding for the subjects of law, they are obeyed for many different reasons. In simpler terms, while not having a binding framework, the effects of legal norms, i.e. their adherence regulates the relations of the subjects of law.

Key words

Soft Law, Framework Approach, Consequentialism, Legal Sources.

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INTRODUCTION

The atmosphere, in which the international law is currently regulating the legal relations, is quite different with the atmosphere of the past decades. The rule of the international law is facing the national sovereignty with more force and more explicitly. And the international community has to reach a desirable balance between these two. On the one hand, the multilateral relations of the nations and the international mixing of people of different nationalities and cultures have increased the complexity of the relations of states. In such a completely newfangled situation, more movement and stronger dynamism is expected from international law. Here, the concept of law-dynamism which is necessary for a dynamic legal system on one hand and legal stability (which is also necessary for any legal system) on the hand are competing one another. Duty of the international community is to create a desirable balance between these two aspects of international law. Sources of international law are divided to theoretical sources of international law and official sources. The starting point for the current inquiry also comes back to the sources of international law. When the theoretical sources are put in front the official sources we understand that we find out that the theoretical sources contains the science of international law and the official sources are enforced clauses of governments which are demanded on the international podium. By one interpretation when we consider the science of international law as something to have organized rules and

principles in the branch of law, in addition to the analysis and nature of these rules and principles and specifying their situation in the general legal relations between governments, it is obvious that instances of this definition are legal scholars and their source books. Along theoretical sources of international law, a discussion about official sources of international law is raised. We must remember that considering official sources of international law and their number, there are no clear and official agreements between governments. What named as official sources under the 38th article of statute of international court of justice are in fact instances which the statute of international court of justice should refer to for solving the raised disagreements. The text of the Article 38 of the statute of the international court of justice was put forward before in the statute of international court of justice. Even the roots of this clause's creation should be traced back before the statute of the international court of justice i.e. in the draft of the statute of permanent court of arbitration in the atmosphere of the Hague peace conference. In conclusion this clause is almost a hundred years old. In such a long time, international law has gone under many normative and formal changes. These changes themselves had created many different and new concepts in the field of international law such as soft law. Frameworks mentioned in the Article 38 of the statute of court in fact regulate the relations between the actors of international law with the help of its element of adherence and binding elements. But in recent decades in the field of international relations, we are witnessing the

manifestation of new titles such as resolutions of international organizations which although do not have a binding element do cause adherence in international affairs. This is where the subject of soft law is formed; i.e. norms which although are not binding cause adherence in the atmosphere of international affairs in the subjects of law. In general, most legal writers and scholars, depending on legal formalism (i.e. formalism or depending on the framework of legal norms), consider most instances of soft law as just norms and rules written in unbinding documents of international law. But as we will see in the present inquiry, the legal formalistic approach has faced challenges due to the behavior international actors. Now the main question is what is the nature of the concept of soft law under the light of an approach other than formalism?

MATERIALS AND METHODS

This is a theoretical inquiry and its methods are descriptive-analytical and the gathering of data is done by the library method and referring to documents, book and articles.

DISCUSSION

A. The Definition of Soft Law

The basis of soft law is that law is not a zero-one phenomenon (or shouldn't be). This view which is derived from Fuzzy logic has challenged the classical approach (formalism) [1]. In an interpretation, the legal atmosphere, must analyze different spectrums of relations and then regulate them in the next step. According to this view, looking at the field of

law in the dualistic frameworks like legal and illegal or binding and nonbinding is useless. Law must be seen as different and various situations and degrees of legal and binding. In simpler terms, norms can be either more or less binding (not necessarily absolutely binding or nonbinding). And actions can be more or less legal (not necessarily absolutely legal or illegal) [3]. Differences of opinion between writers and scholars of international law regarding philosophical-legal schools of thought and the perspectives in the international legal atmosphere and its connections to international law, has led to the introduction of many different definitions and interpretations of soft law. Some writers focusing on these differences believe that giving a concise definition of soft law is impossible [3].

Some legal scholars believe that the root of the concept of soft law can be found in the ideas of lord McNair, although he has in fact theorized about the two concepts of "lex lata" and "lex ferenda". Of course, one must note that lord McNair has not used the term "soft law" in his book of legal conventions, in fact the he has used the distinction between soft law and hard law by his distinction between lex lata and lex ferenda [4]. Some writers with a general view (not limited to international law) believe that "soft law is a set of rules for behavior which although lack the element of being binding from a legal rules viewpoint, have enormous effects in practice." [5] [6]. Some other writers emphasizing that drawing a line between soft law and hard law is not a difficult and

important problem, but it's the validity and status of soft law as a legal principle is the main problem, define soft law as: "soft law is a rule of behavior which is not yet legally binding but is effective in analysis of different legal concepts." Advocates of this perspective in fact emphasize on the common goal of the lawmakers for the lack of the binding element and also the high conformity of behaviors with soft law [7]. Some other writers while consider soft law more as social norms than legal norms, define it as: "any sort of international written non-conventional document which includes rules, standards or other statements which although lack a legal structure, make it possible to predict governments' future behavior." [8]. Others in the field of the rights of governments in the EU have defined soft law as: "promises which are more than political statements but less than legal statements in the precise meaning and all of them are similar in being non-binding as a legal concept, or not having a particular affinity to the law or a particular legal relation." [9]. The definition that professor Linda Senden puts forward has almost considered some aspects of the mentioned definitions: "rules of behavior which are expressed in mediums which are not legally binding but can still have indirect legal outcomes and practical effects." In this account we witness the struggle between intention and outcome. It is here that we must say that soft law creates rules of behavior the goal of which are at least some procedural outcomes but these are bound to factors other than being legally binding [10]. According to the accounts mentioned above we understand that some

elements can be decided as the common elements between the mentioned definitions:

- The first element is behavioral; which is in fact the demand of a certain behavior from the subjects of soft law.
- The second element is the manifestation in mediums lacking a legal binding power.
- The third element according to some writers is a clear intention of the legislator of using soft law. So, if there is no such intention to creation or using the principles of soft law and a non-binding obligation is created, the obligation cannot be considered as a soft law. These writers basically don't accept that any non-binding obligation is a soft law [11].
- The fourth element is having practical effects and influencing behaviors. It is according to this element that not all non-binding elements should be considered as soft law [12].
- The fifth element in some writers' opinion is a significant style and phrasing. According to them in order to not confuse soft law with concepts like general rules of law, it must have its own literature and phrasing, because general principles of law (like good faith) too do not have certain and signifying obligations and rules [14]. Of course, this argument is flawed to an extent, for principles of law are essentially general and in different fields of law, after going through changes and modifications turn into rules of law and finally legal judgment are derived according to these rules. Therefore, the phrasing of the principles is essentially different to that of soft law.

From what is said up until now, we can conclude that soft law is a passing phase in expanding the norms in instances the content of which is vague and their domain is uncertain. From the perspective of soft law, there are no clear cut boundaries between law and not-law and soft law is somewhere in between these two [14].

B. Effects of Soft Law

1. Soft law as a basis for legal norms: soft law plays an important role in the process of creation international social norms. This is clearly seen in both the field of general rules and conventional rules. In more simple terms, soft law is a sort of adversity to traditional mechanisms (like traditional negotiations) in the creation of international legal resources [15].

2. The binding nature of soft law in the related legislative international organ: in the case that soft law is ratified in the form of non-binding documents (mostly declarations or resolutions) we must make a distinction between two presumptions. The first presumption is the relation between the document at hand and party states of the international organization and the second the relation between the said document and the organization itself. It should be noted that these sorts of documents are of non-binding nature relative to the party states of the organization but in contrast due to interior rules of the organization are binding to it itself. So, in the two mentioned presumptions we are in facing two different legal systems; first, the legal system of the party states and

second, institutional legal system of the mentioned organization [16].

3. Soft law as the guide for obtaining the intellectual element of customary rules: as we know customary rules have two elements. One is the material aspect which is the governments' procedures and the other is the mental or intellectual aspect which is the same as the belief that the said procedure is a binding obligation [17]. In fact, in the procedure of the creation of customary rules, obtaining the first aspect is much easier for it is tangible is most cases, but it is not the same for the mental aspect. If the procedure of governments and the necessity for their existence doesn't manifest in form of legal documents before, it means that the stages of needs assessment and then the existence of a basis for a belief that the rule at hand is binding, is obtainable. Of course, in this field we should be avoided from extremist approach and the existence of soft law should be considered as a basis for obtaining the mental element, and the mere direct existence of soft law should not be considered as a definitive reason for the existence of the mental element of customary rules.

4. Delegalization of an existing norm: what is meant by Delegalization is changing the legal status or the binding nature of an existing legal rule. This change may take place as an official procedure (i.e. ratification of a soft law contrary to an existing norm) or an unofficial one (i.e. a change in events or political matters which often lead to an official procedure). For example, ratification of soft laws (like the resolution of the united nations general

assembly) contrary to the present mores, can mean that the mental element (the governments' intentions) has either faced challenges for making the principle at hand binding or doesn't exist at all [18].

5. Internationalizing a subject: soft law causes a subject to be put forward in the international law, in fact soft law is an important and secure starting point for putting forward a subject on the international rules and affairs. Through soft law a subject can be put forward in the international stage as a need or even further as a value [3].

6. Soft law as the main reference of some legal principles: soft law plays an important role in enforcing the existing legal principles. One aspect of this role is when International agreements refer special situations to non-legal principles.

7. Helping the interpretation of legal rules: soft law provides a basis for the interpretation of legal principles. International courts and tribunals often consider non-binding documents to interpret legal norms there for the distinction between binding and non-binding documents in international procedures is losing color [19].

According to what was said, we can conclude that soft law:

"1. Can play a role in organizing the existing customary international rules by creating more clarity through written documents, like the interpretation of united nations of basic rules and guidelines related to compensation for the victims of comprehensive violations of

international human rights and serious violations of international humanitarian rights, ratified in the human rights commission which afterwards in the declaration of the general assembly of the united nations dating December 2005, was approved. In this declaration the assembly stated that these rules and guidelines are not new norm but only reflect the content of many of the conventions and governmental procedures.

2. Show a tendency towards a specific norm;

3. Help the creation of new international customary rules, or provide the grounds for changes in existing norms, like the effects of declaration related to the permanent domination of natural resources on economic fields especially the charter of economic rights and duties of states.

4. Can stabilize political perspectives in necessary cases of action concerning a new issue; strengthen a consensus that can lead to negotiations about convention or more soft laws, like many human rights conventions that were ratified after the ratification of the universal declaration of human rights.

5. Fill the gaps of existing imperative conventions;

6. Can play a role in the creation of parts of the procedure of a new government that are useful to interpret conventions.

7. Provide rules or guide models for national legal systems without the existence of international obligations, or be a replacement

for legal obligations when the current situation of relations makes creating an official commitment costly, time consuming or in any way unnecessary or politically unacceptable.

8. Eventually, it has a large potential for expanding international law. Like in the 21th principle of the Stockholm declaration 1972 concerning human environment, which is repeated in the Rio deceleration 1992 concerning environment and development and also stated in many of the preambles of the bilateral agreements and the 3rd article of the convention on biological diversity" [8].

CONCLUSION

As was seen, there is no consensus on the definition of soft law. The existing accounts of soft law are quite diverse and each is designed from a specific perspective: Some from the perspective of philosophical schools of thought, some from the perspective of regional legal systems like the EU, some from a political perspective, etc. But as we said before, common elements can be derived from the core of different proposed definitions. The point of entry of the concept of soft law into the literature and relations of international law is the distinction of different aspects of legal principle, i.e. the binding aspect and the adherence aspect. The norms and rules of soft law do not have a binding aspect but in the international stage have an adherence aspect. There is no need to say according to the difference in kind, condition, the status of ratification and the audience of a norm, the level of adherence will be different. If we want

to choose a word as the symbol of soft law it will be "flexibility". "Flexibility" sometimes manifests as formal, i.e. the means of expressing the soft law principle is flexible, and sometimes as content, or in more simple terms, the content of the legal principle is flexible. Here some writers of international law make a distinction and name the former "soft law" and the second "flexibility in international law". Hard critics do not consider "soft law" as "law" at all but consider it as a category belonging to the realm of ethics and politics, because in their view in the field of law we are facing a black or white situation and there is no third option in between. But in contrast, the advocates of soft law consider the field of law as something dependent on the needs and relations of the field and therefore due to the diversity and vastness of relations, do not consider the black or white perspective as useful. So, we must consider a middle area which in the literature of the writers of international law is known as the gray area. With all the benefits and defects that writers count for soft law, international actors have widely used documents and norms of soft law for a variety of reasons especially for creating harmony in different aspects of soft law. Soft law, like many other concepts is not without weak and strong points. In analyzing soft law and its role in international law we must not fall into the extremes to either consider soft law as a pointless effort and expense on our way to development and progression and legal and international relations or to consider it as even on a higher level and of more privilege than hard law. In any way, this concept and instances of its

norms and documents exist in the realm of international relations and there is no doubt that it is noted by international actors and authorities of solving disputes. There is no doubt the realm of law and the realm of the relations between subjects have close relations with each other and the vaster and more intricate the relations, the more intricate and vaster the legal atmosphere. Therefore, this vastness and intricacy is the weakness and inefficiency of traditional tools and methods of regulating relations. As a simple example: most of the traditional tools and resources of international law were born when governments acted as the main agent of international relations but currently the role of non-governmental actors, if not more, is no less than that of the governments. Therefore, in order to adapt to their changes, we are reluctant to change and modify traditional structures and institutes. Soft law has important attributes, namely helping governments increase international cooperation in cases that governments due to the lack of trust, are not willing to make binding commitments, or preventing the contention of governments over interior political issues (because there is no need to ratify soft laws in the internal legal procedures), in cases where disagreement between deciding and executive authorities is intensified, reducing tension and friction where governments are not willing to accept hard international settlements and agreements, facilitation of the procedure of international negotiations, creating an open space for non-governmental agents to play a role in the procedure of creating and if need be changing

and modifying international norms, etc. The essential attribute if any government is the zeal over its own sovereignty (its internal and international aspects) and therefore a tendency towards stability and independence. Considering this attribute and how turbulent international affairs are and the lack of trust and confidence, the road to expanding international cooperation's is facing large obstacles indeed. On one had the significance of soft law is its flexibility and this flexibility attracts the tendency of international agents. Relating this attribute, we can say that the norms of soft law are basically not limited to expression in particular forms of resources or international law documents or being designed by particular agents or for particular agents. Of course, we must not forget that the uncertainty of the tools of soft law causes the intricacy of International relations to show instead of political clarity.

Consequently, in the space of international affairs, according to the existence of many variables, soft law based on conditions can be considered weak or strong; we can almost certainly consider this attribute of soft law its advantages and disadvantages at the same time. according to what is stated, we can conclude the role of soft law in these cases: A. describing the organizational framework; B. facing the challenges of legislation; C. presenting the answers and the non-binding positioning, Development of existing norms; D. legislation of new norms; and. Execution of existing norms; E. preliminary assessment and future prospects in the realm of new norms. In

conclusion, soft law is seeking to create a new norm when it is necessary, occasionally in the existence of norms or complementary of existing norms, and at last developing the opposite procedure against the inefficient existing legal rules.

ETHICAL CONSIDERATION

In all steps of writing this inquiry, while observing the authenticity of the texts, honesty and fidelity have been observed.

AUTHOR CONTRIBUTIONS

Planning and writing of the manuscript was done solely by the author.

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CONFLICT OF INTEREST

No conflict of interest was reported by the author. The author declare that he has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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