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Contributions of soft law to international law in dealing with global problems

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Abstract

The research addresses the contributions of soft law to international law in the solution of global problems, assuming that these problems transcend the state sphere, and many of the actions for their solution come from agendas organized by international organizations and actors, through agreements lacking mandatory but that becomes a precedent or interpretation of hard law. This is a current and necessary issue to address in the face of the crisis of the nation state and the loss of the normative monopoly by the States, being necessary the analysis of the new sources of Law. A qualitative, descriptive approach was used, using synthetic, inductive and hermeneutical analytical methods. It was concluded that soft law has contributed concrete actions to the solution of global problems that, although they lack binding character, have been assumed by the States as necessary from a political and ethical commitment for the development of humanity.

Key Words

soft law; hard law; global problems; globalization; binding character.

Introduction

Globalization produced changes in the Nation State, not harboring this regulatory monopoly, which generated changes in the sources of Law and Law itself, thus arise new sources of normative character not emanating from the State, as in the case of the *lex mercatoria*, produced by large transnationals to regulate international

trade, that the state was unable to regulate; on the other hand, we find the soft law, promoted by International Organizations, state or not, promoting technical normative instruments for "regular, although voluntarily, practices and behaviors that may affect other actors. These instruments and tools, considered as soft law, seek to meet the expectations of the so-called stakeholders" (Da Conceição, Fraguío, Gonçalves and Rei, 2020). Stakeholders refer to the parties that influence or are influenced by the decisions or activities of organizations.

Soft law, as a manifestation of a legal reality, has its origins in Roman law, which distinguished different types of normative provisions from the point of view of their effectiveness. Subsequently, this *soft law*, as opposed to *hard law*, has assumed various forms in our contemporary legal systems, and is primarily reflected in international law (Bustos, 2019).

Globalization opened the way to new forms of communication and commercial exchange, permeating the borders of nation states, but at the same time revealed major global problems such as drug trafficking, human trafficking, climate change, terrorism, among others; these global problems cannot be solved in isolation by each State, since it exceeds them in their operational capacity, It is necessary agreements and guidelines of international instances so that from mutual collaboration to find a solution to these great problems. As stated by n Camps, Gomez, Garcia, Mora, Martínez, García, Aranguren, Lorenzo, Estévez, Laguna and Ballesteros (2022)

Global inequality and injustice (social and ecological) are suffering a general tendency to increase. From the great recession of 2008, through the pandemic break (2020) and culminating, at this time, with the great turmoil (2022) of the war in Ukraine, we can clearly observe how the phenomena of inequality and poverty have increased.

International law has traditionally had a set of sources, which in the opinion of the doctrinaires are developed in article 38 of the statute of the International Court of Justice, which establishes as sources:

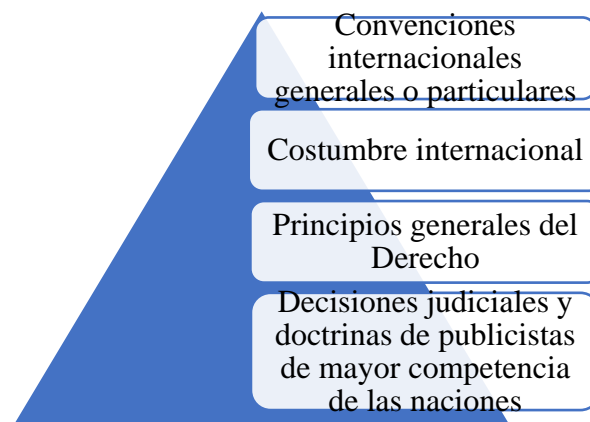


Image 1. Sources of International Law. Taken from article 38 of the Statute of the International Court of Justice.

Several authors have pointed out the emergence of new sources of law from globalization; definitely the law changed, not limited to the State, but generated in a spontaneous and conventional way, with new dynamics, which have been little studied and that make up a new theory of Law. One of these sources is soft law, which has made it possible to address multiple global problems such as international buying and selling, nuclear disarmament, human trafficking, crimes against humanity, violation of human rights, climate change, among others. Soft law is applied in the field of international, transnational and corporate social responsibility law. Hence the importance of analyzing the contributions of soft law to the treatment of global problems from its location within the sources of international law, as a contribution to the understanding of the law product of globalization.

Soft law, or non-binding legal instruments, have been increasingly utilized in international law as a means to address global problems. Soft law can take the form of guidelines, codes of conduct, and declarations, among others. These instruments have proven to be a useful tool in supplementing traditional hard law in addressing complex issues that require a collaborative approach. The contributions of soft law to international law in dealing with global problems are evidenced in various academic articles, including those by Ricardo et al. (2021), Leyva et al. (2021), Ricardo et al. (2022), and González et al. (2021).

One example of the application of soft law is in the field of intellectual property (IP) law. In their article, Ricardo et al. (2021) highlight how soft law can complement the rigid framework of IP laws. They argue that soft law can help address the challenges brought by the rapidly advancing field of artificial intelligence (AI) and the need for a more flexible and adaptable legal framework. Guidelines and codes of conduct can provide guidance to stakeholders in the field of AI, while allowing for a more collaborative approach to addressing the challenges posed by this emerging technology.

Another example of the use of soft law is in the field of public health. In their article, González et al. (2021) discuss the case of Albán Cornejo Vs Ecuador, where a violation of the right to health was alleged. They highlight the importance of using soft law instruments, such as guidelines and declarations, to provide a framework for the realization of the right to health. Such instruments can assist in addressing the complex issues that arise in the field of public health and provide guidance on the development of policies and practices that promote the right to health.

The research answers the question: What is the contribution of soft law to international law in dealing with global problems? A methodological design was assumed with a qualitative approach, descriptive scope, being the methods used the synthetic analytical, the inductive and the legal hermeneutics, as an instrument the analysis de content was used((Vázquez et al., 2021, p. 394).

Development

Materials and methods

The research was carried out with a qualitative approach, which led to delve into the characteristic elements of the object of study, synthetic, hermeneutic and inductive analytical methods were used, to decompose the soft law category from its manifestation in reality international law, in order to make a legal interpretation of it in the contribution to the regulation of global problems; This last category "global problems", likewise, is operationally defined for research. The type of research is documentary bibliographic, consequently, a non-experimental design. The technique of content analysis of the analysis units was used to collect the data.

To guarantee the reliability and validity of the data, triangulation was used: Theoretical, methodological and sources, confronting various sources, theory on the subject and using various methods within the research, establishing the corresponding epistemic distances (Peñafiel Palacios et al., 2021, p. 18).

The data obtained from the interviews were tabulated using content analysis, identification of units of analysis, we proceeded to read the transcript of the answers given by the interviewees, taking into account the objective and identifying the points in common and difference between the experts, and thus obtain the relevant data until saturation was reached (Romero Fernández et al., 2022, p. 167).

Results

Sanz and Folloni (2017) state that "The system of sources in international law lacks a "meta-norm" or, in Hartian terminology, a rule of express recognition" (p. 245); that is, there is no binding classification of the sources of international law, only Article 38 of the statute of the International Court of Justice is used to establish the system of sources, however, this article was drafted to regulate an international body, not all international law, in addition to the subsequent evolution of law, generated changes and the emergence of new sources within the international context, which is why it is necessary to review the sources of law and not limit them to those set forth in article 38 of the Statute of the International Court of Justice. "Globalization produced a change in the sources of Law, the resurgence of the *lex mercatoria*, soft law, and legal pluralism, raising the need to formulate a theory that explains the new Law product of globalization" (Moreno and Garcia, 2022, p. 253).

Barberis (1994) indicates that soft law manifests itself in various ways in international law as norms in the process of formation that have not acquired legal validity, diffuse norms established in hard law legal instruments, norms of international organizations, political agreements, codes of conduct, declarations.

Finally, soft law, as stated by Sanz and Folloni (2017) and Garrido (2017) is presented as an intermediate point between hard law and social norms or politics, which can be represented as follows:

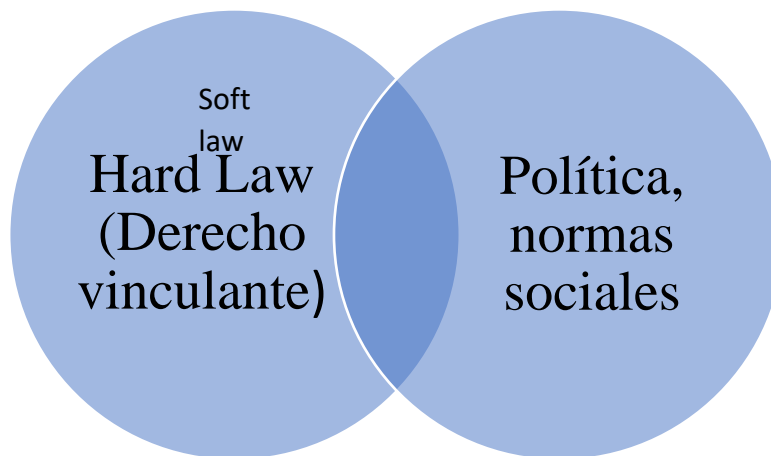


Image 2. Location of Soft Law.

Garrido (2017) emphasizes that "the use of soft law is greater in the fields of human rights and the environment" through organizations such as the International Atomic Energy Agency (IAEA), the International Maritime Organization (IMO), the United Nations Environment Program (UNEP) or the Food and Agriculture Organization of the United Nations (FAO). With regard to the use of soft law in international trade, examples include the recommendations of the Financial Action Task Force on Money Laundering; recommendations of Banco Mundial. For their part, Sanz and Follini (2017), analyze the soft from 3 experiences resolutions of the United Nations General Assembly; the Code of Conduct for Business Taxation, as an example of a non-binding instrument developed within the European Union; and the so-called *lex mercatoria* (p. 246).

The doctrine has been inclined to catalog the soft law as a custom or as a general principle of Law, in order to locate it within the existing sources, however, there are those who exclude from the classification of the sources because they cannot legitimize themselves in a higher norm within the hierarchy, however, as has been stated, globalization produced a crisis in the Nation State, losing this, the normative monopoly, therefore, the legal character of a norm cannot be measured from its hierarchy or legitimation in a higher norm; It is necessary to resort to other aspects, so

The definition of law cannot ignore the norm category, but it is not limited to normativity, from the three-dimensional theory it is revealed as fact, norm and values; while still considering their sources. Therefore, the law is norms, jurisprudence, customs, awards and all other sources of current law, emanating not only from the State, but from international organizations, nationalities, public and private international associations, which seek to regulate social coexistence taking into consideration or limitation, human rights for their validity and

interpretation; and the social reality for its constant renewal. Within a different sanctioning framework; coercive or persuasive (Moreno and García, 2022, p. 256).

Globalization has shown the interdependence between countries in environmental matters and in common problems, classified as global, produced by the flows of trade, investment, technology, human mobility, among others. Through soft law, agreements have been reached, objectives, aimed at creating guidelines to combat global problems from a transnational approach, an example of this, are the objectives of sustainable development, global challenges, aimed at eradicating poverty, promoting gender equality, clean water, quality education, peace, justice, sustainable communities and cities, affordable and non-polluting energy, Climate action, all these issues are addressed by collaborative actions between governments, institutional organizations, corporations, universities, NGOs and individuals, in order to find solutions to these problems (Ricardo, Vázquez & Hernández, 2022, p. 545).

In 2017, the Millennium project team published statistics on the outcomes of the 15 global challenges, finding progress on some issues and stagnation on others.

Human life expectancy has increased from 46 years at birth in 1950 to 72 years today. Infant mortality, poverty, communicable diseases and illiteracy have decreased. Humanity's global nervous system is on track to be completed: 52% of the world, with 3.8 billion people, is now connected to the Internet, about two-thirds of the world has a mobile phone, and more than half has smartphones. environmental conditions, armed conflict, terrorism and organized crime are worsening (Glenn and Florescu, 2017).

These advances in some global issues, suffered setbacks with the covid 19 pandemic, as evidenced by the report of the Sustainable Development Goals of the United Nations (2021)

The global extreme poverty rate increased for the first time in more than 20 years, and between 119 and 124 million people fell back into extreme poverty in 2020. There is a risk of a generational catastrophe when it comes to education, with an additional 101 million children falling short of the minimum level of proficiency in reading, potentially undoing two decades of educational attainment. Women faced an increase in domestic violence, projections indicate that child marriage will increase after a decline in recent years, and unpaid and low-paid care work increasingly and disproportionately falls on the shoulders of women and girls, impacting both education and income opportunities and health. Despite the global economic slowdown, concentrations of major greenhouse gases continue to rise. With a global average temperature reaching about 1.2°C above pre-industrial levels, the climate crisis has clearly begun and its effects are being felt around the world.

Discussion

The changes suffered by the Nation State by globalization make it necessary that the determination of the sources of Law be expanded and not limited to the

creation by the State, because a feature that has characterized the law, contemporary has been its transnational character and legal pluralism, therefore, soft law cannot be excluded from the sources of Law, for the mere fact that it does not emanate from the State, or because its content does not enjoy the coercibility of hard law, since it creates obligations and commitments among the participants, in favor of the development and solution of global problems, whose advances to a large extent, are evaluated, allowing to establish common objectives. "The current international order does not constitute a closed order in which there is a certain number of legal norm-making. The members of the international community can agree on new formulas to create the law of nations" (Barberis, 1994).

Soft law allows the evolution of law through the creation of rules or provisions that are assumed by internal legislators so that it allows the development and unification of internal laws; on the other hand, it allows its use by domestic judges to interpret a rule of law, such as the invocation of Smart contracts in national courts, or the *lex mercatoria* (Ramos Argilagos, Valencia Herrera & Vayas Valdiviezo, 2022).

Soft law has been presented as a characteristic element of globalization in its unifying character outside the regulation of the Nation State, where commitments are established around common issues, which become obligations lacking legal sanctions, however, sanctions of another type such as exclusion, non-recognition in the development of a certain type are not ruled out. Political action, not belonging to the group that works for a certain objective being excluded from support in the solution of a certain problem.

In International Human Rights Law (IHRL) recourse to soft law can be said to be aimed at persuading an offending state to change its behaviour. This is how public debates on the behavior of the non-compliant State are often resorted to both in the United Nations General Assembly (UNGA) and in the Human Rights Council, which culminate in condemnatory resolutions; publicity of reports made by working groups or rapporteurs appointed by an international body for the investigation of violations, etc. (Colmegna, 2012, p. 32).

Soft law versus hard law behaves as a complement, interpreter, or renovator but lacks coercion of the *pacta sunt servanda* of the Vienna Convention on the Law of Treaties, since they are not treaties, constituting "a program law located between ethics and legislative politics" (Garrido, 2022). As Sanz and Follini (2017) affirm,

The social, economic and political changes of the second half of the twentieth century have left behind traditional frameworks for norm-setting. The system of (formal) state sources is in crisis because the discourse it generates is not sufficient to explain everyday legal reality. The strengthening of new subjectivities (both internationally and internally) produces new actors with the capacity to create rules. In other words, the system of formal sources has been overwhelmed by the system of material sources.

In this context, international subjects and actors promote actions and agendas to address issues of general interest, which would hardly achieve a binding agreement through formal mechanisms, due to the diversity of political and economic interests. Soft law does not oblige, but they generate expectations of behavior that develop progressively and can trigger the conclusion of treaties, moving to the field of hard law, before the recognition of the States that it is convenient to go in that particular direction. Similarly, the International Court of Justice has recognized that soft law can codify international custom.

As for global problems, statistics show even before the pandemic an advance in the results of improvement, especially in terms of poverty reduction, access to drinking water, access to internet, greater schooling, longer life expectancy. Likewise, there is a decline in public debt, unemployment, income inequality, organized crime, terrorist attacks.

The pandemic impacted the world leaving traces of death and economic setback that made the advances achieved so far go back, however, not because of this unforeseen eventuality, the achievements achieved in humanity can be discarded through the agendas and actions promoted by international organizations and NGOs, through soft law for the solution of global problems, that, without them, no progress could have been made. It can be affirmed that soft law has contributed concrete actions to the solution of global problems that, although they lack binding character, have been assumed by States as necessary from a political and ethical commitment for the development of humanity.

Conclusions

The crisis of the nation State produced changes in the production of the legal norms losing the State the normative monopoly, therefore, the law product of globalization is characterized by a legal pluralism, coming from various sources other than the State, being, the hierarchy of norms, insufficient to classify the sources of current Law.

The international community is a complex system of political, economic and legal relations, framed in a normative pluralism, which do not necessarily require binding legal norms; In this way, soft law is presented as a possibility to address issues of difficult agreement between international subjects and actors, which allows non-binding guidelines to be taken, but assumed by a political ethical commitment, which if successful can become hard law. Therefore, soft law can be seen as a precedent or complement in the interpretation of binding law or hard law.

The challenges of the Millennium, the sustainable development goals, are examples of how soft law can produce changes and solutions to global problems, although not all the proposed advances have been achieved, there have been achievements, which were in some cases retrotracted by the effects of the pandemic, but currently, They are readjusting, concluding that soft law has allowed the development of international law in the solution of global problems.

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