SOFT LAW: AN INNOVATIVE NON GOVERNMENTAL TOOL

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Abstract: Law is hard but it is the law. Otherwise, the law will be a mere opinion that would not be able to ensure us that our mutual obligations will be maintained. Nevertheless, hard law has been challenged in the last thirty years. Hard law has been discussed in international affairs due to the lack of a supranational government enabled to implement international laws. More recently, hard law was criticized in private law for being too slow to give fair and quick answers to current societal issues. Soft law is not just a *pre*, a *para* or a *post* hard law; it is an innovative non governmental tool which is more and more used in the field of bioethics and business ethics. As an applied legal ethics of deliberation, soft law consents to have a better auto-regulation of all social stakeholders without waiting for late and rigid governmental normative decisions to the legal questions of our time.

Key words: Soft Law – International Law – Private Law – Bioethics – Business Ethics

1.

The law is a polysemic concept that generally indicates an obligation to do or not do an act. The purpose of the legal requirement concerns the just distribution of goods and burdens in a political community. As a political action, law refers to the law of a country. Law is the law enforcement. The law requires citizens to behave in a certain way. A law requires, for example, the minimum age to contract or to incur liability. The law tells us how to behave in our relationships with others. In case of breach of the commandments of the law, the penalty reminds us about the law. Thus, the contract signed by a minor is punishable by revocation of the act. The legal system is therefore a rigid frame. The rigidity of the law concerns us directly in order to be assured of the effects of our actions. Renting a house requires rent payments. A default of payment of sums due, the law is used to obtain them. The rigidity of the law is a token of the certainty of having his right respected. Security conferred by law stems from its rigidity. The law is hard but it is the law, *'dura lex sed lex'*. Proven natural compassion for the sick and unemployed tenant does not justify its non-payment of rent. The law is hard to be truly law. The legal truth is not as absolute morality. It is not the domain of the law but of morality to ensure that we treat our neighbours as we would be treated. The law is a commandment that ensures the execution of taken obligations. The truth of the law is a matter of authority. The power of a State to enact a law is a sign of its sovereignty. Morality can possibly be strengthened by law. The prohibition on public order to rent a house into a facility dedicated to the pleasures (such as a casino or a brothel, for example) can be likened to the fight against moral vices as defined Christian morality. However, this point is marginal for the jurist. The legal question is whether an act is or is not recognized as legal in one country. The permission or prohibition of acquiring a homosexual marriage can certainly be studied from the moral angle. However, it is clear that this moral is legally subsidiary. The truth of the law is whether or not an act can be done and executed. The moral dimension of the law is not a material issue for the lawyer. The law is also hard on morality. The law tends to exclude from its field. During the discussion of the law, morality can be a political argument. Child labour is legally condemned or accepted in countries for socio-historical reasons, nevertheless once the law is adopted, nothing can stop its implementation. The moral doubts about a law do not disappear of course, but they are excluded from the field of law enforcement. They may return if a policy review of the law occurs only. To do otherwise, by a continuous recourse to objection of conscience would weaken the law and it would no longer guarantee that legal obligations will be implemented. The law is a bulwark against social discord. The hardness of the law avoids the constant legal wrangling. The law is not a command with a variable geometry unless it anticipated itself. For example, a law may authorize a Catholic doctor to exercise an objection of conscience to refuse to perform an abortion. The certainty of the law remains intact here. However, the law cannot let taxpayers refuse to pay a share of tax intended for abortions in the name of moral conviction. Common sense calls for this hardness, otherwise moral relativism (with its cohort of moral refusals: pacifist vs. financing the army, vegetarian vs.

subsidies to farm animals, religious fundamentalist vs. secular public school etc.) would undermine the foundation of the law which is to ensure the effects of legal obligations. The law would then become a mere opinion to be considered among all kind of opinions. Social peace conferred by the law would be quickly jeopardized by these claims, which are more or less morally justified. The hardness of the law is a matter of justice: not of a vague general justice as is the moral, but of a precise particular justice which consents social peace to be rigidly defined as a framework of what is legal or not to do in a country. Political authority cannot have its be continuously discussed, otherwise the country risks to fall into anarchy or civil war. The hardness of the law is justified to ensure peaceful human relations. An unjust law remains a righteous law insofar as it is the guarantor of social peace. The unjust moral condemnation made to Socrates for corrupting the youth of Athens became a legal obligation that the famous philosopher accepted on behalf of his love for Athens: refusing to obey to the law would have endangered his beloved city. The law is hard on order to avoid social breakdown. The hardness of the law therefore guarantees the political action of the government. Many legal theorists had given a theoretical explanation for the hardness of the law. Despite their different approaches, their conclusions are always in favour of the hardness of the law. Hardness of the law can be analysed as the proper legal decision (Carl Schmitt), as the sanction of legal formalism (Hans Kelsen), as the result of social deliberation (Jurgen Habermas), as a necessity for a fair distribution of goods (John Rawls), as a pledge of social relationship (Sergio Cotta), as indisputable words to understand the social things (Michel Troper) ... the list is long! And after quoting some famous authors of XX century, it would be possible to add the countless thinkers who preceded them over the centuries. This would not bring much to our question as they tell us all: a law that is not hard is not a law in the legal sense. Well, almost all legal theorists share this assertion. Indeed, in legal theory and in the practices of law, many look for a soft law, a fuzzy law, a flexible law ... After these introductory lines, it is easy to grasp the part of heresy that the concept of soft law bears in front of the dogmatic of hard law.

2.

The hardness of the law must not, however, be exaggerated. The legal thinking lacks the certainty of mathematical reasoning. The method of deductive syllogism (example: 1: it is forbidden to kill - 2: Primus killed- 3: Primus has violated the law that condemns killing) is used in the judge's decision after a long trial in which he had set before any legal evidence linked with many questions (for our example: Did Primus voluntarily or involuntarily kill, or was he in a case of self-defence, or there was someone else, etc.) which determine the conclusions. The use of legal syllogism is certainly the most common methodology to expose legal reasoning. Nevertheless, during the process of the legal characterization, all lawyers (included judges) use the law as an instrument to determine the opportunity of its application to facts according to their requests. The so numerous laws (sometimes even contradictory) are mere instruments that the jurist uses to qualify the facts discussed in court. The selected law nevertheless retains its hardness after being successfully qualified. Going beyond the hardness of the law may be observed also by the use of legal brocards by the courts. These general principles of law are not new. The use of legal brocards (stemmed from the custom and natural rights) has always been influential in certain fields of law, particularly commercial law or international law. The concept of 'soft law' appeared in the context of public international law in the 1970s. International conventions, although presumed above the national legal order, suffers from a constitutive defect that is the absence a supra-state power being responsible for their effective implementation. National sovereignty (which bases the hardness of the law as was mentioned earlier) of a country then confronts the one of another country. Customary international law tradition (such as respect for the adage *Pacta sunt servanda*, for example) has proven somewhat weak for good international conventions' implementation. Besides, national courts have still some reluctance to use international law that lends, due to its great generality, to various interpretations. Moreover, efforts to implement the High Court of International Justice stumble to their lack of effective means to enforce their decisions. Deprived of a political project (as is the case however for the European Union Court of Justice), these international courts are dependent upon local political powers, which most often are reluctant to implement them. Moreover, countries clearly refuse to adhere to these conventions (like the United States of America for the International Criminal Court created in 1998). Faced with these difficulties, the use of non-binding guidelines advising States in the proper practice of their international relations have been developed in the last thirty years. Soft law does deny the role of governmental action, but it modifies it. The role of States cannot be ousted in the public international law, only them have the sovereign power to do

it. However, government action is more 'soft', it seeks by gentlemen's agreement to provide a programmatic framework to international relations. International conventions do not have the binding force of the hard right; they are loose commitments. All the effectiveness of the legal scope of soft law and the need to define the content of soft law remain in a continuous negotiation framework. The intention of finding the agreement is no longer a given acquired, it is constantly changing based on the factual elements related to the agreement. The framework for understanding the agreement is broad and without binding power. The penalty for breaking soft law does not disappear, but it remains fuzzy as far as the conditions of its application are concerned. Discussion remains the only way to give a full implementation to soft law. Being excluded from the discussion is ultimately the true sanction of soft law. Soft law is for public international law what is diplomatic for global peace, both of them seek through negotiations a way to find a frame, a path, a road map for the action of all stakeholders. Eventually soft law can support the decision of binding intergovernmental agreement. Soft law is then a pre-hard law.

3.

The reign of hard law fades away in the field of private law. Obviously, hard law never disappears for the rule of hard law is always present in the relationship among citizens. Governmental action is determinant to decide the general hard law of private contract, nevertheless auto-regulated specific arrangements can made in order to achieve give a better effectiveness. For instance, in the case of a contract agreed between a pharmaceutical company and patients for clinical trials, it is obvious that hard law continues to give the framework of such a contract; ad.es. the legal prohibition of non-therapeutic trials or to get a money, the legal obligation to collect an informed consent etc. In this case, Soft law comes as guidelines; an incorporation of the norms of hard law in order to draw up a flexible and adapted code of conduct for clinical trials. Indeed, hard law is silent on many issues (such as psychological care for patients) but with ethical implications that lead soft law to be developed. As a code of conduct, soft law keeps a binding part (the compliant aspect) to the extent that it includes the provisions of hard law, but it also has an ethical significance that engages all stakeholders (stakeholders). Soft law has become an indispensable element in the conduct of clinical trials; public authorities (like the European Medicine Agency - EMA) or private pharmaceutical companies and private associations of physicians have drafted such guidelines. The scope is always to promote the self-regulation of ethical behaviour of medical doctors. More generally speaking, the soft law is now present in bioethics to balance the best interest of patients with the power of doctors. To give another example, guidelines are in place to explain to the relatives of a deceased person the opportunities to collect organs for transplants, to accompany the dying in order to prevent aggressive therapy, to create forum of spaces discussions etc. At the international level, soft law is also the preferred instrument to give a chart of values to physicians (Universal Declaration on Bioethics and Human Rights, the Oviedo Convention). Governmental action is remote for it only offers elements to framework of physicians' ethical behaviour. The choice of palliative drugs, for example, can take place only in the legal framework of one country. Then, the possibility to prescribe cannabis for therapeutic reason is subject to the national law. However, to continue with this example, choosing a palliative drug always requires a risk assessment based on the specific clinical case. The assumption of drug can partly eliminate the pain but it can also shorten life expectancy. The ethical possibility of doing an euthanasia with palliative medicine must be discussed case by case; and hard law is helpless for that sort of issue. The choice is difficult, even tragic, but at the same time patients can ask euthanasia; they fear to suffer too much, a fear that palliative medicine precisely takes away! To solve such tragic choices, guidelines are a flexible way to set standards recognized by the medical profession (and they remain far away from governmental action).

4.

The soft law also takes a new rise in the context of corporate social responsibility (CSR) and business ethics. Making money is of course the core of the capitalist economy. Certainly, making profit is the first businessmen duty to have towards shareholders who have invested their capital in a business company. The impact of economic activities on society, however, is so important that in the late years the thesis that the corporation does have a social responsibility has taken up. First, a company has a responsibility to its employees. Of course, labour laws protect employees from the excesses of unbridled capitalism. Since the end of World War II, important legislation has been put in place to regulate the action of companies often prompt to dismiss and deny the strike of their

workers. However, the hard labour law shows some limitations due to its rigidity and it does not always allow an efficient economic action in a globalized world. Lately, new soft legal instruments have appeared in to offer to ensure better wellness to employees at their work place (such as SA 8000) or to ensure better cooperation with trade unions and business managers (CSR Label). In both perspectives, the well being of workers is to be conciliated with the search for company profits. The guideline SA 8000 was created in the early 1980s for this purpose. Mainly, it consists to promote social dialog with employees to increase their participation in the company's life. SA 8000 is a document that certifies that a certain number of decisions have been taken to allow employees to live well at their workplace (ad.es. having rooms to rest, a collegial organization of free time, kitchens, nurseries, etc.). To some extent, the SA8000 is a code of conduct whose aim to give workers better respect for their personal lives. SA 8000 is nowadays a important standard of good practices to employees. It gives international recognition to companies that meet its criteria for social responsibility towards employees. One could notice that it is a kind of resumption of industrial paternalism as used to do the families Wendel in France or Ford in the US who already (at the beginning of the last century) understood the importance of having employees satisfied (and even happy) with their working conditions. The societal challenge was (and remains) to increase employee productivity through the virtuous effect of their social contentment working for a company. This goes beyond what the labour law offers to foster social and economic cohesion for the benefit of workers of the company. It is part of a flexible regulatory framework recognized as an international standard of good practice in people management (such as SA 8000), it is an opening to a flexible standard recognized by stakeholders. Just as the companies' codes of ethics that emphasize the values of a society (such as honesty, respect, equal opportunities etc.), the commitment here is a contract of adhesion to a set of flexible standards. In case of breach of the obligations undertaken, the punishment is not a hard law sanction but a private one: on the case of the SA 8000, the company is liable to lose its international award and no longer be part of those who have received the distinction. Nevertheless, it is missing from this type of soft law (like SA 8000), a dynamic and collegial component. To fill this gap, in France (since 2004) the Social Responsibility Label (RS Label) includes the criteria of SA 8000 but in their drafting and approval of a candidate company stakeholders are more engaged; we find in this soft law an ad hoc committee composed with employees, managers, trade unions' members, representatives of the Ministry of Labour and health and consumer associations. In addition, during the execution of the obligations taken, the RS Label Committee may act as conciliator to find solutions to conflicts. The RS Label is present upstream and downstream of the whole process of setting soft rules of good practise. Furthermore, the search for the well being of employees is explicitly linked to the commercial activity of enterprises: the key idea being that the well being of employees at work is a customer satisfaction factor. The company's business success to its clients is then proportional to the motivation of all employees. This example therefore combines in a unique partnership all stakeholders of the company to allow the customer experience of the latter to be the most positive possible. The virtuous circle resulting thus operates in a flexible and dynamic normative framework deeply connected with the pursuit of profit that the company must keep having clients be satisfied (or even delighted). Other types of soft law may also be cited as part of CSR, whether for charities (as does, for example the Gates Foundation) for the protection of the environment, for insertion into the territory for ethical investment, etc.

5.

The many guidelines that promote responsible behaviour have in common to go beyond hard law thanks to self-regulation. As a good practice, the bad players can be excluded from the promoter group of these guidelines but this set off game remains private. Soft law thus is cu off from the traditional definition of law which is based on the public authority. Possibly, as in the case of RS Label or for clinical trials, a government sponsorship can be given but there is nothing coercive in itself. Soft Law is more effective than hard law due to its flexible nature. Though, to give it a real full flexibility that allows the soft law to impact on behaviour, it must be dynamic and collegial. Indeed, the risk of the development of guidelines is to provide a micro-bureaucracy which increases further the work of professionals. Unfortunately, that may even suggest that professionals will find a ready-made answer to their questions about, for example, ethical investment or fair compensation or suspension of artificial feeding. In the health field, the guidelines have a real societal significance only when ethical committees take them in hand; these committees are responsible for applying and foremost to discuss collectively (with doctors, patients and nurses) its specific conditions of

application. It is therefore necessary to avoid the trap of bureaucracy and it is not to see the guidelines as fillable forms providing answers automatically; it is to keep on mind that there is always an ethical challenge (in the sense of responsible social behaviour) to be taken seriously in daily practice. Soft law started to me a kind of copy of hard law in its form (as in the case of SA 8000 for example) to indicate the behaviour to have. The first generation of the guidelines are still dependent on traditional legalistic scheme, it perpetuates its static, heavy and one-sided form. On the contrary, the guidelines of the second generation go further by taking a dynamic, light and collegial form. The RS Label Committee or the decisions of Hospital Ethics Committees are examples of this trend. Soft law deviates authority and government sanction, it complements the silence of the law and jurisprudence. Soft law relies willingness membership legal subjects who decide to self-regulate; soft law committee ultimately acts as a conciliator, an arbitrator, a judge. The collegiate nature of these Committees guarantees its impartiality. The Committee develops the rules of second generation Soft Law and sanctions them in a dynamic, fluid and collegial manner. The effectiveness of second generation soft law is a strong contender to hard law since it consents to take better into account the complexity of our techno-global word than a governmental hard law could ever do.

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