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Subsidiary Sources of International Law: Is It Only as Law Determining?

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Abstract

The sources of international law are divided into two categories which are the primary sources and subsidiary sources. Primary sources are considered as the law-making while subsidiary sources considered only as law determining. This paper discusses how far the role of subsidiary sources in international law. This research used literature research which the writer used journals, cases and documents related to the research. This research finds out that it is true that subsidiary sources act as law-determining but both judicial decisions and writing of the publicists assist the creation of international customary law. Specific for judicial decisions in some cases also ca be considered as law-making.

Keywords: Subsidiary Sources; Law Determining; Law-Making

Introduction

The sources of international law are stated in The Statue of The International Court of Justice Article 38 (1). It states to solve disputes in international law; the court must employ international conventions, international customs, general principles, judicial decisions and the teachings of the most highly qualified publicists. These sources are categorized into two types of sources (Thirlway, 2014: 117), which are formal sources that contain international conventions, international custom and general principles (Perry, 1965); and material sources (subsidiary sources) that contain judicial decisions and writings of the publicist (Shaw, 2008).

This research will discuss about the subsidiary source since frequently the existence of subsidiary sources are not considered as important as the formal sources. Thus, this paper will address the authority and reliability of the subsidiary sources and their impact on the international law. It begins by explaining the meaning of subsidiary sources, then followed by discussing the role of judicial decisions and writing of publicist in international law.

Subsidiary Sources of International Law

Judicial decision and writing of publicists are considered not as autonomous sources but only as subsidiary sources to determine the law (Menon, 1989: 128). Judicial decisions and writing of publicist do not create law, they solely stated what law it is (Thirlway, 2014: 117). It occurs since judicial decisions do not possess any legislative capacity even id courts seem 'make law' in the forms of improving, adjusting, reshaping but still the decisions ought to be derived from definite law (Thirlway, 2014: 118). It also happens to publicists, no matter how prominent their teachings, they do not have a legislative capacity as formal sources acquire (Thirlway, 2014: 118).

Converse about formal dan material sources, they can be differentiated by their function (Dixon, 2007: 25). Formal sources have a function to form law (law-creating), meanwhile subsidiary sources as material sources that have a function to classify the object of obligation that come to be law (law-determining) (Dixon, 2007: 25). Formal sources are the compound institution they may encounter disagreement, subsequently judicial decision and writings of publicist contribute to resolving it as agent for law-determining (Perry, 1965). It implies the material sources and formal sources have interrelated relationship (Schreuer, 2017). When the formal sources have problems with their sources, they need the interpretation from material sources to ensure, while the existence of material sources cannot be regard if they do not give 'assistance' to the formal source.

The meaning of subsidiary in here is still vague. The definition might imply these sources are subordinated to other sources and only be considered when adequate direction cannot be found in formal sources (Peil, 2012). Nevertheless, to ensure the existence of the rules, it can be seen by citing to doctrine and jurisprudence (Peil, 2012). Furthermore, subsidiary sources cannot

be regarded as the examination of relative significance and considered less substantial, since the mark of 'subsidiary' implies they sometimes have powerful authority and persuasion that give them important implication (Borda, 2013).

The positivists reckon international law as the result of international treaties (Gontarek, 1995). Furthermore, international treaties are regarded as 'law', meanwhile judicial decision and writing of publicists are not considered as law by positivists since they do not have legal capacity to create rules. Then, as a result, judicial decision and writing of publicists are not included as formal sources.

Even if judicial decision and writing of publicists are not the formal sources but they give significant impact to the formal sources itself. Particularly, in analysing and expanding the customary law (Beyerly, 1991). For example, judicial decisions, although Article 59 ICJ Statute tries to refuse precedent system, but the court often refers to their prior judgment as competency in following cases (Dixon *et.al.,* 2011). The substantial impact that court gives to the advancement of customary law can be seen in *North Sea Continental Shelf Cases* (North Sea Continental Shelf Cases, 1969). In this case, the court stated that in the creation of maritime delimitation, the court prefers to implement the previous decision rather than consider state practice, then it might be considered that law of sea delimitation was not customary law but the judge-made law (Dixon *et.al.,* 2011). There is a situation when ICJ has to encounter ambiguity situation such as what happen in *North Sea Continental Shelf* (Customary IHL). ICJ and other courts execute the clarification by first-hand determination method of the presence, countries and appropriate perception of the related law (Borda, 2013: 653). For instance, the court can confirm the countries regulation of customary law through an inductive examination of state behaviour and *opinio juris* (Borda, 2013: 653). These first-hand implies for the stipulation of law can be described as 'principal means (Borda, 2013: 653). Besides that, International Law Commission (ILC) as a publicist in its agenda of Formation and Evidence of Customary Law is also expected to assist how to classify customary law (Bordin, 2014).

a. Judicial Decisions

It has been stated in several kinds of literatures that judicial decisions have law-determining effects as explaining the existing rules and such as a guidance to the international law (Borda, 2013: 653). The decisions from ICJ are not only as guidance but authority to ICJ for the next judgements (Dixon, 2007) and it can be seen in *Nauru Case* (Certain Phosphate Lands in Nauru, 1992) by *Nicaragua v USA* (Military and Paramilitary Activities in and against Nicaragua, 1986). The question arises, is it judicial decision only play as law determining? It will better to regard judicial decision also as law-making (Dixon, 2007: 45). The reason because first, the judgement from ICJ create a bounding effect to the states (Dixon, 2007: 45). Thus, the judgement make law for state parties, it can be seen in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion Concerning Legal Consequences of the

Construction of a Wall in the Occupied Palestinian Territory, 2004*)*. Second, frequently, the case that court settle, contribute to the work of establishment of customary international lawto a prompt conclusion, it can be seen in *Anglo-Norwegian Fisheries Case* (Anglo-Norwegian Fisheries Case, 1951).

The judicial decisions itself do not only be derived from the decisions from ICJ but also from other tribunals such as International Criminals Court and national courts (Dixon, 2007: 46). Even if Article 38 (1) (d) did not differentiate which court of the judicial decision it means (Greenwood, 2008), and perhaps it is useful to differentiate the type of courts, but the attention here is not the category of courts but more in the category of law being used (Borda, 2013: 658).

For instance, in the matter of judicial decisions of ICJ and other tribunals mainly using national law, and national courts and other tribunals mainly using international law (Borda, 2013: 658). This elucidation is beneficial as decisions of municipal courts using international law (for instance, post-World War II tribunals running by the advantage of Control Council Law No.10) can be considered as international judicial decisions (Borda, 2013: 658).

It may be claimed that International judicial decisions might have more tendency to give support in the determination of law when they are established by international law (Borda, 2013: 659). However, national courts and other tribunals also have the important role in the law determination.

National courts, as they used domestic law, it might be claimed that their judgement does not possess impact on international law and might not be considered as law making (Dixon, 2007: 46). Nevertheless, municipal courts have a significant impact as proof of customary international law (Borda, 2013: 657). They demonstrate the intention and practice of countries (Borda, 2013: 659). It can be seen in *A v Secretary of State for the Home Department [2006] 2 AC 221* regarding the proof of the violation of international law (Dixon, 2007: 46). The problem with the national court is the independency of the court (Perry, 1965: 94). Their decision might be influenced by the executive or in favour with state interest (Perry, 1965: 95). Thus, there will be a problem with the conformity between national and international law (Perry, 1965: 95). For example, in *Franconia case 1876,* it demonstrates that the country refused its obligation and its government refused to look regulation from international law that legislator has approved as alternative regulations (Perry, 1965: 95). This case can be argued that national court might be biased in taking a decision (Hynning, 1956: 129). Even if there will be hesitation regarding the impartiality of decision that domestic courts yield, but the proofs of impartiality are not often be detected; thus, domestic courts deserve consideration (Hynning, 1956: 129).

The decision from other tribunals such as International Criminal Court and the Yugoslavia War Crimes Tribunal are binding for the state parties, and they assist the advancement in particular field in international law (Dixon, 2007: 46). For instance, Yugoslavia War Crimes Tribunal enhance the concept of individual and country liability (Dixon, 2007: 46).

Furthermore, judicial decisions whether it is from ICJ, national court or

other tribunals possess significant authority due to States have acknowledged the court jurisdiction (Linaki, 2012). Whereas the decision constitutes legal responsibility for state parties and the court's statements are reckoned by states arguing in the court and the circumstance of extra-judicial (Linaki, 2012). Besides that, advocates also acknowledge the authority of the decision when they cite it before the court as they consider the decision include appropriate statement where the court is bound to reckon and adhere it except the decision can be proven untrue (Linaki, 2012).

b. Writing of Publicists

Writing of publicists as subsidiary source cannot make law, moreover, in the expansion of positivist view of international law make them not to be considered (Dixon, 2007: 47). However, according to *Paquete Habana Case,* as this case refers to publicists, this case shows that the writings play as evidence to elucidate the law (Dixon, 2007: 47) when there is a situation that treaty, judicial decision and executive do not exist (Wood, 2010). Furthermore, the teachings also have influence on customary law, as they assist in creating country practice by anticipate the trend and persuade country to act according to anticipated path (Dixon, 2007: 47).

There was a long discussion concerning the reason why the writing of publicist was stated in ICJ Statute. The discussion concentrated on the idea from Baron Descamps to list the regulation, but the debate focused on what court should do if customary and treaty were ambiguous (Wood, 2010). The answer was whether the court announced a *non liquet* or the court had to consider the teachings and international jurisprudence (Wood, 2010). At that time, Descamps suggested that the judges should not declare *a non liquet,* then they should use general principles, however, the judge should not use the general principle arbitrarily (Peil, 2012: 139). Thus, Descamps insisted that the judges in making a judgement should conform with legal conscience of educated society and it gave authority to the writings of publicists to be used in determining the decision (Peil, 2012: 139).

Even if the courts have recognized the authority of the writing of publicists, but in practice, they seldom cite it (Peil, 2012: 137). Even if the courts do, only in common thing, it can be seen in *Lotus Case* when Permanent Court of Justice cited writings of publicists (Wood, 2010). Then question appeared to the function of writing of publicists that indicate their role as stipulating the presence of customary law (Wood, 2010). However, writing of publicists is frequently cited by counsel in their arguments to affect their decision (Sivarkuman, 2017). Besides that, as Sir Humphrey Waldock (ICJ's Judge) stated that the writing of publicists is used by individual judges in demonstrating their personal thought, then it implies they possess a role for the court as internal consideration and in forming the thought (Peil, 2012). For instance, in individual thought of Judges Koojimans, Buergenthal, and Higgins in the *Arrest Warrant Case* (Wood, 2010). Furthermore, the explanation why the courts do not cite to publicists is because it is arduous to

assess who are they 'highly' publicists (Wood, 2010).

It may be argued that it is problematic to assess who the Statute means by the highest publicists since there is various category of them and they possess different influence to international law (Sivarkuman, 2017: 66). Sivarkuman (2017: 66) has classified 3 types of publicists, which are state-empowered entities (such as ILC for its *State Responsibility* article), expert groups (professional who drafted *San Remo Manual on International Law applicable to Armed Conflicts at Sea)* and ordinary publicists (the concept of *respect, protect and fulfil* by Henry Shue and Asbjorn Eide). To figure out how these publicists influence and be considered as 'highly' publicists, it can be examined base on the court and tribunal citation and others elements such as title, reputation and the quality of the teaching itself (Sivarkuman, 2017: 66).

Citation in various aspect can be used as a representative of influence (Sivarkuman, 2017: 25). Regarding citation that used by court and tribunal, it is found to be beneficial as citation show the relation between the teaching and the judge (Sivarkuman, 2017: 25). For example, 129 cases have cited ILC state Responsibility (Sivarkuman, 2017: 5). However, citation is not the only situation to assess the influence since there might be incorrect number in counting it but yet citation is the simple way to ensure the influence (Sivarkuman, 2017: 29). Element such as the reputation and quality of the work provide impact to advancement of law, for instance, Lauterpacht's study to the classification of crimes for the Charter of International Military Tribunal at Nuremberg in Article 6 (c) and particularly in adding crimes against humanity (Sivarkuman, 2017: 33).

Conclusion

Judicial decisions and writing publicists as subsidiary sources mean as law-determining since they do not create law. The authority of judicial decisions as law determining as law determining is elucidating the rules and producing a guidance to international law. However, the decisions are not only acting as a guidance but also as authority to the next decision. Then, judicial decision can also be considered as law creating. The authority of writing of publicists as law determining is being evidenced to explain the law when treaties and customary law are unclear. Both of judicial decisions and publicists influence the development of customary law. The reliability of subsidiary source can be seen by their influence on international law and how other actors such as states and international lawyer use them.***

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