SUDS law: Non-State actors and the haphazard route to implementation of international obligations*

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Abstract. This article focuses on the role of non-State actors at the nexus of international and national law. It illustrates the pivotal role non-State actors can play in the implementation of international obligations and highlights the fact that the traditional dichotomy of national and international law can not fully portray the reality of implementation. It also illustrates the effects of path dependency on implementation. That is the effect whereby once the implementation process has begun, information entering the process automatically shapes the outcome by increasing the costs associated with considering alternative, and as yet undisclosed, information. Thus the option considered first in the implementation process is likely to be the one adopted merely because it entered the arena first.

The article uses a Realist lens to examine a case study of the activities of particular non-State actors as the framework for the analysis of the relationship between the two systems of law. It is based on an empirical study that focused on the actions of a particular group of non-State actors – the Sustainable Urban Drainage Scottish Working Party and its members – and their activities in relation to the development of measures to control diffuse pollution.

Keywords: SUDS, sustainable development, floods, treaty

1. Introduction

The starting point of this article is Ferrari Bravo’s observation that it is:

a commonplace that municipal law, at various levels, takes into account the existence and content of international legal rules…. As a matter of fact, if these obligations exist and the ‘State’ is their addressee, the entities of which the state consists shall be reached, in one way or another, by the beams of the international rule. The problem is to see how and by what means.1

While it might be assumed that the beams of the international rule will take the form of legislation, regulation or prosecution through court systems, this article will demonstrate that they can also take the form of the activities of non-State actors. The article

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is influenced by the Realist school of thought, particularly Hägerström’s² ideas of stripping away layers of meaning to find out what a law actually means. In this instance we seek to find out what implementation means and how it is achieved. A case study is used to highlight the sometimes haphazard route that a State can take on the way to implementation of international obligations. In particular the role that non-State actors can play in persuading States to adopt a particular approach, thus influencing the way in which each State implements its international obligations and the extent to which it complies with them, is highlighted. The possibilities for disparities in implementation of particular obligations both within States such as the United Kingdom where regions operate under devolved powers and between States are also demonstrated as are the effects of path dependency. The latter means that once a regulatory process has begun those methods for tackling a problem that first come to the attention of the regulator gain preference and shape the outcome of the regulatory process, because the costs of considering alternative approaches, of taking a new path, are too great.

The article focuses on a case study of the role played by the Sustainable Urban Drainage Scottish Working Party (the Working Party),³ and its members in persuading regulators and the construction industry to adopt a particular approach to urban drainage issues – Sustainable Urban Drainage Systems (SUDS) – and in persuading the Scottish Executive to provide for the regulation of SUDS in the provisions of the Water Environment and Water Services (Scotland) Act 2003⁴ (‘the Act’).

The Working Party was established in 1998⁵ at the behest of a group of interested individuals who recognised the need for a body to promote the issue of sustainable urban drainage.⁶ ‘[I]nitially the idea was to initiate SUDS research in Scotland, to solve any SUDS problems . . . that arose’.⁷ Membership has since that time included representatives of the Scottish Environment Protection Agency (SEPA), East of Scotland Water, West of Scotland Water, North of Scotland Water Authority, Scottish Water, the Construction Industry Research and Information Association (CIRIA), The Scottish Office, The Scottish Executive, the Scottish Housebuilders Association, the Convention of Scottish Local Authorities, the Society of Chief Officers of Transportation in Scotland, the Scottish Society of Directors of Planning and architects. Thus it contains representatives from government departments and agencies, but it is not a government body per se as it was not established by government, nor does its remit

³ The case study formed part of a larger project, ‘Disciplinary Interactions: Ontological Commitments and Regulations’, funded by the ESRC and supported by the Scottish Environment Protection Agency (SEPA). The project was a nine month field study of standard setting focusing on SEPA’s work which used field observation of meetings, interviews and textual analysis to gather data analysed using a grounded theory approach.
⁴ Water Environment and Water Services Act 2003 Asp.3.
⁶ Field Notes May 2002.
⁷ Biographical interview 19th April 2002.