

# On the Collaborative Governance Path of Soft and Hard Law to Cope with Climate Change in China

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## ABSTRACT

Climate change has become one of the important challenges facing the world. As one of the most populous countries in the world, China plays an important role in the fight against climate change. In the context of managing climate change, the implementation effect of hard law has not yet played a significant role, and soft law, as a flexible and adjustable special governance tool, has the potential to play a role and advantage. This paper aims to discuss the role and advantages of soft law in China's climate change governance, and put forward a path to improve the collaborative governance of soft law and hard law in China's response to climate change.

**Keywords:** *Coping with climate change, Climate change governance, Soft law governance, Soft and hard law coordinated governance.*

## 1. INTRODUCTION

In October 2018, the United Nations Human Rights Committee (CCPR), in its General Comment on the Right to Life (No. 36), clarified the relationship between climate change and the right to life under the framework of international human rights conventions [1]. At present, China's greenhouse gas emission reduction mainly relies on soft laws such as the "13th Five-Year Plan" for the Control of greenhouse gas emissions (hereinafter referred to as the "Plan"), resulting in greenhouse gas emission subjects in the "Plan" to undertake the "obligation" under the policy, not legal obligations, and can not provide reasonable relief for the subject who is "harmed" by climate change. In dealing with climate change, the legal system faces difficulties such as lack of rights base, difficulty in proof, scientific uncertainty on climate change, and the global and complex characteristics of climate change. The current technical conditions cannot effectively promote the legislation, law enforcement and judicial regulations to deal with climate change, and the risks of climate change cannot be properly addressed only at the hard legal level. With the in-depth study of Nicholas Luhmann's social system theory by scholars at home and abroad, it is a more effective governance path to apply social theory law and system theory law to the risk that is difficult to adopt strict hard

regulations such as climate change. However, governance relying solely on soft law will inevitably lead to weak coercive force and binding force. Therefore, this paper aims to use the theoretical basis of social system theory, social governance theory and climate justice theory to study the soft law governance research and the collaborative governance path of hard law and soft law to cope with climate change in our country.

## 2. THE QUESTION RAISED

In the context of increasingly severe global climate change, it is crucial for China, as a major country, to actively respond to the challenge of climate change. Although the Standing Committee of the National People's Congress has issued resolutions and decisions directly related to climate change [2], the direct regulatory role of law is still insufficient in the field of climate change. At present, the practice of addressing climate change relies more on soft laws such as administrative regulations and departmental rules.

Soft law has unique advantages in flexibility and adaptability, but it is relatively weak in authority and compulsion. In order to maximize the effectiveness of soft law, it is necessary to establish a mechanism of collaborative governance between soft law and hard law. In particular, the hard law should clarify the

basic principles and bottom line requirements to provide legal support for the soft law; On the basis of the hard law, the soft law can make more detailed and flexible rules according to the specific situation to fill the blank of the hard law. The establishment of a soft law - hard law collaborative approach to climate change governance requires the participation of governments, enterprises, society and other parties to form a joint force.

The government should formulate more perfect legal framework to provide strong guarantee for the implementation of soft law. Enterprises should actively fulfill their social responsibilities and promote green production and low-carbon development; All sectors of society should also strengthen publicity and education to increase public awareness and participation in climate change issues. Through the joint efforts of all parties, the effective coordination of soft law and hard law will be promoted to contribute to the sustainable development of China's social economy.

### **3. THE REASONS FOR INTRODUCING SOFT LAW TO COPE WITH CLIMATE CHANGE**

Climate change poses huge risks to human society and ecosystems and requires active response. The legal system has the problems of imperfect legislation, difficult law enforcement and lack of judicial basis, while the rule of law system emphasizes public participation and the construction of a green society ruled by law. German sociologist Ulrich Beck once said that only when "risk" is strong enough to affect people's lives, risk has changed substantially compared to the past, and it is enough to call a "risk society". [3]Therefore, when dealing with climate change, the introduction of soft law governance has become an important trend, aiming to make up for the shortcomings of hard law governance through public participation and internalization in the mind and externalization in the practice of green rule of law society, and jointly promote the positive response to climate change.

#### ***3.1 Hard Law Has Its Limits in Tackling Climate Change***

##### ***3.1.1 Inadequate Legislation to Address Climate Change***

With regard to the legal norms for addressing climate change at the national level, the Standing Committee of the National People's Congress has

formulated the Decision on Ratifying the United Nations Framework Convention on Climate Change and the Resolution on Climate Change, but the legislative conditions for the Law on Addressing Climate Change are not yet mature.

The formulation of administrative regulations and departmental rules is more diversified, such as the "Climate Change Report" and "Planning Approval" issued by The State Council, which guide governments at all levels to deal with climate change from a macro level. However, the implementation of these regulations is difficult to effectively manage the functions of various departments, and there is a lack of adequate supervision.

Major bodies such as the China Meteorological Administration, the Ministry of Ecology and Environment, and the National Development and Reform Commission also actively participated in the formulation of policies, but fewer joint documents were issued, resulting in fragmented regulation and insufficient strength.

To sum up, although some norms have been formulated at the national level in dealing with climate change, there are still problems such as imperfect legislation, difficult implementation and lack of supervision, which need to be further improved and strengthened.

##### ***3.1.2 The Reasons for Imperfect Legislation on Climate Change***

The reasons why the "Climate Change Law" has not been promulgated, from the perspective of climate change characteristics, mainly include the following four aspects:

First, the law runs into difficulties on the basis of rights. Because climate change involves complex ecological risks, its legal basis is not yet clear. In the existing legal system, there is no direct equivalent rights base, such as the right to climate stability or specific human rights, to support the legislation of this law. At the same time, existing low-carbon development laws are also facing the need to revise to better address climate change[4][5].

Second, climate change lawsuits are extremely difficult to prove. The gradual and cumulative characteristics of climate change make it different from environmental pollution cases in terms of evidence. In particular, greenhouse gases, such as CO<sub>2</sub>, are difficult to prove directly in the legal system. Although the newly amended "Air Pollution Prevention and Control Law" has included

greenhouse gases in the scope of control [6], the problem of proof is still severe.

Third, scientific uncertainty about climate change makes it difficult to prove causation. Although the impact of greenhouse gas emissions on the climate is widely recognized, some aspects of climate change remain controversial in the scientific community. This uncertainty makes it difficult to legally establish cause and effect of climate change, which increases the difficulty of making laws.

Finally, the global and complex nature of climate change makes it difficult for the parties to settle [7]. Climate change is affected by both natural and human factors, and its responsibility is difficult to define. Companies, organizations or individuals, whether international or domestic, can be the source of greenhouse gas emissions, but existing technologies and algorithms are difficult to accurately calculate the proportion of responsibility of each entity.

To sum up, the enactment of the Climate Change Law faces multiple challenges, including unclear rights basis, difficulty in proving, scientific uncertainty, and difficulty in defining the subject of responsibility. In the future, it is necessary to conduct in-depth research and seek effective ways to solve these difficult problems in order to promote the introduction of the law and effectively respond to the challenge of climate change.

### *3.1.3 Law Enforcement on Climate Change Is Lacking*

Currently, administrative regulations and departmental rules do not directly address climate change, resulting in a lack of a clear basis for enforcement. The 2009 Resolution of the Standing Committee of the National People's Congress on Actively Responding to Climate Change calls for strict enforcement of indirect laws. In 2020, China will voluntarily commit to international obligations to reduce emissions to address climate change. However, the current law enforcement basis mainly comes from indirect related laws, and there are cross-cutting law enforcement bodies, which makes it difficult to coordinate and unify the work of addressing climate change. Therefore, it is urgent to strengthen relevant legislation, clarify the basis for law enforcement, and improve the efficiency and effectiveness of law enforcement in addressing climate change.

## *3.2 The Theoretical Mechanism of Soft Law in Coping with Climate Change*

### *3.2.1 Social System Theory Mechanism of Soft Law Response to Climate Change*

From the perspective of system theory, soft law to deal with climate change governance has its theoretical basis. Luhmann's theory of social systems regards law as an independent subsystem of society, which provides a legal basis for the status of climate change subsystem [8]. At the same time, the legislation of ecological environment code tends to be "domain law", among which the "Climate Change Law" has the characteristics of "third domain", as a cross system of natural resources law and ecological environment law, it can become a new system of its own.

As an independent subsystem, the political system and the legal system work together to address climate change and form a synergy. Although the two functions are different, they have autonomy and can realize functional mutual assistance. However, the intervention of the political system to the ecological environment has risks, and the legal system faces scientific uncertainty when regulating environmental risks. Therefore, it is necessary to respect the operation law of each system and promote structural coupling and functional collaboration.

Although China has not yet formulated the "Climate Change Law", the concept of sustainable development has been integrated into relevant laws, which is consistent with the concept of "Climate Change Law". At present, the regulation in this field is mainly guided by policies with the goal of achieving social governance [9][10]. In the process of promoting the governance of climate change, it is necessary to fully consider the interaction between the legal and political systems to ensure that the formulation of laws is scientific, rational and operable, so as to achieve the goal of sustainable development. At the same time, we must also pay attention to the role of policies in guiding and regulating, and form a good situation in which laws and policies work together.

### *3.2.2 Social Governance Theory and Mechanism of Soft Law Response to Climate Change*

From the perspective of social governance, law aims to achieve legislative purposes and provide governance tools, rather than just making the

perpetrator responsible [11]. In recent years, China has proposed and deepened the "social governance" system, emphasizing diverse participation and legal protection [12]. Social governance aims to promote the modernization of people and the transformation of citizens [13]. In response to climate change, the government needs to lead the market in low-carbon operation and encourage the public to comply with energy conservation and emission reduction requirements, such as green travel and afforestation. At the same time, enterprises need to improve technology, comply with environmental regulations, and strengthen ecological civilization education. Unincorporated organizations such as environmental ngos should also play an important role in addressing climate change. In short, social governance emphasizes multi-party participation and collaboration, jointly promote the realization of the "double carbon" goal, and emphasizes the power of "people" and social subjects themselves.

### *3.2.3 Climate Justice Theory Mechanism of Soft Law Response to Climate Change*

From the perspective of climate justice theory, the principle of common but differentiated responsibilities is an important principle in international environmental law, and it is also the most direct applicable principle to deal with climate change. The domestic practice of climate justice theory should promote the local innovation of the common but differentiated principle in a timely manner. Some scholars once took Rawls' global justice theory as the theoretical basis for solving the climate problem [14]. Later, some scholars opposed this view, pointing out that Rawls' global justice theory could not solve the global climate problem [15]. But Rawls' theory of justice undoubtedly provides an important theoretical basis for our country's soft law governance to deal with climate change. The veil of ignorance set by Rawls provides a way to promote and form the "good" in climate justice, and the representatives behind the veil of ignorance rightly want to obtain as much basic good as possible, "they will strive to obtain for themselves the highest indicators of basic social good, and this behavior will enable them to effectively promote the formation of the concept of good." [16]

## **4. SOFT LAW HAS A MULTIDIMENSIONAL EFFECT IN ADDRESSING CLIMATE CHANGE**

### *4.1 Soft Law Is Flexible in the Governance of Climate Change*

Soft law refers to the social norms and legal soft clauses which are not enforced by state coercive force but have certain binding force. Its flexibility is particularly critical in the fight against climate change, alleviating the constraints of scientific uncertainty. In the process of legalization of ecological environment, climate change regulation needs a large number of soft clauses and social norms [17]. At present, although soft law is binding, it lacks coercive power, and social norms combined with national spirit can enhance its effectiveness.

The superiority of soft law is embodied in three aspects: formulation, implementation and supervision. In the formulation of soft law, the participants are flexible and can accommodate more voices; In content, soft law provides commonly accepted guidelines to facilitate negotiations and development [18]. In terms of implementation, such as the carbon trading system, soft law upholds the principle of voluntariness and flexibly responds to market changes. However, this does not exclude the hard law, but provides practical experience for the hard law formulation system. In terms of supervision, the flexibility of soft law encourages the active participation of social subjects. Public opinion has a huge impact on the government and enterprises, and the public, as the micro-subject of the market, can report violations through various ways and cultivate awareness of climate protection. Soft law governance can not only flexibly respond to the dynamic nature of climate change, but also stimulate the enthusiasm of all social parties to participate in the process of climate governance.

### *4.2 Soft Law Can Save Market Management Cost in Climate Change Governance*

The soft law is lower in the cost of formulation, amendment and implementation than the hard law, and has high efficiency in mobilizing market entities to cope with climate change. First of all, in the face of unclear rights basis, difficult to prove proof, causation is difficult to prove the situation, the enactment of the Climate Change law is costly and there is a risk of future cognition overturn, while soft law such as public policy, industry standards and other costs are lower. Second, while specific

legislation to address climate change is mandatory, amendments and modifications involve high labor and time costs. Moreover, the law needs to be implemented properly, otherwise it may lead to worse results. According to the social system theory, the legal system should respect the law of social operation.

Notice of The State Council on the issuance of the "Twelfth Five-Year Plan" Work Plan for Controlling Greenhouse Gas Emissions (2011) emphasizes the role of market mechanism, the need for enterprises and all sectors of society to consciously control greenhouse gas emissions and form a work pattern led by the government, dominated by enterprises and widely participated by the society. Industry standards can promote healthy competition and cooperation between market entities, each entity based on interests, law and discipline, rational discussion with the government, cooperative enterprises, reach a satisfactory agreement, thus saving the cost of national management. Therefore, soft law has a unique advantage in dealing with climate change, which can effectively mobilize the enthusiasm of market players while reducing costs.

#### ***4.3 Soft Law Can Strengthen the National Spirit in Climate Change Governance***

Soft law guarantees binding force through institutions, public opinion, traditions and moral norms, and relies on people's self-discipline and external supervision [19]. A climate justice ethic will be a powerful force in dealing with climate change. Influenced by public opinion, tradition, and moral norms, the public has long formed a "muscle memory" of climate governance and actively participated in preventing social pressure.

The Chinese "harmony" culture emphasizes cooperation and harmony, which is in line with the concept of soft law and provides cultural support for its development in China. The concept of "seeking common ground while reserving differences" in this culture can influence the status of subjects in climate governance, give play to the wisdom of the masses, and construct ecological wisdom that meets the requirements of the new era [20]. Soft law governance and the formation of national ecological spirit are mutually reinforcing. The former generates stability and sustainability through internal ecological rationality and psychological contract [21], while the latter provides spiritual support.

## **5. IMPROVING THE CO-GOVERNANCE SYSTEM OF SOFT AND HARD LAWS FOR CLIMATE CHANGE GOVERNANCE**

### ***5.1 Creating Incentive Mechanism for Soft Law Response to Climate Change***

Although the soft method has multi-dimensional effect, the execution effect is insufficient. Soft law and hard law are "two sides of the same body" in addressing climate change and need equal attention. Soft law lacks legal responsibility, so it is necessary to create incentive mechanism. Although it does not rely on the coercive force of the state, it is still valuable in terms of public opinion, value evaluation and moral judgment. The whole society should build an incentive mechanism to mobilize the enthusiasm of the government, enterprises, social organizations and the public, encourage innovation, technological improvement and active participation, and give full play to the wisdom of the masses to jointly cope with climate change.

### ***5.2 Hard Law Should Respond Positively to Soft Law Guidelines***

The clear directivity of climate change policies at the national level is the first key to determining a good implementation effect. However, the uncertainty of actors reduces the implementation effect of soft law on climate change to some extent, and even leads to the failure of the expected objectives of soft law.

In this case, if there is no systematic and scientific protection of the hard law, it is difficult to cross the gap between the ideal and the reality only by using the soft law to exert its effect in the level of policy and agreement. Social norms constitute the direct carrier of soft law, while national law is the indirect carrier of soft law, which together build the whole living field of soft law. Although the legislative conditions for the "Response to Climate Change" are not yet mature, it is also a good choice to steadily add "soft clauses" to the hard law. In addition, in the future revision of the hard law related to climate change, China's determination to deal with climate change should be clearly expressed in the legislative purpose and the importance of the "dual carbon" goal.

### ***5.3 Exerting the Effect of "Soft Regulation" in Hard Law***

It is necessary to strengthen the effectiveness of soft regulation in hard law to cope with climate change. Increase government attention through legal provisions to clarify the role of the Ministry of Ecology and the Ministry of Natural Resources in climate change governance. It will be innovative in legal principles to implement the principles of giving priority to protection, giving priority to prevention and public participation, and refine relevant basic principles. To use soft regulations to guide industry self-discipline and to set standards, and to promote enterprises and organizations to assume responsibility in climate change governance. Specific measures include industry associations formulating emission reduction standards, strengthening corporate information disclosure and transparency, and government departments strengthening the management of different standards [22]. These measures will effectively play the role of the soft legal system in the hard law, promote the realization of the "double carbon" goal, and at the same time have a reverse effect on the formulation and amendment of the hard law, forming a virtuous circle.

### ***5.4 Gradually Improving the System for Addressing Climate Change Through Co-governance of Soft and Hard Laws***

#### ***5.4.1 Promoting the Horizontal and Vertical Alignment of Policies***

The current climate change policy formulation body is more scattered, different levels, lack of cohesion and supervision mechanism, although from a macro point of view, the climate change policy has indeed played the role of policy guidance, but it has not yet played its due degree of effectiveness. Therefore, promoting the integration of various policies is conducive to forming a perfect normative system at the level of soft law formulation, and laying a solid foundation for the soft-hard coordination in the next step. Constructivism believes that soft law can achieve normative expansion through imitation, dialogue and learning, and soft law can establish a flexible horizontal institutional arrangement that considers differences, thus promoting the social learning process and accelerating the formation of networks [16].

#### ***5.4.2 Encouraging Public Participation and Enhancing Public Awareness***

The soft legal system promotes public participation and social responsibility, and contributes to climate change governance. First, establishing a climate change information disclosure system to ensure the public's right to know, so that the public can better participate in response. Secondly, public education should be carried out to raise awareness of climate change and encourage low-carbon living. Third, establish a mechanism for public participation in decision-making, fully consider the needs of all parties, give play to the function of democratic consultation, and cultivate a sense of response. Finally, the scope of public interest litigation should be appropriately relaxed to protect the public's right to climate damage relief and supervision. At present, the subject of environmental public interest litigation does not include natural persons. In order to stimulate the enthusiasm of the public, the qualification of the subject of litigation should be relaxed and relevant scientific research should be strengthened. These measures jointly promote the effective application of soft laws and regulations in climate change governance and build a broader social participation system.

#### ***5.4.3 Establishing and Improving the Corresponding Market Mechanism to Promote the Construction of Carbon Market***

The soft legal system can promote the establishment of innovation mechanisms and market promotion, and encourage enterprises and individuals to play an active role in climate change governance through incentive and reward mechanisms. For example, by establishing a carbon emission trading market, enterprises are guided to conduct carbon trading, and enterprises are encouraged to voluntarily reduce emissions. The hard law lacks flexibility and rationality in the regulation of corporate social responsibility, and it is usually difficult to get good feedback in practice. However, the application of soft law can effectively exert the flexibility of soft law, save the cost of market management, strengthen the national spirit, and promote the consciousness of "community of human destiny".

Due to the value orientation of the overall interests of the society, the normative effect of hard law is universal and overall, so it is difficult to take into account the fairness and justice pursued by different subjects under partial time and space

conditions [23]. In coping with climate change regulation, both the complex technical barriers faced by technical standards regulation and the difficulties of setting and monitoring output targets in outcome regulation are largely due to the inherent limitations of the legal system's own cognitive ability. In the context of social systems theory, "regulatory failure can be attributed to a lack of respect for the regulator's systematic autonomy and internal logic." [24] The traditional regulatory model upholds the paternalistic style and attaches too much importance to legal intervention and government authority, which affects the subjective status of other social subsystems and hindering their creativity and initiative [25]. Therefore, to deal with climate change, we should improve the corresponding market mechanism and promote the improvement of the carbon market through the combination of legal means and social norms.

## 6. CONCLUSION

Soft law plays an important role and advantages in China's response to climate change. The nature of soft law determines that governance by soft law cannot only be relied on when dealing with the risk of climate change, while hard law has legislative difficulties in dealing with climate change. Therefore, collaborative governance by soft and hard law is a feasible choice at present. By improving China's policies and regulations on soft laws to deal with climate change, encouraging public participation, promoting the good operation of market mechanisms, and encouraging all market players to work together to deal with climate change, we can better respond to the challenge of climate change and promote sustainable development. The potential of soft law still faces some challenges, and it is necessary to further strengthen the work of legislative research and the revision and amendment of existing laws.

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