„Krytyka Prawa", tom 11, nr 3/2019, s. 74–90, ISSN 2080-1084, e-ISSN 2450-7938, Copyright by Akademia Leona Koźmińskiego

KAROL POPŁAWSKI[1]

# The Role and Functions of the Mechanisms of Soft Law in International Public Law Discourse. Remarks against the Background of the Opinions of the Venice Commission

## Abstract

The aim of the paper is to create an updated typology of soft law. It places soft law among mechanisms of a rather moral, sociological and political origin. This does not mean that it is completely irrelevant in legal terms, but the inclusion of the regulations of soft law in the framework of a "normative system" does not deserve to be taken into account i.a. due to the character of soft law (i.a. formulating the regulations in a general, imprecise manner, the uncertainty of introduced instruments, the lack of an obligatory force to implement them). This paper indicates the roles played by soft law in the international public law discourse. It also presents differences in their consideration on the grounds of the international law (including the Community law) as well as the internal law. Out of the whole catalogue of individual functions and tasks of soft law, special heed should be taken of the co-ordinating role of the mechanisms of soft law. Against this background, the paper makes a categorisation of the opinions of the Venice Commission in the framework of soft law. This is because they show the typical features of the mechanisms of that law: they play a binding role, relatively clarifying the international law, they are based on the undisputed authority of the creating entity. However, they are not subject to the forced implementation of them. In the conclusions of the paper, a chance, but also a fundamental threat related to the conduct of the international legal discourse on the basis of the mechanisms of soft law were indicated.

**Keywords:** Venice Commission, soft law, legal recommendations

[1] Karol Popławski – PhD student in Law College, Kozminski University, e-mail: poplawski_karol@interia.pl; ORCID: 0000-0001-6540-8494.

Ministry of Science and Higher Education Republic of Poland

English-language translation of that article was financed under Agreement No. 645/P-DUN/2018 with funds from the Ministry of Science and Higher Education allocated to the popularization of science.

Modern legal discourse cannot be based exclusively on formalised and complex mechanisms. This causes an increasing interest of the doctrine (and indirectly also of the judiciary) in so-called soft law. The variety of ways to approach the role and functions of soft law enforces their systematising and correct definition. It is on the basis of such a typology that the correct classification of individual legal or extra-legal instruments as part of the international public law discourse (see below). The dialogue between states and the Venice Commission is an example – it is so relevant in the light of the latest events in Poland or in Hungary. As it turns out, there is no systematic approach to the opinions of the Venice Commission in the framework of "soft law". The presentation of the above can be found in the final part of the paper.

## Soft law – terminological remarks

From the perspective of a definition, the analysed issue gives rise to some difficulties. While a span indication of what is classified as soft law is not problematic, difficulties arise when it comes to establishing the precise definition of the term. Terminological remarks may apply to all forms and manifestations of "soft law". Conclusions regarding its tasks and role were formulated in terms of mechanisms in the international public law discourse. This, in turn, refers to the dialogue between states, relatively states and international organisations. It is undeniable that an equally broadly interpreted group of regulations in the framework of soft law is the one that includes regulations concerning the private-law sphere. The most obvious example is e.g. *lex sportiva*. However, they remain beyond the scope of recognition in the framework of this paper. Considering the above – in order to introduce a clear scope of recognition – I use the concept of the international public law discourse already in the title.

When defining "soft law", it is norms which are very frequently discussed. In global works in the area of the international public law, it is, however, the softness (here: weakness) of this aspect of law, which results from the "lineage" (which is not expressed the three traditional sources of the international law) of the said law, and from the lack of the binding force of those regulations, or both of the above[2].

[2] J.E. Alvarez, *International Organizations as Law-makers*, Oxford University Press 2005, p. 248.

 DOI: 10.7206/kp.2080-1084.321

It is, however, impossible to consider the proposed criterion as comprehensive and precise. Against this background, six categories prejudging the classification of individual norms as "soft law" are enumerated. They will be: 1) creation in a non-binding form; 2) expression in the form of general, imprecise clauses; 3) the origin in entities without law-making competence; 4) reliance on the freedom of choice of compliance with it; 5) the lack of mechanisms resulting in responsibility for non-compliance with it[3].

The proper definition of soft law in the European Community law is similarly problematic. In this case, a clear distinction in the terminology of "soft law" and "hard law" (e.g. the treaty law) alone, related to their legal significance and the legal effectiveness of their regulations, is also pointed out. However, it should be noted that the lack of the legal significance of norms formulated in the framework of the group of soft law does not always mean complete legal irrelevance[4]. Therefore, a definition was suggested on the basis of which "soft law" was defined as "norms of conduct specified in instruments (as it seems, legal ones) which were not assigned the criterion of the legally binding force, but which can be legally effective to some extent, oriented, and, as a result, leading to the production of specified practical effects" [translator's note][5].

In the international doctrine, there is also a distinction of soft law from the point of view of the structure of norms. Avoiding an extensive typology, it is noted that these are norms which are unknown to the international law as an immanent legal source or sources which are recognisable in such a way, however – due to their general aspect, imprecise content, and subjective nature – they are not suitable for

---

3 Ibidem, pp. 248–249. The author, however, makes this enumeration secondarily to other authors. It is also noted that in terms of the presented enumeration, it was initially not foreseen that states could be the addressees of "soft law". Some difficulties may also arise from incompatibility in the meaning of words. For instance, point 4, translated by the author as "dowolność wyboru przestrzegania" ["the freedom of choice of compliance" – tr anslator's note], when the original version includes so-called *voluntary adherence* (the author's own translation). It should be noted that both translations seem valid, particularly if the second suitable meaning of *voluntary adherence* – voluntary affiliation (e.g. to a group of states which comply with non-obligatory norms) – is taken into account.

4 For more information, see: L. Senden, *Soft Law in European Community Law*, Oxford and Portland Oregon 2004, pp. 111–112 and references.

5 Ibidem, pp. 112–113. As a matter of fact, the definition above results from three elements which the author points out, on the basis of a doctrinal analysis of the issue, as the root of the term. The first element was the presence of clearly specified, common rules of conduct. The second one was a consensus on the fact that while the norms discussed are not legally binding, this does not deprive them completely of legal effectiveness. The third element was pursuing the production of practical effects or – at least – having an influence on the conduct of specific entities.

execution[6]. Obviously, this does not preclude their possession of content and form which are frequently identical to the usual norms of conduct or close to legal norms and as such retaining their influence on entities subject to the international law – including states. However, the validity of classifying these norms into the category of legal norms is an open question. The doubt comes down to the question whether defining a given norm as one that belongs to "soft law" makes this norm a law under the name alone.

In other sources, out of some caution, soft law was initially given the name of instruments. Subsequently, their functional dimension was heeded[7]. The grounds for the above were provided by a belief that all instruments of the international law, existing in the form of joint declarations or resolutions, always take the form of "soft law", while international treaties will be "hard" law. It was noted, however, that sometimes the decisive factor for the evaluation of a norm, and for classifying it as "soft or hard" is the content of this norm. Therefore, the key factor – even in view of the whole reasoning cited so far – is the result of the application of soft norms. This result is unknown at the stage of implementing those norms. These instruments, which are collectively called "soft law", can also be defined as "paralegal", "half-legal" instruments[8]. Other names can also be distinguished, and they include: "weak law", preceding law (*prejuridiques*) or directly imperfect law (*lex imperfecta*)[9]. However, relying on the essence of this aspect of the law, it is sometimes called "programme law" or "law of purposefulness"[10], which is usually opposed to hard law which is called "relation law"[11] in this context[12]. It is noted that the authors of textbooks on the public international law (Bierzanek, Symonides) avoid defining the term unequivocally, and only indicate its scope. This is no different

---

6 L. Blutman, *In the trap of the legal metaphor: International Soft Law*, "International and Comparative Law Quarterly" 2010, Vol. 59, No. 7, p. 606. The author, however, rightly pointed out that the proposed terminology does not give a chance for the proper definition of the term, since it exists under the same name in two opposing meanings. It was also raised that the first of the suggested meanings of "soft law" is basically not defined for the needs of the international legal discourse, and therefore it cannot be considered in the context of that discourse. The ambiguity in question – in the author's opinion – could not survive even from the point of view of the principle known as "Ockham's Razor".

7 C. Ingelse, *Soft law?*, "20 Polish Yearbook of International Law" 1993, pp. 75–76.

8 Ibidem, p. 77.

9 R. Bierzanek, M. Symonides, *Prawo międzynarodowe publiczne*, 8th edition, Warsaw 2004, pp. 113–114. The authors even point out that the name of soft law – which creates no small terminological controversies – is, in fact, metaphorical.

10 Own translation [translator's note].

11 Own translation [translator's note].

12 Ibidem, p. 114.

 DOI: 10.7206/kp.2080-1084.321

in another paper (Łazowski, Zawidzka-Łojek), where *soft law* is classified as a so-called other source of international law[13]. The authors contradistinguish the concept of "soft law" and "hard law" there, however, they do it in the framework of the structure of the norms of the international law. Therefore, it may be affirmed that in this case, norms with an ambiguous normative meaning are discussed again. These are evaluated in the formal-legal aspect (the significance of an act that covers the norms) or the substantive-legal one (the content of a document). They also notice potential terminological difficulties which were previously referred to. This is interesting insofar as it is also possible for the above to interpermeate. Hence, paralegal regulations are sometimes classified as part of a bigger category that soft law is made to be. In this context, the concept *lex ferenda* is also mentioned, which remaining in the category of soft law may turn into hard law[14].

Recapitulating, narrowing the concept of soft law only to the category of legal norms with an ambiguous legal significance is not right. As shown above, in the process of its interpretation, not only are the content and type of a specific norm considered, but also the will of the participating entities. The effect of solutions implemented in the framework of "soft law" is also impossible to indicate *ab initio*. This strikes the basic definition of a legal norm which in essence has a binary nature – it may be evaluated from the perspective of its validity or the lack thereof. Norms are classified as legally binding "as a result of an act of law-making" (own translation [translator's note])[15]. This act should clearly foresee the normativity of introduced regulations. The ambiguity of the significance of a specific legal institution – after all, immanently connected with the concept of soft law – precludes, in the opinion of the author of the present paper, the inclusion of that significance in the category of legal norms – at least in the strict sense. Even if one takes the existence of so-called optimising norms which require pursuing a specific goal into consideration, then there are no doubts as to their validity[16]. Such doubts are raised, however, in reference to soft law.

---

13 A. Łazowski, A. Zawidzka-Łojek, *Prawo międzynarodowe publiczne*, 2nd edition, Warsaw 2011, pp. 54–55. Next to i.a. the judiciary, doctrine, unilateral acts of states.

14 After: J. Jabłońska-Bonca, *Problemy ze spójnością prawa i regulacjami pozaprawnymi a siła sprawcza państwa – zarys tematu*, "Krytyka Prawa" 2015, Vol. VII, p. 167. As it seems, the author is of an opinion similar to that of the already cited C. Ingelse who also isolated synonymous expressions of the topic described, which, however – for the purpose of the clarity of argument – were classified by him as part of the soft law category.

15 M. Kordela, *Aksjologia źródeł prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 2, p. 15.

16 For more information, see: P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej,* Warsaw 2015, pp. 224–225.

Here one may formulate a question concerning the validity of giving some instruments of soft law a quasi-normative nature. This constatation would concern only those soft law regulations which are based on grounded and common values. "Good faith", "decency", "due diligence", "the rules of social co-existence" may be given as examples[17]. In the international legal discourse, these could be i.a.: respect for the dignity of the human person, the proportionality of actions undertaken, the rules of a legal state. The universal origin of the above, as well as their rudimentary nature is decisive – in the opinion of the author of this paper – for the potential validity of giving those norms a quasi-normative nature. This does not mean in the least that they are fully valid in legal terms. Nevertheless, the validity of the instruments of soft law should be larger, and non-compliance with them by the entities involved should be assessed more severely.

It should thus be assumed that the essence of "soft law" is most fully reflected in the framework of the concept of so-called legal instruments. This is also in line with an attempt to define it by calculating, made by many authors who based their definitions on determining what is classified into the category of soft law, without specifying the term itself. Simultaneously, it should be claimed that the a priori division into soft legal instrument in the form of e.g. opinions, resolutions, recommendations, and hard legal instruments attributed to the treaty law is valid only in part. This is because it does not reflect the manner of editing many treaty norms which are based on their addresses' facultative activity, despite the fact that the norms are an integral part of those treaties[18]. Therefore, the standpoint that the said soft law is the totality of "instruments" which, depending on their character, may be defined in different ways – as "paralaws", "prelaw". On the other hand, this should be decided by states themselves as well as the circumstances in which these instruments are launched.

## The role of the mechanisms of soft law in a general approach

Moving to the description of the role of the mechanisms of "soft law", it is also worth referring to the sources of soft law. Its creation is identified by some with the development of the activities of non-governmental organisations (NGOs). Initially, the

17 For more information on axiology, values and their penetration into the legal discourse, see: M. Kordela, op. cit., pp. 17–18.

18 C. Ingelse saw the above in expressions "the state should...", "states aim at..." [own translation – translator's note]. See: L. Blutman, op. cit., pp. 607–610.

 DOI: 10.7206/kp.2080-1084.321

NGOs were supposed to – under treaties and emerging judiciary activism – "meet their commitments"[19] by conciliation, i.e. by considering the sovereignty and the discretionary power of states[20]. Against this background, instruments called soft law formed. Others directly point to Lord McNair who used this term for the first time in reference to the right to protect the environment in 1973[21]. As a rule, the application of soft law should be associated with the optimisation of results undertaken in the framework of the international legal discourse. Against this background, its function, which may be compared to a strictly legal one, was discussed, placing it, however, in the framework of regulations at a political level[22].

It should be affirmed that "soft law" plays primarily the role of joining or uniting certain/several regulations. It is based on a relative speed of actions undertaken, and its implementation is easier because it frequently concerns future situations. As claimed above, it "fills the gap between a legal void and the full acceptance for specific solutions"[23]. Then it shows a special relationship with moral or political norms[24]. It is also strictly connected with the sovereignty of a state. Assumedly, "soft law" is meant to constitute an ideal interface between the loss of some decision-making (even sovereignty) in favour of extending one's policy tools – in order to secure legally binding agreements[25]. In works in the area of the Community law, soft law is mentioned as a peculiar "umbrella for instruments that introduce regulations the status of which is unclear or uncertain" (own translation [translator's note]) [26]. As it may be assumed, the function of this "umbrella" is to secure the proper procedure and course of legal or political negotiations. Then a new aspect may be attributed to soft law. This is because the authors noted that the instruments

19 Own translation [translator's note].

20 See: J.E. Alvarez, op. cit., p. 248.

21 For more information, see: C. Ingelse, op. cit., p. 76 and L. Blutman, op. cit., p. 606.

22 C. Ingelse, op. cit., p. 76.

23 Own translation [translator's note].

24 R. Bierzanek, M. Symonides, op. cit., p. 114. The feature of effectiveness and speed of the work of "soft law" cannot be considered universal. The authors indeed point out that the real effectiveness of the mechanisms of "soft law" is sometimes based on the persuasive nature of the latter, and this nature constitutes an alternative to repressive methods (customarily attributed to hard law). This, in turn, need time and frequently a long exchange of letters and stances of the parties – after: J.E. Alvarez, op. cit., p. 218.

25 For more information, see: J.E. Alvarez, op. cit., p. 250. The cited author does not present it clearly. As it seems, however, (K.P.'s note), this assumption could be described with an example of a balance that a state has control over, as the final decision on the state's political standpoint depends on that state. Therefore, one of the ends of the balance is thus full sovereignty, independence in decision-making, whereas at the other end, there is a legally binding agreement reached by means of policy tools. The element that binds the above is broadly understood soft law.

26 L. Senden, op. cit., p. 113.

of "soft law" made it possible for states to accept more detailed and precise legal clauses the potential non-realisation of which is not threatened by real consequences[27]. In the Polish doctrine, this role is defined as a cognitive or communication role when an international community communicates its stance by means of the instruments of "soft law" (here: soft instruments)[28]. Furthermore, they pointed out to the circumstance that entering into non-binding regulations sometimes allows for avoiding formalistic procedures related to the ratification of treaties. The instruments of soft law should be used cautiously and carefully because this may involve potential abuse which consist in e.g. bypassing "the requirements for an expression of formal approval by states"[29]. It is also impossible not to notice that the effectiveness of the mechanisms of "soft law" is greater when it is based on – and in fact results from – the real will of those involved. One may also distinguish an approach to soft law in the "pilot" role[30]. Then this is the realisation of the content of specific policies (generally defined by the treaties themselves), which, however, retains a clear controlling dimension regarding the introduced regulations.

The instruments of soft law are updated in the framework of complex structures. It seems from the entire reasoning cited that at least several centres which fill the same or similar legal space are distinguished. Such a phenomenon was called "multicentricity" in the Polish doctrine[31]. It concerns entities which have the right to make decisions on "the efficient application of the law, and interpretation of the latter"[32]. Multicentricity in this sense does not mean centres which are systematised hierarchically, but it means those which are systematised rather horizontally. Their work or competences are sometimes identical, hence effective mechanisms that would make a dialogue between the parties involved possible

---

27 A.E. Boyle, *Some reflections on Treaties and Soft Law,* "International and Comparative Law Quarterly" 1999, Vol. 48, No. 4, p. 903.

28 M. Stępień, *Soft law jako źródło poznania ius cogens*, in: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego*, eds. B. Kuźniak, M. Ingelević-Citak, Cracow 2017, pp. 49–51. The author also makes an interesting division of "soft law" into *soft instruments* and *soft negotium.* He calls the second of the concepts mentioned "unfinished agreements" [own translation – translator's note] which require a complement, completion in order to be relevant.

29 D. Kuźniar-Kwiatek, *Problem space debris – od soft law do norm prawnie wiążących*, in: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego*, eds. B. Kuźniak, M. Ingelević-Citak, Cracow 2017, p. 408; after: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warsaw 2014, p. 15.

30 T. Biernat, *Soft Law a proces tworzenia prawa w Unii Europejskiej. Wpływ soft law na konstrukcję i treść uzasadnień aktów normatywnych,* "Studia Prawnicze" 2012, No. 2, pp. 27–28.

31 E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje,* "Państwo i Prawo" 2005, No. 4, p. 5.

32 Own translation [translator's note].

 DOI: 10.7206/kp.2080-1084.321

are necessary[33]. The totality of the mechanisms of "soft law" is that tool for the dialogue. It is certainly known that "serious regulations of those entities are made and apply in the environment of internal, international and Union law" (own translation [translator's note])[34]. They are not formally applicable, but their practical dimension impinges on their usefulness. Their rationality, equity and the frequent currency of their solutions are pointed out[35].

Thus, it cannot be surprising that the effectiveness of soft law is identified more with the sociological aspect rather than the legal one. The above results from the assumption that the dichotomous division into law and "not-law" has become out of date. The application of soft law may, in specific situations, result in political or directly moral consequences the effectiveness of which may turn out to be greater. From the sociological point of view, the value of those regulations may be assessed equally with strictly legal regulations[36]. This issue is also raised by American authors. It is rightly pointed out there that there are no grounds for disrespectful treatment of soft law. This is associated with the issue of international reputation[37]. It is based on a simple assumption that potential non-fulfilment of the requirements of soft law, despite the fact that it does not lead to formal legal consequences, it may complicate the political position of a given entity. This will be judged in the future as unreliable and breaching its undertaken obligations. The results of such conduct are sometimes assessed more severely that breaking a legal norm. As it seems from the OECD's practice, "soft" control and similar measures (dialogue, recommendations, and even exclusion from a given society) cause more desired and effective results than legal methods of enforcing obligations[38].

---

33 Ibidem, pp. 6–9. This issue is analysed mainly against the relationship between internal law and the Community law. According to the principle of the effectiveness of the Community law, it effectively fills the national legal space. This leads to the creation of one system albeit divided multicentrically. Therefore, there is a clear need for the mutual co-ordination of the above, best in the form of dialogue and agreement. The author's pragmatic postulate is worth noting when she notices that a clear distinction between the above may, as a result, lead to the forced elimination of one of the orders. Considering the necessity of ensuring the effectiveness of the Community law, it is valid to affirm that it will be done at the expense of the national law.

34 Own translation [translator's note].

35 Ibidem.

36 See: L. Blutman, op. cit., p. 612.

37 For more information, see: A.T. Guzman, *How International Law Works,* Oxford 2008, pp. 71–118; G.W. Downs, M.A. Jones, *Reputation, Compliance and International Law,* "Journal of Legal Studies" 2002, Vol. 31, No. 2.

38 L. Blutman, op. cit., p. 612.

However, among the mechanisms of soft law, one should see ways (methods) on the basis of which "soft law" can play the above roles[39]. For support, one may refer to a typology made on the grounds of the Community law. Firstly, preparatory and informative mechanisms are distinguished there[40]. They are oriented on the future activities of the international community, providing information on current actions. The second of the analysed mechanisms are interpretational and decisional ones. First of all, they constitute instructions on the correct interpretation and implementation of the Community law. The third of the enumerated mechanisms are called controlling mechanisms. Their purpose is the creation of goals and policies which indirectly aim at the harmonisation of activities between member states – however, still being deprived of formal legal power. On the basis of the Polish doctrine, one could make a conclusion on the existence of a peculiar competence mechanism. As it has been noted, minimising the proprietary entitlement of individual institutions seems to result in making soft law the basic mechanism of legal influence[41].

Therefore, the role of soft law remains to co-ordinate and bind mutual regulations. This law should basically function as a form of hints for the interested entities. It allows for opening up to an entire catalogue of norms of a different nature than a strictly legal one. Hence, an area of so-called legal greyness is much discussed in this context[42]. This role is, however, paradoxical. "Soft law" is inherently supposed to eliminate doubts, unify procedures and proceedings, increase the subjectivity of states in the course of political negotiations. However, it frequently becomes a source of doubts. It introduces many instruments into the discourse, and legalists consider these instruments to be unnecessary – distorting the clarity of the international legal discourse.

---

39 Mechanisms are understood here as ways "w jaki coś powstaje, przebiega lub działa" ["in which something is created, goes or works" – translator's note] – after *Słownik języka polskiego PWN*, available at: www.sjp.pwn.pl/słowniki/mechanizm.html.

40 L. Senden, op. cit., p. 118. However, in the original version, the author uses the expression "instruments".

41 T. Biernat, op. cit., p. 29. As it may be assumed, this concept is based on the assumption that EU institutions, frequently deprived of empowerment, use mechanisms granted to them on the basis of the character of "soft law". In the light of the reasoning presented so far, direct discussion on legal influence is not justified. Nevertheless, in the face of the role of soft law – especially in the context of the work of the Venice Commission – this standpoint (in principle) is worth considering. This will be discussed in detail further in this paper.

42 For more information, see i.a.: C. Ingelse, op. cit., p. 79–80.

 DOI: 10.7206/kp.2080-1084.321

## Opinions of the Venice Commission – classification, role

A proper classification of the opinions of the Venice Commission (official name: the European Commission for Democracy through Law; hereinafter referred to as: the Venice Commission) remains an open issue. It is impossible to ignore the role of this entity. In the meantime, it is not known whether its opinions will be in the category of soft law or whether they remain only in the scope of opinions of expert entities. In doctrinal studies, two opposing standpoints can be distinguished. There is no doubt as to the fact that i.a. the resolutions of the bodies of international organisations (primarily the resolutions of the United Nations General Assembly), inter-state agreements, multi- or bilateral agreements, which were not given the rigour of an international agreement, are classified as "soft law"[43]. Wider catalogues, covering: the decisions of international organisations, non-obligatory decisions concerning extra-organisational relations, guidelines, action plans, programmes and recommendations, declarations, directives and opinions, can also be distinguished[44]. This is interesting insofar as the same author – referring to the achievements of the doctrine – makes it impossible to classify international legal experts' opinions as soft law[45]. The above leads to a constatation that in order to evaluate whether the opinions of the Venice Commission should be attributed the value of "soft law", the question whether that opinion will be treated as an opinion of exclusively a committee of experts or of a formally applicable organisation will be decisive. One should move towards the second proposition. Then it is possible – even for systematic reasons – to approach the opinions of the Venice Commission in the framework of "soft law".

The Venice Commission should be included in the category of so-called international monitoring and advisory organs. They were initially responsible for the assessment of whether the process of joining the Council of Europe and then the European Union by the states of Central Europe and Eastern Europe took place in compliance with the rules and values of these "transnational institutions"[46].

---

43 R. Bierzanek, M. Symonides, op. cit., pp. 113–114. The second ones of those mentioned raise some doubts and are sometimes included as a source separate from soft law. The authors also devote a large part of the reflections to the initiatives of the International Committee of the Red Cross (i.a. to contracting resolutions). They are attributed a paralegal nature.

44 L. Blutman, op. cit., p. 607.

45 Ibidem, p. 623. The author notices, however, that this happens despite the fact that they correspond to the same criteria which are attributed to other sources in the framework of "soft law".

46 S. Bartole, *Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law,* "European Constitutional Law Review" 2017, No. 13, p. 605. Literally, the expression "rise of the world constitutionalism" was used (the author's own translation) after: B. Ackerman, *Rise of the World Constitutionalism*, "Virginia Law Review" 1997, No. 83, p. 771. It is worth noting that in the original

That process, however, had to be voluntary – based on an informed, coherent choice made by the interested entities which did not lose their sovereignty because of that. It is noted in the Polish doctrine that states, being aware of subjecting themselves to control by an appropriate body, could not, in fact, "act rashly, creating obligations which they could not (or would not want to) realise in the future"[47][48]. In the countries of Central and Eastern Europe, the post-1989 period came down to the reception of principles, values and institutions known to the countries of Western Europe – it did not come down to their creation. In this regard, one talks about "a common European constitutional legacy"[49]. The most challenging issue was to consider potential differences in the national implementation and interpretation of a known and fixed catalogue of principles, which can be traced to the constitutional European culture[50]. The process of transformation was not easy. It is noted that the mentioned states of the region had to undergo a quick metamorphosis from the communist value system, by adjusting to the concepts and principles which have been shared in Western Europe for years. To some extent, this limited the scope of their self-determination[51].

The role of the Commission comes down to the formulation of opinions which at the same time aim at their implementation in the course of persuasion and dialogue. It is characterised, however, by great caution when it comes to the formu-

---

version, the authors discuss the states of the so-called "Warsaw Pact". In order to eliminate terminological doubts, this expression had to be given up on the grounds of this paper (K.P.'s remarks). Apart from that, it is noted that in the states of the Visegrád Group, the negotiations in the framework of the Round Table are assumed to be the starting event (both in Poland and Hungary), whereas foreign publications emphasise the moment when the Berlin Wall fell.

47 I.C. Kamiński, *Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa?* in: *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, ed. A. Wróbel, Warsaw 2009, p. 37. While it is true that the author made an appropriate remark against the background of the Charter of Fundamental Rights, however, the universality and currency of the constatation justified – in the author's opinion – presenting it in the context of advisory and monitoring organs.

48 Own translation [translator's note].

49 Own translation [translator's note].

50 For more information, see: S. Bartole, *Comparative Constitutional Law...*, pp. 602–603. The author even indicates the constatations of the Polish Constitutional Tribunal regarding K 32/09 in which "the great (ceremonial) nature of a constitutional tradition common for all the member states" [own translation – translator's note] is discussed. In his opinion, this emphasises the importance of the said tradition.

51 S. Bartole, *Final Remarks: The role of the Venice Commission,* "Review of the Central and East European Law" 2001, No. 26, p. 352. It is worth pointing out here that the scope of "forcing", even in the form of soft law, peculiar axioms of law known in Western Europe is a source of controversy for the mentioned states. It comes down to a question about the limit of international organs' activity, in a situation of the implementation of institutions which were in no way created by those states, as those states only passively recreated them – see: L. Blutman, op. cit., pp. 605–610.

 DOI: 10.7206/kp.2080-1084.321

lation of final conclusions or orders, which does not mean their complete ineffectiveness. The purpose of the Commission's activity is, however, to promote democracy, human rights and the idea of law-abidingness[52]. Apart from the above, the authors point out the growing need for the Commission's adjustment also to the current challenges of transformation – including their constant monitoring as a permanent process[53]. Therefore, it is postulated that the Venice Commission be characterised by the independent nature of this body as well as by flexible working methods. This was even reflected in the Statute of the Commission[54].

In the practical aspect, some controversies are attributed to the Commission's activity. It should be mentioned that they constitute the effect of criticism from states, against the activities of which objections were raised. It is noted that opinions and recommendations created by the Venice Commission are not subject to further verification. They themselves constitute a material for adopting binding positions i.a. by international organisations which they serve. Because of that, they may be subject to interpretation which is selective or directly "taken out of context" and in spite of that, they may be the basis for negative assessments[55].

Having defining the goals, one should refer to the functions of the Venice Commission. In the author's opinion, they may be classified in the framework of two groups: a securing (guaranteeing) one and an advisory one. The first one is con-

---

52 J. Jowell, *The Venice Commission – Disseminating Democracy through Law*, "Public Law" 2001, p. 676.

53 Ibidem, p. 680.

54 *Revised Statute of the European Commission for Democracy through Law,* adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies (the author's own translation). Available at: www.venice.coe.int; hereinafter referred to as the Statute. It should affirmed that the overriding goal of the Commission is to support democratic processes and choose appropriate methods and measures of action. Against this background, in Article 1 section 1 of the Statute of the Venice Commission, four basic goals were indicated: strengthening the understanding of mutual legal systems, approximating them at the same time; supporting the principles of a legal state and democracy; studying problems arising from democratic institutions' actions; strengthening and developing those institutions. Achieving them should be based on dialogue of independent legal experts (section 2 of the Statute), as well as result from supporting institutions around the world that are similar to the Venice Commission (Article 1 section 3 of the Statute). Moreover, the Commission is competent for strict co-operation with the Constitutional Tribunals of individual states, and their representations (Article 3 section 4 of the Statute). It can undertake its activities in agreement with the Council of Europe, upon request from interested entities as well as on its own (Article 3 section 1 and 2 of the Statute).

55 For more information, see: L. Trocsanyi, *Wokół prac nad Ustawą Zasadniczą Węgier. Tożsamość konstytucyjna a integracja europejska*, Warsaw 2017, p. 100. This reasoning, however, is impossible to share because it includes contradictions. It sets the Venice Commission as an entity of undisputed authority, the conclusions of which constitute a peculiar ultima ratio – even in the professional discourse. Thereby, starting a polemic with the customarily cautious conclusions of the Venice Commission, especially on the basis of highly subjective reasoning, which refers to political arguments, seems to be unjustified.

nected with a highly professional nature of the functioning of that organ. Under its authority, this constitutes a guarantor of the protection of specific values, principles or the way in which specific institutions of a democratic state function. Relatedly, the Commission presents an updated interpretation of the analysed issues, however, on the basis of many years of experience and practice of referring to common principles and values. Most frequently, it takes the form of recommendations and guidelines presented to interested entities. While it is true that dialogue with the Commission is voluntary, however, its recommendations frequently constitute an obligatory point of a constructive dialogue with international organisations (i.a. the Council of Europe, the European Union)[56]. Therefore, it realises its securing function by co-operating with them. The condition for starting the said talks is taking a certain minimum set by the Venice Commission into account. This protects the constitutional systems of analysed states against excessive interference of the legislator, which may go beyond the scope that is in accordance with "the constitutional European culture" – its axiology as well as its balancing and controlling mechanisms. The realisation of the above function requires full co-operation with the already mentioned international organisations. Each of the above makes the Venice Commission adopt a specific, clear position regarding an analysed issue. Taking the statutory clause of obligatory co-operation and dialogue with an interested entity into account, the Commission may – especially if the analysed issue does not directly strike the fundamental principles and values – take a strictly advisory form. The opinion of the Venice Commission on a matter concerning the Slovak Republic[57].

The opinions of the Venice Commission should thus be classified as an instrument of "soft law". This is shown by both its essence and the functional dimension of the Commission's activity. This is because it clearly formulates opinions, recommendations, reports, etc., which, however, in no way become obligatory. As it may be assumed – with reference even to the beginnings of that organ – they are supposed to indicate desired directions of changing the internal law or the correct

---

56 *European Union: College discusses a draft Rule of Law Opinion on the situation in Poland*, "Asian News Monitor", 20 May 2016 – report information from ProQuest, pp. 2–4. Despite the lack of real effectiveness of the opinion of the Venice Commission, the cited source itself indicates its huge reach, and thus, its legal and political relevance.

57 See: *Opinion on questions relating to the appointment of judges of Constitutional Court of Slovakia (CDL – AD(2017)001)*. It was stated there that the scope of the question required that the Commission adopt an opinion on the assessment of facts or the internal law of the asking state. This means the Commission acting as "the fourth instance". The Commission did not accept the above-mentioned role, restricting itself only to tips of a practical nature. The above means that the Commission realises the above-mentioned function only when it does not adopt an obviously critical opinion on a specific topic.

 DOI: 10.7206/kp.2080-1084.321

implementation of the European law[58]. Systematising this in the framework of the previously presented typology of the mechanisms and types of soft law, this sets the opinions of the Venice Commission as those which communicate, lead to appropriate regulations of hard law. One may conclude that against forming or transforming systems, which seek to implement "the Western value system", they take the form of *soft negotium* (see: note 25). They do it on the basis of bilateral dialogue conducted in good faith. A problem occurs when unambiguous conclusions of the Commissions are met with the interested entity's disapproval. This issue is even more justified in the light of one of the roles of soft law, which the parties' mutual gain (*do ut des*) is made to be[59].

Continuing, one should have some doubts as to the correct terminology. According to the terminology proposed for the purpose of this study, soft law was made a collective, general category, whereas one should see specific "subgroups" in its framework. Narrowing it to the category of "pre-law" should be considered incorrect as it covers one aspect of the functioning of the Venice Commission (system transformation guidance). Therefore, the terminology of "paralaw", relatively "half-law". The opinions should thus be included more in the category of political, social or ethical opinions rather than strictly legal ones, despite the retained terminology and the fact of being created by undisputed experts in law.

In conclusion, it is worth considering the effectiveness of the opinions of the Venice Commission as mechanisms of soft law. On the basis of the will of interested entities, this appears weak – however, only from the legal point of view. Analysing the content of submitted replies, their addresses undertook a creative polemic with the opinions, which in some aspect resembled creating legal myths[60]. Particularly in the scope in which references were made to the will of the sovereign as a peculiar *ultima ratio* for the introduced changes[61]. This implies that "soft law" – especially in the international legal discourse – may become not only a means to an end. It may also take the form of a tool and create a specific political narrative which is sometimes contradictory to the original objective of soft law.

---

58 See i.a.: Opinion of the Venice Commission on the act of the Constitutional Tribunal (Poland), *opinion 860/2016, CDL – AD (2016)026,* Opinion of the Venice Commission on the draft act amending: the act of the National Council of the Judiciary; the act on the Supreme Court, *opinion 904/2017, CDL – AD (2017)031.*

59 J. Menkes, *Soft law i ius cogens a prawo międzynarodowe*, in: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego*, eds. B. Kuźniak, M. Ingelević-Citak, Cracow 2017, p. 46.

60 For more information, see: J. Jabłońska-Bonca, *Prawo w kręgu mitów*, Gdańsk 1995, pp. 43–52. The purposes of using "myths" in the legal discourse are discussed.

61 Position of the government of Poland on matters related to the amendments to the law on the Constitutional Court and Judgments (Cases no. 34/15; 35/15), *Opinion no. 833/2015, CDL – REF (2016)015.*

## References


Ackerman B., *Rise of the World Constitutionalism*, "Virginia Law Review" 1997, No. 83.

Alvarez J.E., *International Organizations as Law-makers,* Oxford University Press 2005.

Bartole S., *Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law*, „European Constitutional Law Review" 2017, No. 13.

Bartole S., *Final Remarks: The role of the Venice Commission,* „Review of the Central and East European Law" 2001, No. 26.

Biernat T., *Soft Law a proces tworzenia prawa w Unii Europejskiej. Wpływ soft law na konstrukcję i treść uzasadnień aktów normatywnych,* „Studia Prawnicze" 2012, nr 2.

Bierzanek R., Symonides M., *Prawo międzynarodowe publiczne*, wyd. VIII, Warszawa 2004.

Blutman L., *In the trap of the legal metaphor: International Soft Law,* „International and Comparative Law Quarterly" 2010, Vol. 59, No. 7.

Boyle A.E., *Some reflections on Treaties and Soft Law,* „International and Comparative Law Quarterly" 1999, Vol. 48, No. 4.

Czapliński W., Wyrozumska A., *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014.

Ingelse C., *Soft law?*, „20 Polish Yearbook of International Law" 1993.

Downs G.W., Jones M.A., *Reputation, Compliance and International Law*, „Journal of Legal Studies" 2002, Vol. 31, No. 2.

Guzman A.T., *How International Law Works*, Oxford 2008.

*European Union: College discusses a draft Rule of Law Opinion on the situation in Poland,* „Asian News Monitor", 20 may 2016 – report information from ProQuest.

Jabłońska-Bonca, J. *Problemy ze spójnością prawa i regulacjami pozaprawnymi a siła sprawcza państwa – zarys tematu*, „Krytyka Prawa" 2015, tom. VII, Warszawa.

Kamiński I.C., *Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa?*, w: *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, red. A. Wróbel, Warszawa 2009.

Kordela M., *Aksjologia źródeł prawa,* „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, nr 2.

Kuźniar-Kwiatek D., *Problem space derbis – od soft law do norm prawnie wiążących*, w: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego*, red. B. Kuźniak, M. Ingelević-Citak, Kraków 2017.

Jabłońska-Bonca J., *Prawo w kręgu mitów*, Gdańsk 1995.

Jowell J., *The Venice Commission – Disseminating Democracy through Law,* „Public Law" 2001.

Łazowski A., Zawidzka-Łojek A., *Prawo międzynarodowe publiczne,* wyd. II, Warszawa 2011.

Łętowska E., *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo" 2005, nr 4.


 DOI: 10.7206/kp.2080-1084.321

Marcisz P., *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa 2015.

Menkes J., *Soft law i ius cogens a prawo międzynarodowe*, w: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego*, red. B. Kuźniak, M. Ingelević-Citak, Kraków 2017.

Senden L., *Soft Law in European Community Law*, Oxford and Portland Oregon 2004.

Stępień, *Soft law jako źródło poznania ius cogens*, w: *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego,* red. B. Kuźniak, M. Ingelević-Citak, Kraków 2017.

Trocsanyi L., *Wokół prac nad Ustawą Zasadniczą Węgier. Tożsamość konstytucyjna a integracja europejska*, Warszawa 2017.