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PHILOSOPHY OF "SOFT LAW" AS A UNIVERSAL REGULATOR OF INTERNATIONAL RELATIONS MANAGEMENT

Abstract

Soft law is a set of rules and guidelines, the legal force of which is at the "negotiation" stage. It has appeared in international law since the 1970s as one alternative to international treaties, used in cases where, for various reasons, the parties do not want or cannot commonly decide or to sign an international treaty. Agreements of this kind do not create legal obligations between the contracting parties (under the principle, contracts must be respected) but only set political obligations, observing which is at the discretion of the parties. The primary purpose of the study is to analyze the philosophy of "soft law" in the context of international management of relations. The principal object of the research is the essence and significance of the philosophy of "soft law" as such. The major results of our research are to determine the essence and significance of the philosophy of "soft law" in the context of international relations.

Keywords: philosophy, philosophy of law, philosophy of "soft law", law, international.

Introduction

The development of the international legal order shows a gradual modification of the forms and methods of legal regulation of the system of international relations. Their dynamics is reflected in the ramified system of international legal norms. Now there is a discussion about the essence of such a phenomenon as "soft law" because the philosophy of "soft law" is a kind of point for the collision of opposing ideas and views of scientists. It is rather difficult to develop a unified approach to understanding this concept in view of the fact that the philosophy of "soft law" is a complex phenomenon of a complex nature with an undefined range of essential features today (Zalesny, Goncharov, & Savchenko, 2019).

Changes, in our time, are taking place in the international system, affect all its components, including international law. It seems that our generation is witnessing a change in the system of international relations, which was formed mainly after the Second World War, to a new one, with other subjects and rules of interaction. This poses new challenges for international law. It should act as the main regulator of international relations to prevent international disputes and their effective solution. However, the modern system of international law, because of its static nature and complex mechanisms of law-making, increasingly demonstrates the inability to quickly and effectively meet the needs of the international community. In this situation, actors of the international system, both public and private, are trying to find more effective tools. It is to such mechanisms that the so-called "soft law" or soft law can be attributed (Kryshtanovych, Petrovskyi, Khomyshyn, Bezena, & Serdechna, 2020). Philosophy of "soft law" entered the nomencla-

ture of international law back in the seventies of the twentieth century, provoking serious discussions in the scientific community, both about the very fact of its existence and about its definition, content and functions. These discussions are still ongoing, which confirms the relevance of the relevant research.

The generalized approach to defining the essence of the philosophy of "soft law" allows us to speak of it as a set of legally non-binding international norms created by states, international organizations and other entities, do not contradict the general principles of international law and are aimed at regulating international relations. International law establishes certain limits for the existence of soft law. In return, the latter contributes to its development, codification and improvement, thus exercising a significant impact on international law as a whole.

Methodology

The methodological basis of this scientific article was formed by the most important approaches, methods and principles of historical research. Also, this article about the philosophy of "soft law" was used: general scientific methods (formal-logical, systemic, structural-functional, concrete-historical); general logical methods of theoretical analysis (analysis, synthesis, generalization, comparison, abstraction, analogy, modelling, etc.); private, scientific methods (technical analysis, specification, interpretation, etc.).

Research Results and Discussions

The development of the global information society requires the development of new approaches to international legal regulation, taking into account the peculiarities of cyberspace and the challenges of the digital era. Globalization processes in the modern world are inextricably linked with the establishment of the information society and the spread of information and communication technologies, in turn, leads to the emergence of a new type of legal relationship, the settlement of which, due to the application of existing international legal mechanisms and norms, turned out to be a difficult task. The international law of the XXI century should be a "living" instrument, reacting as quickly as possible to changes in the information ecosystem (Brading, 2002).

The philosophy of "soft law" is characterized by flexibility, openness to changes and a high degree of adaptability to changes associated with the development and complication of the subject of regulation. Soft law acts can be declarations and resolutions, codes of conduct and best practices, recommendations and guidelines, and the like. The dominance of legally binding international legal instruments has long ignored an extensive array of soft law acts. However, the emergence of the concept of the global information society and attempts to regulate it have raised the issue of the effectiveness of the soft international legal regulation of this sphere of legal relations. The technical orientation of most regulatory legal acts on the information society requires deep knowledge and understanding of infrastructure characteristics. Therefore states could transfer to the level of technical communities the functions of developing appropriate standards and rules of conduct with their subsequent recognition as fair and appropriate.

An interesting example of the European Union, within which soft law rules began to spread, especially after adopting the 2000 Lisbon Action Plan, which introduced an open method of coordination. This method provided for the development of soft law acts, and voluntary cooperation in specific areas should have become an alternative to coercive legal prescriptions. The EU has made repeated attempts to create the most effective governance system based on a combination of soft and hard legal regulations. In the EU context, the effectiveness of soft law remedies can be measured by assessing the extent to which it has been possible to achieve harmonization of

regulation in the relevant areas at the supranational level (Köchler, 2016). Traditionally, directives that member states have implemented into national legislation have been considered binding EU acts. However, difficulties arose even when states believed that their sovereign rights were too limited in favour of supranational bodies. Given the technical orientation of a significant part of legal acts related to certain aspects of the functioning of the information society, it is necessary to provide as for the most flexible mechanism for viewing them and making appropriate changes and amendments to them. It is precisely such a mechanism that is capable of providing soft law.

Supporters of the hybridity of international legal regulation advocate a combination of traditional hard law and soft legal processes. While highlighting the benefits of soft law as an organic social product, efficacy and pluralistic respect for diversity, they argue that it can be more effective when combined with hard law. Hybrids can take many forms. Preference is given to combining open coordination processes with framework directives. In this way, soft law acts as a "living law" that complements traditional rigid norms. Hard-soft hybrids are considered highly effective combinations: their soft components guarantee organic responsiveness to social needs, promote pluralism and participation, and intensify mutual learning; hard elements provide a higher level of regulatory compliance by eliminating the ability to ignore soft regulations that effectively correct the asymmetry between market harmonization and social inclusion. An interesting example of a combination of soft and hard legal regulation is the EU directives, in the text of which several specific measures are prescribed, which by their nature are temporary soft regulation. Thus, Directive 2000/31 / EC on electronic commerce has enshrined several legal provisions to create a single European e-commerce market. At the same time, the document contains a minimum of requirements for information service providers, and it is noted that the member states and the Commission should encourage the development of codes of conduct and provide an opportunity for interested parties to freely decide whether to adhere to the provisions of such codes. This mixed approach used by the EU has several advantages. First, at the time of the Directive's adoption, there was no understanding of the specifics of the development of e-commerce in the information society. Thus, the EU has secured itself against the application of too burdensome legal regulations in European firms when they carry out operations on the global market on the Internet and has just begun to gain momentum. Secondly, given the rapid pace of technological progress, the EU was trying to create such a legal framework; it would not have to be looked at in the short term just because they have a deterrent effect in relation to those legal relations that are intended to regulate. Thirdly, it was an attempt to create a better regulatory mechanism compared to the telecommunications sector (Finnis, 2014).

When concluding international treaties, states are often reluctant to agree to assume obligations, significantly limiting their sovereign rights, especially for the creation of supranational bodies, to whose jurisdiction part of the powers of states in certain areas is transferred. Soft law allows states to minimise the risks of limiting their sovereignty by adopting non-binding rules and creating international institutions or organizations with clearly defined delegated powers. Vague formulations and weak institutional mechanisms fulfil a protective function of state sovereignty. An example is the Council of Europe Framework Convention for protecting National Minorities.

The global information society is a new and rather complex area for regulation in the history of modern international law. States, as a rule, are not sufficiently well and comprehensively familiar with the peculiarities of the functioning of the digital environment, and therefore at this stage, it is difficult to talk about the development of legally binding international legal documents. First, there is a need to clearly understand the benefits

and dangers of cyberspace and the use of ICTs. In this case, it would be possible to delegate broad powers in the information sphere to the same International Telecommunication Union or to any other international organization responsible for developing appropriate standards and legal norms. However, by doing so, states are actually weakening their sovereign rights in such a critical area as cyberspace and the information society. At the present stage, the insufficient level of knowledge of legal relations in the information sphere is the reason for the adoption of the framework and declarative international legal documents (Mutua, 2002).

The adoption philosophy of "soft law" always facilitates the process of reaching a compromise solution. In addition, non-binding international legal documents allow states to adapt their obligations in specific circumstances, much more practical than attempts to unify various and often contradictory national practices in a single document. Thus, states get wide scope for the implementation of the agreement while simultaneously adjusting it to the political and economic environment within the country, which in turn increases the efficiency of law enforcement. This is especially true when it comes to multilateral negotiations. Here it should be noted that multilateral participation is recognized as one of the basic principles of cyberspace, and therefore the adoption of soft law acts as a result of such negotiations is an absolutely natural process. The presence of the political interest of states always makes it difficult to reach a compromise. The absence of any legal regulation cannot be considered a better alternative even compared to legally non-binding soft law acts (Ordukhanyan, 2019).

The history of international law shows that lengthy negotiations on key international treaties often end with the adoption of texts in which states make many reservations or refuse to sign or ratify them altogether. As a result, we have a full-fledged international treaty that lacks effective law enforcement. Moreover, without this, the international treaty is dead. After all, its primary purpose should be the settlement of a specific type of legal relationship with the participation of a wider range of subjects. In addition, in the context of the global information society, special attention is paid to developing countries, which, unfortunately, do not have sufficient leverage in the development and adoption of legally binding international documents. They also lack the appropriate institutional mechanisms for the implementation of the relevant international treaties. The multilateral participation regime allows such states to be heard and defend their interests, which will be enshrined in international documents, although in the form of soft law. Subsequently, the relevant provisions will be much easier to translate into the category of legally binding than to try to reach a consensus on them in the course of initial negotiations with stronger and more developed states.

The growing role of non-state actors in the process of international lawmaking cannot be denied either. The overwhelming majority of documents, now regulating a whole range of issues related to the information society, were developed precisely in the course of multilateral negotiations with the involvement of all interested parties. In addition, the private sector plays an essential role in the development of regulatory standards for investment, human rights and environmental protection. In fact, transnational law is being created to understand which the significance of state borders as a territorial basis for the spread of the relevant jurisdiction is completely levelled. In addition, a large number of international dispute resolution bodies accept complaints from both states and private applicants. Another argument in favour of soft international legal regulation may be the fact that in practice, there are widespread cases when the actions of the state differ significantly from the legal obligations assumed under international law.

Obviously, even a soft law framework document will be more effective than an international treaty if its enforcement becomes a logical continuation of the will of the subjects. Such infor-

mal agreements do not require subsequent ratification and any additional approval, and therefore immediately become the object of direct law enforcement. States, being the primary subjects of international law, are not without flaws. Thus, the representation of governments always takes place with the participation of the ruling parties, often guided by their own interests with the support of certain international legal initiatives. In some places, they may not go out of the position of the national interest but, on the contrary, promote formulations that are beneficial for the private sector or certain political groups in exchange for their support in the elections. A large number of soft law acts on issues of the global information society can also be explained by the fact that the most interested parties, such as international non-governmental organizations, the private sector, civil society, communities of Internet users, do not have an international legal personality that would guarantee them the right to participate in international treaties (Kazanchian, 2020).

The philosophy of "soft law" itself is endowed with high normative value. It should not be seen only as a possible step towards the adoption of legally binding acts of international law. As the analysis shows, soft law acts can fill the legal vacuum and become an effective means of international legal regulation in those areas where states cannot or do not want to agree on certain issues. The novelty of the global information society concept takes some time to understand through its key components, characteristics, and features. Only as a result of this will it be possible to develop legally binding international legal norms.

Consequently, regardless of whether we classify an international legal norm as soft or hard, it does not cease to be legal in nature. Everything else is just additional grounds for theoretical discussions. In practice, the only thing that matters is that soft law rules on the issues of the global information society are fulfilled because those subjects whose rights and interests are directly affected and regulated by such rules take part in their development.

The philosophy of "soft law" has several advantages and characteristics, which we have formed due to our analysis.

First, the rules of philosophy of "soft law" can fix elements of a rule-making process or state that a consensus has been reached on a future treaty or act. Second, the rules of "soft" law can interpret and complement the rules of "hard" law. They can play an important role in bridging regulatory gaps and resolving disputes between parties. Thirdly, the rules of "soft law" can fix the parties' consent on a certain issue without making commitments. In the process of its creation, the expression of the subjects' will concern only the content of such a norm but does not concern the issue of its binding, which allows avoiding legal liability for failure to comply with such a rule (Michael, 1992).

The transformation of social relations, which is now taking place because of European integration and globalization processes, inevitably leads to reformatory transformations in various spheres of human activity and, accordingly, to changes in legal reality. It is in the integration's context and convergence of legal systems, as well as the development of the information society, of great importance, not only to study the practical aspects of improving the legal regulation of public relations, but also to rethink the content of the legal doctrine, which, absorbing the ideas of human centrism, is gradually moving from classical positivism and natural law in the new democratically liberal concept of law, the central place in which is the protection of the interests of a person, society as a whole and various social unions (Dang, Jasovska, & Rammal, 2020). In such conditions, it is important to unify legal ideas and thoughts by strengthening the connection between positivist and natural legal views of legal scholars, the formation and application of a new strategy for the study of law, which is based on a free approach to law, based and formed in the concept of "living law" by Evgeny Erlikh even at

the turn of the nineteenth and twentieth centuries. Taking into account modern trends in law, we should talk about the understanding of law through the prism of social manifestations, research of its social nature because the sociological theory of legal thinking today is gaining more and more relevance among scientists and is becoming one of the main in jurisprudence (Labarca & Ampuero Ruiz, 2020).

The emergence of the concept of soft law is associated with the objective qualities inherent in the international regulatory system. First of all, this is the absence of a single centre of rule-making, a single hierarchy of sources of international law, the conciliatory nature of international law.

An important point is a way in which the norms of international law are formed. At the heart of each rule is the agreed expression of the will of the states concerning two points (Pitts, 2020):

1. the content of the norm;
2. a decision on its obligation.

The way of formulating the rules of conduct is reminiscent of the text of an international treaty. However, in this case, one cannot speak about the content of the legal obligation. The parties reached an agreed expression of will regarding the content of the rule and the very fact of its existence but did not reach it on the recognition of this rule as legally binding. The rule is enshrined in a document that is recommendatory according to the UN Charter. Thus, the rule of "soft law" does not have the second feature of a legal norm - the property of formal certainty. By virtue of this, the content of the "soft law" norms is not the rights and obligations of the parties in the international legal sense. If the rule of international law is provided internationally by coercion, then this cannot be said concerning the rule of soft law. The parties are deprived of the opportunity to use legal means of coercion.

Today we can say that the philosophy of "soft law" is gradually penetrating into the sphere of domestic regulation. The authority of soft law norms, their ability to reflect the modern features of the regulation of relations in a certain sphere, as well as their wide distribution in the international legal system, are taken into account in legislation, increasingly contains blanket provisions, refer to acts of soft law (Wang, 2006).

The case when international courts resort to "soft law" testifies to various ways of promoting the norms of a non-legal, moral and political nature to legal regulation: filling gaps in law by giving definitions and interpreting certain concepts; determination of the content of an international custom or confirmation of its existence; strengthening legal argumentation by bringing expert assessments of authoritative international structures in relation to the current controversial situation; informing about existing international standards and the need to comply with them. Nevertheless, "soft law" reveals shortcomings, which are manifested, in particular, in the possible inconsistency of the provisions contained in legally non-binding international acts adopted in different periods. Probably, we can admit several options for solving this problem, depending on the availability of relevant international legal norms. It seems that with the existence of the latter, the recommendatory act should be correlated with the current legal norms, giving preference, of course, to the legal ones, but only those of them that are mandatory for the state. Anything else would hinder the free formation of sustainable state practice. In the absence of the required norms of international law, the lex posterior derogat legi priori principle should probably apply.

It is possible to highlight possible options for the meaning of the acts of "soft law", which determine their place in the European system of sources of law:

1. assistance in interpretation is not necessary, which means that the European and national institutions can decide for themselves the expediency or inexpediency of the application of acts of "soft or law" when interpreting legal regulations;

2. compulsory assistance in interpretation obliges the member states of the European community to take into account the acts of "soft law" in lawmaking and law enforcement activities;
3. ensuring a consistent interpretation provides for the obligation of the participating countries to gradually bring the acts of the national legal system in line with the recommendations and opinions expressed by international institutions. So, the concept of "soft law" has a number of advantages and allows you to influence interstate relations despite the recommendatory nature. They are designed to fill the gaps in legislation and bring existing legal norms in line with the requirements and standards put forward by international bodies and organizations (Racelis, 2017).

Summing up, it is worth noting that the study of modern law should be grounded not in the interpretation of official law but in the study of the legal reality of the present while focusing precisely on the relationship and mutual influence of law and society. The entire "sociology of law" by E. Ehrlich aims to substantiate the need to study "living" law in the context of the organized unity of state, social and economic life. According to the scientist, "living" law is all non-legal norms, at least to some extent involved in regulating social relations (even good taste and fashion). Such statements lead modern researchers of the concept of "living law" to conclude that law is determined not by its creation by lawmaking bodies but by its functioning in the already existing public legal relations. That is, the understanding of the law cannot be confined only to the interpretation of those norms enshrined on paper and to its identification with legislation. After all, the law as a socio-cultural phenomenon includes both the norms of official law and the norms produced in law enforcement. Therefore, it is important to understand law through the prism of lawmaking and law enforcement activities as inseparable processes, the combination of which leads to more effective use of legal means in the relevant situation and an individual approach to the implementation of legal norms for the effective and balanced legal regulation of public relations.

Conclusion

Summing up, it should be noted that in international relations philosophy of "soft law" helps to fill the gaps in international legal regulation, is used in the process of interpreting the provisions of international legal treaties and plays a vital role in resolving conflicts, because it is a universal means of maintaining a dialogue between states with various foreign policy, economic and cultural traditions.

We wish to emphasize that the concept of philosophy of "soft law" is not fully legal, and therefore cannot be considered and defined exclusively in the context of international law and its instruments. Now the term "soft law" is understood as a set of heterogeneous norms, both legal and non-legal, which can be contained both in international treaties and in decisions of international organisations if they do not establish clear legal rights and obligations of states and other subjects of international law... These include norms contained in non-binding parts of international treaties or treaties that have not yet entered into force, decisions of international organizations and conferences, and decisions of international judicial bodies. In accordance with this, "soft law" can be divided into international soft law, international legislative soft law and international general (judicial) soft law. This division is rather arbitrary because the question of classifying certain acts as soft law or hard law remains completely unresolved.

The indisputable fact is that the role of the philosophy of "soft law" in the regulation of international relations is steadily growing. There are many advantages that are prompting subjects of international law to turn to "myakoplegal" means of regulation increasingly. In this context, soft law can really be viewed as an alternative to

the legal regulation of international relations proper, which is now experiencing a crisis. It seems more justified to regulate relations at least with the help of soft law tools than futile attempts to force states to sign a legally binding international treaty. In addition to the exclusively practical result of obtaining a certain model of behaviour, the norms of soft law also play a certain function in international lawmaking. As a matter of fact, their education can constitute the first stage of the international law-making process, namely, the formation of norms, when a certain standard of behaviour is formed, which in the future (at the next stage of law-making) may become legally binding. Soft law often plays an essential role in the process of international customs of lawmaking as evidence of the existence and content of international customs. As noted above, "soft law" consolidates and further strengthens "hard law", helping it be a truly effective regulator of international relations.

References

Brading, K. (2002). *Symmetries, conservation laws and Noether's variational problem* (PhD thesis, University of Oxford). Retrieved from https://philpapers.org-/rec/BRASCL

Dang, Q., Jasovska, P., & Rammal, H. (2020). International business-government relations: The risk management strategies of MNEs in emerging economies. *Journal of World Business, 55*(1). https://-doi.org/10.1016/j.jwb.2019.101042

Finnis, J. (2014). What is the philosophy of law? *The American Journal of Jurisprudence*, *59*(2), 133-142. https://doi.org-/10.1093/ajj/auu012

Kazanchian, L. (2020). Features of human dignity in the context of the modern philosophy of law. *WISDOM*, *15*(2), 147-152. https://doi.org/10.24234/wisdom.v15i2.358

Köchler, H. (2016). Normative contradictions in international law: Implications for legal philosophy. *WISDOM*, *7*(2), 78-94. https://doi.org/10.24234/wisdom.v2i7.140

Kryshtanovych, M., Petrovskyi, P., Khomyshyn, I., Bezena, I., & Serdechna, I. (2020). Peculiarities of implementing governance in the system of social security. *Business, Management and Economics Engineering, 18*(1), 142-156. https://-doi.org/10.3846/bme.2020.12177

Labarca, C. & Ampuero Ruiz, P. (2020). Cultural and global perspectives to relationship management in international public relations: The Sino-Chilean case study. *International Communication Gazette.* https://doi.org/10.1177/17480-48520929817

Michael M. (1992). Law as a functional kind. In Robert P. George (Ed.), *Natural law theories: Contemporary essays* (pp. 55-63). Oxford: Clarendon Press.

Mutua, M. (2002). *Human rights: A political and cultural critique*. Philadelphia: Philadelphia University Press.

Ordukhanyan, E. (2019). A comparative analysis of theoretical and methodological foundations of political culture. *WISDOM, 12*(1), 38-47. https://doi.org/10.24234/-wisdom.v12i1.227

Pitts, J. (2020). Conservation laws and the philosophy of mind: Opening the black box, finding a mirror. *Philosophia, 48*, 673-707. https://doi.org/10.1007/s11-406-019-00102-7

Racelis, A. (2017). International relations in business and management programs: History, cases, and challenges in the Philippines. *Philippine International Studies Organization Conference 2017 at: Manila, Philippines*. Retrieved from https://www.researchgate.net/publication/312493323_International_Relations_in_Business_and_Management_Programs_History_Cases_and_Challenges_in

_the_Philippines

Wang, J. (2006). Managing national reputation and international relations in the global era: Public diplomacy revisited. *Public Relations Review*, *32*(2), 91-96. https://-doi.org/10.1016/j.pubrev.2005.12.001

Zalesny, J., Goncharov, V., & Savchenko, M. (2019). Model of the evolution of social development in the philosophy of global constitutionalism. *WISDOM, 13*(2), 51-61. https://doi.org/10.24234/wisdom.v13i2.277