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'Soft Law' in the Mechanism of the International and National Protection of the Constitutional Electoral Rights[3]

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Abstract

The publication explores the phenomenology and content of 'soft law' in the international and national law and reveals the designation of 'soft law' in protecting the electoral rights of the citizens. 'Soft law' is intended to mean optional international documents, most of which are resolutions of the intergovernmental organisations containing statements, commitments, guidelines, common positions or statements on policy or intentions. 'Soft law' documents are usually adopted by the statutory bodies of the international organisations on issues that reflect new problems, tendencies or trends in the field of electoral law, for which there is no political will or the accordance of all the member states in the form of a classical international treaty. When it comes to the content, the 'soft law' documents are all kinds of statements, obligations, guidelines, codes of conduct, codes of ethics, guidelines and standards, common positions or statements of policy or intentions.

Keywords: 'soft law', mechanism of the international and national protection, constitutional electoral rights, electoral law, elections.

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Miękkie prawo w kontekście mechanizmu międzynarodowej i narodowej ochrony konstytucyjnych praw wyborczych

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Streszczenie

Artykuł omawia fenomenologię i zakres elementów składowych miękkiego prawa w kontekście prawa międzynarodowego i praw narodowych, a także znaczenie prawa miękkiego dla ochrony obywatelskich praw wyborczych. Prawo miękkie oznacza zbiór niewiążących prawnie instrumentów międzynarodowych, z których większość to porozumienia zawarte przez różne organizacje międzyrządowe. Na porozumienia te składają się oświadczenia, zobowiązania, wytyczne, wspólne stanowiska, założenia polityk czy oświadczenia woli. Instrumenty z kategorii prawa miękkiego bywają zazwyczaj uchwalane przez organy ustawowe organizacji międzynarodowych i dotyczą spraw odzwierciedlających nowe ważne problemy, nurty czy trendy w domenie praw wyborczych, co do których brakuje woli politycznej czy zgodności wśród państw członkowskich – wyrażonych w postaci standardowych traktatów międzynarodowych. Jeśli chodzi o zakres elementów składowych stanowiących prawo miękkie, obejmuje on wszelkiego rodzaju oświadczenia, zobowiązania, wytyczne, kodeksy postępowania, kodeksy etyczne, normy, standardy, wspólne stanowiska, założenia polityk czy też oświadczenia woli.

Słowa kluczowe: miękkie prawo, mechanizm ochrony międzynarodowej i narodowej, konstytucyjne prawa wyborcze, prawo wyborcze, wybory.

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Introduction

The dogma of the international customs and international treaties as sources of the public international law is well known. Thus, as early as at the beginning of the 20th century, the Professor P. Kazanskiy wrote in his textbook *Introduction to the Course of International Law*:[4] 'The rapidly growing practice of interstate treaties demonstrates that the future belongs not to the custom, but to the treaty of the people.' However, the 20th century was marked not only by the triumph of the international treaties, but also by the emergence of a new kind of sources of the international law – 'soft law' documents that became a true phenomenon of the modern international law.

In the 21st century, the 'soft law' is becoming more and more recognised in the system of the international sources of electoral law, and its documents are recognised as a universal and effective instrument for the implementation of the international electoral standards and the protection of the electoral rights of the citizens of the EU member states, the United States and many other countries. 'Soft law' documents harmoniously complement the so-called 'hard international law' and make the international human rights mechanisms more flexible. Applying the right documents is increasingly responsive to the new challenges faced by particular states or regions in organising and holding elections and, in accordance with the principles of democracy, to protect the electoral rights of their citizens. In this sense, the view of the German scientist and diplomat H. Hillgenberg is correct, who states: 'International agreements not concluded as treaties and therefore not covered by the Vienna Convention on the Law of Treaties play an important role in international relations. Often states prefer non-treaty obligations as a simpler and more flexible foundation for their future relations.'[5]

The practice of applying 'soft law' in the international and national law has attracted the attention of scholars from around the world to this issue. In particular, the American researcher A. Robilant seeks to establish the origin of the 'soft law' phenomenon in the international law.[6] The American scholars Andrew T. Guzman and Timothy L. Meyer examine the nature of 'soft law' in the system of contem-

4 P. Kazanskiy, *Introduction to the Course of International Law*, Odessa 1901, p. 148.

5 H. Hillgenberg, *A fresh look at soft law*, "European Journal of International Law" 1999, 10(3), p. 499.

6 A.D. Robilant, *Genealogies of soft law*, "The American Journal of Comparative Law" 2006, 54(3), pp. 499–554.

porary international law and its relationship to 'hard law'.[7] The German scholar H. Hillgenberg examines the issue of the international organisations and states as subjects of the international law and the reason of their resort to the application of the 'soft law' documents while there is a number of 'hard law' instruments in the international law.[8] The Chinese researcher B. Druzin attempts to answer the question *Why Does Soft Law Have Any Power Anyway?*[9] The team of authors G. Falkner, O. Treib, M. Hartlapp and S. Leiber consider 'soft law' through the lens of the harmonisation of the law of the EU member states with the law of the European Union.[10]

The Ukrainian lawyer D. Terletskiy considers the phenomenon of 'soft law' in the context of its combination with the constitutional norms in practical application.[11] Critical views on the 'soft law' mission in regulating relationships can be traced to the work by the Finnish scholar J. Klabbers.[12] The French researcher M. Lancri explores the issues of the international standards which are reflected in the 'soft law' documents, transformed into international legal norms of 'hard law'.[13] Another French scholar O. Ştefan studies the application of the 'soft law' documents in the practice of the European courts.[14] The Italian scientists C. Fasone and G. Piccirilli view 'soft law' through the prism of applying the Code of Good Practice in Electoral Matters.[15] Some issues of 'soft law' in establishing international human rights standards and lobbying have also been addressed in the work of the authors of this paper.[16]

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7 A.T. Guzman, T. Meyer, *International Soft Law*, "The Journal of Legal Analysis" 2010, 2(1), pp. 171–225.

8 H. Hillgenberg, op. cit., pp. 499–515.

9 B.H. Druzin, *Why does Soft Law have any Power anyway?*, "Asian Journal of International Law" 2017, 7(2), pp. 361–378.

10 G. Falkner, O. Treib, M. Hartlapp, S. Leiber, *Complying with Europe: EU harmonisation and soft law in the member states*, Cambridge 2005.

11 D. Terletskiy, *The phenomenon of "soft law" in the context of the provisions of Article 18 of the Constitution of Ukraine*, "Legal Bulletin" 2009, 2, pp. 10–16.

12 J. Klabbers, *The undesirability of soft law*, "Nordic Journal of International Law" 1998, 67, pp. 381–391; idem, *The redundancy of soft law*, [in:] M. Koskenniemi (ed.), *Sources of International Law*, London 2017, pp. 189–204.

13 M. Lancri, *Compliance: From Soft Law to Hard Law – A View from France*, "Financial Compliance" 2019, 1, pp. 89–111.

14 O.A. Ştefan, *European competition soft law in European courts: a matter of hard principles?*, "European Law Journal" 2008, 14(6), pp. 753–772.

15 C. Fasone, G. Piccirilli, *Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in "Harmonizing" Electoral Rights*, "Election Law Journal: Rules, Politics, and Policy" 2017, 16(2), pp. 247–254.

16 V. Fedorenko, *Civil (Personal) Rights and Liberties in Ukraine: Notions, System, and Problems of their Establishing*, "Prawa człowieka. Humanistyczne Zeszyty Naukowe" 2015, 18, pp. 45–64; idem,

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The issue of 'soft law' and its application in the field of electoral law has also been addressed in a number of official documents by the international global and regional organisations and supranational associations. For instance, the EU Compendium of International Standards for Elections states: 'Non-treaty standards are usually adopted by the highest decision-making bodies of international organizations concerning issues that reflect new concerns or developments on which the political will to conclude a legally binding treaty is insufficient, or the matter is of such a nature that the adoption of non-treaty standards is better suited for the intended purpose. Non-treaty standards can, however, be used as interpretative tools in establishing the contents of a particular treaty standard, and they can be considered to be indicative of emerging trends in international law'.[17]

Thus, the analysis of the above-mentioned scientific works of jurists from different foreign countries of Europe, America and Asia leads to the conclusion that numerous scientific explorations of the 'soft law' phenomenology did not complete the formation of a coherent theory of its influence on law-making and law-enforcement activity, including human rights. In particular, the issue of the appointment of 'soft law' in the international and national constitutional legal mechanism of promoting the values and standards of democracy in the context of the protection of citizens' electoral law is in need of substantiation today.

In addition, the law-making and law-enforcement practice in the area of electoral rights speaks of the high demand for 'soft law' documents for the national and international courts, election administration bodies, NGOs and other entities. Especially when it comes to the protection of the electoral rights on new and sensitive issues, for which common approaches have not yet been established in the international treaties and acts of the national law. Therefore, at present, a rather acute question has arisen not only about the theoretical generalisations about the legal nature of soft law' in the international and national law, but also about the elaboration of practical recommendations for the application of the soft law' in the protection of the courts and administrative bodies and NGOs in the exercise of the citizens' electoral rights.

Guaranteeing and protecting human rights and freedoms in Ukraine, [in:] *The problems of legal regulation of human rights and freedoms at temporarily occupied territories of Ukraine. The optimization of protection model for rights and freedoms of Ukrainian person: collective monograph*, Lviv–Toruń 2019, pp. 322–345; V. Nesterovych, *EU Standards for the Regulation of Lobbying*, "Prawa Człowieka" 2015, 1, pp. 97–107, idem, *International standards for the regulation of lobbying (EU, CE, OECD, CIS)*, "Krytyka Prawa" 2016, 8(2), pp. 79–101.

17 European Commission, *Compendium of international standards for Elections*, 2016, p. 16 (access: 23.01.2019).

Essential Features of 'Soft Law' Documents in the Field of Electoral Law

Modern international 'soft law' documents in the field of electoral rights are characterised by the following qualifications.

1. In their essence, that is, the origin of the 'soft law' documents, they generally embody the agreed value-based position of international organisations (UN, OSCE, CoE, etc.) and their statutory bodies (PACE, the Committee of Ministers of the Council of Europe, the European Commission for Democracy Through Law (Venice Commission), the Congress of Local and Regional Authorities of the Council of Europe, Office for Democratic Institutions and Human Rights (ODIHR), etc.) on issues relating to the promotion of democracy in the organisation and conduct of elections and the protection of the electoral rights of the citizens, and which cannot be settled in international agreements without the political will of all the member states.
2. In their content that is subject to regulation, 'soft law' documents in the field of electoral law are aimed at affirming the ideals and values of the electoral democracy during the organisation and holding of elections, particularly, the validity of the current electoral legislation and the prohibition to change it for specific elections, as well as to protect the electoral rights of the citizens and prevent discrimination against them. The notion of the content of the 'soft law' regulation is even given by the names of the relevant documents of the Venice Commission: Code of Good Practice in Electoral Matters (Venice Commission 2002, CDL-AD(2002)023rev), Election Report System: Overview of Available Solutions and Selection Criteria (Venice Commission 2003, CDL-AD(2004)003), Interpretative Declaration on the Stability of the Electoral Law (Venice Commission 2005, CDL-AD(2005)043), Declaration on Women's Participation in Elections (Venice Commission 2006, CDL-AD(2006)020), Report on Electoral Law and Electoral Administration in Europe (Venice Commission 2006, CDL-AD(2006)018) and others.
3. According to the form, the international 'soft law' documents in the field of electoral rights are objectified in declarations, guidelines, codes, conclusions, standards, joint statements, reports, etc. At the same time, 'soft law' in the area of electoral law includes not only legal norms, but also political, moral, ethical and other norms which are not peculiar to the classical international treaties.
4. By law, the 'soft law' documents on electoral democracy are advisory. As a result, they do not require the consent of their national parliaments in the form of ratification because they are not formally considered international treaties.

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Obviously, the advisory nature of the 'soft law' documents is that they are better suited to protect the electoral rights of the citizens. In particular, the 'soft law' documents are quite frequently used by courts and quasi-judicial authorities, especially election administration bodies (multi-level election commissions, CDL-AD(2004)003, etc.), in resolving electoral disputes in two cases: firstly, as a tool to interpret when establishing the content of a particular electoral standard which is specified in a binding international treaty; secondly, as an additional argument that reinforces the position of protecting the electoral rights of the citizens, which takes place in the event of their violation or doubt regarding the interpretation of the scope and boundaries of the respective electoral rights of the citizens.

5. The adoption and formulation of the content of the international 'soft law' documents are significantly influenced by the expert environment, in the form of non-governmental organisations and think-tanks operating in the field of electoral law and monitoring the citizens' electoral rights.
6. By their purpose, the international 'soft law' documents are clearly integrative in the system of sources of the international and national electoral law. They are closely related to the content of 'hard law' and functionally interact with the international instruments of that 'hard law' – international treaties and conventions which enshrine the electoral rights of the citizens and prevent any discrimination in their implementation. It is quite frequently that the process of approving new international electoral standards begins with their initial consolidation in the international 'soft law' documents. After the successful validation (with no alternatives) and implementation of the relevant international election standards at the global international and/or regional level, they are formalised in the relevant binding international agreements. More specifically, one argues the conception of the international 'soft law' documents in the field of electoral law and their qualifying features, as an example of the analysis of the relevant domestic and national legislation, as well as the experience of its implementation.

There are five groups of major international 'soft law' documents in the area of electoral law: 1) declarations, recommendations and guidelines which are developed within the framework of the UN statutory bodies and organisations; 2) reports, conclusions, recommendations, codes and principles developed by the European Commission for Democracy Through Law (Venice Commission); 3) resolutions and recommendations of the Committee of Ministers of the Council of Europe; 4) conclusions, recommendations and guidelines of the OSCE Office for Democratic Institutions and Human Rights (ODIHR); 5) codes of conduct, codes of ethics and

guidelines developed by international non-governmental organisations in the framework of corporate self-regulation during the election process.

The most famous and most frequently practised international 'soft law' electoral instruments include the Universal Declaration of Human Rights (UN General Assembly 1948, 302(2)), Document of the 1990 Copenhagen Meeting of the OSCE Human Dimension Conference, Declaration on Criteria for Free and Fair Elections (Inter-Parliamentary Union 1994), Recommendation No. R (99) 15 to Member States on Measures Concerning Media Coverage of Election Campaigns (Committee of Ministers 1999), Guidelines and Report on the Financing of Political Parties (Venice Commission 2001), Code of Good Practice in Electoral Matters (Venice Commission 2002), Europe's Electoral Heritage (Venice Commission 2002), Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (Venice Commission 2003), Declaration of Principles for International Election Observation (UN 2005), Interpretative Declaration on the Stability of the Electoral Law (Venice Commission 2005), Report on the Abolition of Restrictions on the Right to Vote in General Elections (Venice Commission 2005), Declaration on Women's Participation in the Elections (Venice Commission 2006), Report on Electoral Law and Electoral Administration in Europe: Synthesis Study on Recurrent Challenges and Problematic Issues (Venice Commission 2006), Report on the Participation of Political Parties in Elections (Venice Commission 2006), Report on Choosing the Date of an Election (Venice Commission 2007), Comparative Report on Thresholds and Other features of Electoral Systems which Bar Parties from Access to Parliament (Venice Commission 2008), Code of Good Practice in the Field of Political Parties (Venice Commission 2009), Report on an Internationally Recognised Status of Election Observers (Venice Commission 2009).

Application of the International 'Soft Law' Documents in the Field of Electoral Law

The legal force of the international 'soft law' documents in the field of electoral law, which has previously been identified as a qualifying criterion, depends primarily on the following factors.

Firstly, the more authoritative and numerous in the representation of such documents is an international organisation within which an international 'soft law' document has been adopted, the greater will be its impact on the legislative and enforcement activity at the national level in the area of the electoral law.

Secondly, the more international governmental organisations, international non-governmental organisations (NGOs), international observation missions,

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international programs, think-tanks support the international 'soft law' document, the wider will be its 'enforceable geography'.

Thirdly, the more actively the international 'soft law' document is applied by the national and international courts and government bodies which administer elections in resolving any electoral disputes, the faster it embodies the principles of democracy, and the value of the right of the citizens to elect and to be the elected will first be a desirable and subsequently a mandatory model of conduct in the organisation and conduct of elections.

Concerning the latter statement, the international 'soft law' documents are increasingly being invoked by the international and national judicial authorities in resolving specific electoral disputes. For instance, despite the advisory nature of the Code of Good Practice in Electoral Matters of 2002, its provisions are applied by the European Court of Human Rights when dealing with violations of Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to free elections). The European Court of Human Rights, when dealing with complex and controversial electoral issues, quite frequently refers to the Code of Good Practice in Electoral Matters. The European Court of Human Rights has applied the Code of Good Practice in Electoral Matters in at least 26 of its judgments.

Table 1. Application of the Code of Good Practice in Electoral Matters in Judgments of the ECHR by Year

Year	Number of Judgments	Year	Number of Judgments
2005	1	2013	2
2006	1	2014	1
2007	1	2015	2
2008	2	2016	2
2009	1	2017	2
2010	4	2018	1
2011	1	2019	1
2012	4	2020	0

Table 2. Application of the Code of Good Practice in Electoral Matters in Judgments of the ECHR by Country

Country	Number of Judgments	Year	Number of Judgments
Russia	6	Greece	1
Azerbaijan	5	Hungary	1
Romania	3	Italy	1
The United Kingdom	2	Lithuania	1
Bulgaria	1	Moldova	1
Croatia	1	Turkey	1
Georgia	1	Ukraine	1

The European Court of Human Rights referred to the provisions of the Code of Good Practice in Electoral Matters in the judgments it issued in the following cases: *Hirst v. the United Kingdom (No. 2)* of 6 October 2005 (Application No. 74025/01, §32), *Sukhovetskyy v. Ukraine* of 28 March 2006 (Application No. 13716/02, §38), *Russian Conservative Party of Entrepreneurs and Others v. Russia* of 11 January 2007 (Applications Nos. 55066/00 and 55638/00, §§37, 38, 70), *The Georgian Labour Party v. Georgia* of 8 July 2008 (Application No. 9103/04, §§47, 59), *Yumak and Sadak v. Turkey* of 8 July 2008 (Application No. 10226/03, §33), *Petkov and Others v. Bulgaria* of 11 June 2009 (Applications Nos. 77568/01, 178/02 and 505/02), §§52, 63), *Namat Aliyev v. Azerbaijan* of 8 April 2010 (Application No. 18705/06, §54), *Grosaru v. Romania* of 2 March 2010 (Application No. 78039/01, §§22, 56), *Tănase v. Moldova* of 27 April 2010 (Application No. 7/08, §51), *Republican Party of Russia v. Russia* of 12 April 2011 (Application No. 12976/07, §61), *Alajos Kiss v. Hungary* of 20 May 2010 (Application No. 38832/06, §16), *Anchugov and Gladkov v. Russia* of 4 July 2013 (Applications Nos. 11157/04 and 15162/05, §41), *Sitaropoulos and Giakoumopoulos v. Greece* of 15 March 2012 (Application No. 42202/07, §§22, 23, 53), *Scoppola v. Italy (No. 3)* of 22 May 2012 (Application No. 126/05, §44), *Communist Party of Russia and Others v. Russia* of 19 June 2012 (Application No. 29400/05, §51), *Ekoglasnost v. Bulgaria* of 6 November 2012 (Application No. 30386/05, §§38, 39), *Shindler v. the United Kingdom* of 7 May 2013 (Application No. 19840/09, §§62, 113), *Karimov v. Azerbaijan* of 25 September 2014 (Application No. 12535/06, §22), *Tahirov v. Azerbaijan* of 11 June 2015 (Application No. 31953/11, §30), *Gahramanli and Others v. Azerbaijan* of 8 October 2015 (Application No. 36503/11, §52), *Muršić v. Croatia* of 20 October 2016 (Application No. 7334/13, §19), *Uspaskich v. Lithua-*

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nia of 20 December 2016 (Application No. 14737/08, §74), *Orlovskaya Iskra v. Russia* of 21 February 2017 (Application No. 42911/08, §§54, 55), *Davydov and Others v. Russia* of 30 May 2017 (Application No. 75947/11, §§196, 283, 284, 285, 287, 299), *Cernea v. Romania* of 27 February 2018 (Application No. 43609/10, §40) and *Abdalov and Others v. Azerbaijan* of 11 July 2019 (Applications Nos. 28508/11 and two others, §§74, 76, 95).

Among the judgments of the European Court of Human Rights, in which the Code of Good Practice in Electoral Matters has been applied, there are some of the brightest judgments. For instance, according to §33 of the case of *Yumak and Sadak v. Turkey* of 8 July 2008 (Application No. 10226/03): 'The Council of Europe has not issued any binding standards for electoral thresholds. The question has not been raised in the organisation's standard-setting texts. On the other hand, the Code of good practice in electoral matters, adopted by the Venice Commission, makes recommendations on the subject (see Venice Commission, "Code of good practice in electoral matters: Guidelines and explanatory report", Opinion no. 190/2002). As a general principle, the Code requires suffrage to be direct, but in the case of a bicameral parliament it permits one of the Chambers to be elected by indirect suffrage. As for the electoral system to be used, the Code's guidelines state that any system may be chosen.'

When it comes to the judgment of the case of *Muršić v. Croatia* of 20 October 2016 (Application No. 7334/13, §19), the ECHR said: 'Evolutive interpretation of the Convention has also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has made use, for example, of the work of the European Commission against Racism and Intolerance (ECRI) and the European Commission for Democracy through Law (the Venice Commission) [the Code of Good Practice in Electoral Matters].'

In the judgment of the case of *Shindler v. the United Kingdom* of 7 May 2013 (Application No. 19840/09, §113), the ECHR noted: 'The Venice Commission Code of Good Practice in Electoral Matters 2002 makes reference to the need for certain conditions to be imposed on the right to vote and accepts that a residence requirement may be imposed. It provides that the right to vote "may" be accorded to citizens resident abroad (…).'

In the judgment of the case of *Petkov and Others v. Bulgaria* of 11 June 2009 (Applications Nos. 77568/01, 178/02 and 505/02, §§52, 63), the ECHR pointed: 'Finally, the Court observes that an effective system of electoral appeals, as described in the Venice Commission's Code of Good Practice in Electoral Matters (see paragraph 52 above), is an important safeguard against arbitrariness in the electoral process.

Failure to abide by final decisions given in response to such appeals undoubtedly undermines the effectiveness of such a system.'

In the judgment of the case of *Abdalov and Others v. Azerbaijan* of 11 July 2019 (Applications Nos. 28508/11 and two others, §95) it was emphasised by the ECHR: 'The Court notes that the Venice Commission's Code of Good Practice in Electoral Matters recommends that candidatures be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign (…).'

In the judgment of the case of *Communist Party of Russia and Others v. Russia* of 19 June 2012 (Application No. 29400/05, §51), the ECHR indicated: 'The European Commission for Democracy through Law (Venice Commission), at its 51st (Guidelines) and 52nd (Report) sessions on 5–6 July and 18–19 October 2002 adopted the "Code of Good Practice in Electoral Matters". The Venice Commission distinguished two particular obligations of the authorities in relation to the media coverage of electoral campaigns: on the one hand to arrange for the candidates and/or parties to be accorded a sufficiently balanced amount of airtime and/or advertising space including on state television channels ("the access to the media obligation") and on the other hand to ensure a "neutral attitude" by state authorities, in particular with regard to the election campaign and coverage by the media, by the publicly owned media ("the neutrality of attitude obligation") (Explanatory Report to the Code of Good Practice on Electoral Matters, §2.3). The Venice Commission's Code of Good Practice in Electoral Matters also recommended the creation of an effective system of electoral appeals, among other things, to complain about non-compliance with the rules of access to the media (§3.3).'

The connection between Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Code of Good Practice in Electoral Matters is indicated in the European Court of Human Rights' judgment of the case of *Davydov and Others v. Russia* of 30 May 2017 (Application No. 75947/11, §285). The ECHR stressed in this judgment: 'It is true that Article 3 of Protocol No. 1 to the Convention was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process (…). However, the Court has already confirmed that the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, enshrine within themselves the right to vote in terms of the opportunity to cast a vote in universal, equal, free, secret and direct elections held at regular intervals (see the Code of Good Practice in Electoral Matters, paragraph 196 above).'

The Code of Good Practice in Electoral Matters is increasingly being applied by the national courts to electoral disputes. For instance, in Ukraine, according to the Unified State Register of Court Decisions, as of 7 February 2020, the administrative

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courts of Ukraine issued 43 court decisions in election cases, in which judges, in substantiating the position of the court, referred in one way or another to the provisions of the Code of Good Practice in Election Matters (Unified State Register of Court Decisions of Ukraine 2020[18]). The first decision to which the court applied the provisions of the said Code was the Resolution of the District Administrative Court of the Autonomous Republic of Crimea of 14 September 2012 (Case No. 2a-10148/12/0170/9). In this resolution, the court referred to paragraph 104 of the said Code, according to which 'the quality of the voting and counting systems, as well as the proper observance of the election procedures, depends on how polling stations are organised and operated' (Case No. 2a-10148/12/0170/9).

In its Resolution of 8 October 2012, the District Administrative Court of the Autonomous Republic of Crimea referred to paragraph 58 of the Code of Good Practice in Electoral Matters, according to which 'there must be a number of procedural safeguards, especially with regard to the organisation of elections' (Case No. 2a-11052/12/0170/13). The Decision of the Supreme Administrative Court of Ukraine of 20 September 2012 applied the provisions of paragraphs 63 and 64 of the Code of Good Practice in Electoral Matters concerning the stability of the electoral law (Case No. A/9991/145/12).

In the Resolution of the Odessa District Administrative Court of 23 October 2014, the court used to substantiate its position with the provisions of the Code of Good Practice in Electoral Matters that set the grounds for the principle of free elections (Case No. 815/6018/14). In another Resolution of 30 October 2015, the Odessa District Administrative Court, referring to the Code of Good Practice in Electoral Matters, stated that 'the basic principles of a pan-European electoral heritage can only be realised if certain general conditions are met: 1) respect for fundamental human rights, and in particular such freedoms as freedom of expression, assembly and association, without which true democracy is not possible; 2) the electoral law must be sufficiently stable and protected from party-political manipulation. And finally, and most importantly, there must be a number of procedural safeguards, especially regarding the organisation of elections; 3) election observation plays an important role in that it allows one to get an idea of how well the election process has taken place' (Case No. 815/6345/15).

In general, the vast majority of decisions of the administrative courts of Ukraine in which judges have applied the provisions of the Code of Good Practice in Electoral Matters concerned various aspects of equal electoral law, especially in constituency formation. In most court decisions, the judges have separately indicated the legal nature of the Code of Good Practice in Electoral Matters. For instance,

[18] Available at: http://reyestr.court.gov.ua/Page/2 (access: 10.03.2020).

the Resolution of the Chernihiv District Administrative Court of 20 November 2017 stated: '(…) although the said act is not a source of the international law, Ukraine's membership of the Council of Europe is bound by the relevant provisions' (Case No. 825/1878/17). The Decision of the Vinnytsia District Administrative Court of 28 March 2018 stated that 'the Code of Good Practice in Electoral Matters is not a mandatory document, but is only a recommendation and can be applied in determining the effectiveness of the existing national electoral legislation and the effectiveness of decisions taken by the subjects of the electoral process, and not in determining their illegality' (Case No. 802/950/18-a).

In the activities of the Constitutional Court of Ukraine, the provisions of the Code of Good Practice in Electoral Matters have been applied only at the level of opinions of the judges of the Constitutional Court of Ukraine. Here are some of them to illustrate the infiltration of the 'soft law' values into the minds of many judges of the Constitutional Court of Ukraine.

1) Dissenting Opinion of the Judge of the Constitutional Court of Ukraine V.I. Shyshkin of 4 April 2012 Concerning the Decision of the Constitutional Court of Ukraine on the Conformity of the Constitution of Ukraine (Constitutionality) with the Provisions of Article 22(2) of the Law of Ukraine 'On Elections of People's Deputies of Ukraine', Concerning the Uniform Classification of the Foreign Polling Stations in All Single-Mandate Constituencies Formed on the Territory of the Capital of Ukraine – Kiev (Case No. 1-17/2012).
2) Dissenting Opinion of the Judge of the Constitutional Court of Ukraine V.M. Kampo of 29 May 2013 Concerning the Decision of the Constitutional Court of Ukraine in the Case of the Official Interpretation of the Provisions of Part 2 of Article 136, Part 3 of Article 141 of the Constitution of Ukraine, the First Indent of Paragraph 2 of Article 14 of the Law of Ukraine 'On Elections of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils and Village, Town, City Mayors' (Case No. 2-RP/2013).

It should be noted that the perception and application by the judges of the Constitutional Court of Ukraine of the 'soft law' in their separate opinions facilitated the consideration of the relevant international documents and in the collegial decisions of the Constitutional Court of Ukraine. An example of the application of the 'soft law' document by the Constitutional Court of Ukraine is its Decision of 21 December 2017 (Case No. 1-21/2017) in the case of the removal of candidates for deputies of Ukraine from the election list of a political party. In this decision, the Constitutional Court of Ukraine, in substantiating the unconstitutionality of the legislative provision on the exclusion of candidates for People's Deputies of Ukraine from the electoral list of a political party, considered the position of the European Commission

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'For Democracy Through Law' (Venice Commission), by which the powers of the parties to exclude those candidates from the People's Deputies of Ukraine election, who were not elected, but retained the status of a candidate for People's Deputies of Ukraine, do not meet the European standards (paragraph 39 of the Opinion on Changes Introduced by Law No. 4061 by Law No. 1006, Approved by the Council for Democratic Elections at Its 55th Meeting on 9 June, 2016 and by the Venice Commission at Its 107th Plenary Session, 10–11 June, 2016).

The current legislation of Ukraine, similarly to that of most other countries in the world, does not regulate such a term as 'soft law' today. However, the 'soft law' category can be found in the reasoning of some decisions of the courts of general jurisdiction in Ukraine when these decisions concern administrative cases. For instance, in the Resolution of the Supreme Administrative Court of Ukraine of 13 June 2016, the court, when examining the circumstances of the case, stated: 'The decision of the High Council of Justice [renamed the Supreme Council of Justice in 2017] was adopted on the basis of the Constitution of Ukraine, the current legislation, with justified reference and the rules of "soft law"' (Case No. 800/259/16).

Another court decision, i.e. the Resolution of Zakarpathya District Administrative Court of 13 April 2017 stated: 'Comments, positions, recommendations and other regulatory documents issued by the Office of the United Nations High Commissioner for Refugees (UNHCR) are important for the interpretation and application of the [Refugee Status] Convention by the member states. (…) Therefore, the positions, recommendations, comments and guidance of the UNHCR are inherently instruments of the so-called "soft law", which, in particular, explain the content of the obligations of both the UNHCR and the member states to the refugees under the 1951 Geneva Convention and the 1967 Protocol' (Case No. 807/222/16).

An important factor in the dissemination of the international 'soft law' documents is the activities of experts, academics and public human rights organisations, which introduce the values and principles of the relevant documents into the legal awareness of the participants of the election process. In one case, as election campaign observers, and in the other, as voter educators on the international standards of their electoral rights. For instance, in Ukraine, with the support of the European Commission for Democracy Through Law (Venice Commission), the non-governmental organisation, the Electoral Law Institute, publishes and disseminates to the participants of the election process a collection of 'European documents in the field of electoral rights.'[19] Voters' awareness of the 'soft law' documents encourages

[19] Y. Klyuchkovsky (ed.), *Europe's electoral heritage*, Proceedings of the Venice Commission, the Parliamentary Assembly of the Committee of Ministers, the Congress of Local and Regional Authorities of the Council of Europe, Kyiv 2009.

their use when applying to the election administration and courts, including the European Court of Human Rights, for the renewal of their electoral rights. This is where the principle works: 'Knowledge about citizens' electoral rights complicates violating these rights!.'

It is obvious that the reforms of the electoral legislation in Ukraine, an important result of which was the adoption of the Electoral Code of Ukraine[20] by the newly elected Verkhovna Rada of Ukraine on 19 December 2019, encourage the assessment of the use of the 'soft law' potential in organising and holding elections and the protection of the electoral rights of the citizens from possible violations of these rights. It is also worth noting that it contributed to the adoption of numerous recommendations which were formulated in the international 'soft law' documents concerning the codification of the electoral law of Ukraine, which had a branched and somewhat unbalanced character before the adoption of the Election Code of Ukraine. For instance, in its Conclusion No. 338/2005 of 2 March 2006 on the Law on Elections of People's Deputies of Ukraine, the Venice Commission stated 'the need for the codification of all electoral legislation of Ukraine in a single unified Electoral Code' (Venice Commission 2006, CDL-AD(2006)002rev).

In particular, the Venice Commission indicated in paragraph 102(d): 'The detail in which parliamentary elections are now regulated reinforces the need for the codification of all election legislation in Ukraine in a single unified Election Code. In the absence of a Code, it will be difficult to develop consistent practices in the administration of elections, and without consistency it will be difficult to promote public education and awareness of election procedures among election administrators, state and local government employees and the judiciary' (Venice Commission 2006, CDL-AD(2006)002rev).

In 2010, the Venice Commission even prepared a separate Conclusion on the Draft Election Code of Ukraine. Paragraph 57 of this Conclusion states: 'Notwithstanding a number of suggestions and critical remarks of the present opinion, the text of the Draft Election Code is an important step forward in the process of the electoral reform in Ukraine. It integrates a significant number of recommendations of different international organisations. The Draft Election Code can be further improved and the Venice Commission remains at the disposal of the Ukrainian authorities for any future co-operation in this field' (Venice Commission 2010, CDL-AD(2010)047-e).

[20] *Electoral Code of Ukraine*, "Official Bulletin of Ukraine" 2019, 4(1): art. 188.

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Conclusions

Considering the discussion above, 'soft law' should be understood as international advisory documents, most of which are intergovernmental resolutions containing statements, commitments, guidelines, reports, common positions, or policy statements or intentions. The 'soft law' is an important source of the contemporary international law and holds an important place in the international and national protection of the citizens' electoral rights. With the 'soft law' documents the international community is able to respond quickly to the new trends and challenges inherent in the modern democracy in the preparation and conduct of elections in different countries. The role of the 'soft law' documents in protecting the electoral rights of the citizens at the international and national levels will only increase, especially in new and sensitive areas of the electoral law. This, in turn, causes further research in the theory and practice of the application of the 'soft law' international documents in the global practice and in the national legislation of countries of different regions of the world.

Bibliography

Druzin B.H., *Why does Soft Law have any Power anyway?*, "Asian Journal of International Law" 2017, 7(2): 361–378.

Falkner G., Treib O., Hartlapp M., Leiber S., *Complying with Europe: EU harmonisation and soft law in the member states*, Cambridge 2005.

Fasone C., Piccirilli G., *Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in "Harmonizing" Electoral Rights*, "Election Law Journal: Rules, Politics, and Policy" 2017, 16(2): 247–254.

Fedorenko V.L., *Guaranteeing and protecting human rights and freedoms in Ukraine*, [in:] *The problems of legal regulation of human rights and freedoms at temporarily occupied territories of Ukraine. The optimization of protection model for rights and freedoms of Ukrainian person: collective monograph*, Lviv–Toruń 2019: 322–345.

Fedorenko V., *Civil (Personal) Rights and Liberties in Ukraine: Notions, System, and Problems of their Establishing*, "Prawa człowieka. Humanistyczne Zeszyty Naukowe" 2015, 18: 45–64.

Guzman A.T., Meyer T., *International Soft Law*, "The Journal of Legal Analysis" 2010, 2(1): 171–225.

Hillgenberg H., *A fresh look at soft law*, "European Journal of International Law" 1999, 10(3): 499–515.

Kazanskiy P., *Introduction to the Course of International Law*, Odessa 1901.

Klabbers J., *The redundancy of soft law*, [in:] M. Koskenniemi (ed.), *Sources of International Law*, London 2017: 189–204.

Klabbers J., *The undesirability of soft law*, "Nordic Journal of International Law" 1998, 67: 381–391.

Klyuchkovsky Y. (ed.), *Europe's electoral heritage*, Proceedings of the Venice Commission, the Parliamentary Assembly of the Committee of Ministers, the Congress of Local and Regional Authorities of the Council of Europe, Kyiv 2009.

Lancri M., *Compliance: From Soft Law to Hard Law – A View from France*, "Financial Compliance" 2019, 1: 89–111.

Nesterovych V., *International standards for the regulation of lobbying (EU, CE, OECD, CIS)*, "Krytyka Prawa" 2016, 8(2): 79–101.

Nesterovych V., *EU Standards for the Regulation of Lobbying*, "Prawa Człowieka" 2015, 1: 97–107.

Robilant A.D., *Genealogies of soft law*, "The American Journal of Comparative Law" 2006, 54(3): 499–554.

Ştefan O.A., *European competition soft law in European courts: a matter of hard principles?*, "European Law Journal" 2008, 14(6): 753–772.

Terletskiy D., *The phenomenon of "soft law" in the context of the provisions of Article 18 of the Constitution of Ukraine*, "Legal Bulletin" 2009, 2: 10–16.

 DOI: 10.7206/kp.2080-1084.402