

# Soft Law Concept in a Globalized World: Issues and Prospects

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## Abstract

The article is devoted to the soft law concept and its evolution in the modern world. Soft law reduces the degree of uncertainty in the law and at times is the only alternative to abandoning any regulation of people's interactions. It is pointed out that the norms addressed to particular agents may have different degrees of being mandatory. If we depict the whole system of rules as a continuum and place each rule along it according to how binding it is, then soft law would be placed in the "grey zone" between law and non-law. It is not yet the law, but it is not merely politics, morality, traditions and the like. It is something intermediate between the two. Soft law instruments create uniform "rules of the game" for actors in cross-border relations. The purpose of the soft law concept is to decrease the "zones of uncertainty" in the law. Because of this, soft law, whether it is employed in global law-making systems or not, may be viewed as a source of effective instruments that *decrease the level of uncertainty* within systems of law. At the same time, the alternative to soft law is not hard law but the *absence* of any purposeful regulation at all. It is my considered opinion that in the prevailing condition of fragmentation in the official sources of international law, where common approaches are not supported by universal acts and are more typically regulated by bilateral agreements, soft law can offer all interested parties steady, uniform guidelines arrived at through compromise for law-abiding and mutually beneficial behaviour, thus increasing the stability and certainty of cross-border interactions.

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## Keywords

soft law; hard law; lawlessness; source of law; soft law instruments; uncertainty.

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## Introduction

The longstanding discussion of soft law is today experiencing a rebirth. The very concept of soft law is rejected by its opponents, but its proponents adduce much

support for it<sup>1</sup>. The enflamed rhetoric of the debate reaches Shakespearean proportions. The actual existence of soft law is frequently subjected to scepticism and suspicion. However, much good comes from these discussions as they bear on our examination of the dichotomy between the legal and the non-legal and add new colours to the palette by introducing into legal discourse the category of regulatory instruments which have no *official normativity* but nevertheless have real, and frequently legally relevant influence on behaviour.

Although the problem of soft law has been a topic of debate for many years, Russian legal studies have fallen far behind their Western counterparts in taking up the issue. The long-standing dominance of *legal positivism* in Russia makes the situation more difficult. Generations of modern Russian lawyers grew up trained to repudiate any theory of law except legal positivism. Moreover, examining academic theories other than positivism, even without advocating them, was seen until quite recently as a crime against the government. Russian jurisprudence is one of the academic studies has suffered most from the entrenched authority of positivism. However, the soft law concept is a powerful and blatant challenge to legal positivism because the two doctrines are so obviously incompatible.

What precisely *is* soft law? Are there any objective facts that prove its existence in the regulation of human relations? What is the relationship between hard and soft law? What is the regulatory potential of soft law instruments? What are the prospects for further use of soft law instruments in the cross-border and domestic legal systems? Does soft law constitute a threat to the stability, certainty and uniformity of the international and domestic order, or is it an effective regulator of social interactions?

In section two of this article, I look at the reasons for the emergence of the soft law concept in the literature on international law. In section three, I analyse the conceptual foundations of the debate between the binary approach versus relative normativity. I note that in Russian legal theorists have recently entertained the idea of moving away from legal positivism toward acceptance of non-positive legal theories and approaches, and this shift has been steadily gaining acceptance in Russia. In section four, I articulate an original definition of soft law. Systems of

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<sup>1</sup> Anna Robilant has made a detailed classification of opponents and supporters of soft law. She notes “positions in the hard v. soft controversy are highly varied and nuanced”. Robilant relates to the soft law party both the “enthusiasts” of soft law and the advocates of “hybridity” while the hard law camp comprises the “sceptics” as well as the “detractors” of softness. According to “enthusiasts”, soft law is valuable for its flexibility, its organic responsiveness to social goals and its pluralistic thrust; they are confident that “soft law can be a powerful tool for social reform, bringing about legal change more effectively than traditional hard legislation”. Proponents of hybridity call for combining hard law and soft law processes. The sceptics denounce “soft law’s futile, unrealistic and, at times, perverse nature”; they emphasize the impossibility of enforcing soft legal instruments. The detractors of soft law unrelentingly denounce its “obfuscating and distorting effects”; they argue that “soft rhetoric masks hard practices” (Robilant A. Genealogies of Soft Law // American Journal of Comparative Law, 2006, no 3, pp. 504–511).

soft law encompass many different kinds of documents. Therefore, any academic discussion of this topic must start from an understanding of the limits of soft law (i.e., its scope). In that section I also differentiate between soft law and hard law. In section five, I argue that drawing on the concept of soft law at the level of international legal systems allows us to extend legal discourse by including various (and sometimes extremely diverse) documents that are not related to the formal sources of law and have no legally binding force but that directly or otherwise become a resource for complex multi-level regulation of behaviour. In section six, I look at the functional and regulatory potential of soft law, which can be used both as a supplement and as an alternative to hard law. Soft law can function as an auxiliary source for the interpretation of legal norms, as a means for developing legal norms, and as evidence for the existence of *opinio juris*. In the conclusion I affirm that soft law is a very effective tool for regulating cross-border transactions. Soft law reduces the degree of legal uncertainty and at times is the only alternative to abandoning any regulation of people's interactions.

## **I. Place and Time: Why is it Relevant Today and at this Point?**

The first question before us concerns the timing of the emergence of the soft law debate. Why did the potential of traditional sources of law to adequately regulate international relations prove insufficient by the mid-twentieth century? I believe there are several reasons, and they are multi-level. The primary reason is that the classical system of international law had ceased to respond to new needs in the context of globalization, and that the radical complexity and intensification of contemporary international relations provided the necessary prerequisites for the triumphal appearance of soft law<sup>2</sup>.

One can easily see how the emergence of soft law has been facilitated by *post-modernism* and *globalization* as diversity of ideas, increasingly blurred boundaries between sustained structures, and legal pluralism all take on a new life. International law, as both a doctrine and a regulatory system, was forced to respond to new challenges and was subsequently transformed by the quantitative and qualitative evolution of cross-border interactions<sup>3</sup>.

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<sup>2</sup> See Peters A. *Soft Law as a New Mode of Governance / The Dynamics of Change in EU Governance*. Diedrichs U. et al. (eds.) Cheltenham: Edward Elgar, 2011, p. 31 (Anne Peters identifies as an important factor for invoking soft law “the increasing complexity of global problems and scientific uncertainty about causalities. This complexity makes it more difficult to build a consensus of member states. Effective legal responses are often not clearly identifiable, while at the same time civil society demands that something must be done.”).

<sup>3</sup> See Ellis J. *Shades of Grey: Soft Law and the Validity of Public International Law // Leiden Journal of International Law*, 2012, no 2, pp. 313-334 (Soft law is often seen as a means to address certain acknowl-

Thus, one important reason why there is now so much interest in soft law is that the subjects of international legal relations are dissatisfied with the conservative orientation of the treaties and customs which are the traditional sources of international law. The procedures for establishing these two sources are quite difficult, formalized and cumbersome. In addition, official sources of law typically do not have the flexibility and operational adaptability to mount a prompt and adequate response to changing circumstances.

It is not unusual for a government (for various reasons) to prefer working with legally binding obligations which carry with them restrictions on sovereignty and which can bring about formal sanctions if obligations are not fulfilled. States wedded to using traditional regulatory procedures therefore encounter increasing difficulty in finding rapid and adequate solutions for urgent international problems. Of course, one cannot argue that treaties and customs have completely exhausted their regulatory potential. It would be more correct to say that today they are not able to provide *comprehensive coverage* for the whole range of diverse international interactions that need to be regulated.

In such circumstances, soft law provides an alternative way to fill in gaps in the law when there is a clear and urgent need for regulation of a particular situation but a total absence of applicable legal norms. Soft laws do not impose difficult procedures for their adoption, ratification, extension, etc. Moreover, they are better suited to the variations and complexity of cross-border relations, and that is why they are relied upon in practice more often than more elaborate traditional procedures<sup>4</sup>.

Another reason for the increasing acceptance of the soft law concept is the growing involvement of non-state actors in cross-border cooperation, and this in turn is accompanied by decentralized and informal regulatory processes. This has led to coinage of a new term in legal discourse: “privatization of legal regimes”<sup>5</sup>.

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edged weaknesses of the international legal system, namely: “the limited effect of many legal norms on state behaviour and the relative paucity of sanctions for violations, the democratic deficit, the slowness and reluctance with which international legal institutions respond to grave problems in international society, and the woeful inadequacy of many of those responses.”)

<sup>4</sup> See *Meyer T.* Soft Law as Delegation // *Fordham International Law Journal*, 2008, no 3, p. 897 (arguing that “the flexibility created by soft law is unique, because it allows legal rules to evolve more easily in response to political realities and the changed (changing) circumstances”); *Pergantis V.* Soft Law, Diplomatic Assurances and the Instrumentalisation of normativity: Wither A Liberal Promise // *Netherlands International Law Review*, 2009, no 2, p. 143 (suggesting that soft law can better follow the pace of technological advancement and enhance cooperation because of its plasticity and its ability to reflect the diversity of the international legal order).

<sup>5</sup> See, e.g., *Robilant A.* Op. cit. p. 500; *Zerilli F.* The Rule of Soft Law: an Introduction // *Focaal — Journal of Global and Historical Anthropology*, 2010, no 56, p. 8; *Büthe T., Mattli W.* The New Global Rulers: The Privatization of Regulation in the World Economy. Princeton: Princeton University Press, 2011, 320 p.

Many theorists and practitioners have noted the effective involvement of non-state actors in law-making processes<sup>6</sup>. However, international law is addressed to states alone and rejects such non-state actors as individuals, transnational corporations, non-commercial corporations and others as suitable immediate addressees of international legal norms. Soft law instruments in this context have a significant advantage as they can be addressed to non-state actors. Thus, soft law is an important channel for the involvement of individuals in regulatory processes<sup>7</sup>.

For example, it is difficult to ensure by means of hard law that the corporate practices of multinational companies are compatible with sustaining human rights because numerous mechanisms for implementing international law into national legal systems would have to be created and adapted to (or more likely defended against) lobbying from businesses as well as from governments<sup>8</sup>. Soft law instruments do not at all share this disadvantage<sup>9</sup>.

For instance, the Secretary-General Special Representative of the United Nations for Business and Human Rights chose to implement the UN “Protect, Respect, Remedy” Framework not by means of a unified convention but instead by proclaiming a soft law instrument — the Guiding Principles on Business and Human Rights, which was approved by the United Nations Human Rights Council in June 2011. The informal character of that soft law instrument had the advantage

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<sup>6</sup> See *Abbott K., Snidal D.* Hard and Soft Law in International Governance // *International Organization*, 2000, no 3, p. 423 (recognizing that non-state groups operating at both the domestic and international levels are increasingly key actors in the development of international legalization, and of soft law in particular).

<sup>7</sup> See *Shaffer G., Pollack M.* How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists // *Inaugural Conference, Geneva, July 15-17, 2008*. Online Proceedings Working Paper No. 45/08, p. 9. Available at: <http://ssrn.com/abstract=1156867> (accessed: 14.02.2018) (“The very emergence of the soft law concept reflects the multiplication of producers of international law in this context, including not only foreign ministries, but also sector-specific transgovernmental networks, supranational bureaucracies, multinational corporations and business associations, and international non-governmental organizations. These groups generally do not have the authority to create binding international law in a traditional sense, which is reserved to states, yet they use non-binding instruments to advance their policy goals, instruments which may be subsequently transformed into binding hard law, at either the national or international levels.”).

<sup>8</sup> According to Justine Nolan, the traditional understanding of human rights by international law makes them binding for states only insofar as they are subjects of international law: “This focus on States as the bearers of human rights responsibilities has meant that some corporations, in particular, transnational corporations (TNCs) have been able to operate largely in a legal vacuum, devoid of obligations at the international level.” See *Nolan J.* The Corporate Responsibility to Respect Rights: Soft Law or Not Law? Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect? *Deva S., Bilchitz D.* (eds.), Cambridge: Cambridge University Press, 2013, pp. 10-11. Available at: <http://ssrn.com/abstract=2338356> (accessed: 14.02.2018).

<sup>9</sup> Among the most prominent international instruments addressed to non-state actors can be called the ILO Declaration on Fundamental Principles and Rights at Work 1998, the OECD Guidelines for Multinational Enterprises 1976, the Global Compact, etc.

of involving a wider range of participants in the development and implementation of the necessary strategies. Such tasks as involving businesses in solving ecological problems and respecting human rights are also typically managed with the help of corporate codes of conduct and other documents of that kind.

## **II. Soft Law and the “Grey Zone”: between Law and Non-law**

### **1. Binary View vs Relative Normativity**

The external boundaries of the law are not clear; they are mobile and diffuse. Hence the question arises of what belongs to the “grey zone” located at the boundary between law understood as a system of legally binding norms and principles and other non-binding rules (such as morality, politics, traditions, etiquette, etc.) for which compliance is not legally mandatory?<sup>10</sup>

According to Jean de Aspermont, the general idea of “softness” rests on the presupposition that the binary nature of law is ill-suited to accommodate the growing complexity of contemporary international relations, and that contemporary normative instruments are needed to regulate the multi-dimensional problems of the modern world<sup>11</sup>. From this viewpoint the emergence of the concept soft law is evidence of a crisis in legal theory caused by using out-of-date techniques that are no longer able to explain and forecast any new phenomena in law-making and legal practices.

The opponents of soft law adhere to a *binary approach* which is founded on strict differentiation between legal and non-legal regulation and which does not acknowledge any “interpenetration” between the two. Normativity, i.e. the quality of being legally binding, cannot have any degree and cannot be less or more for any regulation; any prescription can be either legally binding or not — *tertium non datur*. The flippant formulation “there’s no such thing as being a little bit pregnant” shows the essence of this approach. “In other words there was a tendency to view soft international law in its relationship to treaty and customary international law as binary concepts, polar opposites, or even a bifurcation of one another”<sup>12</sup>. If that

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<sup>10</sup> See Shelton D. International Law and “Relative Normativity” / International Law. Evans M. (ed.). Oxford: Oxford University Press, 2006, pp. 180-181 (“In respect to ‘relative Normativity’ scholars debate whether binding instruments and Non-binding ones are strictly alternative or whether they are two ends on a continuum from legal obligation to complete freedom of action, making some such instruments more binding than others. If and how the term ‘soft law’ should be used depends in large part on whether one adopts the binary or continuum view of international law”).

<sup>11</sup> d’Aspremont J. Softness in International Law: A Self-Serving Quest for New Legal Materials // European Journal of International Law, 2008, no 5, p. 1076.

<sup>12</sup> Footer M. The (Re)Turn to “Soft Law” in Reconciling the Antinomies in WTO Law // Melbourne Journal of International Law, 2010, no 2, p. 244.

is so, there is no need to create or discover any interim forms between law and non-law. Therefore, the idea of soft law has been regarded as not only erroneous but also extremely detrimental because it undermines the very idea of legality along with the predictability and certainty of the legal order<sup>13</sup>.

The supporters of soft law subscribe to a *theory of relative normativity* (or graduated normativity, diverse normativity), looking at “normativity” as relatively inconstant and recognizing that the obligatory nature of norms in a legal system may vary. Allison Christians suggests that the distinction between something that is or is not hard law may not be binary, but may present a spectrum or continuum based on theories about obligation and its attendant features<sup>14</sup>.

Law may have various legal effects and consequences: direct and indirect, stronger and weaker ones. Normativity is not solid and one-dimensional; on the contrary, it comes in many shades and degrees.

Demands addressed to members of the social environment may have to be mandatory to different degrees. That is, a norm may be more or less peremptory. Hence, “law can be harder or softer, and...there is a continuum between hard and soft (and possibly other qualities of the law)”<sup>15</sup>. A norm may be part of a complex and differentiated flexible system of rules which are each endowed with a different prescriptive intensity and a graduated, relative normativity. Thus, Christine Chinkin concludes, “categories of hard and soft law are not polarized but lie within a continuum that itself is constantly evolving”<sup>16</sup>.

The idea that soft law occupies an interim “layer” between legal and non-legal phenomena is quite prevalent among supporters of the continuum approach<sup>17</sup>. As Peters notes, a clear distinction between “law” and “non-law” is difficult to delineate because the “outward appearance of law is unclear and ‘soft law’ presents itself

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<sup>13</sup> French scientist Prosper Weil, one of the severe critics of “relative normativity”, suggested: “To succumb to the heady enticements of oversubtlety and loose thinking is to risk launching the normative system of international law on an inexorable drift towards the relative and the random. It is one thing for the sociologist to Note down and allow for the infinite gradations of social phenomena. It is quite another thing for his example to be followed by the man of law, to whom a simplifying rigor is essential.” See *Weil P. Towards Relative Normativity in International Law? // American Journal of International Law*, 1983, no 3, pp. 440-441.

<sup>14</sup> See *Christians A. Hard Law & Soft Law in International Taxation // Legal Studies Research Paper Series*. Paper No. 1049, May 2007, p. 7.

<sup>15</sup> *Peters A., Pagotto I. Soft Law as a New Mode of Governance: A Legal Perspective / NEWGOV: New Modes of Governance*, 2006, p. 8. Available at: <http://ssrn.com/abstract=1668531> (accessed: 14.02.2018).

<sup>16</sup> See *Chinkin C. Normative Development in the International Legal System / Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton D. (ed.), Oxford: Berg, 2000, p. 32.

<sup>17</sup> See, e.g., *Cini M. The Soft Law Approach: Commission Rule-making in the EU’s State Aid Regime // Journal of European Public Policy*, 2001, no 2, p. 194 (noting that it is generally accepted that soft law lies somewhere between general policy statements, on the one hand, and legislation, on the other).

somewhat in the shadow; *soft law is in the penumbra of law* because it deploys specific legal effects apart from outright legal bindingness, and not merely political or otherwise factual effects (i.e. not being legally obliging, soft law carries legal consequences, and not merely political or otherwise factual effects)<sup>18</sup>. I believe that this is the most promising approach to soft law.

## **2. The Continuum View in Russian Legal Theory**

The tradition in Russian law-making of classifying legal norms according to different levels of obligation may not be widely acknowledged but is nevertheless quite widespread. Along these lines, Prof Gennady Maltsev identifies in the legal system norms of high, medium and low imperative force related to recommended (non-binding) rules. The recipient (or addressee) has the option of accepting the recommendation or rejecting it,<sup>19</sup> although the legislator endorses the recommended behaviour and wants the recipient legal entity to choose to follow it. This is a motivating, authoritative, or imperative effect of the recommended norm<sup>20</sup>. For regulating broad areas of social activity, such as markets, there should be a combination of rigidly binding rules, some default (or discretionary) rules, and recommended (non-binding) rules<sup>21</sup>.

In Russian theory of law the rules of behaviour prescribed by the norms of international law have been usually understood as a legal obligation acknowledged by governments and other actors constrained by international law. The concept of so-called non-binding norms<sup>22</sup> has usually been and still remains quite prevalent. A non-binding norm is a rule whose application in practice is recommended but is not obligatory. However, its implementation (when it is in fact carried out) entails adherence to specific obligations (or responsibilities) and also engenders obligatory legal relations between the subjects of the law. This method of providing recommendations in law is used when it is impossible or pointless to establish norms in the form of legal prescriptions pertaining to the varieties of behaviour that a participant in legal relations may choose. At the same time, the participant who adopts a compliant position has some freedom in choosing among varieties

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<sup>18</sup> See *Peters A.* Op. cit. p. 23.

<sup>19</sup> See *Maltsev G.V.* *Socialnye osnovaniya prava* [Social Foundations of Law]. Moscow: Jurist, 2007, p. 582.

<sup>20</sup> *Ibid.* P. 588.

<sup>21</sup> *Ibid.* P. 589.

<sup>22</sup> The legal scholars who acknowledge recommendations as specific elements of the law-governance system are well-known Russian scholars: M.I. Baitin, G.M. Velyaminov, V.M. Gorshenev, V.H. Kartashov, A.P. Korenev, V.L. Kulapov, G.V. Maltsev, V.S. Osnovin, A.F. Cherdantsev, etc.



of behaviour, while a model of more acceptable, effective and rational behaviour (from the point of view of the law-maker) is indicated.

A doctrinal foundation for the debate on the role of soft law instruments in the system of social regulation could be created by explicitly developing the method of “carrots and sticks” in Russian legal theory, by arguing that the respect for norms is grounded in the interest their addressees have in them, and by multiplying sources of law closely connected with the participation of private individuals in the processes of creating law<sup>23</sup>.

The binary theory of law is criticized for being too schematic and simplified. The extension of law is always blurred, and it is difficult to draw a distinct line between “law” and “non-law” unless we accept an extreme form of legal positivism. In the “gray zone” between “law” and “non-law” we are often faced with *quasi-legal phenomena* that, although they are *de facto* and not *de jure*, nevertheless have important implications for the law. This implies that there is a sliding soft-hard continuum of normativity in the law and in all rules of conduct.

Moreover, a binary approach is ill-suited as a response to the growing complexity and variety of activities requiring legal regulation.

The Universal Declaration of Human Rights approved in 1948 by the UN General Assembly serves as a vivid illustration of this. The Declaration’s original status did not go beyond UN-authorized recommendations that lacked any legal protection and in practice were constantly breached by states as there was no threat of sanctions. This meant that even those subject to international law did not take the provisions of the Declaration seriously. Prof. Hersch Lauterpacht aptly noted that states agreed to the terms of the Universal Declaration only because they would not be bound by them<sup>24</sup>. However, that situation has changed completely. The legal communities of both separate countries and the whole world now regard the Unified Declaration as a legally binding document that is subject to strict observance and implementation. Gross violations of its human rights provisions can bring about an immediate moral and political reaction as well as imposition of sanctions on the country in violation of them. This illustrates an actual transformation of the “non-legal” into the “legal”. That change can be easily traced through the evolution of the Russian Federation’s legal system from that of the USSR. Is it possible to identify a moment before which the provisions of the Declaration had been mere recommendations and after which they turned into binding criteria for all Russian courts (and thus for all the other actors too) used in justifying and legitimizing laws and regulations? When exactly did this transformation take place? Obviously,

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<sup>23</sup> In this context, it may be worth mentioning the concept of *nudges* as developed in debates on social regulation in the USA (See, e.g., *Sunstein C. Nudging: A Very Short Guide // Journal of Consumer Policy*, 2014, no 4, pp. 583-588).

<sup>24</sup> See *Lauterpacht H. International Law and Human Rights*. London: Stevens, 1950, pp. 397–398.

such an exact “boundary” does not exist. The norms of the Declaration existed in the “gray zone” between “law” and “non-law” for a certain span of time as they necessarily reflected all the historical upheavals of the Cold War, the rejection of totalitarianism, and the formation of a constitutional state in Russia.

Thus, the universal regulatory system may be graphically depicted as a continuum of norms with different degrees of obligation from those strictly imposed and backed by sanctions (at one extreme the continuum) to those that are recommendations merely encouraged by conviction and advocacy (at the other extreme). As we noted earlier, an approach acknowledging the usefulness of *recommended norms* is gaining more and more proponents in Russian legal theory. The aggregate of these kinds of recommended norms is the basis for soft law, but it is not limited to them.

### III. What is Soft Law?

#### 1. The Reasoning behind Soft Law

The principal question of how to define soft law as an independent kind of regulation which has come about because of the interaction of legal and non-legal phenomena is still open to discussion in the literature on international law. Academics and politicians use the term “softness” to characterize such varied phenomena as law, governance, control, coercion, arbitration, corporate activity, etc. The historical roots of soft law are found in either the widely accepted trade customs of the Middle Ages (that is, *Lex Mercatoria*), or in the theories of social law and legal pluralism that were popular in the late 19th and early 20th century<sup>25</sup>.

As an analysis of the academic literature shows, there is no accepted definition of the term “soft law”<sup>26</sup>. The response of legal theory to the emergence of soft law has been to offer a large variety of opinions<sup>27</sup>. Conceptual views and approaches

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<sup>25</sup> See *Robilant A. Op. cit.* P. 499–501.

<sup>26</sup> Waliul Hasanat emphasizes that “although the [soft law] concept is fairly well established, when it comes to definition there is ambiguity”. See *Hasanat W. Definitional Constraints Regarding Soft Law // AALCO Quarterly Bulletin.* 2007. 1&2. Available at: <http://ssrn.com/abstract=2321552> (accessed: 14.02.2018)

<sup>27</sup> According to Jay Ellis, soft law can be roughly divided into three categories, namely: (1) binding legal norms that are vague and open-ended and therefore (arguably) neither justiciable nor enforceable; (2) non-binding norms, such as political or moral obligations, adopted by states; and (3) norms promulgated by non-state actors. Authors do not necessarily restrict their definitions of soft law to one or another of these categories. The boundaries of the category may be drawn so as to include all three types of norm (A. Boyle); only norms, whether legally binding or not, promulgated by states (C. Chinkin, R. Baxter, R. Dupuy, D. Thürer); non-binding norms promulgated by states (H. Hillgenberg, I. Seidl — Hohenveldern, J. Carlson, Ch. Inglese, J. Klabbers); non-legally binding norms, regardless of authorship (G. Abi-Saab, I. Duplessis, J. Kirton, M. Trebilcock, M. Footer); or vague and general norms contained in international legal instruments (J. D’Aspremont, W. Heusel), to mention the most prominent examples. “The various definitions are generated by a series of criteria, sometimes used alone and sometimes in

from different authors and the academic schools vary<sup>28</sup>. One can safely assume that each commentator has their own image of soft law. “Soft law means different things to different people”<sup>29</sup>. There are heated discussions about even such an allegedly simple semantical question as whether the term “soft law” should appear in quotation marks or not.

There is no point in denying the criticism that the concept of soft law is amorphous and ambiguous because it does not reflect the actual state of affairs. That state can be partly explained by the relative newness of the soft law concept; processes typical in framing a concept such as accumulation of examples, generalization from them, and comprehension of practical and theoretical ramifications have only just begun. The soft law concept is criticized because a clear and precise definition of its scope has not yet been formed. However, such opinions seem to overreach<sup>30</sup>. It is tempting to ask whether distinct and acknowledged limits regarding the concepts of law, morality and traditions have been formed. Of course, they have not, and yet these phenomena have been subjects of theoretical study for centuries.

In the literature on international law, soft law has one relatively clear definition as an aggregate of stances (provisions, positions, principles) which are included in documents that are not formally binding sources of international law in the sense of Article 38(1) of the Statute of the International Court of Justice of the UN. These are stances which do not have obligatory legal force, but which can nevertheless have certain (indirect) legal consequences and also are aimed at imposing such consequences and do in fact lead to them<sup>31</sup>. In this way, soft law extends to (or cov-

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combination with others. The criteria are ‘normativity’ (or justiciability), enforceability, precision, and formal legal status.” (*Ellis J. Op. cit.* P. 3–4).

<sup>28</sup> For a detailed overview of the various estimates of soft law see: *Goldmann M.* We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law // *Leiden Journal of International Law*, 2012, no 2, pp. 2–29.

<sup>29</sup> *Weeks G.* The Use of Soft Law by Australian Public Authorities: Issues and Remedies // *UNSW Law Research Paper No. 2012-42*, September 13, 2012, p. 2. Available at: <http://ssrn.com/abstract=2148123> (accessed: 14.02.2018).

<sup>30</sup> Hungarian scientist Laszlo Blutman is most keen in the assessment of soft law: “Indeed, as a generic term, there is an argument that ‘soft law’ conceals as much as it reveals, making it at best unhelpful and at worst a misleading simplification. ... Almost every commentator dealing with soft law stumbles against the fact that an exact and meaningful definition of soft law borders on the impossible. ... So, we have a term that denotes something vague, by which every author means different things, or even worse, does not mean any defined phenomenon leaving the term in its undetailed generality in common legal discourse.” (*Blutman L.* In the Trap of a Legal Metaphor: International Soft Law // *International and Comparative Law Quarterly*, 2010, no 3, pp. 610-611).

<sup>31</sup> See, e.g., *Senden L.* Soft Law in European Community Law. Oxford, 2004, p. 112. Francis Snyder had formulated the classic definition: “Soft law — rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects”. See *Snyder F.* Soft Law and Institutional Practice in the European Community / *The Construction of Europe: Essays in Honour of Emile Noël*. Martin S. (ed.). Dordrecht: Kluwer, 1994, p. 198.

ers) the aggregate of rules which do not have a legally obligatory character, are not backed by sanctions, and are adhered to voluntarily as being in the interests of the actors in international law in forming and supporting a stable cross-border lawful order that is founded on mutual consensus and compromise. The wide acceptance and application of soft law in international practice and also in the practice of domestic courts and other regulatory agencies (or organs) which have adopted soft law positions (founded on a common interpretation of the rules of international treaties supported by the Vienna Convention of 1969) gives these positions or recommendations a *de facto* obligatory character<sup>32</sup>.

In Kenneth Abbott and Duncan Snidal's interpretation, the term "hard law" refers to three dimensions: legally binding obligations; rules and obligations with a high degree of precision; and delegation to a third-party decision-maker, such as a dispute settlement body. "The realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions"<sup>33</sup>.

Anne Peters and Isabella Pagotto argue that "the term soft law characterizes texts which are *on the one hand not legally binding in an ordinary sense, but are on the other hand not completely devoid of legal effects either*. ...soft law has the legal significance to *protect legitimate expectations* and to bind actors on the basis of the principle of good faith"<sup>34</sup>. Michael Bonell defines "soft law" as "referring in general to instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance"<sup>35</sup>. According to Anna Robilant, the formula "soft law" labels those regulatory instruments and mechanisms of governance that, while implying some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions<sup>36</sup>. Andrew Guzman and Timothy Meyer define soft law as "nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct"<sup>37</sup>. Dinah Shelton believes that soft law gener-

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<sup>32</sup> See Gribnau H. *Soft Law and Taxation: EU and International Aspects // Legisprudence*, 2008, no 2, p. 95. (Dutch scholar H. Gribnau highlights the three core elements of soft tax law. Firstly, the concept refers to "rules of conduct" or "commitments". The second element is that these rules or commitments are laid down in instruments have no legally binding force (they are not directly enforceable) as such. Although soft law lacks the possibility for legal sanctions, it may nevertheless produce indirect legal effects. Thirdly, rules of soft law aim at, and may lead to, some practical effect or impact on behaviour).

<sup>33</sup> Abbott K., Snidal D. *Op. cit.* P. 421, 422.

<sup>34</sup> Peters A., Pagotto I. *Op. cit.* P. 4, 24.

<sup>35</sup> Bonell M. *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles // Loyola Law Review*, 2005, no 1, p. 229.

<sup>36</sup> Robilant A. *Op. cit.* p. 499.

<sup>37</sup> Guzman A., Meyer T. *International Soft Law // The Journal of Legal Analysis*, 2011, no 1, p. 174.

ally includes an “international instrument other than a treaty that contains principles, norms, standards or other statements of expected behaviour”<sup>38</sup>.

Most soft law proponents underline that soft law is capable of producing considerable practical or even legal effects. Such consequences might in due course make soft law instruments the foundation for formulation of legally binding norms, or to serve as a means for their interpretation, or to manage social interactions directly. In the latter case soft law instruments are used either as a complement or as an alternative to hard law (e.g., for filling gaps). Of course, they may arouse reasonable expectations of behaviour conforming to soft law norms. Sometimes soft law instruments have a certain judicial effectiveness, that is, they are applied by the courts to formulate arguments and to justify judgements.

If the positions presented in the literature on international law are dissected and generalized, then soft law might be defined as a set of formalized theses (norms, rules, principles, criteria, standards) that have no legally binding force, are not backed with official sanctions but are followed voluntarily due to the authority of their creators, the involvement of the addressees, and mild peer pressure applied to potential (and actual) violators by an affected group (or community).

## 2. Soft Law vs Hard Law: Similarities and Differences

Hard law and soft law are not isolated from each other but have much in common and interact in many ways. They have inevitably coexisted through the years and should therefore be regarded as kindred, interrelated and complementary to each other. To begin with, they both act as a tool for social engineering, as they regulate human behaviour intentionally but not spontaneously. In both cases there is the formation and objectification of either multilateral or unilateral desiderata of the participants in rule-making. Moreover, hard law and soft law rules are functionally equivalent as they permit reaching similar or even identical goals using quite similar methods. In this context it is often said that soft law looks like hard law and basically functions like hard law<sup>39</sup>.

Soft law instruments, like the sources of any hard law, are drafted and passed by authoritative centres<sup>40</sup> within a framework of institutionalized procedures. Soft law rules have both authoritative interpreters and mechanisms for monitoring their

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<sup>38</sup> *Shelton D.* Normative Hierarchy in International Law // *American Journal of International Law*, 2006, no 2, p. 319.

<sup>39</sup> See, e.g., *Goldmann M.* Op. cit. p. 2, 11.

<sup>40</sup> Various structures might act as these authoritative centres. Eric Posner notes that the central authority — the government — does not create, interpret, and enforce soft law rules. See *Posner E.* Soft Law in Domestic and International Settings. Available at: <http://www.j.u-tokyo.ac.jp/coelaw/download> (accessed: 14.02.2018). This statement is only partly true. Soft law rules may emanate from government but not always. That is, the government is not the *exclusive* soft lawmaker.

implementation. Soft law rules are identical to legal rules in terms of their logical structure and textual presentation; as demands for specific behaviour, both are stated prescriptively and not descriptively. It would be quite difficult or even impossible for someone examining a particular soft law prescription without knowing its source or context to determine whether it is a legally binding law or a soft law norm.

Hard law and soft law then have the following features in common: 1) a set of rules aimed at regulating people's behaviour; 2) authorized actors using agreed-upon procedures to elucidate, alter and repeal those rules; 3) publication of the rules allowing for transparency so that the rules may be studied and be well-known to the appropriate agents; 4) enforcement and control of the observance of the rules by an authorized centre; 5) purposeful changes and adaptations in the rules to respond to changing realities. What then, distinguishes hard law and soft law?

A different range of criteria including linguistic and semantic features are useful in finding the differences between soft law and legal provisions. Perhaps the main criterion in this sort of differentiation is recognition or non-recognition of a document as a formal source of law endowed with legal force. It is generally agreed that use in a document of such terms as "shall", "agree", "undertake", "rights", "obligations", "enter into force" testifies to its status as legally binding, while the terms "should" and "commitment" are characteristic of soft law. Hard law terminology may sometimes be "softened" with such formulations as "to the extent appropriate", "as far as practicable", "as far as possible" and others<sup>41</sup>.

One more criterion hinges on the intention of the creators of a document to give it a binding or non-binding character at the moment when it is written. Thus an international agreement is hard law provided that the parties to it are also agreed upon its legally binding character. That binding character may be evident in the agreement's form, context and content. Employing a strictly formal approach to identifying the parties' intention regarding an agreement's binding character is absolutely unacceptable because the form of the sources of international law may be extremely varied. For this purpose it is necessary to dissect the text of the agreement, the circumstances of its creation, the positions of the official negotiating parties, preparatory materials and more.

Soft law instruments thus do not refer to sources of law, do not contain legally binding rules, are not backed by public sanctions, and are not enforceable. However, they have significant practical importance and may sometimes bring about definite legal consequences. Being widely acknowledged and employed in practice (primarily by courts), soft law instruments acquire their binding character *de facto*.

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<sup>41</sup> See *Hasanat W. Op. cit.* P. 14–15 ("If the States do not intend to create binding obligations, they use less imperative terms, e.g., 'will' instead of 'shall', and terms such as 'agree' or 'undertake' are generally avoided").

It is mainly the authority of the creators of a soft law instrument that brings about its acceptance as binding. This is especially so because, unlike hard law, soft law rules may emanate from non-state actors as well as from state actors.

Soft law does not derive any of its force or persuasiveness from the sovereignty of a state, from coercion by a state, or from the jurisdiction of a state. A distinctive characteristic of soft law is the absence of official sanctions. The essence of any soft law norm is that it cannot be enforced through state (or public) force. Therefore, it is impossible to bring charges against a wrongdoer or sue for damages under soft law. Any discrepancies and conflicts arising from the interpretation and implementation of soft law instruments are resolved not in a trial but by means of various mediation and conciliation procedures. The main purpose of such procedures is not to punish an offender or secure payment of damages but to settle the dispute. Thus, the manner of settlement indicates whether we are dealing with hard law or soft law<sup>42</sup>.

Obviously, soft law norms are in fact obeyed even though they are neither legally binding nor legally enforceable. However, it is wrong to suggest that they completely lack an enforcement mechanism and are absolutely without sanctions. The means of their enforcement include both positive and negative incentives. Moreover, the social pressure deployed to influence an offender can be quite considerable: nobody wants to be an outcast. The observance of soft law rules depends substantially on their relevance to the addressees' interests, the authority of the rule-makers, the quality of the texts, and the risks associated with non-compliance<sup>43</sup>.

Even though soft law instruments can exert considerable force or bring about consequences, they are not directly connected with legitimate state coercion, i.e. they do not rely upon international or national law enforcement systems.

There is a widely known statement of Anthony D'Amato that "soft law may be thought of as a naked norm, whereas hard law is a norm clothed in a penalty"<sup>44</sup>. On

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<sup>42</sup> This criterion is quite relevant to international law because international law lacks any universal system of centralized compulsion, and a majority of treaties regard various consultations and negotiations as the only possible way to resolve disputes. As is true for soft law norms, violating of many conventional international rules holds few negative consequences other than diplomatic protests or reputational losses. Guzman and Meyer emphasize: "Not only do states routinely make use of nonbinding soft law agreements, but even when they enter into hard law agreements international law provides quite limited enforcement." See *Guzman A., Meyer T. Op. cit.* P. 182. Some commentators have come to the startling conclusion that "there is no international hard law: all of it is soft". See *Posner E. Op. cit.* P. 9.

<sup>43</sup> According to Gabrielle Kaufmann-Kohler, soft law "security arrangements" include mainly such considerations as "a sense of respect for the authority of the 'soft lawmaker', social conformism, convenience, the search for predictability and certainty, the desire to belong to a group, and the fear of naming and shaming". See *Kaufmann-Kohler G. Soft Law in International Arbitration: Codification and Normativity // Journal of International Dispute Settlement*, 2010, no. 2, pp. 284–285.

<sup>44</sup> *D'Amato A. Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont // European Journal of International Law*. 2008, no. 3. p. 902.

the other hand, it is worth mentioning the thesis of H.L.A. Hart saying that “rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great”<sup>45</sup>. And then Hart notes: “What is important is that the insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations”<sup>46</sup>.

In summary, soft law is based on voluntary observance and non-judicial means of law enforcement. Why do actors comply with soft law? Various stimuli, such as common interests, expectation of positive or negative results (for instance, receiving financial help from a non-governmental organisation conditioned on following certain recommendations), the opportunity to influence a decision-making process, the threat of being excluded from participating in a profitable project, high reputational costs (such as blacklisting offenders and giving this information to general public using a “naming and shaming” technique) and the risk that hard-law documentation will be imposed in place of less burdensome undocumented self-regulation can all motivate various agents to comply with soft law norms.

### 3. Some Forms of International Soft Law

As a rule, the literature on international law relegates two types of instruments to the category of soft law<sup>47</sup>. First, there are official sources of international law which do not direct any particular action either because their norms have too much aspirational (declarative or uncertain) content or because they require additional instruments to before they can come into effect (for example, model documents). Second, there are instruments which are not formally part of the sources of international law and do not stipulate legal obligations strengthened by sanctions, but that do have some sort of legal significance (sometimes quite material significance) and legal consequences. Let us assert that soft law should be limited to the *second group of instruments*. The level of abstraction (normative generalizations) of a legal norm depends on the position of the observer (and interpreter). One can draw a parallel with domestic law systems, which maintain norms with varied degrees of definiteness from highly abstract principles to quite detailed rules. At the same time it seems evident that merely the degree of generalization and specification in either of these situations is not an exhaustive criterion for determining that a given rule has the status of a legal norm. Therefore, when norms and model instruments

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<sup>45</sup> Hart H.L.A. *The Concept of Law*. 2nd ed. Oxford, 1997. P. 86–87.

<sup>46</sup> Ibid.

<sup>47</sup> See, e.g., *Blutman L. Op. cit.* P. 606–607.



are quite clearly defined, they should be regarded as ordinary sources of law have a required degree of specificity.

The exact forms of soft law are not definitively described anywhere; they are situational and reflect only those questions that the parties involved are trying to settle. An extremely wide range of actors takes part in developing and enacting soft law instruments. Among them are, first of all, bilateral and multilateral agreements which impose legally non-obligatory political commitments. They can be promulgated by means of intergovernmental (or interdepartmental) agreements which do not require ratification or other similar provisions and also by “gentlemen’s agreements”, memoranda, communiqués, protocols of intent, declarations, acts concluded at summit conferences and so on. Second, there are non-obligatory (non-binding) decisions of international organisations and supranational bodies, including recommendations, adopted at international conferences. A third category includes declarative, advisory, informative and interpretive instruments of non-governmental organisations and also the decisions of international courts and tribunals<sup>48</sup>.

Certain specific kinds of soft law include so-called “soft codification” acts<sup>49</sup> (e.g., the UNIDROIT principles for international commercial contracts of 2010, the York-Antwerp Rules of 2004, the rules of securities and commodities exchanges and of financial clearing organisations, some materials of the ICC, UNCITRAL, UNECE, etc.) and private self-regulation and co-regulation instruments that are issued primarily by transnational companies and trade and industry associations<sup>50</sup>.

The list of international instruments that are soft law is quite varied. And the list is not closed; it is being constantly supplemented.

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<sup>48</sup> By analogy with the common law used in the Anglo-Saxon tradition, Guzman and Meyer called this category of acts international common law or in abbreviated form ICL. See *Guzman A., Meyer T.* Op. cit. P. 221–222 (“Binding legal rules thus remain the benchmark by which legality and quasi-legality are measured, but binding instruments are not the exclusive tool for defining legal obligations... We refer to it as common law because, like judge-made law in domestic systems, it is made by entities other than legislatures or, in the case of international law, states entering into treaties. Because ICL is made by many actors in a decentralized way and because there is no formal process through which it is created, it is impossible to generate a closed list of relevant sources of ICL.... ICL refers to those obligations that emerge from institutions that are authorized to speak about legal rules but whose pronouncements are nonbinding with respect to future conduct. It is this category of soft law that most deeply underscores the analytic need for a category of quasi-legal rules.... But such a view is regularly belied by state conduct, which employs a range of nonbinding instruments that have legal consequences precisely because they shape state expectations.”).

<sup>49</sup> See, e.g., *Gabriel H.* The Advantages of Soft Law in International Commercial Law: the Role of UNIDROIT, UNCITRAL, and the Hague Conference // *Brooklyn Journal of International Law*, 2009, no 3, pp. 655–672; *Kaufmann-Kohler G.* Op. cit. P. 283–299.

<sup>50</sup> See *Peters A.* Op. cit. P. 27.

## IV. Functional and Regulatory Potential of Soft Law

The proponents of soft law make various arguments in its favour. They criticise the traditional sources of law as being too conservative to adapt to current circumstances, while states are reluctant to endorse hard law obligations that seem to curtail their sovereignty. They praise the potential of soft law to involve the widest range of subjects (including private actors) in the rule-making process and invoke the need to provide a foundation of broad criteria for the interpretation of legal norms and other similar advantages of soft law<sup>51</sup>. This argumentation works well both at the international level and at the level of national legal systems. On the other hand, soft law opponents argue that there is a wide range of disadvantages<sup>52</sup>.

Soft law serves a variety of functions and values. Waliul Hasanat emphasizes that “soft law is soft in nature, flexible in function and free from strict formalities”<sup>53</sup>. Using criteria derived from function, one can distinguish some of the uses of soft law provisions. One function is that they fill the gaps in international legal regulation, proposing to actors in transnational relations the precise kinds of behaviour acceptable in the so-called “areas of uncertainty” where a norm of international law is unclear or missing. “It is evident that a soft law document is to be preferred to no document at all”<sup>54</sup>. Of course, the soft law instruments and the actions employed in their implementation should not contradict the general norms and principles of international law.

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<sup>51</sup> David Trubek, Patrick Cottrell and Mark Nance summarized the advantages of soft law instruments offered in the literature on international law and identified situations in which soft law could be preferable to the traditional sources of law, namely: 1) lower “contracting” costs; 2) lower costs sovereignty; 3) coping with diversity; 4) flexibility that is particularly important in the rapidly changing and technology-driven environment characteristic of globalization; 5) simplicity and speed; 6) increased openness that allows more active participation of non-state actors, promotes transparency, enhances setting agendas, and facilitates the diffusion of knowledge; 7) incrementalism. See *Trubek D., Cottrell M., Nance M. “Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity // University of Wisconsin Legal Studies Research Paper No. 1002, November 2005, pp. 11–12. Available at: <http://ssrn.com/abstract=855447> (accessed: 14.02.2018)*

<sup>52</sup> Michelle Cini has provided a list of soft law “drawbacks” found in the legal literature. She writes that “the most damning criticism of soft law is that it results in soft compliance: that is, as soft law is not legally binding, implementation must rest solely on the goodwill of those agreeing to and affected by it. Some might argue that this is a rather unstable foundation for policy consistency. Moreover, when soft law is used, parliaments tend to be bypassed; its content is often vague and non-judiciable; it may be inconsistent with existing legislation; it tends to be inaccessible and opaque, with little scope for public input; and it can allow judges and/or administrators a dominant role in the making of policy.” See *Cini M. Op. cit. P. 194*. Some commentators are certain that the efficacy of soft law instruments is comes at the cost of legal certainty. As legal certainty diminishes, soft law is favoured as a tool for to compensate for the areas of uncertainty in the law.

<sup>53</sup> *Hasanat W. Op. cit. P. 9.*

<sup>54</sup> *Barelli M. The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples // International and Comparative Law Quarterly, 2009, no 4, p. 964.*

In such cases, soft law instruments add to the existing legal norms by means of references, interpretations or direct reproduction of soft law provisions in the official sources of international law. For example, Section 8 of the Protocol to the Agreement between the Government of the Russian Federation and the Government of the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income, states that “the Contracting States shall endeavour to apply the provisions of this Agreement in accordance with the Commentaries on the Articles of the Model Tax Convention on Income and on Capital drawn up from time to time by the OECD Committee on Fiscal Affairs to the extent that the provisions contained in the Agreement correspond to those set forth under such Model”<sup>55</sup>.

The most important function of soft law is the help it provides in interpreting the official sources of law<sup>56</sup>.

Great precision and minute detail in legislative language do not always eliminate legal uncertainty. Indeed, uncertainty is an inherent feature of legislation because the system of linguistic tools available to write law is itself open to uncertainty. The organisation of any language as a symbolic system requires a process of decoding that will always be open to alternative readings.

The need for creative interpretation in reading legal texts will always exist, and so will the need to interpret legal rules because it is impossible to create absolutely unambiguous legislation.

In many branches of law, resorting to soft law documents in order to interpret hard law rules is a universally received and widespread practice. In recent years international courts and tribunals (the International Court of Justice, the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, etc.), as well as national courts have regularly referred to soft law instruments to justify their judgments. The European Court of Justice, for example, has referred to the OECD Model Tax Convention on Income and Capital in more than twenty judgments<sup>57</sup>.

Russian courts and fiscal authorities also employ soft law to form their argumentation and legal positions. For example, they regularly use the OECD Model Tax Convention on Income and on Capital and Commentaries to interpret double tax treaties, referring to their widespread use in international tax practices. Using

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<sup>55</sup> Available at: [https://www.nalog.ru/html/docs/in/mex/mex\\_in.doc](https://www.nalog.ru/html/docs/in/mex/mex_in.doc) (accessed: 14.02.2018).

<sup>56</sup> I fully agree with Sergey Marochkin that “the common tendency is that the use of international recommended acts has become a daily practice in all types of judgments”. See *Marochkin S.U. Dejstvie i realizaciya norm mezhdunarodnogo prava v pravovoj sisteme Rossijskoj Federacii* [Realization of International Law Norms within Russian Legal System]. Moscow: INFRA-M, 2011, p. 254.

<sup>57</sup> See *Dubut T. The Court of Justice and the OECD Model Tax Conventions or the Uncertainties of the Distinction between Hard Law, Soft Law, and No Law in the European Case Law // Intertax*. 2012, no 1, p. 2.

these documents, which the courts call framework instruments, judges establish general principles and approaches to the elimination of double taxation<sup>58</sup>.

In such cases, soft law is used in conjunction with legally binding documents as a subsidiary tool that courts employ to formulate a legal position, to articulate legal argumentation, to interpret one or another norm, to define the content of legal customs or to ratify the existence of such customs. Using soft law to resolve disputes contributes to the development of national legislation that is more compatible with established international standards and tendencies in regulation. At the same time any reference to a soft law document either in legislation or political acts of a supreme authoritative body (for example, Supreme Court, Constitutional Court) significantly facilitates their implementation by Russian courts.

It is worth mentioning that soft law is indispensable if the potential subjects are reluctant or unready to be bound by legally significant acts which always result in restriction of sovereignty, especially when delegating authority to supragovernmental organs<sup>59</sup>. This is a typical consideration for the former Soviet states that are still apprehensive about the supremacy of their stronger “Northern Neighbour” and concerned about losing their political and economic independence<sup>60</sup>. A similar situation is developing between the Russian Federation and the European Union where the countries are ready to agree on most issues except binding obligations<sup>61</sup>.

Adopting a soft law ideology facilitates the achievement of consensus in regulatory processes, and this is quite valuable whenever a joint decision requires a qualified majority of votes, and especially so if unanimity is required.

Soft law instruments often define “the utmost” in policy and law; they serve as a kind of compromise if it is impossible to establish intentions and agreements us-

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<sup>58</sup> See, e.g., Resolution of the Presidium of the Supreme Commercial (Arbitrage) Court of the Russian Federation, 15 November 2011, case No. 8654/11; Resolution of the Federal Commercial Court of the North-Western District, 8 February 2012, case No. A56-23858/2011; Resolution of the Federal Commercial Court of the Western-Siberian District, 31 January 2012, case No. A45-3310/2011.

<sup>59</sup> So, Abbott and Snidal point out that the “states, jealous of their sovereign autonomy, are reluctant to limit it through legalized commitments”. See *Abbott K., Snidal D.* Op. cit. P. 435. In turn, Gribnau notes “states treasure their sovereignty in the field of taxation, because taxation is a fundamental sign of national sovereignty”. See *Gribnau H.* Improving the Legitimacy of Soft Law in EU Tax Law // *Intertax*, 2007, no 1, p. 72.

<sup>60</sup> For more details see: *Dragneva R.* Is “Soft” Beautiful? Another Perspective on Law, Institutions, and Integration in the CIS // *Review of Central and East European Law*, 2004, no 3, pp. 279–324.

<sup>61</sup> Most decisions within the EU can be reached only by using soft law. For example, concerning European tax law, Mariola Seeruthun-Kowalczyk has said quite correctly: “Hard law generally proposes uniform solutions and in some cases, as with direct taxation, reaching a compromise among the Member States towards adopting uniform solutions might not be politically possible. In such cases, soft law presents itself as a solution to the potential deadlock on the road to integration.” See *Seeruthun-Kowalczyk M.* Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future. University of Edinburgh, 2011, p. 47. Available at: <https://www.era.lib.ed.ac.uk/bitstream/1842/6409/1/Seeruthun-Kowalczyk> (accessed: 14.02.2018)

ing the formulations of hard law<sup>62</sup>. In other cases, soft law permits “softening” the impact of legally binding norms to smooth over contradictions and fully take into account the (not always coinciding) interests of counter-agents<sup>63</sup>.

Pluralisation of the sources of law and decentralization of regulation (or outright deregulation) are worldwide tendencies, Lawmakers are encouraged, whenever the practice is acceptable, to delegate the tailoring of some concrete aspects of legal norms to those to whom the norms are addressed. A wide range of subjects such as courts, law enforcement organs, international organisations, individuals and their unions and associations are supposed to be involved in the law-making process. Very often such concretization is executed with the help of soft law instruments. The risk here lies in blurring what is meant by lawful behaviour. A lawmaker might adopt the following attitude toward the parties to taxation: “I know that you are clever and responsible people. I trust you. You understand how you must behave in order not to go too far. If it is difficult for you to understand, then begin a dialogue between the private actors and the authorities; involve consultants and the academic community. Uphold your position in court. I have set a norm, and it is your task to fill it with specific content.” We all become lawmakers in part under these conditions.

Soft law instruments have substantial flexibility that allows them to adapt to various conditions. As compared with the official sources of law they do not require any formalized procedures for their development, enactment, ratification, accountability or for revision and repeal later on. Harmonizing interests in the contractual process for developing a multilateral convention or an additional treaty is beset by well-known difficulties. Reaching consensus is much easier when working with soft law instruments<sup>64</sup>.

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<sup>62</sup> One example will serve as an illustration. Article 19(1) the ILO Constitution explicitly states that “When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.” See also *Cini M. Op. cit.* P. 194 (focusing on how soft law can open a path to regulation where no regulation would otherwise be possible).

<sup>63</sup> As Mary Footer points out in relation to the WTO’s laws, soft law may be used to constrain and “soften” hard law, particularly where there may be a conflict of interest between members over the distributive consequences of cooperation. See *Footer M. Op. cit.* P. 244.

<sup>64</sup> See, e.g., *Brummer C. Why Soft Law Dominates International Finance — And Not Trade // Journal of International Economic Law*, 2010, no 3, p. 631 (“Treaty-making often entails months — if not years — of negotiation between heads of state, their representatives, and domestic legislatures. And once created, they are hard to change, increasing the risk that rules generated through treaties fall out of step with practice. Soft law, by contrast, provides a decisively cheaper means of agreement-making. It carries what can be thought of as low bargaining costs due to its informal status.”); *Abbott K., Snidal D. Op. cit.* P. 423 (emphasizing that “soft law facilitates compromise, and thus mutually beneficial cooperation, be-

One more consideration must not be overlooked: soft law often serves as a “stepping-stone” to legal rules, as a direct “predecessor” in which hard law originates. This source of inspiration applies to both international and domestic legal regulations. After a soft law has been in place, there is no need to prove that its new method needs testing in some kind of preproduction model before being introduced as a finished product. In this capacity soft law can be a useful tool for securing agreement to future legal norms.

Examples in which soft law instruments are regarded as either a basis or a fluid prototype for law-making are so numerous and deeply entrenched that this practice may be considered firmly established and common. For instance, the Guiding Principles of the International Atomic Energy Agency (IAEA) were employed as the foundation for expeditious approbation of the Convention on Early Notification of a Nuclear Accident of 1986. An acceptance of soft law declarations has preceded most of the global multilateral conventions in international ecological law and in matters pertaining to protection of competition and human rights. Thus, the soft law Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1974 became an important step towards the acceptance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Declaration on the Rights of the Child of 1959 and the subsequent Convention on the Rights of the Child of 1989, Declaration on the Elimination of Discrimination against Women of 1967 and subsequent Convention on the Elimination of all Forms of Discrimination against Women of 1979, Declaration on the Rights of Disabled Persons of 1975 and subsequent Convention on the Rights of Persons with Disabilities of 2006, etc.

For national lawmakers in various separate countries, soft law documents also serve as signposts contributing to the improvement of legislation and its harmonization. Along these lines, many provisions of the Tax Code of the Russian Federation have reproduced soft law approaches to the regulation and the levy of taxes. These approaches had already been employed at an international level, and the same sort of influence of international soft law is also evident in substatutory (sub-legislative) norm-making concerning taxes and fees. As an example, statutes of the already approved Resolution of the Government of the Russian Federation dated 24 February 2010 No. 84 Model Agreement between the Russian Federation and Foreign Governments on the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and Property reflect approaches embodied in the OECD Model Tax Convention on Income and on Capital.

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tween actors with different interests and values, different time horizons and discount rates, and different degrees of power”).

In such cases soft law may be regarded as a component of a multistage process of setting norms at both the international and national levels. Some soft law instruments serve as a foundation for creating institutional structures. Some of them go on to become features of international organisations<sup>65</sup>.

The term “hardening”<sup>66</sup> which is sometimes used in the legal literature means a gradual transformation of soft law instruments into hard law<sup>67</sup>. I want to emphasize that a soft law rule may be transformed into a legal norm through various processes. For example, the international standards which were developed by the International Accounting Standards Board (IASB) and which are by their nature soft law were later included in the Regulations of the European Commission of 2003 and in this way were officially implemented in the legal system of the European Union. Some multilateral treaties either require or allow stakeholders to implement generally accepted norms and standards imposed by a duly authorized international organisation or joint diplomatic conference<sup>68</sup>.

As we can see, soft law rules can acquire a legally obligatory character either by interpreting and applying legal norms using soft law rules or by referring to them within the official sources of law.

According to Boyle, another important role of soft law instruments is in designing the detailed rules and technical standards required for implementation of some sources of law. “Environmental soft law is quite often important for this reason, setting standards of best practice or due diligence to be achieved by the parties in implementing their obligations. These ‘ecostandards’ are essential in giving hard content to the overly-general and open-textured terms of framework environmental treaties”<sup>69</sup>. The soft law character of technical rules and standards facilitates altering or supplementing them as scientific understanding develops or as political priorities change<sup>70</sup>.

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<sup>65</sup> The prominent examples are the Arctic Council, the Northern Forum, the Barents Euro-Arctic Council, the South Asian Association for Regional Cooperation, etc. See *Hasanat W.* Op. cit. P. 19–29.

<sup>66</sup> See, e.g., *Karmel R., Kelly C.* The Hardening of Soft Law in Securities Regulation // *Brooklyn Journal of International Law*, 2009, no 3, pp. 884, 950-951. (“Soft law sometimes can harden law when it is incorporated into statutes, regulations, and even treaties. ... And soft law may ultimately harden once normative positions and rationalistic preferences have moved sufficiently to make a binding commitment politically acceptable”). See also *Arner D., Taylor M.* The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation? // *University of New South Wales Law Journal*, 2009, no 2, pp. 488–513.

<sup>67</sup> As Gabriel points, although soft law instrument “do not begin as positive law, they can of course become positive law either by courts, arbitral tribunals, or legislatures adopting them, or by transactional parties adopting them in their agreements”. See *Gabriel H.* Op. cit. P. 659.

<sup>68</sup> See, e.g., Art. 207-212 United Nations Convention on the Law of the Sea 1982 // SPS Garant.

<sup>69</sup> *Boyle A.* Some Reflections on the Relationship of Treaties and Soft Law // *International and Comparative Law Quarterly*, 1999, no 4, p. 905.

<sup>70</sup> *Ibid.*

It is worth highlighting the subsidiarity of soft law, its derivative and supplemental nature in relation to legal norms. Here law has significant priority as soft law acts and any actions taken by their subjects should not contradict the norms and principles of law. The general opinion is that soft law instruments that are incorporated into law lose their “soft” nature and turn into an integral part of a legal system<sup>71</sup>. In my view however, soft law instruments are valuable quite apart from being either a supplement or a “step” towards the sources of law.

I want to draw attention to another aspect. Soft law is also a means of forming common, stable and uniform practices may eventually lead to the emergence of customary law. Hence, soft law instruments and their sustainable compliance can encourage widespread and consistent state practice and/or provide evidence of *opinio juris* for customary norms. It is also necessary to pay attention to two recent tendencies: first, the need in long-term international practice for creating common international norms is disappearing; second, what once seemed an essential feature of legal custom, the unwritten character of prescribed rules of behaviour, is falling out of favour. Thus, soft law can be used to confirm the existence of common law norms and to make their content more concrete.

## Conclusion

To sum up, norms addressed to particular agents may have different degrees of being mandatory. If we depict the whole system of rules as a continuum and place each rule along it according to how binding it is, then soft law would be placed in the “grey zone” between law and non-law. It is not yet the law, but it is not merely politics, morality, traditions and the like. It is something intermediate between the two.

Soft law has two parents: postmodernism and globalization. The soft law concept reflects objective realities in the complicated modern world where the speed of change is constantly increasing. When there is a real objective need for regulation in unavoidably fragmented and uncertain conditions, soft law very often serves as an alternative not to law but to a complete absence of legal norms.

Soft law instruments create uniform “rules of the game” for actors in cross-border relations. The purpose of the soft law concept is to decrease the “zones of uncertainty” in the law. Because of this, soft law, whether it is employed in global law-making systems or not, may be viewed as a source of effective instruments that *decrease the level of uncertainty* within systems of law. At the same time, the alternative to soft law is not hard law but the *absence* of any purposeful regulation at all.

It is my considered opinion that in the prevailing condition of fragmentation and uncertainty in the official sources of international law, where common ap-

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<sup>71</sup> Ibid. P. 901 (arguing that “once soft law begins to interact with binding treaties its non-binding character may be lost or altered”).



proaches are not supported by universal acts and are more typically regulated by bilateral agreements, soft law can offer all interested parties steady, uniform guidelines arrived at through compromise for law-abiding and mutually beneficial behaviour, thus increasing the stability and certainty of cross-border interactions. On the whole, the rules and principles of international law and soft law instruments are becoming increasingly harmonized, linked, and complementary to each other; and this blending fosters “hybrid” regulatory regimes and constructions.



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