EASTERN EUROPEAN JOURNAL OF TRANSNATIONAL RELATIONS

The importance of implementing soft law standards in legal and constitutional matters in the European Union system – the case of Poland

Kamil Spryszak
Jan Kochanowski University of Kielce, Poland
ORCID 0000-0002-3318-3742

Abstract. In today's dynamic world, where global challenges bring new, often previously unknown aspects, there is an urgent need to adapt the legal framework to contemporary realities. In this context, the European Union, as one of the most complex and integrated legal systems in the world, must constantly evolve to respond effectively to the challenges posed by modern society. One of the key elements of this adaptation is the implementation of soft law standards in the legal and constitutional framework of the European Union. The concept of soft law refers to norms and principles that, although not binding in the traditional sense, influence the shaping of legal practice and constitute an important tool for the interpretation and implementation of hard legal norms. In the context of the European Union, whose structure is based on a complex legal system covering both Community and national law, understanding and proper application of soft law becomes a key issue to maintain unity and effectiveness of action. This article will focus on analyzing the importance of implementing soft law standards in the context of the legal and constitutional system of the European Union. Both theoretical and practical aspects will be considered, showing how norms of this type influence the shaping and development of European law. Moreover, the article will attempt to assess the effectiveness of these standards in the context of the changing political and social realities that the European Union must currently face.

Keywords: European Union, soft law, legal and constitutional changes.

JEL Classification: K10, K39, K40.

Citation: Spryszak, K. (2023). The importance of implementing soft law standards in legal and constitutional matters in the European Union system – the case of Poland. *Eastern European Journal of Transnational Relations*, *7*(2), 43-48. https://doi.org/10.15290/eejtr.2023.07.02.05

Academic Editor: Andrzej Jackiewicz

Publisher's Note:

INTRODUCTION

In legal sciences, there is a distinction between hard law (legally binding, based mainly on international agreements and international custom) from soft law (called legislative law) (Klabbers, 1996, p. 169), created by international organizations and not legally binding (Boyle, 1999, p. 903), although despite this carrying some kind of obligation (Abbott & Sindal, 2009, p. 18). *Ius cogens* and soft law are treated as two poles of public international law. In many cases, the analysis of this issue is based on standards developed both in national legal system (Kuźniak, Ingelević-Citak, 2017), and in international law (Skuczyński, 2008, p. 327).

It is indicated that the tendency to use soft law is associated with the increasing diversity of countries that are members of international organizations, which makes it difficult to reach an agreement on the creation of hard law (Bierzanek, 1987, p. 139). These countries prefer not to use international agreements falling under the Vienna Convention, but to use more simple and flexible forms of communication regarding mutual obligations (Schäfer, 2006, p. 194).

In the European Union, the phenomenon of soft law is not new. Soft law instruments were already included in the founding treaties of the European Communities, but are now being used more and more often. One of the reasons why soft law is used in the EU is the need to diversify legal instruments, which in turn is expected to contribute to greater effectiveness, legitimacy and transparency of actions. The interest in soft law is primarily related to the implementation of the principle of subsidiarity in treaties, as well as to the discussion on new forms of the European legal system (governance). The Union is characterized by a special integration dynamics, where soft law is balanced by hard law, with hard obligations and the possibility of enforcing them (Hillgenberg, 1999, p. 513).

EUROPEAN UNION STANDARDS OF A SOFT LAW NATURE REGARDING LEGAL AND CONSTITUTIONAL MATTERS

EU soft law is a set of standards that play a preparatory and informational role, i.e. green and white papers, action programs (authored by the European Commission) and action programs (developed by the European Commission and, at a later stage, also by the Council). To this should also be added the interinstitutional communications and information communications issued by the Commission (Hofmann, 2021, p. 39-56). The second type of soft law standards are interpretative and decision-making documents (Cappellina et. al, 2022, p. 741). Their task is to explain primary as well as secondary law. Interpretative communications are usually issued by the European Commission. Another group are also administrative rules, which, although they do not have binding force, are assigned legal significance because they indicate how a Community institution will interpret and apply Community law (Baratta, 2014, p. 293-308). This type of documents also includes decision notifications, codes, and framework regulations issued by the European Commission. EU soft law also includes steering instruments, which include applications and declarations, joint declarations, interinstitutional agreements and Council resolutions (Senden, 2004, p. 5).

The instruments discussed complement, explain and interpret existing European regulations, e.g. in the form of announcements, program guidelines issued by the European Commission, as well as declarations of other institutions. The importance of soft regulations is increasing not only in terms of form, but also in their scope. Soft forms regulate increasingly new areas of European policies (e.g. protection of civil rights, employment policy, etc.) (Kabat-Równicka, 2017, p. 176).

However, the literature indicates that soft law in the EU is increasingly censored, and the main allegations are formulated in the context of theoretical findings related to the value of law, especially legal certainty in the formal and material sense (Świstak, 2013, p. 44).

It is worth paying attention to the position expressed in the European Parliament Resolution of 4 September 2007 on the institutional and legal effects of the use of soft law instruments. Paradoxically, by using an act of soft Community law, the European Parliament presents a critical position towards this type of acts. This is illustrated in

point 19 of the resolution, which emphasizes that the expression soft law and references to this instrument should always be avoided in all official documents of the European institutions (Biernat, 2012, p. 32-33).

The process of European integration has had and continues to have an impact on the legislation of the Member States. This phenomenon is most often referred to in the literature as the Europeanization of law. The analysis proves that until recently it mainly concerned the regulation of economic and administrative law, but over time, the deepening of European integration processes also began to include the relationship between Community and constitutional law .

The first country to open its constitutional system to integration processes was France. In the constitution of this country adopted in 1946, the introduction indicated that subject to reciprocity, France consents to the limitations of sovereignty necessary for the construction and defense of peace[18]. Particularly noteworthy is Article 11 of the Constitution of the Italian Republic (Orłowski, 2011) according to which Italy renounces war as an instrument of attack on the freedom of other nations and as a means of resolving international disputes: it consents, subject to reciprocity on the part of other states, to limitations on sovereignty necessary for order that will secure peace and justice among nations; supports and assists international organizations pursuing such a goal.

It is worth noting that membership in the EU, especially after the entry into force of the provisions of the Treaty of Lisbon, or the adoption of the principles contained in the Charter of Fundamental Rights, is a guarantee against possible undemocratic changes to the constitution in these countries and also safeguards fundamental values.

It is also worth emphasizing that these basic values, rooted in a given country's membership in the EU, result to a large extent from the accession conditions contained in the Copenhagen criteria established by the European Council in 1993 in Copenhagen. These criteria are:

1) stability of guaranteeing institutions, the rule of law, human rights and respect for and protection of minorities;
2) a well-functioning market economy and the ability to cope with competition and market forces within the EU;
3) the ability to assume the obligations of a member of the Union, including adapting to the objectives of the political, economic and monetary union, and adopting common rules, standards and policies that constitute EU legislation (*acquis communautaire*) (Copenhagen criteria).

The Copenhagen criteria have contributed to numerous internal reforms in many countries. Many provisions of the constitution were also changed and thorough changes were made to codes and important laws. It should be noted that the so-called the first Copenhagen criterion was introduced into the provisions of Article 49 TEU by the Treaty of Amsterdam (Szymański, 2011, p. 12). This is a characteristic example of how a standard from the area of soft law finds its way into a soft law treaty document.

The Court of Justice is also assigned a fundamental role. Considering the fact that resolving conflicts of values is the greatest difficulty in shaping the system of individual rights and freedoms, there is no doubt that maintaining two centers determining the responsibility of states for violating human rights at the European level means that in fact we should talk about standards of protection. The assessments made by the tribunals may be different, especially since, firstly, compared to the ECHR, the catalog of fundamental rights contained in the CFR is extended to include social rights, and secondly, it seems that the hierarchy of values of both tribunals is not identical. The Court of Justice strongly emphasizes its position as a defender of the EU's autonomy and subordinates its judicial activity to this task.

At this point, it cannot be omitted that the system of constitutional guarantees is also treated as the one that determines the minimum level of protection for the individual. The Constitutional Tribunal also follows the European trend of positioning itself as the guardian of minimum standards in the field of rights and freedoms (Kos, 2015, p. 54).

MECHANISMS OF INFLUENCE OF THE EUROPEAN UNION'S SOFT LAW ON THE PROCESS OF CONSTITUTIONAL CHANGES ON THE EXAMPLE OF POLAND

Each country's accession to the EU structure requires, in the short or long term, a revision of the existing constitutional provisions. In turn, the state's participation in the EU, which covers more and more spheres of socio-economic and political life, also requires interference in the text of the Constitution, although, as J. Szymanek claims, this interference does not have to take place at a single, specific moment, nor does it have to take some uniform, homogeneous shape. Despite everything, however, the successive and consistent integration and, as a result, the creation of a common EU body, puts on the agenda the need to sooner or later adapt national law, including that in the form of a constitution, to Community (EU) requirements. (Szymanek, 2013).

A state participating in the process of European integration must take into account a certain "opening" of the constitution to international law and a simple consequence of this, which is the clearly noticeable internationalization of the Constitution (Bałaban, 2004, p. 201).

The implementation of relevant EU standards into national law is only the first step to fulfilling the obligations arising from EU membership. A much more difficult task is to implement these standards, i.e. to introduce EU regulations into practice.

The membership phase involves monitoring a given member state in fulfilling its obligations. Meeting the accession criteria does not mean that after obtaining membership, the country will continue to respect democratic principles and other common values (Wójtowicz, 2017, p. 451). In a sense, this procedure forces the harmonization of law in the context of constitutional matters, which is why we talk about the phenomenon of "Europeanization of constitutional law" (Lis-Staranowicz & Galster, 2010, p. 29-52).

If any of the countries violates the adopted obligations, it is possible to implement the procedure provided for in Article 7 of the TEU. It provides, inter alia, that, upon a reasoned request from one third of the Member States, the European Parliament or the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU. The European Council, acting unanimously on a proposal from one third of the Member States or from the European Commission and after obtaining the consent of the European Parliament, may declare, after inviting a Member State to submit its observations, a serious and persistent breach by that Member State of the values referred to in Article 2. Following this determination, the Council, acting by a qualified majority, may decide to suspend certain rights arising from the application of the Treaties for that Member State, including the voting rights of the representative of the government of that Member State in the Council (Wójtowicz, 2017, p. 451).

National parliaments are assigned a fundamental role in the process of transforming soft law standards into the political practice of states (Wójtowicz, 2012, p. 184). In accordance with Article 12 TEU, the purpose of the provisions relating to national parliaments is to ensure conditions in which they can actively contribute to the proper functioning of the Union. The concept reflected in the treaty provisions and protocols is based on the assumption that this activity depends on having appropriate information about EU activities in various fields. Having this information is intended to allow national parliaments to use control mechanisms to influence decision-making processes in the Union more effectively than before.

It is worth paying attention to the *ex ante* parliamentary mechanism for observing the subsidiarity principle (the so-called early warning mechanism). Its main purpose is to draw the attention of the applicant, usually the European Commission, to the potential problem of non-compliance of a legal act with the principle of subsidiarity. The system includes granting the so-called yellow and orange cards by national parliaments. This mechanism is regulated in Protocol 2, and partly also in Protocol No. 1, on the role of national parliaments in the European Union. The parliamentary early warning mechanism is limited to legislative acts only. As a result, parliaments do not scrutinize delegated and implementing acts issued by the European Commission, or acts issued by the EU institutions under the CFSP, or international agreements concluded by the EU (Grzeszczak, 2015, p. 76).

By participating in political dialogue in the European Union, the Polish Parliament acts as a representative body, by its nature related to voters and should express their views. As part of the political dialogue, it expresses this by formulating legally non-binding opinions to the European Commission. Therefore, it does not interfere in the position taken by the Council of Ministers in the course of EU procedures.

The literature indicates that in Polish Europeanized constitutionalism, the legislative function of the parliament has been limited, and therefore the president's participation in its exercise has been reduced. It is also noted that this process also changes the formula of political relations between Poland and other EU Member States and third countries, taking the form of a common policy established by the European Council[33]. This sphere of EU activity has been significantly strengthened after the reform introduced by the Lisbon Treaty. However, there is no room for instruments such as ratification or refusal to ratify, or preventive control of the constitutionality of an international agreement. Although they still apply in foreign policy, they do not apply or they apply only to a limited extent in European policy.

The Constitutional Tribunal in its judgment of 24 November 2010 (sygn. Akt. K 32/09), already referring to the effects of the Lisbon Treaty, it concluded that the common feature is emphasizing the openness of the constitutional order towards European integration while drawing attention to the importance of the constitutional and political identity - and therefore, in essence, the sovereignty - of the Member States, the respect of which excludes the possibility of any implied change to the national constitution, especially in relation to the rules for transferring competences based on the Constitution. According to the Tribunal, on the basis of the treaty provisions that recognize the Union as an international organization and not a federal state, the importance of the principle of subsidiarity is emphasized and the parliaments of the Member States are granted the so-called last word, the lack of which suspends EU activities, and moreover, the effectiveness of the Union is made dependent on the internal constitutional procedures of its members (Stoyanov, 2013, p. 2035).

CONCLUSIONS

Perceiving the European Union as a certain set of norms, principles and values associated with the idea of democracy, it is worth pointing out that the constitutional standard in force today is an integral element of the consolidation processes taking place within the Union, and is also, in its own way, their foundation.

Each country joining the EU must respect a *minimum minimorum* of axiological values associated with the democratic form of the political system[38]. However, the mere acceptance of these principles and their constitutional articulation is not the same as the country's accession to the European Union. Rather, it is considered a necessary condition for the state's belonging to the family of democratic state systems, approving everything that constitutes the constitutional standard associated with properly understood constitutionalism.

The issues of shaping the principles of the political system are a very important attribute of state sovereignty. However, this is an area of particular sensitivity, where serious controversies often arise in societies sensitive to the protection of sovereignty, even when restrictions on its exercise may be a consequence of the state's membership in an international organization. In this situation, it is difficult to expect that states will agree to make hard law documents fully applicable in this area. Certain elements of obligations of this nature are exceptions to the rule (e.g. Article 2 of the Treaty on European Union, defining the democratic axiological system of the European Union, in connection with Article 7 TEU, specifying the sanction of violating democratic principles). A number of elements of democratic standards have and will most likely have a soft law nature in the future. This creates a more flexible mechanism for states and does not give the impression of limiting sovereignty to the same extent as the use of hard law instruments. To some extent, soft law standards can be perceived in terms of know how. The state does not cease to be sovereign, but can benefit from the achievements of other states and international public opinion regarding how particular political values (e.g. division of power, political pluralism) can be most effectively implemented into the political system.

REFERENCES

Abbott, K., & Sindal, D. (2009). Hard and Soft Law in International Governance. In Ch. Ku & P.F. Diehl (Eds.), *International Law: Classic and Contemporary Readings*. Lynne Rienner.

Bałaban, A. (2004). Krajowe, porównawcze i unijne prawo konstytucyjne. In Z. Ofiarski (Ed.), *Księga jubileuszowa z okazji 15-lecia Wydziału Prawa i Administracji Uniwersytetu Szczecińskiego*. Wydawnictwo Naukowe Uniwersytetu Szczecińskiego.

Baratta, R. (2014). Complexity of EU law in the domestic implementing process. *The Theory and Practice of Legislation*, *2*, 293-308.

Biernat, T. (2012). Soft law a proces tworzenia prawa w Unii Europejskiej. Wpływ soft law na konstrukcję i treść uzasadnień aktów normatywnych. *Studia Prawnicze. Rozprawy i Materiały, 2*(11), 27-38.

Bierzanek, R. (1987). „Miękkie" prawo międzynarodowe. *Sprawy Międzynarodowe*, 1, 91-106.

Boyle, A.E. (1999). Some Reflections on the Relationship of Treaties and Soft Law. *International and Comparative Law Quarterly*, *48*(4), 901–913. https://doi.org/10.1017/S0020589300063739.

Cappellina, B., Ausfelder, A., Eick, A., Mespoulet, R., Hartlapp, M., Saurugger, S., & Terpan, F. (2022). Ever more soft law? A dataset to compare binding and non-binding EU law across policy areas and over time (2004-2019). *European Union Politics*, *23*(4), 741-757. https://doi.org/10.1177/14651165221111985.

Grzeszczak, R. (2015). Model procesu legislacyjnego w Unii Europejskiej. In W. Brzozowski & A. Krzywoń (eds.), *15 lat funkcjonowania modelu rządowego procesu legislacyjnego a perspektywa porównawcza* (pp. 65-78). Rządowe Centrum Legislacji. Retrieved from https://cuue.wpia.uw.edu.pl/wp-content/uploads/2022/11/RCL_4_Grzeszczak.pdf.

Hillgenberg, H. (1999). A fresh look at the soft law. *European Journal of International Law, 10*(3), 499–515, https://doi.org/10.1093/ejil/10.3.499.

Hofmann, A. (2021). Types of EU soft law and their national impact. In M. Eliantonio, E. Korkea-aho & O. Stefan (Eds.) *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence.* Oxford: Hart Publishing.

Kabat-Równicka D. (2017). Soft law w Unii Europejskiej. In B. Kuźniak & M. Ingelević-Citak (Eds.), *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego".* Wydawnictwo Uniwersytetu Jagiellońskiego.

Klabbers, J. (1996). Redundancy of the Soft Law. *Nordic Journal of International Law, 65*(2), 167–182. https://doi.org/10.1163/15718109620294889.

Kos, K. (2015). Rola Trybunału Konstytucyjnego w multicentrycznym systemie ochrony praw i wolności jednostki, In P. Tuleja (Ed.), *Prawo międzynarodowe i europejskie a sądownictwo konstytucyjne*. Wydawnictwo JAK.

Kuźniak, B., & Ingelević-Citak, M. (2017). *Ius cogens, soft law. Dwa bieguny prawa międzynarodowego publicznego.* Wydawnictwo Uniwersytetu Jagiellońskiego.

Lis-Staranowicz, D. & Galster, J. (2010). O zjawisku europeizacji polskiego prawa konstytucyjnego. *Przegląd Sejmowy*, *2*(97), 29-51.

Orłowski, W. (2011). *Zmiany w konstytucjach związane z członkostwem w Unii Europejskiej*. Wydawnictwo WSE w Krakowie, WSIiZ w Rzeszowie i Wisza w Zamościu.

Schäfer, A. (2006). Resolving Deadlock: Why International Organisations Introduce Soft Law. *European Law Journal*, 2, 194.

Senden, L. (2004). *Soft Law in the European Community Law*. Hart Publishing.

Skuczyński, P., (2008). Soft law w perspektywie teorii prawa. In O. Bogucki & S. Czepita (Eds.). *System prawny* (pp. 325-343). Uniwersytet Szczeciński.

Stoyanov, D. (2013). Party Politics in Central and Eastern Europe. Does EU Membership Matter? by Tim Haughton. *Europe-Asia Studies*, *65*(10), 2035-2036.

Świastak, M. (2013). Nowe metody zarządzania zadaniami publicznymi w Unii Europejskiej a Traktat z Lizbony. In J. Tkaczyński (Ed.), *Lizbońska Unia Europejska: zagadnienia wybrane* (pp. 37-70). Wydawnictwo Uniwersytetu Jagiellońskiego.

Szymanek, J. (2013). Uwagi na temat euro-nowelizacji Konstytucji RP". Retrieved from www.biblioteka.oapuw.pl/wp-content/uploads/2013/03/szymanek-euro-nowelizacja-konstytucji-rp.pdf.

Szymański, A. (2011). Wprowadzenie. In: A. Szymański (Ed.), *Turcja i Europa. Wyzwania i szanse".* Polski Instytut Spraw Międzynarodowych.

Wójtowicz, K. (2012). Rola parlamentów narodowych w świetle postanowień Traktatów stanowiących podstawę Unii Europejskiej. In T. Mołdawa, J. Szymanek & M. Mistygacz (Eds.), *Parlamentarny system rządów. Teoria i praktyka*. Wydawnictwo Elipsa.

Wójtowicz, K. (2017). Standardy demokratyczne Unii Europejskiej a Konstytucja RP – doświadczenia praktyki ustrojowej. In J. Jaskiernia & K. Spryszak (Eds.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*. Wydawnictwo Adam Marszałek.