



Perception, Application, and Some Recommendations of Soft Law in Vietnam

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Abstract. In the contemporary world and especially in the current trend of expanding legal sources, “soft law” is becoming more and more popular. This term refers to legal tools that do not officially establish legal effect, but in fact, can bring about certain legal results by being recognized and applied by competent state agencies. In this article, the authors analyze current concepts of soft law, point out the reality of the perception and application of soft law in Vietnam, and propose some recommendations.

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1. Introduction

In the international context, more and more global problems require the participation of all humanity in solving them. In each country, the requirements of building a modern state, protecting human rights, and promoting freedom and democracy are also receiving more attention. For that reason, the traditional views on law have changed. Faced with new problems and the constant change of social life, sometimes the hard law proves to be no longer really effective and comprehensive; then, more flexible tools appear and fill the shortcomings left by the hard law, which is "soft law" - a non-traditional legal tool.

Soft law has been used for a long time in many fields and in many countries. It is recognized to a certain extent and become more and more influential. In Vietnam, the discussions about solving the law lead to no common conclusion despite the fact that it is being used daily and plays an increasingly important role.

The lack of adequate perception of soft law makes its use ineffective as expected. This article aims to provide a discussion about perceptions, assessments, and the use of soft law in Vietnam. Finally, it aims to propose recommendations for the recognition and use of soft law in Vietnam. Of course, within the scope of this article it will not be possible to clarify all aspects of soft law, the author chooses to clarify some aspects as stated below: Firstly, the article focuses on clarifying "soft law" as a source of law in relation to "hard law". Secondly, it also gives some evidence of soft law in many different fields, from international to national law in Vietnam. And thirdly the authors propose some recommendations for soft law in the Vietnamese context.

2. Literature review

Soft law is not a new issue in legal science in the world. There have also been many typical works on this topic. However, most of the publications only approach soft law in one or several aspects, not providing the most overview of this tool. Some typical projects in the world can be mentioned as follows: P. Westerman et al. (eds.) (2018), *Legal Validity and Soft Law*, Law and Philosophy Library Volume 122, Springer International Publishing AG; Cecilia M. Bailliet (2012), *Non-state actors, soft law, and protective regimes*, Cambridge University Press; Linda Senden (2004), *Soft Law in European Community Law*, Published in North America (US and Canada) by Hart Publishing; Weeks Greg (2016), *Soft Law and Public Authorities: Remedies and Reform*, Bloomsbury Publishing Plc; Dinah L. Shelton (2008), *Soft Law*, in *Handbook of International law*, Routledge Press.

Regarding the domestic research situation in Vietnam, there are only a few publications on "soft law". They analyze only some aspects of soft law and mainly consider it as a new source of international law, which can be listed here: Nguyen Thi Thu Trang (2020), "Soft Law" – the trend of modern international law, *Vietnam Legal Science Journal* No. 05 (135)/2020; Nguyen Manh Dung (2021), *Litigation in international arbitration: Some understandings of soft law sources in relation to procedural laws in international arbitration*, posted on the Homepage of the Vietnam International Arbitration Center.

In conclusion, soft law is a very novel issue. The perception and application of soft law in Vietnam are problems that are very necessary to research.



3. Research methods

Various traditional research methods from the social and legal sciences are employed by the authors to undertake the research on the perception and application of soft law in Vietnam. They include legal analysis, assessing the effectiveness of regulations, and employing the methodology of comparative legal research.

4. Results and Discussion

4.1. *The concept of soft law*

In the trend of expanding legal sources, the term "soft law" refers to a number of new legal sources in relation to hard law. Soft law has been discussed in the world for decades with different views on its approach.

Following a narrow approach, legal scholars consider soft law as a new source of international law, which is not listed in Article 38 of the Statute of the International Court of Justice (ICJ). Accordingly, international soft law does not include international treaties, international practices, general principles of law, case law, and doctrine, for example, the views of Rebecca Bymes, Petter Lawrence, and Baxter, Blutman (TRANG, 2020, p. 103-104). Some other scholars consider soft law as a tool of non-governmental actors in formulating, operating, and implementing a political agreement (BAILLIET, 2012, p. 202). According to Chinkin, soft laws are different legal documents, which are from treaties but only include soft obligations, to non-binding resolutions and codes of conduct developed and accepted by international and regional organizations, to statements drafted by individuals within a non-governmental organization but intended to set out original international principles (CHINKIN, 1989).

According to the broad approach, soft law is not limited to international law, they appear in national law as well. In this approach, the soft rule is often defined in the most general way. For example, Hage defines soft law as including rules in legal documents which was created by an agency that has no formal legislative power or by an agency that did not follow a proper procedure to create binding legal documents (HAGE, 2018, p. 28). Snyder believes soft law as rules of conduct that, in principle, are not legally binding but can still have practical effects (SNYDER, 1993, p. 19). Baldwin describes soft law as not primary law and authorization law. He explains that primary law is a law passed by Parliament, and authorization law is a secondary law created by another entity authorized by Parliament. This viewpoint is essentially placed in the context of national soft law (BALDWIN, 1995, p. 60-80). Similarly, Mackor believes that soft law is not officially legally binding, but is a system of well-defined rules and is recognized by an authority or an organization that does not have the authority to create such legal rules, which is recognized, applied, and has legal influence in practice (MACKOR, 2018).

In the author's opinion, the soft law approach in the broad sense will be more appropriate in terms of science and current legal practice. Because soft law is not only necessary in international relations, but also important in the national context in both the state and civil society life. Soft law supports the implementation of the goals of good governance, the rule of law, human rights and democracy. Civil society life is increasingly diversified, the need for self-governance is higher, the state is increasingly shrinking from the role of ruler to the role of management and regulation, in this context, soft law exists and plays an important role.

Although the concept of soft law is still controversial, there is no universally accepted definition. To what extent soft law is approached depends mainly on the political, legal, and cultural context of each country. Basically, it can be understood that soft law includes regulations aimed at regulating human behavior, although not given formal legal effect, but capable of creating certain legal effects. Accordingly, soft law excludes sources of law that are prescribed to have legal effect, such as treaties, customs, legal documents, etc. Besides, soft law is distinguished from ordinary social norms such as ethics, and religion and also distinguished from political statements. In addition, soft law also does not include directive documents, imposed by superiors on subordinates.

4.2. *Current status of soft law in Vietnam*

The current perception of soft law in Vietnam

In Vietnam, soft law is often approached in a narrow sense as the new source of international law. In this sense, soft law is often mentioned with positive perspectives to avoid the cumbersome and rigid of international treaties (MINH, 2018). Treaties including soft obligations or non-binding resolutions and codes of conduct in international law were used in Vietnam, for example, the 1948 Universal Declaration of Human Rights, the Rio Declaration on Environment and Development, the Regulations of the Basel Committee, or the International Bar Association Rules. However, they are only mentioned as legal tools affecting Vietnam law without considering them as "soft law" "hard law" or any other term. In recent times, scholars in the arbitration law field in Vietnam tend to pay more attention to, research, and express opinions on soft law as a useful tool to support legal proceedings (DUNG, 2020).

Soft law in the broad sense is rarely mentioned in Vietnam. In the Vietnamese domestic legal system, sources of law refer to legal normative documents and a number of other official sources such as customary law, and case law. In fact, the term soft law is not mentioned in the theoretical aspect. It has never been publicly mentioned by state agencies. Thus, it can be seen that Vietnam currently does not have a full and profound awareness of soft law, from a scientific to practical perspective. The reality of awareness is still very vague and unclear about the scope, roles, and



especially about the legal effect as well as the necessary mechanism to control soft law. Vietnam seems to have just considered soft law as a new source of international law and without any legal effect, because if Vietnam approached soft law in a broad sense and considered it to have some legal effect, perhaps soft law would have been mentioned more. Contrary to this, in many countries, soft law in its broad sense has been widely perceived and is recognized to have a certain legal effect through its use to regulate social relations and even apply in adjudication, for example in China (YANG, 2019).

The current situation of applying international soft law in Vietnam

Many international soft laws have been applied in Vietnam and have indeed brought about legal and social effects.

In the field of environmental law, when the Stockholm Declaration and the Rio Declaration began to gain influence, Vietnam made legal changes to match the spirit of these Declarations, even though they were soft laws, not binding on Vietnam to internalize. The 1972 Stockholm Declaration states: "Everyone has the fundamental right to live in a quality environment that allows a life of dignity and well-being, which he has a solemn responsibility to protect and improve for present and future generations" Similarly, in the 1992 Rio de Janeiro Declaration, it was also affirmed: "Everyone has the right to a productive, healthy and harmonious life with nature". On that basis, Vietnam has recognized this human right to the environment in Article 43 of the 2013 Constitution: " Everyone has the right to live in a healthy environment and has the obligation to protect the environment". Such provision of the 2013 Vietnamese Constitution can be determined to be influenced by the above declarations. Vietnam has also effectively applied the issue of sustainable development according to the Rio Declaration when stipulating in Article 63 of the 2013 Constitution that: "The State has a policy to protect the environment; manage and use effectively and sustainably natural resources; nature conservation, biodiversity; proactively prevent and combat natural disasters and respond to climate change. The State encourages all activities of environmental protection, development, and use of new and renewable energy". In fact, the right to live in a healthy environment has been noticed by our government and the whole society in recent years (DANG, 2015).

In international financial law, soft law has been applied. The State Bank of Vietnam has also amended and supplemented many regulations towards approaching Basel II standards, for example, issuing Circular No. 41 in 2016. In addition, the group of 10 commercial banks has restructured their organization, and established a department in charge of promoting the application of Basel II; for example, since late 2012, Techcombank has

established a team to implement the Basel II project (LINH, 2018). Although Basel's regulations are soft law, not binding on Vietnam, in fact, Vietnam's banking system has voluntarily complied and applied them quite effectively.

In the field of commercial arbitration, Vietnamese arbitration tends to be active in applying international soft law. The Vietnam International Arbitration Center (VIAC) has applied some of the International Bar Association (IBA) Rules to its operations in a variety of ways. The parties to the dispute in many cases have also used some of the IBA rules in their arguments (DUNG, 2020). This application is recognized as bringing many effects, helping the proceedings to take place quickly and conveniently.

The current situation of applying national soft law

National soft law has been and is being applied relatively commonly in Vietnam despite the vague perception of them, which is reflected in both the public and private sectors.

In the field of state administration, state agencies often promulgate legal documents containing regulations governing human behavior, but these are not legally effective documents.

For example, the Codes of Conduct on Social Networks which were promulgated by the Ministry of Information and Communications provided a general code of conduct and many specific rules. Although they are not mandatory and have no sanctioning mechanism, this Code of Conduct has also set standards for people to voluntarily comply with.

National Standards (TCVN) in many cases are also considered soft law and are widely applied. It is developed and announced for voluntary application in the field of production, business, and services.

In addition, a number of administrative documents such as the official dispatch (Vietnamese: Cong van) of the Ministry of Planning and Investment, the State Securities Commission has been guiding the application of provisions of the Enterprise Law 2014 and the Law on Investment 2014 when these laws take effect. Although these official dispatches are not normative legal documents according to Law on promulgating legal normative documents, they have still in fact been applied widely and therefore are really difficult to confirm that they have no legal value in reality (QUANG, 2022, p. 64-65). Accordingly, such official dispatch can be considered as soft law. In fact, these documents influence to society greatly, in many cases they are applied as binding directions. Problem is that how to handle the consequences when these documents are applied and contrary to legal normative documents. Currently, there is no clear mechanism.

Another interesting example is the Code of Ethics and Conduct for Judges issued by the National Council for Selection and Supervision of Judges. This Council is not authorized to create legally binding documents, so in



principle, this document is soft law. However, this Code of Conduct stipulates quite fully the ethical standards and code of conduct of Judges. Even this Code has been applied by people as a basis to denounce violations by judges (HUNG, 2022).

Some documents of political, and socio-political organizations are also considered as soft law in a broad sense when they are applied by state agencies because in principle these organizations are not authorized to enact normative documents. For example, the Charters of the Vietnamese Communist Party and of socio-political organizations are also applied when handling violations of cadres according to Art 78 of the Law on Cardes and Civil Servants 2008. Theoretically, the Communist Party's guidelines and policies can only be a source of content to legal normative documents, but cannot be a direct source of law; but in practice, they were considered as direct sources of law applied such as the Resolution 10 and Directive 100 of the Vietnam Communist Party on contracting agricultural products in some localities (HOI, 2008).

In professional associations, soft law is also applied regularly, for example, the Code of Conduct of the Labor Exporters Association for Vietnamese enterprises sending laborers to work abroad (CoC-VN) in 2018. It has received high praise from the Ministry of Labour, Invalids and Social Affairs.

In corporate governance, a study showed that soft law has not been applied in corporate governance in Vietnam until 2006 (HAI, 2006, p. 36). But up to now, soft law in this field has been widely developed and applied, for example, the Code of Corporate Governance for companies with a capital contribution of SCIC (State Capital Investment Corporation). The SCIC Code of Conduct has received positive feedback from businesses during the application process, and also received good reviews from experts (SCIC, 2017).

Finally, in Vietnamese courts, there are currently no official statistics on the application of soft law. However, according to the author's research, it seems that the court has not applied soft law in adjudication either in the argument or the decision reasons and there is no data showing that the parties have invoked soft law in their arguments. Accordingly, the application of soft law has not taken place widely in the courts.

5. Discussions and Conclusion

The practice of applying soft law shows that Vietnam has gradually developed and applied soft law quite widely. Based on the analyzed real situation of soft law in Vietnam, the author proposes some recommendations as follows:

Firstly, it is necessary to promote propaganda and improve understanding of soft law. This is an important factor in applying soft law more effectively because if the perception is unfamiliar and ambiguous, it is inevitable that

it cannot be applied appropriately and thoroughly. Professional agencies, organizations, and law training institutions can research, and organize seminars about soft law and make soft law popular in society.

Secondly, soft law is not only a supplementary source but also can be transformed into hard law if necessary. In order to promote the advantages of soft law, competent state agencies can develop positive regulations of soft law into hard law if they consider that the practice of applying such rules is effective and appropriate. It will help those regulations to be implemented more synchronously and thoroughly.

Thirdly, in order to overcome the current limitations in the application of soft law and to be more suitable to practical needs, the court should recognize arbitration decisions with references, citing international soft law if there is no basis to clearly prove that the application of such soft law is contrary to the basic principles of Vietnamese law.

Fourthly, in order to promote the development of soft law in Vietnam, the Court may invoke a number of important soft laws to assist in its argument to reach the conclusion of the judgment in cases where there is insufficient legal basis, the argument is not coherent, or when the soft law in that field is closely related to the legal relationship or the subject of the case. The Court may also accept the arguments of the parties in the case with reference to soft law if it is deemed convincing and not contrary to basic principles, in accordance with Clause 3, Article 102 of the 2013 Constitution on the Court's duty to protect justice, human rights and citizens' rights.

Fifthly, regarding the question of whether legal documents issued by administrative agencies should be considered soft law or not, according to the author, they need to be divided into 3 categories: 1. Legal documents issued by the Government, ministries, or local authorities promulgated under the Law on Promulgation of legal normative documents that are not soft law; 2. Documents on the organization and internal operations of administrative agencies may become soft law if recognized by the Court and invoked in dispute settlement. 3. Documents related to urging and organizing the implementation of legal documents (e.g. official dispatches) are only considered soft laws when: 1) such documents are promulgated according to the form, authority, and procedures prescribed by law; 2) used by a competent state agency as a basis for settling arising disputes; 3) not infringe upon the legitimate rights and interests of individuals, organizations, and enterprises.

In summary, soft law is still a very novel issue in Vietnam, so it is necessary to gradually study and apply it effectively, in line with the trend expanding legal sources and current modern governance trends.

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