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Research on "Soft Law" of Social Governance from the Perspective of "Soft Law" Theory

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Abstract: The overall goal of constructing the social governance pattern of co-construction, co-governance and sharing reflects the comprehensive promotion of modern government's governance and policy ideas in the social field. It also reflects the change from a unified government management system to a diversified and coordinated government and social governance system of the main body. Through comparative study, this paper focuses on several key issues of "Soft Law" theory, in order to promote "Soft Law" research in the field of social governance to provide a useful reference.

1. Introduction

The "Soft Law" in the study of rule of law has a deep foundation in the practice of social governance because of its characteristics of regulatory restraint, legal guidance, practical flexibility and universal application, strengthening and advocating "Soft law" plays an important role in the multi-subject cooperative governance based on the rule of law. This paper focuses on the echo of "Soft Law" and modern governance, the status quo of theoretical research, basic theoretical issues and governance concepts, and other key points of view, in order to promote the study of this field to provide reference.

2. Research on "Soft Law" From the Perspective of Global Governance

The research of "Soft Law" is located in the normative system corresponding to "Hard law", which actually plays the role of legal guidance and promotes the construction of harmonious social governance and good order. Although these normative systems have not become national laws and do not have the national mandatory force to guarantee the implementation, as far as "Law" and social governance are concerned, their functional attributes reflect the value goal of law. It is generally believed that, the concept of "Soft law" or "Soft regulation" originated in the field of international law and was founded in 1930 by Lord Mc-Nair, the first English judge of the International Court of Justice. In the common international understanding, "Soft law" refers to quasi-legal instruments that are not legally binding or whose binding force is "Weaker" than "Traditional law". "The observance of a common rule in the study of international law depends on the participation and recognition of the participants of the common will in the rule, on the public binding guarantee rather than on the legal compulsory system guarantee". As for the new trend of the development of "Soft Law", Laubert expressed his views in the New Deal: the decline of regulation and the rise of governance in modern

jurisprudence. He has studied a large number of academic theories about government governance model, including “Soft Law” governance. It also points out that the governance model recently adopted by the EU is a novel policy, which is called open coordination mechanism, and that this mechanism can play a role in inter-country employment, education, health and so on. This new chosen model allows the development of common goals without official state commitment and is therefore considered a novel “Soft Law” model[1]. In fact, from the perspective of global governance, “Soft Law” plays an important role in regulating subject behavior, promoting international cooperation and communication, building a harmonious international exchange and communication environment, and maintaining public value goals. However, at the beginning of the research, the scholars think that the “Soft law” has more representational function than theoretical significance, the research value is not big, so the “Soft Law” research has not aroused widespread attention. However, with the rise of public governance, the acceleration of globalization and the advancement of regional economic integration, worldwide, the study of “Soft Law” has been transferred to the category of domestic law, and more and more scholars pay attention to and explore the construction of “Soft Law” in modern social governance and public management. As for the basic theory research of “Soft Law”, there are always disputes in the foreign academic circles. The comparison between “Soft law” and “Hard Law” is inevitable. For example, the dispute over the concept of “Soft law”, is “Soft Law” law or not? How to fuse “Soft law” and “Hard Law”? How to extend “Soft Law” to social public governance. (see table 1)

From a practical perspective, in fact, more scholars and practitioners who are sensitive to the changes of the times focus on thinking that the consequences of the risk faced by international subjects due to the neglect of “Soft Law” should be determined according to the legal risk management rather than its legal characteristics. Therefore, researchers pay more attention to the study of “Soft Law” rules. From the perspective of constructing legal rules, Pierre Mary Dupuy argues that the “Components” of “Soft Law” are part of the contemporary law-making process[2], although there is an argument that its “Legal” effects and manifestations are uncertain[3]. Or logically sound is by definition binding. From a (legal) perspective, its “Legal” effect may not be directly identifiable, but it may affect a company’s legal obligations to third parties[4]. On one level, those who question the “Soft law”as law emphasize too much the superficial features of the legal system and neglect the more important function of law as the value level of existence, that is, the regulating and guiding function of the regulating object.

3. Theoretical Analysis of the Basic Attributes of “Soft Law”

In recent years, scholars in related fields have done some research on “Soft Law” and formed some research results, but there seems to be no general agreement on its precise concept and basic attributes. For the “Soft Law” and its provisions for the performance of the exposition, because of its own novelty, different sources and different ways of operation, it is always difficult to easily and accurately define and classify these provisions. In addition, there is the problem of classification of “Soft Law” relative to the definition of jurisprudence and the specific rules of Constituent Law. From Legal positivism, natural law to Legal realism, how to determine the essence of “Soft Law” in the legal genealogy? This is a theoretical problem of multiple legal interpretations.

From the point of view of various schools of thought, jurisprudential scholars have not reached an agreement on what constitutes “Law”. Thomas Hobbes, Carl Lewellyn, Auliffe Windle Holmes, Thomas Aquinas, or John Austin have analyzed the basic idea of soft disorder, but have not defined it in terms of soft law. Hilberg considers the definition of “Soft law” to be self-contradictory, although he does not point out why he calls “Soft law” self-contradictory. But it may be a matter of fact to say that “Soft law”, though not binding, is still used because of its relevance as a rule or as a legal attribute, with reference to Article 38 of the Statute of the International Court of Justice, which provides that

the International Court of Justice adjudicates cases under international law, the laws applicable at the time of adjudication are: 1. An international convention or treaty; International custom; General principles of law recognized by civilized nations; 4. Judicial precedents and the doctrine of the most authoritative public jurist as supplementary material for the determination of legal principles. It can be seen that the International Court of Justice has adopted conventions, treaties and international custom as the basic rules of international judicial application. However, in the international law environment, there is not a unified legal system of each country, and what makes the International Court of Justice decide the international affairs is the soft rule, that is, "Soft Law", which is accepted by all countries. And the actual effect of these rules can be recognized and guaranteed, that is, it exists in the uniform acceptance of community rules by all countries, although it has no enforcement power, but it also achieves the same or similar effect of law, effectiveness in maintaining international order.

Furthermore, the lack of clarity and enforceable obligation when trying to define "Soft law", and the fact that "Soft law" lacks clear and fixed enforcement mechanism, makes "Soft law" be regarded as non-binding. In particular, the "Soft Law" developed by industry and non-governmental organization depends on the outcome of effort or investment. Lauter Pacht is quoted as saying that "These provisions are 'invalid' and 'inapplicable' due to uncertainty and pending differences"[5]. Unlike hard law, the enforcement of hard law relies on the enforcement of courts or arbitral tribunals. In any case, the implementation of "Soft Law" will ultimately depend on the integrity of the parties. In addition, the enforcement of "Soft Law" may also be due to the deterrent effect of the negative impact of non-enforcement, obviously, this situation is often encountered. According to Handel and others, "Soft Law" is a legal phenomenon that is neither new nor limited to international law, and it means different things to different people." [6]knowable, or "Soft law," is defined as non-law. It means an endorsement that has legal characteristics, but is far removed from what has been established or agreed upon, or can be described as a (structured) legal system. In fact, other scholars define "Soft law" as "Global Law". They recognize that "Soft law" has resonated as a result of globalization, especially as it relates to global issues. The role and importance of "Soft Law" has been increasingly recognized in the legal field, and it is supported that "Soft law" can be regarded as a supplementary form of "Supervision" of "Hard Law", so as to solve the social and legal risks of related activities. In calling "Soft Law" global law, Jacques Le Goff cited the growing acceptability of "Soft Law" by citing the global use of UNCITRAL contract models. Because the contract model is widely accepted in the absence of any form of coercion, at least in the absence of any legal requirement for parties to do so. Another point made by Herndl and others is that the "Soft law" phenomenon is neither new nor limited to international law, contrary to Hillgenberg's definition. Trubek, Cottrell and Nance note that there is no new definition of "Soft law" as it has always played a role in European integration. They are defined as a generic term known as a "Generic term."[7]. The non-binding nature has interpreted some soft law as non-legal provisions, described "Soft Law" as voluntary, non-legally binding rules of conduct always included in the requirements of international law, and considered that "Soft law" can be developed into a binding legal standard. Vinogradoff and Wagner therefore not only saw a convergence between "Soft law" and "Hard Law", but also supported the idea that "Soft law" could be translated into binding legal standards. The concept of "Soft law" effectiveness means that "Soft law" can affect anyone, despite its voluntary, non-binding nature and the absence of enforcement mechanisms.

Table 1. Comparison and analysis table of "soft law" and "hard law"

Soft method	Hard method
Types	
Declarations, covenants, norms, initiatives, agreements, principles, standards, codes of conduct, memorandum of understanding, community participation agreements, neighbourhood agreements and ICPPSI, among other forms	Treaties, national laws, national constitutions, government regulations, regional, state and local laws, articles of incorporation, ministerial documents, contracts and subcontracts
Roles	
1. The search for voluntary and mutually understood corporate social responsibility, whether voluntary or not, tends to fill the gap created by hard law. 2. Encouraging transparency and accountability in the public sector through peer review and industry reputation. Bringing domestic issues of transnational projects to the forefront of international discussions. 3. Shape hard rules and turn them into hard rules.	1. Balancing profitable activities with legally defined social responsibilities. 2. Rules on transparency and accountability in the investment process are established and enforced through penalties and sanctions 3. Limiting local issues to domestic and national jurisdictions 4. Focus on everyone, including individuals.
Service	
1. Non-binding, at best persuasive, with no criminal consequences for non-compliance, but many companies face specific social and legal risks. 2. Failure to comply may exacerbate the social and political risks of the project. It can lead to complicity in human rights violations, environmental degradation and corruption, because violations go unpunished. 3. It can be used to initiate social litigation and may lead to changes in industry practices and legal procedures. 4. There is no impact on governance costs due to lack of monitoring and enforcement. 5. Change may be persuaded, but innovation is encouraged in its implementation. 6. Create a loosely defined framework and tend to self-regulate into the traditional government role of the industry. Kill. Incentives and related pressures may lead to new laws or changes in existing laws. Bring about changes in business practice and behavior.	1. Binding. Failure to comply with the provisions shall be punished accordingly. 2. Hard-law stress may be combined with other factors such as sovereign risk, a high tax regime and high labour costs. 3. Reducing complicity in enforcement, human rights abuses, environmental degradation, and corruption. Certainty in the implementation of the enforcement process. 4. Through monitoring, prosecution and enforcement increased administrative costs. 6. To make up for the failure of soft method, sometimes can better solve its shortcomings. 5. Only solve the problems of the moment

From the above analysis, two legal attributes of “Soft Law” are identified, as follows: “Soft Law” is a non-binding (voluntary) code of conduct, usually is not the inherent basis for law enforcement, the lack of law enforcement capacity mechanisms, there is no formal structure for its execution. This becomes clearer when comparing the “Soft law” with the “Hard law”. Abbott and SNÍ DAL define it as a precise legally binding obligation (or can be determined by an award or power of attorney, ruling or ruling). Compared with the “Soft law”, the “Hard law” refers to the legal rules made by the legislature or the legislature, which can be enforced and guaranteed by the judicial force. Nevertheless, due to the objective use such as industry custom, courts and arbitral tribunals must in some cases

interpret legal documents or bases according to them, that is, “Hard law” has a “Logo” of “Soft Law”. The other attribute is the voluntary attribute. Wilhemlms thinks soft law is voluntary. This voluntary agreement is not binding. Debra larae examines “Soft law” from the perspective of social justice. In her description of “Soft law” and “Social Justice”, she states that “Soft law” represents an “Unenforceable agreement” between states on a global scale[8]. Although her unenforceability appears to represent a global legal consensus, she argues that agreements, conventions, declarations and enforcement orders will be referred to by the International Court of Justice if they are recommended in the form of a United Nations resolution.

Despite difficulties in defining “Soft Law” or reaching agreement on what it means. But I think “Soft Law” has the double attribute of non-binding and voluntary. In nature, the essence of “Hard Law” includes the prevention of public interest infringement, the stabilization of social order, the promotion of good order in society and the protection of individual rights.

4. Theoretical Analysis of “Soft Law” Under the Ideological System of Modern Governance

Although “Soft Law” as a concept is seldom mentioned in the works of domestic public law, “Soft law” as a phenomenon already exists and is universal in domestic public law. In order to effectively regulate public relations and solve public problems, countries should always use various public system resources, the “Soft Law” norm, which exists in the carrier form of Political Law Convention, public policy, self-discipline norm, cooperation norm, professional standard and elastic law, is always indispensable in the governance of public domain[9]. From the perspective of the actual effect of legal rules, “Soft Law” has already taken root and germinated under the public environment such as social management and public governance. According to the general theory, “Law is the sum of norms formulated or approved by the state and enforced by the State Force”, and its mandatory attribute is self-evident.

In terms of the development of legal theory, Austin, the founder of the Legal positivism, closely combined law with the theory of sovereign (state), command and compulsion. For Austin, all “Laws” or “Rules” are “Orders”. It can be said that what people mean by law or rule is an order. The scope of the command is broad and includes many attributes of the rules that are far removed from the content of the law. So Austin takes it a step further. In his view, the difference between a legal order and other orders is this: If you ask me to do this, ask me what I should or should not do, then I will comply with your request, otherwise you will punish me with adverse consequences. Thus, the order is the result of Austin’s legal restoration, but there are many unique conditions and characteristics in addition to the simple issuance of the order. All “Laws” or “Rules” are, in Austen’s view, “Orders”. It can be said that what people call laws or rules in the precise sense are orders of a kind. The extension of command is very wide, including many and law far from the content with the attributes of the rules. Therefore, Austin makes a further analysis of “Command”. In his view, what distinguishes an order called law from other orders is this: If You Express to me a request for me to act in this way, asking me what I should or should not do, then I shall comply with your request, or you will punish me with unfavorable consequences. Therefore, the order is the result of Austin’s reduction of the law, but there are many unique conditions and characteristics besides the simple issuance of the order. Austin does not single out the characteristic attribute of law as a special order, he thinks that law also includes the two attributes of obligation and sanction. Obligation is to act in accordance with the Order of the restraint, sanctions for the order and the guarantee of the implementation of obligations, is mandatory as a condition for implementation.

However, from the daily life experience of human beings, we can find that there are still a large number of “Soft rules” in real life. Such rules are not protected by law enforcement, nor backed by state orders, but it plays an important role in people’s lives. In his book the concept of Law, H. L. A. Hart strongly criticizes Austin’s doctrine of law order, which is centered on the state, order and force.

He believes that there are various forms of law in human social life, which is an unavoidable fact. These “Authorized rules” also have the attribute and meaning of law. And it is clear that much of the statute derives not from the dictates of the sovereign but from the habits of man. This is obviously untenable for the claim that the law is a sovereign command of political dominance. The concepts of sovereign, command, coercion and general obedience constitute the basic connotation of Austin’s theory of legal command. In terms of methodology, the empiricism Legal positivism is a feature of Austin’s legal imperative theory, which is based on a theoretical model with obligations at its core. It can be said that Austin’s legal concept of obligations model similar to Selznick’s so-called “Repressive law”. In the repressive society, because the sovereign has the supreme unlimited discretion, the repressive law is closely combined with politics, thus shielding the alternative social sanctions and forming the unlimited expansion of the discretion, all this can be understood as the inevitable result of “The lack of ruling resources”. Due to the defects of Austin’s theory and the strong criticism of the theoretical circle, Austin’s theory of legal command gradually lost its charm.

Hart’s rule-practice theory holds that the function and significance of law to modern society is not only through coercion to achieve social control. He argues that the main function of the law is to control, direct and plan our lives in a variety of ways outside the courtroom. He believed that not all laws were dictated by sovereign powers and that not all laws relied on enforcement to ensure their enforcement. By means of the philosophy of linguistic analysis, the concept of sovereignty is separated from the concept of law so that the concept of coercion and sanction is no longer a necessary factor in legal discussions. The different understanding of mandatory elements is an important sign to distinguish Austin’s theory of legal imperative from H. L. A. Hart’s theory of legal rules. The former is summarized as the model of obligation of legal concept, while the latter is the model of authorization of legal concept. The duty mode is centered on the order of the Sovereign, while the authorization mode is based on the duty mode by adding secondary rules (including alteration rules, Recognition Rules and adjudication rules)[10].

In their book law and society in Transition: Toward Responsive Law, Berkeley luminaries Philip of Swabia and Philip of Swabia Nonette, from the Sociology of law point of view, this paper expounds the importance of purposefulness to legal system and legal order, and holds that law is “A convenient tool to respond to various social needs and wishes”. Three types of theories of law in the development of law are put forward, that is, repressive law, autonomous law and responsive law. The repressive law maintains order as the core direction, the autonomous law takes the procedural justice as the direction, emphasizes the rule-centralism, strictly abides the boundary between law and politics, the court does not interfere in the making of the universal rules, but at the same time get the promise of program autonomy. Responsive law emphasizes substantive justice and advocates de-rule centralism, with rules subordinate to principles and policies. At the same time, the legitimacy of the civil autonomy order is recognized, and a legal pluralism appears. The responsive law is compared with the repressive law and the autonomous law.

It can be said that with the development of the times, the responsive law development is a kind of high-level legal development pattern. In responsive law, coercion is replaced in the legal system by various systems of encouraging, self-supporting obligations. Purpose takes the place of coercion, and then occupies the central position in the formation of the rule of law order. It can be said that the responsive approach is a goal-oriented approach. Its typical characteristics include: problem-centered decentralized management instead of imperative management, encouraging consultation, sharing decision-making and justifying decision-making, regarding consent as a test of rationality, and so on[11]. From the point of view of the theoretical development of the concept of law and the social function of law, “Soft Law” must also be law from the point of view of the concept of responsive law. It contains many ideas such as “People-centered” and judicial protection of human rights. The requirements of the modernization of the country’s governance capability and governance system in the new era will necessarily require a positive response to all aspects of social governance, promote

the spirit of rule of law to go deep with the idea of "Co-construction, co-governance and sharing".

5. Research on "Soft Law" in the New Era of Innovative Social Governance

Social governance of modern government points out that government responsibility can not be understood as government dominating everything, not control in the traditional sense, but to do a good job in public service, public safety, public management, improve interest coordination, interest expression, interest protection mechanism. At the same time, it is pointed out that it is the key to solve the problem to deal with some basic relations in the process of social governance. Namely: deal with the relationship between maintaining stability and correctly safeguarding rights and interests. Maintaining rights is the basis of maintaining stability, the essence of maintaining stability is to maintain rights, and the relationship between social vitality and social order should be well handled. Social development needs to be dynamic, but this dynamic must be orderly, we must deal with the relationship between the rule of law and Tokuji, autonomy. Law is the written morality, morality is the internal law. In the process of grass-roots self-government, we should attach importance to the role of morality in regulating citizens' behavior, take the law as the benchmark, give full play to the normative role of village regulations and folk conventions, make the enjoyment of rights consistent with the performance of obligations, and finally realize the positive interaction among the three, mutual promotion.

The above important statement makes clear the relationship between law and morality in the environment of grass-roots governance, between the rule of law and Tokuji, and calls for taking the law as the criterion, but at the same time pay attention to give full play to the normative role of town regulations, civic conventions and articles of association, and affirm the important function of other social norms outside the legal system in modern social governance. This paper affirms the value of the rule of "Soft Law" in the theory and practice of innovative social governance from the angle of multi-cooperation governance, and provides the strongest guidance and follow for the research and promotion of the construction of "Soft Law". In this sense, we will implement the new concept, new ideas, and new strategies for the comprehensive rule of law of socialism with Chinese characteristics, unswervingly follow the path of the rule of law of socialism with Chinese characteristics, and persist in taking the people as the center, the era calls for the research and theoretical construction of "Soft law" to realize "Co-construction, co-governance and co-sharing" of innovative governance.

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