

Criteria for selecting case law in some countries and lessons for Vietnam¹

Truong Thi Thu Trang

Ph.D, Institute of Social Sciences Information, Vietnam Academy of Social Sciences

Email: truongthutrangissi@yahoo.com

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Abstract: *In most countries around the world, case law plays an increasingly important role. This is caused by defects in written law. In cases where the law has no regulations or unclear regulations, the Judge is considered an additional legislator, or in other words, the Judge has the role of creating the law when providing solutions to the specific cases. Therefore, the construction and promulgation of precedents to serve trials in other countries has been receiving increasing attention. However, not all legally effective judgments and decisions of Courts at all levels become precedents. For a judgment or decision to become case law, it must meet certain selection criteria. In different countries, the criteria for selecting case law will also be different. However, with the trend of convergence, criteria for selecting case law of countries generally have some similarities. The article introduces the concept of case law; analyzes criteria for selecting case law of some countries around the world and draws some lessons for Vietnam.*

Keywords: Case Law, Criteria for Selecting Case Law, Older Brother, USA, France, Japan, Vietnam

1. Background

Case law has had a long history in world jurisprudence. It exists in the form of judicial decisions aimed at regulating new and emerging issues to align with the development of modern society. In Vietnam, in 2016, the Supreme People's Court officially announced the first six case laws, and by October 2023, 70

case laws had been promulgated². As a country without a longstanding history of constructing and applying case law, Vietnam has faced challenges in selecting effective court rulings to serve as case law. Therefore, it is important to explore the criteria that different countries across the world use to select case laws in order to draw practical and theoretical lessons for Vietnam.

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² Reference: *Compilation of 70 case laws promulgated in Vietnam*, <https://thuvienphapluat.vn/banan/tin-tuc/tong-hop-70-an-le-da-duoc-cong-bo-o-viet-nam-6712>.

2. Definition of case law

The term “case law” lacks a consistent universal definition. Countries with different legal traditions hold varying perspectives toward case laws. For countries following the Common Law tradition, case law is referred to as “a law formed by precedents”. This is considered a primary source within the legal system. For example, in England, case laws are understood as “cases that have been decided providing a basis for adjudicating subsequent cases involving similar events or legal issues” (Lindquist and Cross, 2005). Similarly, in the United States, case law is “the judicial practice of recognizing and applying new rules in the adjudication process. Resolved cases serve as the basis for judgment in later cases involving similar circumstances or issues” (Garner, 1999).

Meanwhile, countries following the Civil Law tradition do not recognize case laws as a mandatory primary source within the legal system. For instance, in France, case laws are understood as “judgments and decisions of the courts, including methods for resolving new legal issues and serving as reference for resolving similar cases in the future” (Troper and Grzegorzczak, 1997). Similarly, in Japan, case law is just a component in forming court judgments and decisions, and it is necessary to appropriately apply this component only when resolving disputes of a specific case (Oda, 2009).

As such, case laws may have either broad or narrow definitions. As a whole, case laws refer to court judgments and decisions that have legal validity and are circulated in society. Narrowly defined, case laws encompass court judgments and decisions regarding events or legal issues presented

in a specific manner for other courts to consider (adhere to) in similar cases thereafter.

Within the scope of this article, case laws are understood as court judgments or decisions that establish rules or reliable legal principles for deciding similar cases in the future (Garner, 1999).

3. The criteria for selecting case laws in selected countries

In some countries following the common law tradition (such as England, the United States, and Australia), case laws are selected when they meet one of the following criteria:

When there is no existing law but the court still has to adjudicate to ensure justice: the judgment becomes precedent, meaning it becomes law for similar cases. Once a ruling has been pronounced, it must be considered a solution for similar issues in the future; judges must adhere to the judgment of similar cases that had been previously adjudicated.

When the law is unclear, judges must independently interpret and apply the law in their judgments. Such judgments become law for similar situations.

When there is existing law but new situations arise that the law did not anticipate, judges must apply existing law to these new situations (Ward and Wragg, 2005; Edlin, 2007; Kirby, 2007).

In countries following the Civil Law tradition, the criteria for selecting case laws are not uniform. In France, the criteria for selecting case laws include: the case law originates from judgements of the highest court in the court system (Supreme Court or Council of State); the content of the case law must involve legal issues; the content of the case law must contain legal

opinions; case laws must arise from real-life disputes (Troper and Grzegorzczuk, 1997). In Japan, the criteria for selecting case laws include: (1) Judgments on important issues related to the Constitution and law codes but have not had any precedent in the Supreme Court; (2) Precedents from the previous appellate courts but are judgments appearing for the first time in the Supreme Court; (3) Judgments and decisions of the The “Grand Bench” (大法廷 Daihōtei) changing the precedent of the Supreme Court; (4) cases which that the circumstances of the case have become justice or received implicit recognition will gradually become case laws; (5) Cases deemed necessary for publication because of their particular importance to case laws and decision-making situations (on the principle that these cases had not published in the collection of case laws) (Supreme People’s Court Legal Affairs and Scientific Management Bureau, 2019). In South Korea, the criteria for selecting cases are: rulings must contain legal opinions (legal interpretations) of a generic and widely applicable nature that can be applied to similar cases (Joon, 2017).

Thus, each country may have different criteria for selecting case laws. However, most countries share one thing in common: the chosen case law only needs to fulfill one of the selection criteria, rather than all of them. In addition, common law and civil law traditions also share four criteria, including:

First, judgments or decisions concerning significant issues related to the Constitution or the law codes yet had not had any precedent.

In cases where judgments are rendered when legal issues are clear and have

been stipulated in the Constitution or in the law, the judge applies existing laws to resolve them, and these judgments do not establish case laws. However, in cases where the judge must address significant issues pertaining to the Constitution or laws but there lacks any regulations or precedents to address these issues, and whereby the verdict stipulated by the judge provides a resolution to that legal issue, these cases will be designated as case laws, thus establishing a precedent for resolving similar cases in the future (Charles J. Reid, 2006).

Take the case of *Donoghue v Stevenson* in 1932 in England for example. In 1928, Ms. Donoghue and her friend went to a café in Paisley. Donoghue’s friend bought a bottle of ginger beer, and the café owner poured it into a glass after opening the bottle. After drinking, Ms. Donoghue discovered a rusted nail in the glass. Subsequently, Ms. Donoghue suffered from a nervous shock and stomach pain. Afterwards, Ms. Donoghue sued the manufacturer (Stevenson) for negligence towards consumers and sought compensation for damages. The legal issue here revolves around whether there was a legal contract between the manufacturer and the consumer and whether the consumer has the right to claim damages from the manufacturer. According to the Doctrine of Privity of Contract, the contractual relationship between the manufacturer and the consumer was not recognized because the manufacturer did not enter into a contract with the consumer. However, ultimately, the House of Lords ruled that the manufacturer must compensate Ms. Donoghue under tort law. From this, the principle of duty of care of the manufacturer towards the consumer

was established. Hence, the verdict in the *Donoghue v Stevenson* case of 1932¹ was selected as a case law, applicable to similar cases thereafter because it addressed an issue without precedent (Do Thanh Trung, 2012).

Second, the content of the judgment presents solutions for new legal issues.

A legal issue is understood as a question posed for judges to seek solutions for a new legal event or situation that emerges in real life. Therefore, for a verdict to become a case law, the judge's decision must contain solutions for new legal issues, providing a basis for resolving similar cases in the future (Ho Ngoc Diep, 2015). This means that when faced with a new event that is not clearly defined by the law or where current legal provisions are unclear, the judge must find a solution to that specific case during the course of their judicial duties. In doing so, the arguments presented to explain the solution declared by the judge will become precedent-setting case law for similar cases that may arise.

For instance, in England, in order for a verdict to be chosen as a case law, that verdict must stipulate a new rule or regulation for the law, making foundational changes to the current law or resolves a legal loophole.

This also means the explanation for statutes and cases that cannot be selected for publication. The core criterion of case law is that it must contain new legal principles or new legal solutions, or clarify doubts in the application of existing legal norms.

In France, only judgments of principle by the Court of Cassation, through which the Court resolves new legal issues or controversial matters, can become case law. Through these judgments, the Court of Cassation establishes principles for resolving the relevant legal issues. These are general principles aimed at resolving similar cases. Conversely, judgments resolving specific disputes based on clear legal grounds to resolve specific cases cannot be universally applied to other cases, and therefore cannot become case law.

Third, the verdict or judgment contains legal standpoints.

A legal standpoint can be understood as the generalization of the trial approach in a specific case into a general principle, serving as a precedent for subsequent judges to apply in similar cases.

In England, when judges deliver a verdict in a case, they often describe the factual issues, analyze the events of the case, and arrive at a decision by providing reasons (reason - ratio decidendi). When making a decision, each judge may present many legal standpoints. Among them, only the legal principles and legal bases deemed essential to the judge's decision are considered as the ratio of the verdict, and that verdict is selected as case law for similar situations thereafter (Garner, 1999).

Fourth, the verdict alters previous precedents.

If the principles established in previous case laws are incorrect or inapplicable, they will not bind similar cases in the future. Judges adjudicating subsequent cases will establish correct principles, thereby negating erroneous principles in previous case laws. Here, case law is

¹ Reference: *Donoghue v Stevenson* [1932] A.C. 562, [1932] UKHL 100, 1932 S.C. (H.L.) 31, 1932 S.L.T. 317, [1932] W.N.139.

created in exceptional circumstances and must be novel, meaning the rule established in the case law did not exist previously (Whittaker, 2007: 54).

For example, in 1896, the United States Supreme Court, in the ruling of *Plessy v. Ferguson*¹, established that when the conditions and resources provided for African Americans and white individuals are equal, it constitutes equality, without discrimination. This ruling established the principle of “separate but equal,” meaning that when there is segregation between people of color and white individuals, but if all material conditions are equal, it is still considered equal. By the late 1950s, the Civil Rights Movement advocated for the equal rights of people of color and supported the landmark case of *Oliver Brown v. Board of Education of Topeka, Kansas*². In 1951, this ruling became a transformative decision altering the principle of separate but equal. When Oliver Brown’s daughter was denied admission into Topeka Primary School, where only white students attended, Brown sued the Board of Education of Topeka for discrimination.

Brown reasoned that the segregation of schools into those for Black children and those for White children was unequal, and this segregation violated the Fourteenth Amendment to the United States Constitution, which explicitly states that no state can deny any person equal protection of the law in court rulings. In the ruling on May 17, 1954, Chief Justice Warren declared that the principle

of “separate but equal” had no basis for application in the field of education. The plaintiffs in this case were deprived of their rights to equal protection under the Fourteenth Amendment to the United States Constitution. Thus, this ruling by the Court altered outdated perceptions that were no longer suitable for the new social context. Therefore, this landmark decision was chosen as new case law and applied to similar situations thereafter.

4. Lessons for Vietnam

In Vietnam, “case laws” are understood as “the arguments and rulings in the verdict, or decisions that have legal effect of the Supreme People’s Court on a specific case chosen by the Judicial Council of the Supreme People’s Court and announced by the Chief Justice of the Supreme People’s Court as case law for courts to study and apply in trials” (Judicial Council of the Supreme People’s Court, 2019). Thus, case law is understood narrowly, in line with the understanding of countries following the tradition of civil law.

According to Resolution no. 04/2019/NQ-HĐTP, a judgment/decision chosen as case law must meet three criteria:

1. It clarifies provisions of the law that have had different interpretations; analyzes or explains legal issues and events; and demonstrates the principles, approaches, legal norms to be applied in a specific case or establishes impartiality for issues not specifically regulated by law;
2. It sets a standard
3. It provides guidance for the uniform application of the law in trials” (Judicial Council of the Supreme People’s Court, 2019).

However, there are still some limitations in the provisions regarding the criteria

¹ Reference: *Plessy v. Ferguson*, 163 U.S. 537 (1896).

² Reference: *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), at 495.

for selecting case law that need to be considered and adjusted to fully promote the role and significance of case law in the trial process according to Vietnam's judicial reform approach. Specifically:

First, according to Resolution No. 04/2019/NQ-HĐTP, a verdict or decision selected to become case law is not limited to the judgments or decisions of any specific court. Moreover, once a judgment or decision has been developed into case law, it binds all courts, regardless of the level of the issuing court. However, to meet all of the three criteria mentioned above, only judgments or decisions issued by the Chief Justice or Vice Chief Justices of the Judicial Council of the Supreme People's Court or verdicts and judgements of the High People's Court can fulfill the requirements. Judgments or decisions issued by provincial or district-level people's courts are unlikely to meet these requirements, especially criterion number 3, "the judgment or decision must provide guidance for the uniform application of the law in trials," as provincial or district-level people's courts may find it challenging to provide consistent guidance for the uniform application of the law in trials.

Second, the criterion of "setting a standard" has no clear definition. What constitutes "setting a standard"? It can be understood that a case law must have a "standard-setting" aspect, where it contains rigorous, scientifically based, legally sound, and highly persuasive arguments. However, concerning this criterion, there is no clear explanation in either Resolution No. 03/2015/NQ-HĐTP to Resolution No. 04/2019/NQ-HĐTP (the document directly regulating the criteria for selecting case law) or other legal normative documents.

It can be seen that the establishment of a qualitative criterion for selecting case law along with the lack of guiding regulations may pose difficulties for the process of selecting case law and may somewhat lead to the selection process being influenced by the subjective will of the authorized entities in selecting, approving, and announcing case law (Nguyen Thi Hong Nhung, 2018). *Third*, the selection of verdicts or decisions that fully meet the above criteria to develop into case law is very challenging. This is because criterion number 1 itself includes two scenarios (different interpretations of existing regulations and lack of regulations), making it difficult for a judgment to meet both of these scenarios simultaneously. Many countries around the world only require judgments or decisions of the court to meet one of these scenarios to be considered as case law. Therefore, it is necessary to separate criterion number 1 into two smaller criteria. The first scenario: a judgment provides a unified interpretation when there are different interpretations of the law. The second scenario: a judgment analyzes, explains legal issues, events, and indicates the principles, approaches, legal norms to be applied in a specific case or demonstrates fairness for issues not specifically regulated by law.

It can be said that the stringent criteria for selecting case law outlined above are one of the reasons for the slow development of case law in Vietnam, with only 70 cases being issued from 2016 to October 2023, averaging only 10 cases per year. This modest number of case law does not meet the expectations of the Supreme People's Court and the practical trial requirements, nor fully utilize the role of case law in filling gaps in the legal system.

Considering the experiences of criteria for selecting case law in some countries around the world and the challenges Vietnam is facing, the author provides some recommendations for Vietnam:

First, it is recommended to stipulate that judgments and decisions only need to meet one of the criteria outlined to be selected as case law, similar to other countries worldwide. In addition, criterion number 1 should be divided into two distinct sub-criteria. This would ensure the flexibility and adaptability of case law, as well as guarantee that any judgment or decision issued by any level of court can be chosen as case law.

Second, the criterion of establishing case law based on standards should be reconsidered. There is no need to specify standards for case law since the legal interpretation within case law or its contribution to filling legal gaps in actual legal events inherently determines its standardization level. If the criterion regarding standards for case law remains, there may be opinions suggesting that the rules of case law should remain unchanged, which could complicate the selection of judgments or decisions as case law. This could impede the flexibility of applying case laws. Moreover, in Vietnam, as well as in other legal systems (including Common law systems), legal statutes always take precedence when applying the law in court, while case law may or may not be chosen for application (Nguyen Van Nam, 2019).

In conclusion, Article 2 of Resolution No. 04/2019/NQ-HĐTP should be revised such that judgments and decisions selected and developed as case law only needs to meet one of the following criteria:

- Clarifying legal provisions with various interpretations;
- Analyzing or explaining legal issues and events, and identifying principles, approaches, and legal norms to be applied in specific cases or demonstrating fairness for issues not specifically regulated by law;
- Providing guidance for consistent application of the law in trials.

5. Conclusion

As case law has different definitions, so the criteria for selecting case law in different countries vary, but there are certain commonalities especially in the flexibility in establishing criteria for selecting case law. Vietnam interprets case law narrowly, closer to countries following common law tradition. The criteria for selecting case law in Vietnam are quite complex, which complicates implementation and limits the role of case law. Referencing the experiences of other countries worldwide, Vietnam should streamline the criterion of “standardization”, as it is overly complex and leads to various interpretations by practitioners. Furthermore, to ensure the flexibility and adaptability of case law, verdicts or decisions selected and developed as case law should only need to meet one of the specified criteria, rather than all of them □

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