As a previously unknown virus, the spread of the coronavirus challenged not only medical science and public health systems, but also public governance in all countries. In order to tackle the COVID-19 crisis in China, public authorities at various levels have issued a large number of measures that have no legally binding force, but produce practical effects. A closer look at selected COVID-19 measures in China shows that both the advantages and drawbacks of soft law are brought to the fore by the pandemic. This contribution, focusing on Chinese experiences with COVID-19 soft law, argues that the lack of legal bindingness and consequently of legal enforcement does not make soft law measures ineffective. On the contrary, these “defects” ease the adoption of soft law and ensure its availability to both public authorities and citizens, hence increasing its effectiveness in combating the pandemic. Yet problems remain in realising participatory possibilities and ensuring respect for legality.

I. INTRODUCTION

Since the outbreak of the COVID-19 pandemic in late 2019, almost everyone’s work and lifestyle have undergone tremendous changes. Caused by an unknown virus, the coronavirus outbreak has not only brought great challenges to medical science and public health systems around the world, but has also posed a serious challenge to public governance in all countries. In order to tackle the COVID-19 crisis in China, public authorities at various levels have issued a large number of soft law measures, such as guidance documents and guidelines. These soft law measures have played a crucial role in dealing with the COVID-19 pandemic, in a way that hard law could never match. However, due to the lack of a clear legal basis for soft law in legislation and their lack of legally binding force, soft law measures have given rise to certain concerns as to their legality and legitimacy. These concerns are useful for academics in helping to rethink the functions and boundaries of soft law in tackling the COVID-19 crisis, and more broadly to think about soft law as an instrument of modern public governance.

This article focuses on three types of soft law norms that exemplify a regulatory response to the prevention and control of the coronavirus in China: the Diagnosis and
Treatment Protocol for Novel Coronavirus Pneumonia; the Guidelines for the Use of Masks; and the Guidelines on Resuming Work and Production. In particular, their functions, the concerns on their legality and legitimacy and the academic response to these soft law measures will be addressed. These three specific soft law measures were chosen because they were widely used by the Chinese government in the three stages of treatment, prevention and post-epidemic recovery in relation to COVID-19.

In early February 2020, the number of new coronavirus infections in China increased by thousands every day. After more than two months, by early April, the number of people infected with the coronavirus in China was increasing only sporadically. In May and June, small-scale outbreaks rebounded in Dalian, Beijing and Xinjiang. By the end of August, all areas of the country had been reduced to low-risk areas, and no new cases had been reported in the country. Production and life in all parts of the country have returned to normal. All universities, middle schools, primary schools and kindergartens have reopened. Although it is difficult to say that these achievements can be attributed entirely to the three types of soft law measures mentioned above, what is clear is that those norms have played an important role in defeating COVID-19.

II. THE GENERAL USE OF, AND ACADEMIC ENGAGEMENT WITH, SOFT LAW IN CHINA

Although we share the common idea of soft law in this Special Issue, the manifestation and academic focus of soft law is different in different countries. Before entering the detailed discussion of the application of soft law in specific fields, it is necessary to introduce the general framework of the application and research of soft law in China, so that readers can generally understand the specific context of our discussion. Whether or not people accept the concept of soft law and have a clear understanding of the boundary between hard and soft law, it is clear that, in modern governance, various forms of soft law norms and measures exist and play an increasingly important regulatory function. Soft law originated from international law but has gradually penetrated into regional legal systems such as the EU as well as domestic legal systems.1 In China, construction of the rule of law has inherited many of the non-confrontational elements of traditional Chinese governance while drawing lessons from Western concepts and systems of the rule of law to restrain power and guarantee rights. The rise and application of soft law in China is the product of this complex conceptualisation of the rule of law.

1. The scope and classification of soft law in the Chinese legal system

The question “what is soft law?” is universally controversial. Chinese scholars have thus, like scholars in other places, attempted to define the scope of soft law and have put forward different categorisations.

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1 See F. Snyder, “Three Worlds of Chinese Soft Law” in M Eliantonio et al (eds), EU Soft Law In the Member States: Theoretical Findings and Empirical Evidence (Bloomsbury 2021, forthcoming).
The multiple manifestations that soft law takes mean that delineating the boundaries of soft law is not an easy task. The concept proposed by Luo Haocai has attracted the attention and affirmation of many scholars. He considered that, in addition to hard law expressed in command-and-control measures and implemented by the state’s coercive force, the more extensive institutional arrangements in state law are soft laws. Such soft law includes the following four categories: (i) legal norms embodied within laws, regulations that describe legal facts, or which are demonstrative, hortative, enticing, promotional, consultative or guiding in nature; (ii) normative documents without legal effect legitimately created by public authorities; (iii) self-regulatory norms devised by various political organisations seeking to determine issues such as the exercise of power, participatory government and public political discourse; and (iv) self-regulatory norms created by various societal communities.2

It should be noted that there exists a tendency to propose that all rules, other than hard law, that can restrict people’s behaviour are soft laws. This is what is sometimes called “Pan soft law” and includes customs, folk laws, ethics, religious rules, legal consciousness, legal culture and so on. On the one hand, this framing ignores the major premise that soft laws are posited as legal norms, and interferes with the scientific construction of soft law theory. On the other hand, the idea of Pan soft law relegates soft law to a “pocket concept”, which hinders soft law from obtaining its own independent value. However, just like the complex relationship between law and morality, soft law and other norms are not entirely distinct and unrelated, but the uniqueness of soft law is obvious in terms of its norm-making bodies, ways of creation, effect, means of implementation, significance and so forth,3 and these features can be used to distinguish it from other social norms.

2. Academic engagement with soft law in China

At present, academic research on soft law in China focuses mainly on three aspects: network governance; regional collaborative governance; and the legal effects of soft law.

First, new situations arising from the implementation of the 2015 Chinese “Internet Plus” strategy pose great challenges to the governance of the state and society. For example, Ji Weidong has pointed out that artificial intelligence harbours great risks that may endanger legitimate interests and social order. Soft law may provide one way to govern artificial intelligence networks.4 As a second example, soft law, rather than state law backed by coercive force, works better to solve the problems posed by technical and complex data governance.5

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2 L Haocai and S Gongde, Soft Law Is Law (Law Press 2009) pp 2–3.
3 S Kui, “Why Is It Soft Law Instead of Folk Law?” (2016) 2 People’s Rule of Law 81.
4 L Yinchi, “Luo Haocai’s Legal Lecture on Soft Law and the Governance of Intelligent Network Was Successfully Held” (Peking University Public Law Net, 4 November 2019) <www.publiclaw.cn/?c=news&m=view&id=7699> (accessed 1 October 2020); J Weidong, “Concept, Law and Policy of Artificial Intelligence Development” (2019) 5 Oriental Law 4.
5 S Kui, “Data Governance and Soft Law” (2020) 1 Financial Law 3.
Second, in areas such as environmental pollution and food safety, different administrative regional authorities govern through soft law instruments, such as signing administrative agreements, in a bid to provide both sides with flexible and predictable opportunities for interaction and cooperation, thus enhancing mutual trust.\footnote{See S Youqi and H Zhe, “On the Cooperative Governance of Trans-boundary Water Pollution in the Pearl River Delta From the Perspective of Rule of Law” (2013) 12 Academic Research 59; S Youqi and H Zhe, “On the Legal Regulatory Mode of Government Cooperation in Cross-Border Pollution Control” (2015) 6 Jianghai Journal 147; S Youqi and H Yonghong, “On the Construction of Legal Mechanism on Food Safety Cooperation Between China Mainland and Hong Kong” (2011) 5 International Economic and Trade Exploration 38; Y Chao, “On the Soft Law Regulation of Coordinated Development of Regional Economy in China” (2012) 3 Hunan Social Sciences 77; C Zhuolan and H Jiawei, “On Intergovernmental Agreement” (2011) 6 Contemporary Law 22.} Shi Youqi has noted that soft law in the form of regional administrative agreements is an innovative institutional mechanism that can break through the shackles of space and legal traditions, compensate for the lag, rigidity and institutional failure of hard law, balance diverse interests and demands, and enhance the effectiveness of regional governance.\footnote{S Youqi and C Kexiang, “The Legal Approach to Governance Innovation in Guangdong–Hong Kong–Macao Greater Bay Area” (2019) 11 China Social Sciences 64.}

Third, with the increasing number of different soft law instruments, the legal effect of soft law, as an important aspect of soft law theory, has gradually attracted more attention from scholars. Does soft law have legal effect(s)? Some Chinese scholars have suggested that, in contrast to hard law, soft law has a persuasive binding force that is ultimately derived from people’s consent and acceptance. The actual legal effects of soft law do not rely only on enforcement mechanisms of the administrative and judicial systems, but may also be realised through non-mandatory means such as incentives and guidance adopted by non-state actors.\footnote{L Yiwei, “The Effect of Soft Law” (Doctoral Dissertation, Peking University 2020).}

In addition, other topical issues such as non-state actors’ key role in the application of soft law, the relationship between soft law and human rights protection, and the relationship between soft law and inner-party regulations have been discussed in detail by Chinese scholars interested in soft law, thus enriching the breadth and depth of soft law theory, responding to the practice of soft law application and promoting the realisation of good governance in China.

### III. THE HARD LAW PANDEMIC FRAMEWORK

We are not completely ignorant as regards the general prevention and treatment of the coronaviruses, although the SARS-CoV-2 is a new and unknown virus, and human beings lack experience in preventing and treating this particular virus. In fact, since the outbreak of the SARS epidemic in 2003, China has attached great importance to legislation regarding the prevention and control of infectious diseases and has established a relatively complete legal framework concerning those sorts of diseases. However, this does not mean that hard law alone can provide a sufficient basis for the regulatory response to the coronavirus pandemic.
1. China’s hard law framework regarding the prevention and control of infectious diseases

After the 2003 SARS epidemic, China began to enact and revise legislation on the prevention and control of infectious diseases on a large scale. The Law on the Prevention and Control of Infectious Diseases, enacted in 2003, has become the basic law on the prevention and control of infectious diseases in China. The Emergency Response Law, adopted in 2007, provides the legal basis for China’s response to emergencies including public health emergencies. In addition, the government has enacted the Regulation on Emergency Response to Public Health Emergencies and revised various administrative regulations such as the Administration Regulations on the Circulation of Vaccines and Vaccination. The relevant departments of the State Council have also revised departmental rules, such as the Measures for the Administration of Blood Stations and the Measures for the Administration of Disinfection, which are closely related to the prevention and control of infectious diseases, and formulated and revised relevant standards, including 18 standards related to the diagnosis of infectious diseases, and 12 standards for the control of hospital infections.

The provinces (ie autonomous regions and municipalities directly under the Central Government) have also, since 2003, successively issued a number of local regulations to further improve the prevention and control of infectious diseases. Generally, China has established a comprehensive legal framework that can respond to major epidemics, including measures on infectious disease epidemic monitoring and early warning systems, reports and information disclosure, control measures for epidemics and medical treatment and prevention of infectious diseases. The laws, regulations and departmental rules to be followed in the prevention and control of major epidemics are mostly hard law norms.

2. The drawbacks of hard law in dealing with the coronavirus

Soft law and hard law are contrasting legal paradigms. If the radical cause of the existence and rise of soft law in the field of international law lies in the lack of

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9 The Law on the Prevention and Treatment of Infectious Diseases, was enacted in 1989 and revised in 2004 by the National People’s Congress. It stipulates mainly the types of infectious diseases, prevention, reporting and publicity, epidemic control, medical treatment, supervision and legal responsibilities, totalling 80 articles.

10 The Emergency Response Law, adopted by the National People’s Congress in 2007, mainly stipulates the types of emergencies, the prevention and preparation of emergencies, monitoring and early warning, emergency response and rescue, recovery and reconstruction after the event, and includes a total of 70 articles.

11 The Regulation on Emergency Response to Public Health Emergencies is an administrative regulation formulated by the State Council in 2003 to effectively prevent, timeously control and eliminate the hazards of public health emergencies, safeguard public health and safety, and maintain normal social order.

12 The Administration Regulations on the Circulation of Vaccines and Vaccination are an administrative regulation formulated by the State Council in 2005 to strengthen the supervision of vaccines.

13 Report of the Law Enforcement Inspection Team of the Standing Committee of the National People’s Congress on inspecting the implementation of the “Law of the People’s Republic of China on the Prevention and Control of Infectious Diseases” (Xinhuanet, 30 August 2020) <www.xinhuanet.com/politics/leaders/2018-08/30/c_1123355848.htm> (accessed 1 October 2020).

14 All the regulations can be found on website of the Ministry of Justice of the People’s Republic of China <http://en.moj.gov.cn/lawsandregulations.html> (accessed 20 November 2020).

15 For a comprehensive literature review see O Stefan et al, “EU Soft Law in the EU Legal Order: A Literature Review” (2018) SoLaR Working Paper 1/2018 <ssrn.com/abstract=3346629> (accessed 1 October 2020).
sovereignty, then, in the field of domestic law, the introduction of soft law does not stem from the lack of legislators with legislative capacity, but lies in the inherent deficiencies of hard law itself. In the context of the prevention and control of the COVID-19 pandemic, the drawbacks of the relevant hard law are mainly manifested in the following aspects.

**a. Legislating unknown risks: SARS-CoV-2 as a novel coronavirus**

The 2003 Law on the Prevention and Treatment of Infectious Diseases clearly enumerates and classifies the specific types of infectious diseases that trigger the applicability of the law. The new coronavirus is not included in the list. According to Peng Zhao:

> The paradox is that the premise of inclusion is to monitor the existence of such infectious diseases; however, under the current model of prevention and control, both the regulatory resources and the design of the law itself are mainly focused on existing infectious diseases. Therefore, how to effectively monitor new infectious diseases that have never been seen before, release early warning timely, and carry out temporary control orderly has become a problem.

Since the SARS-CoV-2 is an unknown virus, its pathology, infectiousness and therapeutic regimen needed to be explored by medical experts. When the preliminary scientific basis became available, based on the understanding of the pathogen, epidemiology and clinical characteristics of pneumonia caused by this new coronavirus and the degree of harm to the population’s health, China’s National Health Commission issued a notice on 20 January 2020 including this particular coronavirus as a Class B infectious disease as prescribed in the Law on the Prevention and Treatment of Infectious Diseases, and requiring that the coronavirus be managed as a Class A infectious disease. The notice is equivalent to a legislative amendment to add to the categories of infectious diseases stipulated in Article 3 of the Law on the Prevention and Treatment of Infectious Diseases.

The above measures of the Chinese government were prompt and timely. However, in order to scientifically understand the basic pathology and infectious nature of infectious diseases, medical experts need a certain amount of time to collect, observe and examine related cases. The existing framework of hard law did not provide adequate behavioural guidance for the monitoring and reporting of unknown infectious diseases.

**b. The limits of general authorisation norms of hard law to guide the specific conduct**

It is precisely because of the quick but large-scale outbreak and high contagiousness of this new coronavirus that it was difficult for the legislature to set up unified control measures and diagnosis and treatment protocols in advance. A certain level of

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16 The Law on Prevention and Treatment of Infectious Diseases, Art 3.
17 P Zhao, “The Power and Law in Prevention and Control of Epidemic” (2020) 460 Legal Science 94.
scientific evidence needed to be in place before the adoption of regulatory measures. As observed by Peng Zhao: “A large number of emerging risks show a high degree of complexity, uncertainty and dependence on situation, which cannot be fully understood in advance and regulated directly through legal norms.” For this reason, the legislature had to delegate broad powers to administrative authorities so that they could create a regulatory scheme based on administrative management experience and scientific knowledge.

Article 49 of the Emergency Response Law stipulates that the government can take ten types of response measures, but does not set out the specific conditions for the application of these various measures. Meanwhile, Article 49 is rather vague in terms of what measures can be taken by administrative agencies, using a large number of general provisions such as “other control measures”, “other protective measures” and “necessary measures”. As a result, the Emergency Response Law was warmly welcomed by governments at all levels, because it generally grants local governments great powers, but does not stipulate in detail the restrictions and constraints on the exercise of those powers.

c. The limitations with hard law

The 2003 Law on the Prevention and Treatment of Infectious Diseases is not fully adapted to the prevention and control of the highly contagious coronavirus. For example, there is no clear legal basis for the isolation of close contacts when an outbreak of new infectious diseases occurs; consequently, compulsory isolation measures could not be taken to control the epidemic in a timely manner. In addition, some provisions stipulating obligations have no legal consequences (see, for example, Articles 13 and 14 of the Law on the Prevention and Treatment of Infectious Diseases), and in the legal liability section, some provisions are impractical and the penalties imposed are light, resulting in low costs of violating the law and a lack of deterrent effect.

Here, for example, Article 76 of the Law on the Prevention and Control of Infectious Diseases stipulates that if large-scale construction projects such as water conservancy, transportation, tourism and energy are built in natural epidemic foci confirmed by the state, if construction is carried out without a health investigation or if necessary measures for the prevention and control of infectious diseases are not taken in accordance with the instructions of disease prevention and control institutions, then the health administrative departments of the people’s governments at or above the county level shall be ordered to make corrections within a time limit. A fine of no less than 5,000 RMB but no more than 30,000 RMB can be imposed. The administrative penalty of no more than 30,000 RMB (equivalent to €380) is not enough to produce sufficient legal deterrence to offenders. As such, the Law on Prevention and Treatment of Infectious Diseases is deficient and was only ever able to play a limited role in the prevention and control of the COVID-19 pandemic.
3. The use of soft law in coping with COVID-19

Although there are still many controversies about the scope, legality and binding force of soft law,\(^\text{19}\) it is an undeniable fact that soft law has been increasingly applied in the public governance of various countries. As discussed above, although China has a relatively complete hard law framework to combat infectious diseases, it was insufficient to cope with the challenge of the COVID-19 epidemic. The mix of the uncertainty that COVID-19 brings, the high reliance on scientific judgments, the flexibility necessary for emergency control and some other inherent deficiencies make hard law inadequate and inefficient in tackling the COVID-19 crisis. Against this background, it is unsurprising that public authorities at all levels in China have issued various non-mandatory soft law measures to guide administrative officials and encourage the public to cooperate in the prevention and control of the epidemic. Generally speaking, the use of soft law has made an important contribution to the scientific treatment of the novel coronavirus and helped prevent its spread.

The following section focuses on three soft law norms created in response to the COVID-19 situation in China, namely, the Diagnosis and Treatment Protocol for Novel Coronavirus Pneumonia, the Guidelines for the Use of Masks, and the Guidelines on Resuming Work and Production Amidst Epidemic Control, and will analyse the specific form, function and disputes on the legality of these soft law measures.

IV. THE DIAGNOSIS AND TREATMENT PROTOCOL FOR COVID-19

Given the unknown properties of the coronavirus, it was difficult to determine precise institutional arrangements for its prevention and treatment in advance based on existing medical and legal knowledge. This opened up space for soft law measures.

1. The hard law legal basis of the Diagnosis and Treatment Protocol for COVID-19

Paragraph 3 of Article 51 of the Law on the Prevention and Treatment of Infectious Diseases stipulates that:

Medical agencies shall, in accordance with the standards of diagnosis and requirements of treatment for infectious diseases specified by the health administrative department of the State Council take necessary measures to enhance their capability for medical treatment of infectious diseases.

Article 37 of the Regulation on Responses to Public Health Emergencies stipulates that:

In the case of any newly found contagious disease, colonial disease with unknown causes, or severe alimentary and occupational intoxication, the health administrative

\(^{19}\) See J Klabbers, “Undesirability of Soft Law” (1998) 67 Nordic J Intl L 381; J Klabbers, “Redundancy of Soft Law” (1996) 65 Nordic J Intl L 167.
department of the State Council shall organise forces as quickly as possible to formulate relevant technical standards, specifications, and control measures.  

Therefore, in the face of newly discovered infectious diseases such as COVID-19, the applicable laws and regulations put obligations on the health administrative department of the State Council to formulate diagnosis and treatment protocols.

It should be pointed out that although the above provisions stipulate that medical agencies shall take necessary measures in accordance with the diagnosis and treatment requirements for infectious diseases, this does not mean that those provisions are legally binding. On the one hand, the legislation has not established the corresponding legal liability for violating this duty. On the other hand, the diagnosis and treatment protocol does not necessarily imply a specific behavioural requirement. From the point of view of medical agencies, medical staff and/or the public, the Diagnosis and Treatment Protocol does not have legally binding force; in other words, it is soft law.

The National Health Commission has promulgated eight editions of the COVID-19 Diagnosis and Treatment Protocol (trial). It should be pointed out that although the State Health and Health Commission promulgated the Pneumonia Diagnosis and Treatment Program for New Coronavirus Infection on 15 January 2020 (for trial implementation) and the Pneumonia Diagnosis and Treatment Program for New Coronavirus Infection on 18 January 2020 (for trial implementation), it is impossible to find these two versions via the website of the National Health and Health Commission. The full text is only circulated in an informal way on a limited number of medical websites. As a guidance document, it is a mix of scientific, political and policy considerations that reflects its adoption process. While medical experts lead the formulation of this Protocol and it is officially adopted by the administration, the general public holds strong opinions on what it should contain. It is worth emphasising that the Protocol is not compulsory and has no legally binding force. Nor does it directly set or change the rights, obligations and legal status of parties. It is clear that the Protocol should be regarded as best practice on medical treatment.  

It is addressed mainly to public health administrators and medical professionals. There is no doubt that it has played an important role in the fight against COVID-19.

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20 The Regulation on Responses to Public Health Emergencies is promulgated by Order No 376 of the State Council of the People’s Republic of China on 9 May 2003; amended in accordance with the Decision of the State Council on Abolishing and Amending Some Administration Regulations by the Order No 588 of the State Council of the People’s Republic of China on 8 January 2011.

21 The General Office of National Health Commission and Office of State Traditional Chinese Medicine Administration of the People’s Republic of China, “Notice on the Diagnosis and Treatment Protocol for Severe and Critical Novel Coronavirus Pneumonia Cases (Trial Version 2)” (1 April 2020), National Health Commission of the People’s Republic of China <www.nhc.gov.cn/zyyjg/s7653p/202004/c083f2b0c7eb4036a59be419374ea89.shtml> (accessed 1 October 2020).

22 H Song and J Niu, “How Are the Guiding Documents Formulated and Evolved?” (2020) 75 Journal of Public Administration 43.
2. The legal and practical effects of the Diagnosis and Treatment Protocols

To date, China’s National Health Commission has published eight versions of the Diagnosis and Treatment Protocol for COVID-19. The last version was published on 18 August 2020. Save for the first two versions, subsequent versions can be found on the official website of the National Health Commission. By way of overview, each of them contains the following nine aspects: background; etiological characteristics; clinical characteristics; case characteristics/diagnostic criteria; clinical classification; case finding and reporting; therapeutic regimen; discharge criteria; and infection control. With the spread of the COVID-19 epidemic and the accumulation of diagnosis and treatment experience, the content of the diagnosis and treatment protocol is becoming increasingly detailed, including a more accurate description of clinical characteristics, increasingly detailed diagnostic criteria and clinical classification, and continuous improvement of the recommended therapeutic regimen.

a. Flexibility

Faced with the complex and constantly changing nature of COVID-19, promulgating administrative regulations following the formal rule-making procedures would have been inadequate to meet the urgent need of medical treatment. For this reason, the Diagnosis and Treatment Protocol for COVID-19 issued by the health administration department with general applicability are helpful in providing guidance for the future. The formulation process for such a protocol is much simpler than the formal rule-making process. The process is led by scientific experts, unlike that used for formal rule-making, which is led mainly by administrative officials. Most importantly, there is no general notice and comment procedure before the publication of the Protocol. The change of protocol versions is also very rapid. In the early days of the COVID-19 outbreak, one version lasted less than a week before being updated.

b. Experimental nature

The successive changes in the Diagnosis and Treatment Protocol for COVID-19 reflect the concept of experimentalist governance and reflexive law, which highlights the dynamic evolution, development, feedback, adaptation and revision of guidance documents. The study by the medical community of the pathology of the new coronavirus is in a state of constant flux. For this reason, the diagnosis and treatment of COVID-19 need to be constantly adapted to emerging medical research. In the prevention and control of COVID-19, the public health department continuously adjusts and updates the specific content of the Diagnosis and Treatment Protocol. For

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23 See General Office of National Health Commission and Office of State Traditional Chinese Medicine Administration of the People’s Republic of China, “Notice on Issuing the New Coronavirus Pneumonia Diagnosis and Treatment Plan (Trial Version 8)” (19 August 2020) National Health Commission of the People’s Republic of China <www.nhc.gov.cn/zyyglj/s7653p/202008/0a7bd12bd4b46e5bd28ca79a7f5e5a.shtml> (accessed 1 October 2020).

24 The General Office of National Health Commission and Office of State Traditional Chinese Medicine Administration of the People’s Republic of China, supra, note 21.

25 See C Sabel and J Zeitlin, Experimentalist Governance in the European Union: Towards a New Architecture (Oxford University Press 2010).
example, due to the participation of some Chinese medical experts with frontline experience in diagnosis and treatment of virus patients in Wuhan, version three onwards of the Protocol has noted that some traditional Chinese medicines can be used in the treatment of the virus and has specified the particular dosage requirements.26

c. Participatory nature
At present, there is no information available on who has participated in the formulation of the Diagnosis and Treatment Protocol. However, it is clear that it is not the product of government officials working behind closed doors, and that various versions have absorbed a large number of frontline medical professionals’ experience as well as scientific expertise from various fields. For example, revisions to the fourth version of the Protocol saw certain diagnostic criteria that had been questioned by respiratory medicine experts being removed. It is through the introduction of participatory procedures, allowing different subject experts to express their views, preferences and positions, as well as through full consultation with different stakeholders, that soft law rules have been amended to increase their effectiveness and acceptability among users and stakeholders.

3. Legitimacy concerns and suggestions for improvement
During the process of formulation and revision of the Diagnosis and Treatment Protocol, many questions have been put forward. There are (at least) six areas where further clarification in relation to the Protocol would be useful. First, the nature or legal basis of the Protocol is unclear. Second, the institutions and disciplines of the experts involved in the formulation of the Diagnosis and Treatment Protocol are not officially disclosed. Third, formal participation channels are limited and many experts and doctors have no formal channels to express their opinions and suggestions. Fourth, there is no specific disclosure of the opinions and disputes in the formation of the Diagnosis and Treatment Protocol. In other words, medical personnel and the public know only how to do something, but they do not know why they should do it.

In order to further enhance the effectiveness of the Diagnosis and Treatment Protocols as soft law measures, the following procedural requirements should be emphasised in the future. First, the system of information disclosure and declaration of conflicts of interest for experts should be improved. It is recommended that, in the future, when publishing these protocols, the name, workplace and academic background of the experts who participate in their drafting or act as consultants should be disclosed, and it should be stated that the experts have no actual or potential conflicts of interest. This will help enhance the professional persuasiveness and acceptability of these protocols and help clarify the responsibilities of the experts. Second, more emphasis should be placed on the involvement of frontline medical worker experts drawing on their clinical experience, new scientific findings and advances accumulated in treatment practice. Third, the democratic nature of the participation process should be emphasised. At

26 See <bgs.satcm.gov.cn/gongzuodongtai/2020-01-23/12504.html> (accessed 20 November 2020).
present, in the formulation of these protocols, most attention is paid to the quality and scientific nature of the rules, and to whether those rules constitute “sound science”. However, many administrative measures like these protocols not only contain judgments on the medical level but also imply judgments on various (and possibly competing) social values.

For example, the question of whether and how to use traditional Chinese medicine in fighting COVID-19 has caused much controversy. Those trained or experienced in Western medical expertise reject Chinese medicine, and vice versa. In addition, when selecting patients for clinical trials of vaccines, doctors also face ethical dilemmas. In the formulation of future Diagnosis and Treatment Protocols, it would be useful to follow the principles of democratic decision making, listen to the opinions of stakeholders, such as patients, the general public and professional organisations, and ensure that the public can participate in the formulation of Diagnosis and Treatment Protocols through various channels and forms.

V. The Guideline for the Use of Masks

According to the World Health Organisation’s guidance on the prevention of COVID-19, wearing masks is one of the various measures used to prevent and control infectious diseases transmitted by airborne droplets.²⁷ Although wearing a mask is not obligatory for individuals without symptoms of respiratory tract infection, since there is no evidence that wearing masks is useful for protecting uninfected people, due to the differences in culture and living habits, wearing masks when going out is generally required and can be strictly enforced in some places in China.

1. The legal nature of the requirement to wear a mask

The first document from the central Chinese government on wearing masks as a response to COVID-19 was the “Guidelines for the Use of Masks for the Prevention of Novel Coronavirus Pneumonia” issued by the National Health Commission on 30 January 2020. The guidelines state:

Masks are *not required* to be worn in open and ventilated places in non-epidemic areas, but are required to be worn when entering crowded or enclosed public places. It is recommended to wear disposable medical masks in empty and ventilated places in areas hit hard by the epidemic; wear surgical masks or particulate respirators when entering densely populated or enclosed public places.²⁸

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²⁷ World Health Organization, “Advice on the Use of Masks in the Context of COVID-19: Interim Guidance, 5 June 2020” (World Health Organization 2020) <apps.who.int/iris/handle/10665/332293> (accessed 1 October 2020).

²⁸ The General Office of National Health Commission and Office of State Traditional Chinese Medicine Administration of the People’s Republic of China, “Notice on the issuance of guidelines for the protection of people at different risks of new coronavirus infection and guidelines for the use of pneumonia masks to prevent new coronavirus infection” (1 January 2020), see <www.nhc.gov.cn/jkj/s7916/202001/a3a261dabfc14c35fa255d4eb07ddab34.shtml> (accessed 1 October 2020) (emphasis added).
It is important to note that this document is only a “guideline” to guide the protection of the public and reduce the risk of infection. In addition, its function, as indicated in the document, was only “for guidance to strengthen personal protection”\(^{29}\). The guideline neither obliges the public to wear masks in all public places nor imposes sanctions for not wearing masks. In this sense, wearing masks when going out is not a hard law obligation with clear binding force, but only a soft law obligation providing guidance for the public for personal protection.

In addition to the guidelines for the use of masks issued by the National Health Commission, many local health commissions have issued similar guidelines reflecting the situation of local epidemics. According to these guidelines, wearing a mask when going outside is a recommendation, rather than a mandatory requirement. However, there are examples showing that entering public places without wearing masks will be punished as an illegal act. A typical example is the circular issued by the Health Commission of Guangdong Province on 26 January 2020, which states:

Operators and managers of public places shall require the personnel entering their places to wear masks. Those who do not obey the requirement shall be reported to the relevant competent departments in accordance with the provisions of the Law on the Prevention and Treatment of Infectious Diseases and the Regulation on the Administration of Sanitation in Public Places, so that they can be dealt with by the competent authorities in accordance with their respective duties and in accordance with the law. Those who obstruct the emergency response staff from performing their duties in violation of the Public Security Administration Punishments Law, which constitutes a violation of public security administration, shall be punished by the public security authorities according to the law.\(^{30}\)

This document was later imitated by many local governments. Originally a soft law obligation, the requirement of wearing masks when going outside has been transformed into a mandatory obligation by many local governments, with the additional consequences of administrative penalties. Although there is no legal basis, this obligation has been generally observed in combating COVID-19.

2. The legality of the requirement to wear a mask

Whether or not an action is a punishable illegal action is essentially a question of whether the violated act provides for an administrative penalty. According to the Law on Administrative Penalty, only laws and administrative regulations can be accompanied by administrative penalties; and penalties involving restriction of freedom of persons can only be created by laws. Therefore, the soft law measure issued by the local governments cannot be accompanied by administrative penalties.

In practice, the legal basis for public security organs of the state to impose sanctions is Article 50 of the Public Security Administration Punishment Law, which stipulates:

\(^{29}\) ibid.

\(^{30}\) See <www.sohu.com/a/369051639_119778> (accessed 20 November 2020).
Anyone who commits any of the following actions shall be given a warning or shall be fined not less than 200 RMB. If the circumstances are serious, he shall be detained for not less than 5 days but not more than 10 days, and may be concurrently fined 500 RMB: (1) Refusing to execute the decision or order lawfully issued by the people’s government under the state of emergency; (2) Obstructing state officials performing their duties in accordance with the law . . .

If we consider carefully the wording of this provision, it can be seen that, in order to prevent the possible expansion of public power in the application of this article, the legislator emphasised that what citizens must fail to abide by must be “the decisions and orders issued by the people’s government in accordance with law under the state of emergency”, and that what they must obstruct must qualify as acts of “state officials performing their duties in accordance with the law”. In other words, the legality of the administrative order is the basis for the public security authorities to punish the alleged offender according to this provision.

However, neither the Law on the Prevention and Treatment of Infectious Diseases, the Emergency Response Law nor the Regulation on Responses to Public Health Emergencies set additional obligations for the public during an epidemic other than compulsory quarantine, isolation and treatment; nor do those laws authorise local authorities to take other tougher prevention and control measures beyond the requirements set by those laws. The fact that local authorities relied on lower-level soft law measures, elevating what was originally administrative guidance to a mandatory order with administrative penalties attached as a deterrent, is clearly inconsistent with the premise of the application of Article 50 of the Public Security Administration Punishment Law. In reality, some citizens went out without wearing masks, clashed with epidemic prevention workers and were held in administrative detention according to Article 50.31

It should be noted that those offenders were eventually punished not only because they did not comply with the requirement to wear a mask but also because they had physical conflicts with epidemic prevention workers.

Although current legislation gives the local government broad authorisation in the form of vague and general language, it does not mean that the local government can impose at will harsh legal obligations on the public without a clear legal basis. The scope and legitimacy of necessary measures depend on the careful balance between the necessity of epidemic prevention and control and the legitimacy of restricting rights. In the absence of a clear basis in the hierarchically higher law, local governments cannot use this broad authorisation as a basis for setting universal mandatory obligations on the public.

3. Compliance with a soft law obligation to wear a mask

It can be seen from the above that statutory law does not impose a legal obligation to wear a mask when going out during the pandemic, nor does it set a specific legal liability for

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31 “A minor who refused to wear a mask and refused to cooperate was administratively punished according to law” (Baidu, 16 February 2020) <https://baijiahao.baidu.com/s?id=1658706067872421554&wfr=spider&for=pc> (accessed 1 October 2020).
non-compliance with this obligation. Neither the Law on Administrative Penalty nor the Public Security Administration Punishment Law can serve as a legal basis for detaining people not wearing masks when going out. When the country is fighting against COVID-19, individuals are subject to additional obligations for the public good, and their rights are subject to additional restrictions. This does not mean, however, that public authorities can create unlimited obligations for citizens and elevate moral obligations to legal obligations, because the confusion this creates between moral and legal obligations can lead only to the continuous curtailment or even the total erosion of individual freedoms.

At present, the pandemic situation is still challenging. Although the current applicable law does not establish a hard law obligation to wear a mask when going out, empirical evidence has demonstrated the positive impact of wearing a mask in preventing the spread of the novel coronavirus. In China, although there are a few places that ensure that people wear masks when going out (through the (illegal) enforcement methods just discussed), it appears that wearing masks when going out is still formally only a soft law obligation. Why do people generally wear a mask then? Given the limited law enforcement resources, it is not realistic to attribute the extensive compliance with this soft law obligation to the fear of legal sanctions. Despite the lack of legally binding force, the main reasons for the extensive compliance with the guidance on wearing a mask in China can be attributed to the following aspects: (i) large-scale social publicity has made people generally aware of the positive effect of wearing masks on the prevention of COVID-19, although the World Health Organization recommends that asymptomatic people should not be required to wear masks; (ii) under the “joint prevention and control” mechanism, the staff of social organisations at all levels, communities, shops, supermarkets, sports stadiums and other public places dissuade those not wearing a mask from going inside, which makes it almost impossible for those not wearing a mask to go anywhere; and (iii) the government has adopted a variety of measures to ensure the adequate supply of affordable masks in the market so that the public can easily purchase them.

VI. THE GUIDELINES ON RESUMING WORK AND PRODUCTION: SOME CONTROVERSIES

No society can be stopped from operating because of the need to prevent and control the epidemic. Measures such as the shutdown of the city of Wuhan in China in the spring of 2020, 32 H Zhao, “Detention Caused by Not Wearing a Mask: What Is the Legal Ground?” (Surging News, 1 March 2020) <www.sohu.com/a/376938851_260616> (accessed 1 October 2020).
33 World Health Organization, “Coronavirus disease (COVID-19) advice for the public: When and how to use masks” (World Health Organization, 5 August 2020) <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks> (accessed 1 October 2020).
34 The joint prevention and control mechanism of the State Council is a multi-ministerial coordination mechanism platform at the level of the Central People’s Government launched by the Chinese Government in response to the outbreak of the new crown pneumonia epidemic in early 2020, with 32 member units. It is a temporary institution with no clear legal basis or statutory authority.
35 Local governments have taken various measures to ensure the supply of masks, eg by providing subsidies for production enterprises and severely punishing businesses selling masks at high prices; or restricting the availability of masks for purchase using a lottery or booking system.
2020 were extreme measures taken in the early stages of a massive outbreak of the epidemic and cannot be replicated. As the risk of the epidemic gradually decreases, countries must carefully balance the prevention and control of the epidemic with the restoration of economic and social order. Despite the lack of both a clear legal basis and legally binding force, the Chinese Guidelines on Resuming Work and Production Amidst Epidemic Control issued by various levels of government play an important role in balancing the epidemic prevention and control and the restoration of economic and social order.

1. The formulation of Guidelines on Resuming Work and Production

On 21 February 2020, the joint prevention and control mechanism of the State Council issued the Guidelines for Enterprises and Institutions on Resuming Work and Production Amidst Epidemic Control.36 The guidelines mainly emphasise the responsibility of enterprises and institutions in epidemic prevention and control. The obligations set by the guidelines include the following aspects: (i) the need to strengthen the health monitoring of employees. Each employer is to monitor the temperature of employees who live in collective dormitories twice a day, summarise the health status of all employees, and report that information to the disease control department on a daily basis; (ii) the need to strengthen the prevention and control measures in workplaces, including registration of the entry and exit of personnel, regular disinfection of the workplace, reduction of staff gathering and collective activities, staggered dining, and remote office working; and (iii) the need to enhance anti-epidemic knowledge among employees. As part of this, employers are to guide employees to strengthen their own personal protection, including reducing unnecessary trips out and wearing masks in crowded places.

On 9 April 2020, the joint prevention and control mechanism of the State Council issued the Guidelines for Enterprises and Institutions on Resuming Work and Production Amidst Epidemic Control in Different Risk Areas Nationwide.37 They emphasised that enterprises and institutions in low-risk areas should be further promoted to the full resumption of work and production, and restore normal production and living order as soon as possible. At the same time, the Guidelines urged that high-risk and medium-risk areas should continue epidemic prevention and control measures and resume work and production in accordance with the requirements in relation to zoning and classification, precisely implement prevention and control policies, and coordinate the epidemic prevention and control work in enterprises and institutions, so as to restore the order of production and life in an orderly manner.

36 The Guidelines for Enterprises and Institutions on Resuming Work and Production Amidst Epidemic Control is a document issued by the joint prevention and control mechanism of the State Council. The purpose of this document is to guide enterprises and institutions to implement COVID-19 prevention and control requirements, and promote enterprises and institutions to resume production in a steady and orderly fashion.

37 This is the second guide for resumption of work and production issued at the national level. Compared with the first edition of the Guidelines, the most significant feature of this edition is that local governments are required to take differentiated prevention and control measures according to the different levels of the epidemic, avoiding a one-size-fits-all approach. According to the requirements of epidemic prevention at the national level, local governments can issue epidemic prevention guidelines with different requirements according to different risk levels.
These two Guidelines provide a necessary policy basis for the adoption of epidemic prevention and control measures and the resumption of work and production throughout the country. However, judging by the issuing body, the process of adoption and the legal effects of the two Guidelines, it is obvious that they are not legally binding hard law norms, but rather soft law documents that have practical effects.

Despite the fact that these two Guidelines are soft law documents with no clear legal effect, they have played an important role in guiding the orderly resumption of work and production in various production and operation entities.

2. The general content of Guidelines on Resuming Work and Production

The Guidelines on Resuming Work and Production Amidst Epidemic Control issued in April require local authorities to adopt different prevention and control measures according to the geographic risk level of the epidemic. For low-risk areas, it is necessary to fully resume work and production; for medium- to high-risk areas, tailored measures should be devised and implemented to avoid a “one-size-fits-all” approach. This idea of resuming work and production in accordance with local conditions was particularly prominent and evident during the combat of the second wave of COVID-19 in Beijing in June 2020.

Based on the risk differences of different industries in the prevention and control of COVID-19, regions have adopted differentiated policies when issuing guidelines for the resumption of work and production. For example, the Guideline issued by Shanghai on 5 March 2020 clarifies that:

all industries can resume work after filling in the relevant information of the company through the online government service platform of Shanghai. Specific industries such as cosmetology and fitness need to report to the competent department for confirmation and then resume work. Industries such as travel agencies, theatres and offline education and training activities are not currently suitable for resuming work.\(^{38}\)

With regard to the conditions for the resumption of work and production, the guidelines do not set out explicit restrictions or prohibitions, except for a small number of industries with a large turnover and high risk. In order to facilitate the flexible application of measures by local authorities based on different risks, the guidelines set a large number of guiding norms. For example, on 4 March the General Office of the State Council issued a Notice on resuming work and production, which requires simplifying the procedures and conditions for doing so. For medium to high-risk areas, local governments shall, on the basis of meeting the requirements for epidemic prevention and control, formulate and publish unified and harmonised conditions for the resumption of work and production setting out the procedures, materials and time limits for each item.

\(^{38}\) Fitness venues, cinemas, travel agencies and other special industries all returned to normal in early August.
3. The legality of the implementation of the Guidelines on Resuming Work and Production

As mentioned above, the two Guidelines are not legally binding, which means that they are not, in principle, capable of changing the conditions of administrative licensing in workplaces. However, in practice, due to strong public sentiment and political pressure, many local governments have set excessively stringent conditions for the resumption of work and production. As soft law norms, the guidelines are intended to provide scientific guidance for enterprises resuming work and production to prevent the spread of the epidemic, but in practice, many local governments, when implementing the measures stipulated in the Guidelines, have often transformed a soft law obligation into a hard law obligation, imposing obligations and responsibilities on enterprises without a legal basis. In fact, besides the shutdown of Wuhan, there is no clear legal basis for the shutdown of production in other areas. Local governments have acted based on the need to formulate emergency responses and paying attention to social stability pressures. Fearing the risk of the spread of the epidemic, local governments are still actively taking some overly strict anti-epidemic measures. Of course, during this particular period, few enterprises will directly challenge the legality of such measures through the relevant administrative or judicial mechanisms. Some news reports by the relevant media show, however, that the illegal setting of overly stringent conditions for resuming work and production has caused dissatisfaction among many business owners.39

The severe conditions set by local governments are not based on scientific evaluation but rather are an emotional response. In order to avoid legality risks, governments and public institutions at all levels should, on the one hand, respect the soft law nature of the guidelines and ensure that they do not illegally set excessively stringent epidemic prevention obligations for businesses without a legal basis. At the same time, governments and public institutions need to strengthen the scientific basis of the guidelines for the resumption of work and production and take targeted and flexible epidemic prevention measures to avoid a “one-size-fits-all” approach in view of the different epidemic prevention risks faced by different industries in the resumption of work and production.

VI. CONCLUDING REMARKS: POLITICAL AND CULTURAL FACTORS

All countries have been trying to adjust the tension between the state of emergency and the law, attempting to bring the exercise of emergency powers into line with the rule of law. The global outbreak of the novel coronavirus highlights the limited function of

39 Shi Guilu, deputy to the National People’s Congress and vice president of the All-China Federation of Industry and Commerce, a business owner, pointed out in a 19 February report entitled “Problems and Suggestions in the Resumption of Work and Production of Enterprises”, that at present, the government departments are not very clear about the conditions for the resumption of work and production of enterprises, resulting in most enterprises being unable to resume work. See <www.acfic.org.cn/zt_home/zcmq2020/zcmq2020_ck/20200219/20200219_157093.html> (accessed 20 November 2020). Incidentally, the Center for Rural Governance Research of Wuhan University has completed a survey report on the labour mobility of 104 zero-epidemic villages in 98 counties of 14 provinces (excluding Hubei). This report points out that before the end of mid-February 2020, the flow of rural labour force was in a frozen state, and the average proportion of cross-regional flow of the village labour force in 12 provinces with labour outflow was less than 10 per cent. At that time, the overly strict epidemic prevention and control system seriously restricted the flow of labour, making it difficult for the economy and society to return to normal. See <www.thepaper.cn/newsDetail_forward_6275361> (accessed 20 November 2020).
traditional hard law in regulating the exercise of emergency powers and guiding the public to abide by the law. In response to the COVID-19 pandemic, the Chinese government at all levels has played an important role in guiding medical personnel, the general public, business owners and workers to cooperate in the prevention and control of the epidemic by issuing various soft law measures including the Diagnosis and Treatment Protocol for the COVID-19, the Guideline for Wearing Masks, and the Guidelines on Resuming Work and Production Amidst Epidemic Control, within the applicable legal framework set by hard law such as the Law on the Prevention and Treatment of Infectious Diseases and the Emergency Response Law.

Despite the effectiveness of soft law measures in practice, we cannot ignore the legality and legitimacy risks that these measures may bring with them. By analysing three soft law measures used by the Chinese government in response to the COVID-19 crisis, this article showed the different mechanisms of effectiveness of soft law measures and the legality and legitimacy controversies surrounding their adoption and use. In the absence of legally binding force, the threshold for the justiciability of soft law measures is rarely met. This means that the legality and legitimacy of these soft law measures cannot be ensured through ex-post judicial review. In China, almost everyone’s life has been affected by various anti-epidemic measures, many of which have no legal basis, and some individuals and enterprises have suffered administrative penalties, we have seen hardly any disputes over COVID-19 soft law enter the courts. Given this, it is of great importance that those who are subject to these soft law measures can participate in their formulation, and that soft law can be formulated and issued through a more open, participatory and transparent process.

Of course, it should also be pointed out that the Chinese success in tackling COVID-19 in the short term is due not only to the aforementioned hard law framework and soft law measures but also to political and cultural factors beyond the law. Most importantly, authorities at all levels have political mobilisation ability and the public in China support the anti-epidemic measures. Under the leadership of the Central Government, all officials in urban and rural areas across the country were mobilised overnight to conduct community prevention and control, screening and monitoring suspected patients and close contacts. National and even global resources were mobilised for epidemic prevention and control. At the same time, at the call of the government, people across the country have given their support to the fight against the epidemic despite the inconvenience to their life and work.

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40 X He, “Understanding China’s National Conditions from the Prevention and Control of the COVID-19 Pandemic” (2020) 402 Journal of Social Development 18.