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Introduction to Research Handbook on Soft Law

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Introduction to *Research Handbook on Soft Law*

1. SOFT LAW: AN OMNIPRESENT CONCEPT IN CONTEMPORARY REGULATION

Soft law plays an important role in national, international, and transnational politics as well as the everyday life of public administration at all levels of government. Its role in these contexts is, however, difficult to appraise, as soft law comes in a multiplicity of forms. Guidelines, recommendations, codes of conducts, standards, policy guidance, technical notices – to mention just a few – are all captured by the notion of soft law.

The dynamics of soft law in global and European politics suggest that the use of soft law in complex and sovereign-sensitive issues, such as migration and climate change, is a function of political necessity. The non-willingness by nation states to delegate decision-making authority to the EU and other international organizations often explains the utilization of soft law. Global agreements on climate change, migration, public health, gender policy goals, financial crime prevention and poverty reduction may entail a 'false' sense of how important issues are being substantially addressed and implemented when the agreements are merely reduced to scoreboards on global performance indicators. From a democratic point of view, such agreements that lack a clear chain of accountability raise questions about the possibilities for realizing democratic accountability. In the EU context, the use of soft law – especially if it is used instead of legislation – can undermine the role of national or EU parliaments and neglect the views of the public.

Soft law does, however, have some clear advantages too. Soft law may be seen as more effective than hard law and formal legal sanctions which come with it. Regulators may opt to use soft law given that it is quick to adopt and amend to reflect changing contexts and technological advances. Soft law can also serve to open the door for the participation of (socially responsible) global companies and other stakeholders during periods of heightened need for global governance. For better or worse, soft law is an intrinsic part of regulation and governance at all levels of governance.

The concept of soft law has existed for decades and has been tackled by different academic disciplines. Consequently, there are various understandings of the concept, reflecting the fact that the term soft law is used by scholars of international law, European law, international relations, and European politics. All of them approach it from their own scholarly traditions. Lawyers are interested in the role that soft law plays in adjudication and administrative decision-making, and whether legal actors differentiate between hard law and soft law. Social scientists study the design of institutions, public decision-making and how the use of soft law may undermine the role of parliaments and empower private actors. International relations scholars examine the force or 'bite' of soft law. Of course, many of the issues are common to different disciplines, further complicating the landscape in soft law research. A common feature in this research is how it problematizes and sometimes also challenges traditional images and perceptions within various disciplines on the dichotomy between law and non-law, public and private actors and between national, European and global levels of regulation and governance. From a conceptual standpoint, soft law functions as an 'irritant', encouraging

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researchers to venture into unchartered territories and pose questions that challenge the status quo.

2. THE AIMS AND STRUCTURE OF THE RESEARCH HANDBOOK

The aim of this *Research Handbook on Soft Law* is to provide a scholarly, state-of-the-art overview of the research and scope of current thinking in the field, attempting also to envisage the future of soft law research. The chapters in the handbook show the empirical, theoretical, and analytical breadth and depth of the research on soft law.

The handbook consists of four broad themes.

The first theme covers the conceptual history and development of the notion of soft law, that is, the different concepts, meanings and historical narratives we associate with soft law as well as the different contexts in which soft law can be analysed. What does the notion of soft law entail and how has it changed over the years? Or has it changed at all? Can we talk of an all-encompassing concept of soft law, or should we rather accept the diversity of concepts that are linked to the empirical phenomenon of voluntary and non-binding rules/norms? What can certain methodological approaches, such as the economical and anthropological analysis of law, teach us about the concept of soft law? And how is soft law linked to other concepts commonly used to assess rules and norms and their legitimacy and democratic pedigree?

The main finding here is that the development, history and uses of soft law in legal and social sciences research are diverse and complex. The chapters in the first part show how the concept and development of soft law is closely linked to the changing scientific dynamics and contexts in law, politics and history. In the first chapter of the handbook, Francis Snyder, reflecting on the past research and the needs of the (sustainable) future, boldly proposes renaming soft law as ‘bamboo’. In his words, bamboo ‘is part of human and natural life that is strong, fast-growing, highly visible, easily recognizable, resilient, and flexible’. The resilient nature of soft law is manifest from the fact that soft law is not a modern-day folly, something we have only come to know as the product of contemporary complex societies. As Jansen describes, ‘pre-modern jurists’ well understood that laws, while being a source of authority, had to be reconciled with other authoritative sources. In other words, these pre-modern jurists had a very modern idea of the law, which suggests that while soft law as a concept may not have changed, our views of it have.

The other chapters of the first part illustrate that soft law is both a multifaceted empirical phenomenon as well as an important concept in the legal and social sciences to understand and explain regulation and governance. A clear definition of soft law has escaped generations of scholars, and Fabien Terpan fearlessly tackles this important question, suggesting that soft law should be approached from a perspective that both recognizes its position in between hard law and non-law as well as its functions with regard to hard law: pre-law, post-law and para-law. Michael Faure and Niels Philipsen also take up the definitional challenge, looking at soft law from an economic perspective. They demonstrate that law and economics research has used the public and private interest perspective to explain the emergence of soft law in particular contexts. They see more research to be done on the policy question of when soft law may bring about better results than hard law. Filippo M. Zerilli’s chapter adds an important legal anthropological perspective. But rather than using legal anthropology as a way to define

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soft law, he suggests that soft law is a refreshingly new field or a standpoint from which to approach the emerging transnational legal order and particularly the relations among state, supra-state, and non-state (private) forms of regulation. The chapter also briefly touches upon the question of how soft law can be examined through the adaptation of ethnographic methods. The conceptualization of soft law is the focus of the final chapter of the first part. Ulrika Mörth concludes that the democratic status of non-binding rules depends on whether and how these rules are 'coupled to the liberal representative system of democracy'. Like Zerilli, she also wonders what happens to soft law beyond the nation state and in the era of global normative and legal pluralism. What emerges from the first part is indeed that the diversity of concepts of soft law linked to the empirical phenomenon of non-legally binding rules and norms seems an unescapable feature of the research on soft law.

The second theme concerns the different disciplinary understandings of soft law, that is, how different academic fields understand and investigate soft law, as well as how these fields characterize and delimit various soft law regimes and their authority. What features characterize legal, political science and administration, international relations or organizations research into soft law? Do lawyers approach soft law from the perspective of actors (courts, regulators, standardization bodies) and social scientists from the perspective of institutions? Do private lawyers see the authority of certain soft law regimes, such as technical standards, differently than public lawyers? Does the EU legal and political scholarship understand the authority and effects of soft law differently than the scholarship interested in transnational and international law?

One important finding here is that soft law can either be interpreted and analyzed as one instrument in the regulatory toolbox from which rational decision-makers can choose, or soft law can be seen as providing a forum for deliberation and learning. In the first interpretation, the strategic choices with respect to the pros and cons of soft law by decision-makers are highlighted, whereas the second interpretation emphasizes how deliberative social processes form new modes of governance and regulation. The chapters show how both interpretations are important in understanding how different disciplines analyze soft law and that soft law can be regarded as a continuum of rules rather a static concept.

De Witte's chapter examines the phenomenon of EU soft law from the general perspective of EU public law, by showing that the judicial and institutional practice of the EU departs from a categorical distinction between binding law and soft law. While soft law is a pervasive phenomenon in EU regulation, de Witte reminds that the constitutional principles of conferral and institutional balance need to be respected when soft law is used. Claudio M. Radaelli and Gaia Taffoni focus on the notion of 'better regulation' as an instance of meta-regulation, which typically – in the EU – comes in the form of soft guidelines, communications and peer-review processes. They show that the argument for the use of soft law in the field of better regulation adheres to both of the ideas of soft law mentioned above. 'Better regulation', as a form of soft regulation, attaches great importance to deliberation and discussion, but it also matches the general virtues of flexibility and respect for Member States' sovereignty commonly attached to soft law. Focusing on soft law in the form of corporate social responsibility policies as well as methods of social and environmental reporting and certification schemes, the chapter by Boris Holzer shows how interactions between transnational corporations and transnational activists result in the elaboration of a transnational normative framework for corporate decision-making. Here soft law provides a framework for deliberation of socially acceptable norms, informing the public's appraisal of business practices. The public in turn participates

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in the deliberative processes through the scrutiny of corporate behaviour during public debates about the rights and duties of corporate actors. Adhering instead to an idea of soft law as a regulatory tool, Hans-W. Micklitz's chapter discusses soft law in the form of technical standards and shows how these function as a substitute for the failed attempt to find political support for the development of a European Civil Code.

Two chapters complete this part by providing critical views on soft law. A reading, which rejects the idea of soft law providing a forum for deliberative social processes, is offered by Jan Klabbers. In his chapter, he argues that soft law has become a sort of elite governance, responsible for the populist backlashes which we witness everywhere in the world, and suggests replacing the notion of soft law altogether with that of 'epistemic governance' or 'epistemic authority'. This would do justice to the idea of soft law being linked to knowledge and expertise. Finally, the chapter by Ingrid Gustafsson Nordin and Kristina Tamm Hallström uses organization theory to show how standards as a form of soft law - tend to dilute responsibility because they have a tendency to generate more organizational structures instead of clarifying or concentrating responsibility.

The third theme covers the public and private actors as well as institutions adopting and engaging with soft law, and the process of soft law-making and its challenges. What is the role of national administrations and courts with respect to soft law? Does this role show peculiar features in a multi-level context such as that of the EU or in a federal system such as the USA? Have regulatory agencies become the main soft law regulators and why? How is soft law adopted and is this process accessible to societal stakeholders, social partners and civil society in general? What lessons can we learn from the use of the Open Method of Coordination (OMC), something once hailed as the prime soft law instrument in the EU?

One important finding here is the soft law scene is populated with actors. Courts are probably the most contested actors in the scene. By systematically reviewing the literature on courts and soft law, Mariolina Eliantonio and Emilia Korkea-aho argue that there are compelling reasons for the courts to both engage with soft law as well as not to engage with it, leaving the courts in a bind with no clear avenue of escape. Of course, the institutional framework influences the courts' actions with regard to soft law, and Jacint Jordana and Joan Solanes Mullor, focusing on EU economic governance, show how differently legal accountability is constructed with relation to the European Economic and Monetary Union and the European System of Financial Supervision.

The next four chapters focus on actors that could be for good reasons considered as the most hands-on actors. Steven Vaughan offers a fascinating depiction of a series of 'fictions' and 'fuzziness' that are deployed to think about EU agencies and their normative powers (for instance, 'EU agencies have no powers' or that 'agency guidance is not binding'). In his view, EU agencies' soft law rule-making is 'a complex governance situation characterized by various forms of fuzziness', making them a 'messy' but worthwhile area of study. Moving across the Atlantic, Blake Emerson also looks at guidance but in the US context. He reminds us how the concept and use of guidance is hotly contested in the USA, which leads him to raise several serious questions about the impact of these documents on private parties' moral reasoning as well as considering the 'fraught role' that guidance can play 'in mediating intense political disputes'. His chapter is a welcome reminder to scholars on this side of the Atlantic not to look at soft law only as a neutral, technical instrument of governance. Part of seeing soft law as an instrument of politicized governance is to look at the processes of its creation. Noting that the procedures of soft law-making by the European Commission are famously obscure,

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Oana Ştefan asks how the Commission – the key soft law regulator in the EU – makes soft law. She shows that unlike the common perception, the Commission actively engages with public and private actors when issuing its soft law. While moving away from the specific context of the EU, Rene Urueña and Rafael Tamayo-Álvarez continue with this idea of collaboration. Rather than acting as norm entrepreneurs, civil society organizations play a significant role in the international law-making process by contributing to the 'framing of the legal' and shaping legal consciousness and ultimately, perceptions of what is legally possible.

The final two chapters of the third part revisit the important question of soft law-making: Is soft law considered the second-best option (to hard law) or is it a new governance opening in its own right? The chapters show that both perceptions of soft law are important in explaining the dynamics behind soft law. By zooming in on the OMC in two different policy domains, social policy and energy and climate policy, Minna van Gerven and Sabina Stiller show that the OMC has undergone gradual changes following the EU developments. What is important is that the OMC is not simply a policy instrument. It provides a mode of governance that fosters creative appropriation and policy leverage for both national and EU level actors. The OMC (and by analogy, soft law) is whatever actors want it to be. In the final chapter of the third part, Anne Ausfelder, Adam Eick and Miriam Hartlapp, take up a neglected aspect of soft law, its use at the national level. They show how the way in which soft law is used at the national level is an integral part of the policy cycle of soft law, and by focusing only on the EU level, we not only miss important insights into soft law but also into the operation of the EU's multi-level system more broadly.

The fourth theme addresses the role of soft law in tackling some of the current global societal challenges. What role – if any – does soft law have to play in new regulatory fields such as artificial intelligence or in terms of emerging regulatory actors such as cities? Is soft law fit to tackle global and recurrent crises such as migration, climate change and financial instability? Can soft law serve as a suitable regulatory tool for politically sensitive problems, such as gender inequality, citizenship, or the backsliding of the rule of law?

The main finding here is that soft law continues to have a major role in regulating the most urgent issues that our global societies face today. In fact, it may be the most effective and viable regulation mode in transnational and multistakeholder governance. The technologies of power in these regulatory processes raise fundamental questions about the relationship between normative ideals and regulatory practices. This is certainly the case with the question of how to reconcile liberal representative democratic ideals with times of crisis management and transnational governance. Another challenge is how to secure human rights while also ensuring a high degree of effectiveness of public policy.

When it comes to the prevalence of soft law in the efforts to tackle global issues, the chapter of Kati Kulovesi and María Eugenia Recio shows, in the context of the pressing issue of climate change, that while an important regulatory tool in the field, soft law has not yet surpassed hard law when it comes to guiding countries' behaviours vis-à-vis climate mitigation actions. From the global to the local level, a different picture is depicted by Astrid Voorwinden and Sofia Ranchordás' chapter. They show that local governments have embraced soft law (in the form of technical standards, memoranda of understanding, charters of ethics, etc.) when using digital technologies, since these new technologies pose challenges unaddressed by traditional regulation. The use of soft law, in turn, foster the creation of transnational networks of cities, which the latter use to tackle global challenges. Along similar lines, the chapter by Timothy Jacob-Owens and Jo Shaw conclude that soft law is already a significant instrument

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in contemporary citizenship regimes, by contributing to the emergence of international norms shaping and constraining domestic citizenship practices in relation to the right to a nationality, the modes of citizenship acquisition, and multicultural citizenship. They also posit that soft law may come to play an even more substantial role in the development of an international citizenship regime.

With respect to the capacity of soft law to generate policy change, the chapter by Birte Böök and Linda Senden shows that, in the field of gender equality, the effectiveness of soft law has been generally rather limited. Soft law has indeed not been sufficient to bring about the desired 'classic' legal implementation, nor the behavioural, organizational and social policy changes. Similarly, the chapter by Joelle Grogan and Clara van Dam, which considers the soft law mechanisms that have been adopted to enhance the rule of law in the EU, conclude that soft law tools do not necessarily guarantee an effective outcome in remedying the rule of law crisis.

A number of chapters show how soft law has been the 'go-to' mechanism to tackle pressing societal issues. However, its use needs to be constantly monitored for compliance with democratic and fundamental rights credentials. In his chapter, Alexander Türk tackles the use of soft law in the financial crisis. He shows how the use of soft law, in particular by Union committees and agencies, as a means of crisis management raised significant concerns about the legal status and legitimacy of soft law instruments in this context as well as the danger of circumventing Treaty constraints. Finally, the chapter of Frederik Schade and Mikkel Flyverbom examines the multitude of soft law initiatives adopted at the EU level aimed at governing artificial intelligence (AI) technologies and their perceived societal risks. They show that significant ambiguities and uncertainties surrounding AI governance still remain, a situation which will need to be closely examined by researchers in the future because of important fundamental rights issues stemming from AI and its many uses.

3. CONCLUSIONS: IS SOFT LAW (RESEARCH) FUTURE-PROOF?

Will we still be talking about soft law in 2030 or will the concept have become obsolete? If we asked some of our contributors, in the future we should be talking about 'bamboo' (Snyder) or 'epistemic authority' (Klabbers) instead of soft law. But if we accept that soft law is still part of our vocabulary in the years to come, what should we be talking about exactly? What are the avenues for further research?

When putting together the handbook, we realized that soft law research has increasingly adopted a form of case study research. It was difficult to find scholars ready to write about soft law from a broader perspective, and many whom we invited to contribute to the present handbook agreed to do so only if they could submit a case study chapter. We acknowledge that this tendency towards case studies is because of the diversity of soft law instruments and their multiple applications across policy areas. While it may have been possible to write about soft law in general terms in the early 2000s, now 20 years later a soft law scholar feels compelled to characterize soft law as environmental soft law, soft law adopted by the three supervisory authorities in the area of financial market, and so on.

And so, the research on soft law is an increasingly specialized field, with scholars of soft law at a growing rate speaking past each other and not engaging with each other's research. One future avenue and challenge ahead for a broader soft law community is perhaps to zoom out

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a little and to focus on soft law as an instrument that is used across policy fields, recognizing that many advantages and disadvantages of using soft law are common to multiple policy fields. But while distances between researchers of ‘x’ soft law and those of ‘y’ soft law have increased in legal research and political science, there has been increasing rapprochement and cross-contamination between the researchers of ‘x’ soft law in legal scholarship and political science. For instance, researchers of environmental soft law and governance are increasingly cooperating and collaborating, a trend also seen in other sectors. In this sense, soft law has created interdisciplinary bridges and a sense of bonding, something that future research should further encourage. More research is also needed with linguistics scholars, psychologists, or economists, because there is more to know about soft law than just lawyers and political scientists can unveil.

Are there any themes that we anticipate to be important in the future? One such theme is populism and the emergence of right-wing politics across Europe and beyond. Has the rise of populist movements changed societies’ use of soft law? Populism involves the rejection of expert-based politics, and soft law, which is often seen as a crystallization of state-of-the-art technical and expert knowledge on a certain matter (just think of agency soft law both in the EU and the USA), would then be rejected too. The extent to which this holds true should be studied (see also Klabbers, this volume). Relatedly, future research should take far more seriously than it has so far done the hidden values and distributional, moral and ethical effects of soft law on divided societies, a theme explored in Emerson’s chapter. While establishing the legal effects of soft law is certainly an important theme, we should also aim to establish the effects soft law has on minorities, for instance. Is using soft law a problem for minorities or from a gender perspective? Are enforceable rules necessary to ensure that governments do not take advantage of softness and fail to respect their obligations? Urueña and Tamayo-Álvarez’s chapter suggests that soft law may also shape the perceptions of what is legally possible, thus supporting civil society in the push for a better, fairer and more inclusive world.

Horizons must be broadened also in terms of methods and theoretical frameworks. One obvious new horizon relates to computational text methods in the research on soft law. In terms of theoretical frameworks, it is surprising how little used Michel Foucault is in the research on soft law and governance. For instance, in this handbook, only one chapter (Schade and Flyverbom) discussed Foucault’s governmentality that could, however, open up several new directions for research. Further dialogue is needed between theories of governance and its empirical reality. Take for instance regulatory hybridity, which is a practice almost everywhere we look, but as a notion and an empirical practice it has very little support in theories of democracy (Mörth, this volume). Democratic theories are very much based upon static dichotomies. Should regulation adapt to impossible ideals, or should theories of democracies change and be modified? Is there a case for democratic hybridity that can match transnational regulatory hybridity?

These research themes and questions require further interdisciplinary collaboration. The handbook shows how the diversity of the concept of soft law brings researchers together. Indeed, the richness of soft law in empirical, analytical and theoretical research constitutes a goldmine for interdisciplinary research.

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The practices of governance and regulation and the ensuing fundamental normative questions about power, legitimacy and democracy will certainly continue to be posed in the years to come.

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