Implementing Soft Law: The Case of Equality Promotion

I. Introduction

Today, minority rights promotion in Europe is no longer largely a question of transposition of international norms into domestic law. Even formerly contested norms such as minority rights, which do not fully enjoy the seemingly undisputed status and legitimacy of fundamental human rights as formulated in the European Convention on Human Rights (ECHR), now find formally wide-spread approval. In Europe, only Turkey, Monaco, Andorra and France have not consented to sign the Framework Convention on the Protection of National Minorities (FCNM). The years after the entry into force of the FCNM in 1998 have seen a continuous proliferation of minority rights across Europe with the FCNM almost achieving pan-European influence. EU enlargement and membership conditionality has accelerated the process of norm adoption in Eastern Europe¹ and it is fair to say that ethnic minorities in Europe enjoy the highest formal protection of their rights around the world. This is an unparalleled achievement of the Council of Europe (CoE) and its monitoring mechanism. At the same time, however, the living conditions of the most disenfranchised minority groups did not follow suit and appear to be in a staggering mismatch when compared with the formal protection granted. Thus, the real challenge is the implementation of minority rights norms which aim to provide redress from substantial inequalities in the economic, social and political sector. For this reason, this chapter focuses on existing challenges in the implementation process of minority rights. It examines the relationship between the soft law quality of the FCNM and the process of norm implementa-

tion understood as behavioural compliance with the objective and purpose of the FCNM. Although non-implementation is always connected to domestic actors and has a regional and local dimension because the CoE does not implement any of its conventions directly, this study does not inquire into specific country-based conditions of noncompliance, which may vary across cases, but starts its analysis with minority norms themselves.

The emphasis on norms for discussing implementation challenges is warranted for a number of reasons. First, the literature on norm compliance, especially those studies which examine compliance with EU law, have a tendency to treat legal norms as rather monolithic entities. In this context, norms are often treated as providing uniform models for all, constraining behaviour equally and allowing for direct litigation and enforcement by an independent court. Although many studies implicitly assume that norms do not provide enough variance to falsify research results because of their uniform impact on countries, they are too easily abandoned as explanatory variables. Second, the situation is fundamentally different when examining minority rights. Member states to the FCNM can often circumvent the strict application of minority rights in their country because many minority rights standards are vaguely formulated. There is no uniform understanding of the term minority and the FCNM does not formulate litigable rights. The exact meaning of many minority rights norms only becomes apparent through their application and the monitoring procedure.

This chapter explores the impact of the soft law quality of minority rights on the process of their implementation. In the first section, the author investigates the quality of minority rights as soft law instruments in contrast to hard law. This section conceptually reviews the potential of soft law, assessing its merits and misfortunes for norm implementation. The following section focuses on Article 4 of the FCNM which prohibits discrimination against minorities and formulates obligations for “effective equality” promotion. This section analyses the continuous quasi-jurisprudence of the Advisory Committee (AC) to the FCNM, primarily focusing on the second review cycle monitoring the implementation of Article 4 and the AC’s opinion. Here, the emphasis is on the monitoring process with the aim to explore whether AC monitoring has helped to harden the softly formulated minority rights and whether the AC has positively induced the domestic implementation process.

II. Minority Rights Between Hard and Soft Law

Much has been written on hard and soft law in international relations. A minimalist definition of soft law ascribes to it only those international acts which

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2 Vienna Convention on the Law of Treaties, 23 May 1969, Art. 18, obligation not to defeat the object and purpose of a treaty prior to its entry into force.