Rationalizing the Differentiation between ‘New’ and ‘Old’ Minorities? The Role of the Margin of Appreciation Doctrine in Determining the Scope of Protection of Minority Rights

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1. Introduction

In an age when the right to be different and to distinct identity has been successfully manifested under the expanded notion of the right to privacy, the notion of ‘minorities’ itself is a contestable concept,¹ the ‘ownership’ of which is claimed by varied groups in a national society. Members of minorities relied upon existential rationales to advance a common set of rights, which they consider essential to their self-identification and survival.²

The purpose of this paper is to explore the role of the margin of appreciation doctrine in determining the level of protection afforded to minority rights in relation to the oft-cited distinction between so-called ‘old’ minorities and ‘new’ minorities. The paper will start with discussing the nature of the margin of appreciation doctrine, and its application in clarifying indefinite concepts of minority rights and determining specific positive obligations to give effect to rights of minorities. Having obtained insight into the modalities of the margin of appreciation in relation to minority rights regime, the paper will undertake theoretical inquiries into underlying rationales for differentiating or undifferentiating ‘old’ and ‘new’ minorities.

¹ Clearly, the term ‘minorities’ is not confined to holders of distinct ethno-cultural identities. It may be used to encompass members of diverse politically and socially disadvantaged groups, such as homosexuals, transsexuals, the handicapped and the mentally-ill. Indeed, this denomination may not necessarily suppose numerical inferiority of a historically disadvantaged group as compared to a politically and socially ‘dominant’ group, so that women may be categorised as a minority in relation to men.

² Such rights encompass political rights (political participation and autonomy), cultural rights (identity, cultural security, language and education), religious rights, and anti-discrimination (equal treatment), and in case of indigenous populations, the right relating to land.
2. Classification of the Genres of Minority Rights

It has been proposed that the catalogue of minority rights may be distinguished between four generations of rights, which correspond to their historical developments. The first generation rights relate to existential rationale of minority groups such as their right to existence and survival. The second generation rights refer to the rule of anti-discrimination and equality rights, which are equipped with clear and hard substantive obligations and fully anchored in the bedrock of customary international law. The third-generation rights are the category of rights that yield obligations to protect and foster minority identity and diversity, the obligations embodied in the provisions may, at first glance, be programmatic. These rights can be gradually given more specific meaning through the work of the national and international monitoring bodies. The conceptual framework of these rights is underpinned by the keenly felt need to address the problem of minorities being prevented from, or dispossessed of necessary preconditions for, preserving their identity (language, religion and cultural practices).

Langue and educational policies prove of pivotal importance, often requiring states not only to abstain from interference but also to implement affirmative measures. The ‘fourth generation’ rights relate to the full and effective participation of minorities in cultural, social and economic life, and in public affairs. This category of minority rights should not, however, be confused with rights associated with a soft law. Instead, they ought to be deemed foundational in nature, as their right to devise forms of

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4 Weller, ibid., p. 3.

5 Malloy et al., supra n. 3, p. 36–37.

6 Ibid.

7 Weller, supra n. 3, p. 3.