A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision

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The European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) may have a solid reputation in terms of contributing to the effective protection of human rights, the position of the Court and its legitimacy have come increasingly under threat. The latter is not only due to its ever increasing workload and related backlog, but also due to the reaction of states vigorously criticizing particular judgments of the Court, and related announcements of non-compliance. These judgments tend to concern issues that are felt by the states to fall squarely in their sovereign decision making powers, inter alia because it would regard essential determinants of the ‘national identity’.

It can be argued that these reactions from states – to some extent at least – have been fed or even induced by the development and use of the margin of appreciation doctrine by the Court. More particularly, when the Court’s analysis uses the margin of appreciation of states as its starting point, this contributes to the sense that decisions relating to the respect of human rights fall (to a great extent) within the sphere of ‘domestic jurisdiction’. Consequently, when the Court in a particular case reduces the margin of appreciation and actually takes up its role of international supervisor, states almost scream that the Court should respect their decisions to maintain national traditions.

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1 See J. H. Gerards, Het Prisma van de Grondrechten (Nijmegen: Radboud Universiteit Nijmegen, 2011), 5–6.
This can actually be considered to amount to a reversal to a situation prior to the development of the human rights paradigm after the Second World War. The emphasis then was very strongly on the importance of international supervision so as not to allow a recurrence of the horrors of the holocaust. Hence, it was ‘understood’ that (respect for) human rights is a matter of international concern and no longer a question of merely internal affairs or ‘essentially within the domestic jurisdiction of a state’ (in the sense of article 2(7) UN Charter).²

This article sets out to critically analyse the margin of appreciation doctrine as developed and used by the European Court of Human Rights, covering both fundamental concerns about and problems with the way the Court applies the doctrine. Subsequently these concerns are traced and exposed in the Courts jurisprudence pertaining to environmental protection and the traditional way of life of minorities and indigenous peoples, both issues of special concern within polar law. The article then goes on to identify an alternative way for the Court to fulfill its role of international supervisor, implying a radical halt to using a margin of appreciation for states as the baseline and thus shifting the focus to the supervisory task of the European Court. The supervision by the Court would then have more body and would focus on identifying and balancing all relevant interests, thus taking into account ‘all relevant circumstances’, while being more explicit about the relative weight of these respective interests. This implies a reconsideration of the meaning and implications of the subsidiary nature of international protection. The conclusion is preceded by a paragraph investigating what this alternative model of supervision could potentially mean for the protection of indigenous peoples as interrelated with rights to a healthy environment.

1. Setting the Scene: Definitions of the Margin of Appreciation, State Discretion and Levels of Scrutiny

A critical analysis of the margin of appreciation doctrine requires the elucidation of some concepts that tend to be used in discussions on the margin of appreciation.

The margin of appreciation left to states by the European Court of Human Rights is a particular form of state discretion. It is indeed possible to distinguish several forms of state discretion in relation to human rights.³ In this regard it should be highlighted that human rights and state obligations in this respect