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Subsidiarity to the Rescue for the European Courts? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection

The empty phrases concerning the states' margin of appreciation—repeated in the court's judgments for too long already—are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights [...]

(Brauch 2005, 148)

Introduction

One of the constant tensions in multilevel legal and political orders concerns the allocation of authority among the bodies at different levels.¹ What scope of autonomy should they enjoy over various issue areas, and how should they be checked or balanced? One of the recent arenas for such tension and debate concerns the role of the European Court of Human Rights (ECtHR), which is entrusted the power of judicial review over the member states of the Council of Europe's compliance with the European Convention on Human Rights (ECHR, Convention). According to the 'Copenhagen Criteria' of accession to the European Union (EU), the ECtHR thus serves important gate keeper functions for applicant states to the European Union (European Council 1993). It also monitors the continual compliance with the Convention by existing members—which is of shared concern for all EU states. In exercising its powers, the Court must often combine apparently irreconcilable requirements: it must assess and sometimes criticize the states' legislation and policies—yet respect the sovereignty of those of the states which are well functioning democracies. Further controversies have

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