

# Table of Contents

---

Table of figures		xii
Foreword		xiii
Preface		xv
<b>Chapter 1</b>	<b>Introduction</b>	<b>1</b>
1.1	Proportionality, subsidiarity and primarity	1
1.1.1	The birth of the ECHR	7
1.1.2	The subsequent development	14
1.2	Structure and basis of the study	21
1.2.1	International law	22
1.2.2	Comparative law	26
1.2.3	Case-law	28
<b>Chapter 2</b>	<b>The principle of proportionality</b>	<b>31</b>
2.1	Introduction	31
2.2	Origin of the principle of proportionality	33
2.2.1	A historical perspective	33
2.2.2	General international law	35
2.2.3	Drafting and early practice	37
2.2.4	Perspectives on international human rights law	40
2.3	Proportionality and interpretation	44
2.3.1	Textual interpretation	44
2.3.2	Integrative interpretation	46
2.3.3	Minimalist interpretation	47
2.3.4	Special interpretation	49
2.3.4.1	Law-making treaty	50
2.3.4.2	Objective obligations	52
2.3.4.3	Living instrument	54
2.3.4.4	Practical and effective rights	55
2.3.5	Comparative interpretation	57
2.3.6	Conclusions	66

2.4	(De)limitation of rights	68
2.4.1	Vertical and horizontal proportionality tests	69
2.4.2	Express limitations	76
2.4.3	Implied limitations	78
2.4.4	Delimitations	81
2.4.5	Absolute rights	83
2.4.5.1	The use of force	84
2.4.5.2	Expulsion etc. of aliens	87
2.4.6	Positive obligations	94
2.4.6.1	Key arguments	95
2.4.6.2	Acts and omissions	100
2.4.6.3	Rights and obligations	103
2.4.6.4	Conflicting rights	108
2.4.7	Conclusions	110
2.5	Least onerous means	111
2.5.1	Rejection of the principle of strict necessity	114
2.5.1.1	Use of lethal force (Article 2)	115
2.5.1.2	Derogation (Article 15)	115
2.5.1.3	Inhuman and degrading treatment (Article 3)	116
2.5.1.4	Deprivation of liberty (Article 5)	117
2.5.1.5	Private and family life (Article 8)	120
2.5.1.5.1	Communication of personal data	121
2.5.1.5.2	Public care of children	121
2.5.1.5.3	Environmental human rights	122
2.5.1.6	Freedom of expression (Article 10)	124
2.5.1.7	Positive freedom of association (Article 11)	125
2.5.1.8	Negative freedom of association (Article 11)	126
2.5.1.9	Protection of property (Protocol No. 1 Article 1)	127
2.5.1.10	Freedom of movement (Protocol No. 4 Article 2)	129
2.5.2	Implementation freedom and the principle of strict necessity	129
2.5.3	Conclusions	135
2.6	The very essence of rights	135
2.6.1	Wide use of the essence of rights	140
2.6.1.1	Interferences	140
2.6.1.2	Importance of rights	141
2.6.1.3	Human dignity	142
2.6.2	A relative doctrine of the essence of rights	145
2.6.2.1	Extraordinary limitation (Article 15 and Article 56 § 3)	146
2.6.2.2	Ordinary limitation	149
2.6.2.2.1	Access to court (Article 6 § 1)	149
2.6.2.2.2	The right to remain silent (Article 6 §§ 1 and 2)	150
2.6.2.2.3	Right to vote etc. (Protocol No. 1 Article 3)	153
2.6.2.2.4	Right to marry (Article 12)	154
2.6.3	An absolute doctrine of the essence of rights	155
2.6.4	Conclusions	163

2.7	The suitability of measures	163
2.7.1	The interaction between facts and norms	166
2.7.2	The legal determination of the means-ends relationship	169
2.7.2.1	Substantive interpretation and future facts	169
2.7.2.2	The law of evidence (past facts)	170
2.7.2.2.1	Free admission and assessment of evidence	171
2.7.2.2.2	Burden of proof	173
2.7.2.2.3	Standard of proof	174
2.7.2.2.4	Proof without evidence	176
2.7.2.3	The law of information (future facts)	178
2.7.2.3.1	Proof of future facts	178
2.7.2.3.2	The standard of information	181
2.7.2.3.3	The interaction between facts and norms	187
2.7.3	Conclusions	190
2.8	A theoretical explanation of the fair balance-test	192
2.8.1	The partially inadequate justification of the fair balance-test	192
2.8.1.1	Necessity, regulation, and limitation	193
2.8.1.2	The notion of democracy	195
2.8.1.3	The inherent fair balance-test	198
2.8.2	Normative structure	204
2.8.2.1	Rules and principles	205
2.8.2.2	Exceptions	211
2.8.2.3	<i>Prima facie</i> and ultimate rights	217
2.8.3	The double structure of norms	219
2.8.3.1	The double structure of principles	220
2.8.3.2	The double structure of rules	221
2.8.4	Conclusions	224
2.9	Perspectives	225
<b>Chapter 3</b>	<b>The principle of subsidiarity</b>	<b>227</b>
3.1	Introduction	227
3.2	Subsidiarity and discretion	230
3.2.1	From tradition to a doctrine of multiple standards	231
3.2.2	Polysemi and synonymy	236
3.2.2.1	Margin of appreciation	236
3.2.2.2	Fourth instance principle	238
3.2.2.3	Implementation freedom	239
3.2.3	Conclusion	239
3.3	The origin and basis of subsidiarity	240
3.3.1	The Commission's practice	243
3.3.2	The Court's leading cases	247
3.3.2.1	The Belgian Linguistic case	247
3.3.2.2	Handyside v. the United Kingdom	251
3.3.2.2.1	Final ruling	252
3.3.2.2.2	Interpretation	253

3.3.2.2.3	Direct and global review	254
3.3.2.2.4	The principle of subsidiarity	257
3.3.2.3	Searching for a standard of protection and review	264
3.3.2.3.1	Upper and lower limits	264
3.3.2.3.2	Identifying the standard of review	265
3.3.2.4	The convergence of standards of protection and review	268
3.3.3	Conclusion	274
3.4	Fact-subsidiarity	276
3.4.1	The Court's fact-finding role	278
3.4.2	The principle of subsidiarity and the margin of appreciation	280
3.4.3	Inter-temporal assessment	282
3.4.3.1	Extension of the basis of the Court's review	283
3.4.3.2	Limitations on the basis of the Court's review	285
3.4.4	Conclusions	288
3.5	Lawfulness-subsidiarity	289
3.5.1	The Court's view on the rule of law	289
3.5.2	The principle of subsidiarity and the margin of appreciation	291
3.5.2.1	International law	292
3.5.2.2	Contract law	293
3.5.2.3	Criminal law	294
3.5.3	Conclusions	295
3.6	Norm-subsidiarity	296
3.6.1	Implementation freedom	296
3.6.2	Execution of judgments	298
3.6.3	Procedural provisions	299
3.6.3.1	Fair trial (Article 6)	299
3.6.3.2	Effective remedy (Article 13)	300
3.6.3.3	Right to liberty (Article 5 § 4)	302
3.6.4	Substantive provisions	303
3.6.4.1	Discretion	304
3.6.4.2	Discretion and norms	307
3.6.4.3	The horizontal scope of norms	310
3.6.4.4	The vertical scope of norms	311
3.6.4.5	Interpretation and application	315
3.6.5	Conclusions	318
3.7	EC law-subsidiarity	319
3.7.1	The resolution of conflicts between international norms	321
3.7.1.1	The principle of continued responsibility	323
3.7.1.2	The principle of discontinued responsibility	324
3.7.1.3	Continued responsibility vis-à-vis discontinued responsibility	325
3.7.2	Other procedures of international investigation or settlement	328
3.7.3	The Court's different models of subsidiarity	330
3.7.3.1	No jurisdiction if equivalent protection (M&Co.)	331
3.7.3.2	No violation if equivalent protection (Waite & Kennedy)	332
3.7.3.3	Presumption of compliance if equivalent protection	

	(Bosphorus)	335
3.7.3.3.1	Review at the level of jurisdiction or substance	336
3.7.3.3.2	The presumption of compliance	338
3.7.3.3.3	The scope of the doctrine	344
3.7.3.3.3.1	Discretion and obligations of means and result	345
3.7.3.3.3.2	Discretion and judicial subsidiarity	346
3.7.3.4	No jurisdiction if attributable to the UN (Behrami/Saramati)	350
3.7.4	Conclusions	354
3.8	Perspectives	356
<b>Chapter 4</b>	<b>The principle of primarity (formal aspect)</b>	<b>359</b>
4.1	Introduction	359
4.2	Remedies in national law	362
4.2.1	Substantive review	363
4.2.1.1	Incorporation, direct effect, and supremacy	364
4.2.1.2	Indirect effect	367
4.2.1.2.1	Review of lawfulness (Article 5 § 4)	367
4.2.1.2.2	Access to court (Article 6 § 1)	370
4.2.1.2.3	Effective remedy (Article 13)	374
4.2.1.2.4	Indirect effect inherent in substantive rights	376
4.2.1.3	Implementation obligations in substantive obligations	378
4.2.1.3.1	Negative obligations	378
4.2.1.3.2	Positive obligations	380
4.2.1.4	Direct effect and supremacy revisited	384
4.2.1.4.1	Article 13 read in conjunction with the principle of subsidiarity	385
4.2.1.4.2	Article 13 read in conjunction with the principle of primarity	391
4.2.2	Interim measures	399
4.2.2.1	The international level (Article 34)	399
4.2.2.2	The national level (Article 13 and substantive provisions)	403
4.2.3	State responsibility	407
4.2.3.1	The international level	409
4.2.3.1.1	Cessation, non-repetition, and reparation	409
4.2.3.1.2	Shared responsibility (Articles 41 and 46)	411
4.2.3.1.3	The Court's substantive review (Articles 19 and 32)	415
4.2.3.1.4	Consequences of a violation (Articles 41 and 46)	417
4.2.3.1.4.1	Compensation	418
4.2.3.1.4.2	Specific measures	423
4.2.3.1.4.3	General measures	428
4.2.3.1.4.4	Temporal limitation	435
4.2.3.2	The national level	438
4.2.3.2.1	Compensation	439
4.2.3.2.1.1	Deprivation of liberty (Article 5 § 5)	439
4.2.3.2.1.2	Wrongful conviction (Article 3 of Protocol No. 7)	441
4.2.3.2.1.3	General remedy (Article 13)	441
4.2.3.2.1.4	Substantive provisions	443

---

4.2.3.2.2	Cessation, non-repetition, and reparation	444
4.2.3.3	Subsidiarity and primarity (the level of compensation)	449
4.2.4	Conclusions	454
4.3	Proceduralization of substantive rights	455
4.3.1	The dynamics of proceduralization	456
4.3.1.1	Subsidiarity or proceduralization	456
4.3.1.2	Aspects of subsidiarity and primarity	457
4.3.1.3	Process value and efficacy	461
4.3.2	Decision-making and review procedures	463
4.3.2.1	Child care and access (Article 8)	463
4.3.2.1.1	Procedural obligations	464
4.3.2.1.2	Substantive obligations	469
4.3.2.1.3	Integrated review of procedure and substance	470
4.3.2.1.4	Conclusions	478
4.3.2.2	Expulsion (Article 3)	478
4.3.2.2.1	Procedural obligations	478
4.3.2.2.2	Integrated review of procedure and substance	479
4.3.2.3	Derogation (Article 15)	483
4.3.2.3.1	Specific safeguards	483
4.3.2.3.2	General safeguards	485
4.3.2.3.3	Integrated review of procedure and substance	488
4.3.2.4	Other areas of case-law	489
4.3.3	Investigative obligations	501
4.3.3.1	Reasons for proceduralization	502
4.3.3.1.1	Use of lethal force (Article 2)	502
4.3.3.1.2	Use of excessive force (Article 3)	503
4.3.3.2	Key aspects of the investigatory obligations	507
4.3.3.3	Integrated review of procedure and substance	509
4.3.3.3.1	Use of lethal force (Article 2)	510
4.3.3.3.2	Use of excessive force (Article 3)	515
4.3.3.4	Investigative obligations in other areas of case-law	518
4.3.4	Conclusions	521
4.4	Perspectives	522
<b>Chapter 5</b>	<b>The principle of primarity (substantive aspect)</b>	<b>527</b>
5.1	Introduction	527
5.2	Decreasing international review	530
5.2.1	Constitutional justice and individual relief	532
5.2.2	Constitutional justice and docket control	536
5.2.3	Decreased admissibility	537
5.2.3.1	The scope of “significant disadvantage”	538
5.2.3.2	Domestic authorities’ role in cases without “significant disadvantage”	541
5.2.4	Conclusions	544
5.3	Increased national review	544

---

5.3.1	Domestic independence	544
5.3.2	Substantive and formal principles	549
5.3.2.1	A practical view on proportionality and subsidiarity	549
5.3.2.2	A theoretical view on proportionality and subsidiarity	551
5.3.2.3	The Court's view on proportionality and subsidiarity	553
5.3.3	Empirical and normative polycentricity	561
5.3.3.1	Polycentric pluralism as an empirical fact	562
5.3.3.2	Polycentric pluralism as a normative challenge	566
5.3.4	Conclusions	576
5.4	Perspectives	577
<b>Bibliography</b>		<b>579</b>
<b>Index of cases</b>		<b>655</b>
<b>Index</b>		<b>661</b>