

INSTITUT FOR
MENNESKE
RETTIGHEDER

HØJESTERETS-
SKRANKEN

17. MAJ 2018

PROPORTIONALITET OG
SUBSIDIARITET

THE DANISH
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HUMAN RIGHTS

EUD & EMD

Sammenlignelig proportionalitet, men EUC kan give bedre beskyttelse (EUC art 52)

EMRK **laveste fællesnævner** og EUC **højeste fællesnævner** for at undgå konflikt med forfatninger

Subsidiaritet konceptuelt underudviklet i EUD-praksis, men **veludviklet** i EMD-praksis:

- National ret (fjerde instans princip)
- Bevis vurdering (fjerde instans princip)
- EU-ret (Bosphorus-doktrin)
- Europæiske norm (fortolkning)
- Processuelt/institutionelt (subsidiaritet)

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KØBENHAVN-
ERKLÆRINGEN
PUNKT 28.C

The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8-11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention.

- Where a **balancing** exercise has been undertaken at the national level
- in conformity with the criteria laid down in the **Court's jurisprudence**,
- the Court has generally indicated that it **will not substitute** its own assessment for that of the domestic courts,
- unless there are **strong reasons** for doing so.

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NDIDI V. UK
14.9.2017

The requirement for “European supervision” does **not** mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court’s task to conduct the Article 8 **proportionality assessment afresh**. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that,

- where the **independent and impartial domestic courts** have
- **carefully examined** the facts,
- applying the **relevant human rights standards** consistently with the Convention and its case-law, and
- **adequately balanced** the applicant’s personal interests against the more general public interest in the case,
- it is **not for it to substitute** its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities.
- The only exception to this is where there are shown to be **strong reasons** for doing so

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EKSEMPLER PÅ PROCESSUEL /INSTITUTIONEL SUBSIDIARITET

HATTON V UK
2003

Luftforurening ved lufthavn

”role of **domestic policy-maker should be given special weight** in matters of general policy, on which opinions within a democratic society may reasonable differ widely”

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PARLAMENTARISK
DEBAT

EKSEMPLER PÅ PROCESSUEL /INSTITUTIONEL SUBSIDIARITET

Animal Defenders: Politiske TV-reklamer

- "The **quality of the parliamentary and judicial review** of the necessity of the measure is of particular importance"

Hirst: Stemmeret til kriminelle

- "no evidence that the **Parliament has ever sought to weigh** the competing interests or to assess the proportionality"

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STØRRE
RÅDERUM?

UDVIKLINGENS BETYDNING FOR DANSK RETSPRAKSIS

En vis **retsusikkerhed et grundvilkår** pga fortolknings- og subsidiaritetsprincipper

Subsidiaritetsprincippet kan **udvide implementeringsfriheden** ved at gennemføre lovgivning og træffe afgørelser i lyset af EMD-praksis

Domstolene kan komme i klemme mellem (forventet) EMRK-udvikling og lovgivningspraksis, der afsøger yderste grænse for proportionalitets- og subsidiaritetsprincippet