

Index

- absence of arbitrariness in
 - rights restrictions, 212
 - absolute (non-derogable) rights.
 - see Convention rights
 - accessibility of rights
 - restrictions, 203
 - assembly and association. *see* freedom of assembly and association
 - autonomous interpretation
 - dependency principle, 74
 - effectiveness principle as rationale for, 67
 - limits to, 68
 - public authority, definition of, 138
 - autonomous positive
 - obligations, 130
 - autonomy as interpretative principle, 62
 - balance, obligation to provide
 - for fair, 152
 - burden of proof, margin of appreciation as to assignment of, 166
 - case-based review of rights. *see* Convention rights, review
 - civil and political rights,
 - positive obligations in relation, 122
 - collective enforcement of rights, 10
 - common ground (consensus) interpretation
 - European law as source, 97
 - European Union law as source, 102
 - international law as source, 97
 - and margin of appreciation, 97
 - national law as source, 95
 - rationale for, 93
 - sufficient common ground, 104
 - compliance
 - ECtHR's role. *see* European Court of Human Rights
 - conscience. *see* freedom of thought, conscience and religion
 - Convention. *see* European Convention on Human Rights
 - Convention rights
 - absolute (non-derogable) rights
 - absolutely absolute rights, 20
 - not notstandsfest, 19
 - application of
 - determination of applicability, 12
 - responsibility of national courts for, 155
 - assembly and association. *see* freedom of assembly and association
 - categories, 19
 - competing rights, 187
 - conscience. *see* freedom of thought, conscience and religion
 - definition of, uncertainties as to, 160–1
 - discrimination. *see* prohibition of discrimination
 - effect. *see* effect
 - essence of, 253
 - exercise of
 - determination of interference with, 14
 - interference with, seriousness and nature of, 193
 - justification or reasonableness review of interference, 18
 - restriction of. *see* restriction of rights
 - rights typology based on permissible restriction, 19
- expression. *see* freedom of expression
 - fair trial. *see* right to a fair trial
 - family life. *see* right to respect for private and family life
 - freedom of thought. *see* freedom of thought, conscience and religion
 - interference with. *see* restriction of rights
 - interpretation. *see also* autonomous interpretation; common ground (consensus) interpretation; evolutive interpretation; meta-teleological interpretation
 - autonomous interpretation, 67
 - case-based refinement of general principles, 41
 - common ground (consensus) interpretation, 93
 - Convention as living instrument, 51
 - democracy, principle of, 64
 - dependency principle, 74
 - determination of, 12
 - effectiveness principle, 67, 119
 - European law as source, 97
 - European Union law as source, 102
 - evolutive interpretation principle, 51
 - general interpretative role of ECtHR, 11, 31, 36, 46

262 Index

- Convention rights (cont.)
 - human dignity, principle of, 61
 - incremental formulation of
 - general principles, 41
 - individual interpretative
 - role of ECtHR, 31, 36, 46
 - internally consistent (harmonious)
 - interpretation, 87
 - international law as source, 97
 - legal effect of
 - interpretations (*res interpretata*), 44
 - limits to, 56
 - meta-teleological interpretation, 59
 - methods, 78
 - minimum level of
 - protection by rights, clarification of, 10, 160
 - national law as source, 95
 - object of review, 32
 - personal autonomy,
 - principle of, 62
 - pluralism, principle of, 66
 - precedent, use of, 37, 78, 120
 - principles of, 46
 - progressiveness of, 58
 - reflective equilibrium as
 - aim of, 43, 46
 - sufficient common ground, 104
 - temporal effect of, 53
 - textual interpretation, 79
 - travaux préparatoires* as guide, 48, 83
 - and underlying values of Convention, 59
 - and Vienna Convention on the Law of Treaties, 47, 83
 - liberty. *see* right to liberty
 - life. *see* right to life
 - limitation. *see* restriction of rights
 - marriage. *see* right to marry
 - non-absolute (derogable) rights
 - legitimate aim requirement for restriction, 220
 - necessity requirement for restriction, 229
 - with express, general limitation clauses, 25
 - with express, specific limitation clauses, 24
 - without express limitation clauses, 26
 - other non-absolute rights, 28
 - obligations. *see* obligations
 - private life. *see* right to respect for private and family life
 - protection
 - collective enforcement of rights, 10
 - compliance obligations (subsidiarity principle), 5, 46
 - ECtHR's role, 9, *see* Convention rights, protection
 - effective remedy and fair balance, obligation to provide for, 152
 - effectiveness principle, 3, 10, 46, 50, 67, 119
 - margin of appreciation. *see* margin of appreciation
 - maximalist approach,
 - reasons against use of, 160
 - minimum level of,
 - clarification of, 10, 160
 - positive obligations for, 145
 - primary responsibility (primarity principle), 5, 9
 - regulatory obligation for enforcement, 150
 - subsidiarity and, 160
 - subsidiary protection by Convention, 9
 - reconciliation with State interest, 247
 - religion. *see* freedom of thought, conscience and religion
 - restriction. *see* restriction of rights
 - review
 - case-based review, 41
 - incremental approach (incrementalism), 41
 - of legislation and/or individual application of legislation, 32
 - process of, 11
 - rights typology based on permissible restriction, 19
 - stage 1, determination of applicability of Convention, 12
 - stage 2, determination of interference with exercise of Convention right or freedom, 14
 - stage 3, justification or reasonableness review of interference, 18
 - slavery. *see* prohibition of slavery
 - thought. *see* freedom of thought, conscience and religion
 - torture. *see* prohibition of torture
 - typology based on permissible restriction, 19
 - weight of, determination of, 245
- criminal law, horizontal effect, 136
 - democracy as interpretative principle, 64
 - dependency as interpretative principle, 74
 - dependent positive obligations, 130
 - derogable (non-absolute) rights. *see* Convention rights, non-absolute (derogable) rights
 - dignity as interpretative principle, 61
 - discrimination. *see* prohibition of discrimination
 - domestic law. *see* national law
 - ECHR. *see* European Convention on Human Rights
 - ECtHR. *see* European Court of Human Rights
 - effect
 - direct responsibility of States for interferences with Convention rights, 138

- governmental organisation, definition of, 138
- horizontal effect
 - of Convention, 137
 - of criminal law, 136, 147
 - effective remedy and fair balance, obligation to provide for, 152
 - indirect, 144
 - limits to positive obligations in horizontal relationships, 154
 - positive obligations to protect Convention rights, 145
 - power imbalances and, 137
 - of private law, 136, 149
 - regulatory obligation to enforce, 150
 - responsibility of national courts to apply Convention, 155
- private law acts by public authorities, 142
- public authority, definition of, 138
- State, definition of, 138
- vertical effect
 - of Convention, 136
- effective remedy, obligation to provide for, 152
- effectiveness principle, 3, 10, 46, 50, 67
- effectiveness-based definition of positive obligations, 119
- enforcement of rights. *see* Convention rights, protection
- essence of a right, test for impairment of, 253
- ethical factors as to margin of appreciation, 177
- European Convention on Human Rights (Convention, ECHR)
 - application of. *see* Convention rights, application of
 - application of Convention system, 1
 - effect. *see* effect
 - effectiveness principle, 3, 10, 46, 50, 67, 119
 - entry into force, 1
 - impact, 1
 - interpretation. *see* autonomous interpretation; common ground (consensus) interpretation; Convention rights, interpretation; evolutive interpretation; meta-teleological interpretation
 - law-making nature of, 50
 - as living instrument, 51
 - margin of appreciation. *see* margin of appreciation
 - obligations. *see* obligations
 - primarity principle, 5
 - restraint of State power, 136
 - rights. *see* Convention rights
 - subsidiarity principle, 5, 46
 - underlying values of, 59
 - and Vienna Convention on the Law of Treaties, 46, 48, 83
- European Court of Human Rights (ECtHR)
 - authors' approach to study of, 3
 - compliance supervision role, 1, 9
 - effectiveness principle, 3, 10, 46, 50, 67, 119
 - establishment, 1
 - influence worldwide, 1
 - interpretative role. *see* Convention rights, interpretation
 - judgments
 - diversity of challenging topics, 2
 - influence and effect of, 1
 - precedent, use of, 37, 78
 - jurisdiction, 1
 - procedural review function, 258
 - protective role. *see* Convention rights, protection; margin of appreciation
 - recognition of positive Convention obligations of States, 108
 - review of Convention rights. *see* Convention rights, review
- subsidiarity principle, 5, 46
- and Vienna Convention on the Law of Treaties, 46, 83
- workload, 1
- European law as source for interpretation, 97
- European Union law as source for interpretation, 102
- evidence and establishment of facts, margin of appreciation in relation, 186
- evolutive interpretation
 - Convention as living instrument, 51
 - limits to, 56
 - progressiveness of, 58
 - temporal effect of, 53
- exercise of rights. *see* Convention rights, exercise of
- express limitation clauses. *see* restriction of rights, non-absolute (derogable) rights
- expression. *see* freedom of expression
- fair balance
 - restriction of rights. *see* restriction of rights, necessity requirement
 - test for positive obligations, 111
- fair balance, obligation to provide for, 152
- fair trial. *see* right to a fair trial
- fairness factors as to margin of appreciation, 187
- family life. *see* right to respect for private and family life
- foreseeability of rights
 - restrictions, 199, 205
- freedom of assembly and association, 65, 88–9, 248–56
- freedom of expression
 - interpretation, 64
 - limitation of, 17, 26, 65, 154, 176, 193, 235, 242
 - margin of appreciation, 174, 195

264 Index

- freedom of expression (cont.)
 - other rights in relation, 88, 157, 188–9, 242–60
 - pluralism and, 66
 - protection of, 6, 68, 164
 - violation of, 202, 240
- freedom of thought, conscience and religion, 66, 68
- freedoms under Convention. *see* Convention rights
- fundamental rights. *see* Convention rights
- governmental organisation, definition of, 138
- harmonious interpretation, 87
- horizontal effect. *see* effect
- horizontal positive obligations, 129
- human dignity as interpretative principle, 61
- incremental review of rights (incrementalism). *see* Convention rights, review
- indirect horizontal effect, 144
- individual and excessive burden
 - test for rights restriction, 250
- interference with rights. *see* Convention rights, exercise of
- internally consistent (harmonious) interpretation, 87
- international law as source for interpretation, 97
- interpretation. *see* Convention rights; Vienna Convention on the Law of Treaties
- intrinsic positive obligations, 130
- lawfulness of rights restrictions. *see* restriction of rights
- least restrictive means test for rights restriction, 231, 236
- legitimate aim of rights restrictions. *see* restriction of rights
- legitimate aim requirement, proportionality and, 227
- life. *see* right to life
- margin of appreciation
 - applicability of, 168
 - burden of proof, assignment of, 166
 - certain (degree of) margin, 165, 167
 - continued relevance of, 196
 - development of doctrine of, 163
 - ECtHR's use of, 167–8
 - introduction of, 163
 - maximalist approach to rights protection, reasons against use of, 160
 - minimum level of rights protection, clarification of, 160
 - narrow margin, 165, 167
 - as to necessity requirement for rights restriction, 232, 243
 - scope of margin
 - balancing of factors, 194
 - better placed argument, 177
 - common ground (consensus) factor, 173
 - competing Convention rights, 187
 - as to core rights, 188
 - evidence and establishment of facts, issues of, 186
 - extra margin due to special context of case, 181
 - factors for determining, 172
 - fairness factors, 187
 - fourth instance argument, 181
 - interference with right, seriousness and nature of, 193
 - interpretation of national law, 185
 - moral and ethical factors, 177
 - as to peripheral rights, 188
 - political and operational policy factors, 178
 - procedural quality factors, 187
 - socio-economic factors, 178
 - subject of case, nature and importance of, 188
 - as to States' capability and freedom to regulate (better placed argument), 162, 165
 - subsidiarity and, 160
 - subsidiary protective role of ECtHR in relation, 165
 - wide margin, 165
- marriage. *see* right to marry
- meta-teleological interpretation
 - democracy, principle of, 64
 - human dignity, principle of, 61
 - personal autonomy, principle of, 62
 - pluralism, principle of, 66
 - and underlying values of Convention, 59
- moral factors as to margin of appreciation, 177
- national courts, responsibility to apply Convention, 155
- national human rights
 - authorities
 - compliance obligations (subsidiarity principle), 5, 46
 - primary responsibility for Convention rights protection (primacy principle), 5, 9
- national law
 - interpretation of, and margin of appreciation, 185
 - lawfulness requirement in, 200
 - as source for interpretation, 95
- national obligations under Convention. *see* obligations
- necessity of rights restrictions. *see* restriction of rights, necessity requirement
- negative obligations. *see* obligations

- non-absolute (derogable) rights.
 see Convention rights
- non-derogable (absolute) rights.
 see Convention rights,
 absolute rights
- obligations
 - compliance obligations
 (subsidiarity principle),
 5, 46
 - negative obligations
 - definition of, 108
 - positive obligations in
 relation, 132
 - positive obligations
 - autonomous, 130
 - civil and political rights in
 relation to, 122
 - definition of, 110
 - dependent, 130
 - effectiveness-based
 definition of, 119
 - fair balance test for, 111
 - horizontal, 129
 - and horizontal effect.
 see effect
 - intrinsic, 130
 - negative obligations in
 relation, 132
 - no general theory of, 109
 - precedent-based definition
 of, 120
 - procedural, 126
 - to protect Convention
 rights, 145
 - reasonable knowledge
 and means test for,
 116
 - recognition of, 108
 - socio-economic rights in
 relation to, 122
 - substantive, 122
 - supporting, 130
 - types of, 121, 129
 - vertical, 129
 - operational policy factors as to
 margin of appreciation,
 178
 - personal autonomy as
 interpretative principle,
 62
 - pluralism as interpretative
 principle, 66
 - political policy factors as to
 margin of appreciation,
 178
 - positive obligations. see
 obligations
 - precedent, interpretative use of,
 37, 78
 - precedent-based definition of
 positive obligations, 120
 - preparatory works of treaty
 (*travaux préparatoires*)
 as guide to
 interpretation, 48, 83
 - pressing social need test for
 rights restriction, 230,
 234
 - private entities, definition as
 governmental
 organisations, 138
 - private law
 - acts by public authorities, 142
 - horizontal effect, 136
 - private life. see right to respect
 for private and family
 life
 - procedural positive obligations,
 126
 - procedural quality factors as to
 margin of appreciation,
 187
 - procedural review, 258
 - procedural safeguards as to
 restriction of rights, 214
 - prohibition of discrimination,
 27, 49, 74, 87, 98–9, 137
 - prohibition of slavery, 20
 - prohibition of torture, 18, 20,
 126, 132, 161
 - proof, margin of appreciation as
 to assignment of burden,
 166
 - proportionality. see restriction
 of rights, necessity
 requirement
 - protection of rights. see
 Convention rights,
 protection
 - public authorities
 - definition of, 138
 - private law acts by, 142
 - reasonable knowledge and
 means test for positive
 obligations, 116
 - relevancy test for rights
 restriction, 233
 - religion. see freedom of
 thought, conscience and
 religion
 - res interpretata*, 44
 - restraint of State power by
 Convention, 136
 - restriction of rights
 - accessibility of restrictions,
 203
 - discrepancy between stated
 and real objectives of
 restriction, 225
 - intrusiveness of interference,
 246
 - justification
 - conditions for, 198
 - determination of, 198
 - lawfulness requirement
 - absence of arbitrariness,
 200
 - accessibility of restrictions,
 203
 - autonomous and
 substantive
 interpretation of, 199
 - basis national law, 200
 - elements of, 198
 - foreseeability element,
 199, 205
 - legal certainty element,
 199
 - procedural safeguards, 214
 - legitimate aim requirement
 - application of, 221
 - discrepancy between stated
 and real objectives of
 restriction, 225
 - element of, 198
 - exhaustive lists of
 - legitimate aims, 220
 - in express limitation
 clauses, 220
 - interpretation of, 221
 - plurality of aims, 226
 - proportionality and, 227
 - necessity (proportionality or
 fair balance)
 requirement
 - application of, 231
 - element of, 199
 - essence of a right, test for
 impairment of, 253

266 Index

- restriction of rights (cont.)
 - in express limitation clauses, 229
 - factors in balancing review, 248
 - individual and excessive burden test for, 250
 - intrusiveness of interference with rights, 246
 - least restrictive means test for, 231, 236
 - legitimate aim requirement and, 227
 - margin of appreciation as to, 232, 243
 - national-level balancing of rights decisions, 256
 - need for, 229
 - pressing social need test for, 230, 234
 - procedural review and, 258
 - reconciliation of Convention right and State interest, 247
 - relevant and sufficient test for, 231–60
 - scale of necessity, 230, 233
 - strict sense of balancing or proportionality, 242
 - tests for, 230
 - weight of interests involved, 245
- non-absolute (derogable) rights
 - legitimate aim requirement for restriction, 220
 - necessity requirement for restriction, 229
 - with express, general limitation clauses, 25
 - with express, specific limitation clauses, 24
 - without express limitation clauses, 26
 - other non-absolute rights, 28
- rights typology based on permissible restriction, 19
- review of rights. *see* Convention rights, review
- right to a fair trial
 - applicability of, 69, 73, 75
 - dependency approach, 77
 - limitation of, 24, 26
 - protection of, 69, 108, 253
- right to liberty, 23–4, 130
- right to life
 - duty to protect, 4, 116, 130
 - interference with, 16, 131, 153, 243
 - interpretation of, 57
 - limitation of, 24, 82
 - margin of appreciation, 71, 169, 186
 - procedural positive obligations, 126, 218
- right to marry
 - interpretation of, 57, 103
 - limitation of, 28, 170, 253
 - protection of, 70
 - provision for, 11–12
- right to respect for private and family life, 12, 25, 29, 130, 157, 182, 248
- rights under Convention. *see* Convention rights
- slavery. *see* prohibition of slavery; right to liberty
- social need test for rights restriction, 230, 234
- socio-economic factors as to margin of appreciation, 178
- socio-economic rights, positive obligations in relation, 122
- State. *see also* national human rights authorities; national law; public authorities
 - courts, responsibility to apply Convention, 155
 - definition of, 138
 - law as source for interpretation, 95
 - margin of appreciation as to capability and freedom to regulate (better placed argument), 162, 165
 - national-level balancing of rights decisions, 256
 - obligations under Convention. *see* obligations
 - power, restraint by Convention, 136
 - State interests, reconciliation with Convention rights, 247
- subsidiarity
 - and margin of appreciation, 160
 - principle of, 5, 46, 160
- substantive positive obligations, 126
- sufficiency test for rights restriction, 233
- supporting positive obligations, 130
- temporal effect of interpretation, 53
- textual interpretation, 79
- thought. *see* freedom of thought, conscience and religion
- torture. *see* prohibition of torture
- travaux préparatoires* as guide to interpretation, 48, 83
- vertical effect. *see* effect
- vertical positive obligations, 129
- Vienna Convention on the Law of Treaties
 - authentic language versions, 48
- ECtHR's explanation of interpretation rules of, 48
- importance, 47
- main principles for interpretation of international treaties, 47
- travaux préparatoires* as guide to interpretation, 48, 83