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Taxation and the Principle of Subsidiarity: A Multifaceted Analysis within Council of Europe Law

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ABSTRACT

The article explores subsidiarity in taxation, focusing on its relation to European Court of Human Rights jurisprudence. Taxation impacts society's socio-economic structure. By applying subsidiarity, the Court supports Member States' fiscal autonomy while protecting individual rights, especially under Article 1 of Protocol No. 1 to the European Convention on Human Rights. The article reviews key judgments from the European Court of Human Rights, such as Ferrazzini v. Italy, Bulves AD v. Bulgaria, and Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, to highlight the tension between state fiscal powers and individual property rights. Statistical findings derived from HUDOC data highlight trends in subsidiarity tax cases, underlining the adaptability of the principle to meet evolving governance challenges. The findings demonstrate how subsidiarity is implemented, with the ECHR balancing fairness in taxation while respecting national sovereignty. The analysis reveals geographical variations in tax cases related to subsidiarity, illustrating the different challenges faced by Member States. This connection underscores subsidiarity's importance in advancing governance and human rights.

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KEYWORDS
subsidiarity, taxation, human rights, European Court of Human Rights, fiscal autonomy, proportionality, national sovereignty, European Convention on Human Rights

Introduction

A Subsidiarity is now considered as an important principle in the Council of Europe's human rights framework. It reflects the idea that national authorities bear primary responsibility for protecting rights, included in the European Convention on Human Rights, and enjoy a wide "margin of appreciation" to tailor policies to local conditions (European Court of Human Rights, 2024). Protocol 15 (2021) codified subsidiarity and the margin of appreciation in the Convention's Preamble, underscoring that the Court's role is subsidiary to the protection of human rights at the national level. Similarly, the 2012 Brighton Declaration asked the European Court of Human Rights (hereafter referred to as the "ECtHR") to give "great prominence to, and apply consistently", both the principle of subsidiarity and the margin of appreciation, in its case law. The scientists have noted that subsidiarity includes both a negative (restrictive) dimension and a positive (entailing active duties on states) dimension (Acconciamessa, 2025). Recent declarations and judgments more and more often describe subsidiarity as a "fundamental feature" of the European human rights order.

The issue of taxation demonstrates the tension between national discretion and individual rights, which is what subsidiarity is intended to address. Although the European Convention on Human Rights (hereafter referred to as the "Convention") only explicitly refers to taxation in a derogation clause, the guarantees set out in the Convention (notably the right to property under Article 1 of Protocol 1 and the right to equal treatment under Article 14) implicitly constrain fiscal measures. Attard and de Albuquerque (2023) observe that over 500 ECtHR "tax cases" together form a kind of human-rights code of conduct for Member States' tax policies. In such cases the ECtHR have to balance national fiscal autonomy against Convention rights claims, and subsidiarity often facilitates this balance. Depending on context, subsidiarity can cut both ways: it may limit the role of the ECtHR by deferring to domestic tax policy, or (conversely) it may strengthen the protection of rights by requiring states to justify tax measures under the standards of the Convention.

This article addresses the following research question: Does the principle of subsidiarity primarily act as a limit or a facilitator in the ECtHR' handling of tax-related human rights cases? We argue that it performs both roles. When framed as judicial restraint (the negative dimension), it safeguards state autonomy by granting a broad margin of appreciation in tax cases (Cassese, 2014). In contrast, when framed as an institutional or positive norm, it obliges states to actively secure rights, serving as a mechanism for enhanced rights protection. In other words, depending on how the ECtHR interprets its role, subsidiarity can operate as both a "shield" and a driver for rights. This distinction is sometimes described as "judicial" versus "institutional" subsidiarity: the former stresses restraint by the ECtHR judges, while the latter stresses the duties of domestic institutions under the Convention.

This question is highly relevant to understanding how the ECtHR balances state discretion with individual rights in tax affairs. Tax policy is a significant aspect of state sovereignty with a direct impact on citizens' economic well-being. However, it can also affect fundamental rights such as property rights and the right to a fair trial in tax administration. If subsidiarity primarily serves as a limitation, the ECtHR will generally respect national tax policy decisions, potentially at the expense of individual rights. However, if subsidiarity acts as an facilitator, the ECtHR will demand solid justification for tax regulations and may more readily enforce Convention norms. Clarifying this dynamic reveals whether the Convention system ultimately favors tax sovereignty or strong human rights oversight in taxation.

Methodology

This article uses a mixed doctrinal and empirical approach.

The doctrinal section examines the principle of subsidiarity in the context of taxation by analysing Council of Europe instruments, ECtHR case law and relevant academic literature.

The empirical component is based on a targeted search of ECtHR judgments in HUDOC. To this end, I manually compiled a dataset of decisions containing the terms "tax" and "subsidiarity" in either the judgment text or the headnotes. The search was carried out using the standard HUDOC search interface. As these keywords may also appear in contexts unrelated to taxation or judicial subsidiarity reasoning, each result was manually reviewed to verify that the case genuinely concerned both. Cases that mentioned the keywords only incidentally were excluded.

The resulting dataset is not intended to be a complete statistical study, but rather a supporting tool to identify patterns in how subsidiarity appears in tax-related decisions. Quantitative observations (such as the number of relevant judgments and visible chronological "peaks") were used only to contextualise the doctrinal analysis, not to derive independent statistical conclusions.

Combining doctrinal analysis with manually verified empirical material enables the article to examine how the ECtHR treats subsidiarity in tax matters and identify broader tendencies in the ECtHR's reasoning.

1. Subsidiarity in Human Rights Protection Activity of the Council of Europe: Concepts, Debates, and Their Relevance for Taxation

When it comes about the human rights protection activity of the Council of Europe, the principle of subsidiarity is rather important. However, the term "subsidiarity" is used differently – both by legal scholars, professionals and in the case law of the ECtHR. The broad and functional understanding of the principle of subsidiarity is also reflected in economic and administrative theory. As Urgen Backhaus argues, "subsidiarity is a perfectly generalizable principle of organization, applicable across policy domains and not tied to a particular substantive goal" (Backhaus, 1997, p. 281). Precisely because of this broadness, the principle of subsidiarity developed along two different directions in Europe:

(a) institutional subsidiarity, concerning the vertical distribution of powers; and

(b) judicial subsidiarity, which is used by the ECtHR when assessing domestic decision-making.

While these two approaches to the principle of subsidiarity overlap, they serve distinct legal functions and cannot be treated as interchangeable.

So, it is important to clarify these differences before analysing – how the principle of subsidiarity is used, when it comes about taxation. This section explores the existing points of view to the two forms of subsidiarity: institutional and judicial. Although these are two forms of one principle, they are different (neither identical nor interchangeable).

1.1. Institutional Subsidiarity: Distribution of Competences

In the biggest part of the European countries this form of subsidiarity is more popular in public law discourse. It goes without discussions, that the institutional subsidiarity refers to the division of powers between different levels of governance (international – national – subjects of federation – local). In Europe, this form of subsidiarity is primarily associated with European Union law. It is acquis communitaire, where the principle of subsidiarity defines the relationship between the European Union and its member states.

Within the Council of Europe, however, the term "subsidiarity" has a broader meaning. It is mostly related to the responsibility of national institutions (mostly and foremost parliaments, governments, courts) to promote human rights at the national level before the ECtHR intervention (international level).

Scholars discuss pluses and minuses of such an approach. The main strength is that subsidiarity allows national authorities to design policies that reflect local needs – in other words, to "tailor" it [e.g. subsidiarity supports the idea that, wherever possible, tax decisions should be taken by the level of government closest to the taxpayer (Mishyna, 2019)]. But subsidiarity can be used strategically by states to justify wide discretion in areas where human rights risks are significant. Recent debates in the Human Rights Law Review and related literature (Krenc, 2025) show that subsidiarity increasingly becomes a structural principle of the Convention system, but its exact content remains contested.

In taxation, institutional subsidiarity is particularly relevant because fiscal policy is an essential expression of state sovereignty. States have extensive authority over tax issues, and the Convention only imposes a few substantive requirements. At the same time, however, national provisions have to respect the human rights enshrined in the Convention, especially when tax regulations impact property rights, access to justice or equality.

1.2. Judicial Subsidiarity: Margin of Appreciation and Review Standards

Judicial subsidiarity concerns the relationship between the ECtHR and domestic (national) courts. It is closely linked to the margin of appreciation, which describes how much discretion states have when applying Convention rights. The scientific discourse on the margin of appreciation reflects the broader application of the principle of subsidiarity. The ECtHR supports the idea that judgements are best made at the most local and context-sensitive level. As Nussberger notes, strengthening subsidiarity is essential for preserving the ECtHR's legitimacy and ensuring that Member States have discretion over matters managed within their national legal frameworks, including taxation (Nussberger, 2020, p. 13).

According to Dean Spielmann (2014), judicial subsidiarity has become one of the defining features of the modern ECtHR, especially after the Brighton, Brussels, and Copenhagen Declarations.

Not only these conceptual documents should be mentioned, when it comes about the principle of subsidiarity. Also the Interlaken Declaration (2010) and the Izmir Declaration (2011) pay attention to the subsidiary nature of the Convention's mechanism. These declarations underline, that the ECtHR is a "safeguard" for individuals when domestic protection fails, but it is not intended to replace the human rights protection at the national level.

Related to the taxation, – this means that at the national level authorities have the discretion to implement and enforce tax policy. The ECtHR more and more emphasises that domestic courts have to take primary responsibility for implementing Convention human rights. This tendency is reflected in the Court's admissibility practice. As noted by Glas (2023), applicants now have to demonstrate more precisely that their Convention arguments were raised in domestic proceedings. If this condition is not met, the ECtHR may declare the application inadmissible.

In tax cases, judicial subsidiarity plays a dual role.

Firstly, it protects national autonomy because tax policy is a sensitive field.

Secondly, it determines the level of scrutiny, particularly when tax measures may involve punitive elements or disproportionate interference with rights.

Understanding this second dimension is essential when analysing the Court's case law on taxation.

1.3. Interaction between the Two Dimensions

Although institutional and judicial subsidiarity are conceptually distinct, they influence each other. In areas where states have primary regulatory competence, such as taxation, the ECtHR tends to emphasise judicial subsidiarity and grant a wide margin of appreciation. However, this does not mean that the ECtHR gives up its supervisory role. When tax measures impact rights such as access to court, legal certainty or non-discrimination, the ECtHR may apply closer scrutiny.

For this reason, the two forms of subsidiarity are analysed together, but not merged. Institutional subsidiarity explains why tax policy generally remains in the hands of states, while judicial subsidiarity determines the extent to which the ECtHR will review national decisions. This distinction provides a clearer framework for understanding the Court's jurisprudence, which will be examined in Section 2.

2. The ECtHR's Approach to Taxation and Subsidiarity

This section examines how the European Court of Human Rights has applied the principle of subsidiarity in tax-related cases. It also demonstrates how the ECtHR's reasoning has changed over time. In the literature, taxation is often presented as a field where the ECtHR shows exceptionally strong deference to the State, but in practice the approach is more nuanced. The ECtHR does rely on subsidiarity and on the idea that tax policy belongs primarily to the national level. But it is also willing to intervene (and does intervene!) when domestic measures become arbitrary, unpredictable, or punitive. In this sense, the ECtHR uses subsidiarity as both a limit to its own role and a tool for protecting individuals when domestic systems fail.

Before turning to the individual judgments, it is important to come back to the two different meanings of subsidiarity, because they influence the case-law in different ways. On the one hand, institutional subsidiarity refers to the distribution of powers inside the State, where taxation is usually a central competence. On the other hand, judicial subsidiarity concerns the ECtHR's own restraint when reviewing domestic decisions (see the previous section of this article). The ECtHR expects national authorities, especially domestic courts, to carry out a detailed proportionality analysis – and the Strasbourg Court intervenes only when this process is "inadequate". While these two dimensions of the principle of subsidiarity are separate, they interact in practice. Foremost, strong centralisation of tax competences at the national level usually leads the ECtHR to be more cautious, but this caution disappears when national procedures break down.

The starting point for understanding the ECtHR's modern jurisprudence/case law is *Ferrazzini v. Italy* (2001). In the relevant judgement the ECtHR underlined that tax disputes do not fall under the "civil" limb of Article 6. The judgment stressed that taxation belongs to the "hard core of public authority" and therefore remains outside the scope of private rights. Scholars often refer to the *Ferrazzini v. Italy* judgement as the clearest expression of the ECtHR's deferential position. However, the judgment also reflects the ECtHR's deeper concern. This concern is as follows: it did not want to turn itself into a supranational tax appeals tribunal and relied strongly on judicial subsidiarity. In other words, the ECtHR connected the nature of tax powers (institutional subsidiarity) with its own possibility to intervene (judicial subsidiarity).

The ECtHR adjusted this position a few years later in *Jussila v. Finland* (2006). There, it accepted that certain tax surcharges have a "criminal" character for the purposes of Article 6. The ECtHR was careful not to contradict *Ferrazzini v. Italy* completely, but the judgment clearly set out a new approach. It confirmed that when tax measures take a punitive form, the level of procedural protection must increase – and the ECtHR's deference becomes more limited. This evolution shows that the principle of subsidiarity scope is not fixed. It always depends on the nature of the domestic measure and the way national authorities justify it.

Case law on taxation also illustrates how the ECtHR evaluates issues of arbitrariness, proportionality and legal certainty. In *Gasus Dosier v. the Netherlands* (1995), for example, the ECtHR accepted the sale of goods belonging to a third party to satisfy tax arrears as a strong enforcement measure – but only after establishing that the interference was foreseeable and that a fair balance had been achieved. The ECtHR concluded that the State's approach was justified. Its reasoning indicates that subsidiarity depends on a predictable legal framework.

In contrast, cases such as *Bulves AD v. Bulgaria* (2009) demonstrate that the ECtHR is ready to intervene when tax authorities act inconsistently or impose excessive burdens. The refusal to allow VAT deduction due to formal mistakes made by a third party was considered disproportionate and incompatible with the principle of legal certainty. Similarly, in *Shchokin v. Ukraine* (2010), the ECtHR found that the retroactive application of tax legislation violated the Convention. In general, ECtHR emphasised that unpredictability in tax matters is particularly problematic. In both examples, the ECtHR applied stricter scrutiny and did not rely on subsidiarity.

These cases show that the ECtHR accepts the need for effective tax enforcement. At the same time, it follows the approach that the principle of subsidiarity cannot justify measures that are arbitrary, discriminatory, or unforeseeable. This is also visible in cases concerning differences in tax treatment that amount to discrimination, as in *Darby v. Sweden* (1990). In such situations – according to the ECtHR – the State's margin of appreciation narrows significantly. Therefore, the thesis that taxation always enjoys a wide margin of appreciation is not fully/always correct. The ECtHR's position depends on the type of interference and the quality of the reasoning on the domestic level (mostly in the decisions of the domestic courts).

To complement the doctrinal and jurisprudential review, a small quantitative analysis was conducted (technical details are described in the methodological part).

The broader jurisprudence also reflects the tension between subsidiarity "in principle" and subsidiarity "in practice".

To support the analysis of judicial subsidiarity, I also assembled a small empirical dataset from HUDOC. I searched for all ECtHR judgments that contained the terms "tax" and "subsidiarity" in the reasoning of the ECtHR. The initial search produced 1,186 documents. After that, I manually removed inadmissibility decisions, duplicate entries, and cases where taxation was mentioned only briefly or not as part of the legal reasoning. The final dataset consists of 422 judgments delivered between 2007[1] and 2023[2], where taxation formed an element of the case - either directly (e.g., tax assessments, enforcement, fiscal penalties) or indirectly (e.g., Article 6 applicability, property rights, discrimination).

The purpose of these data is not to present independent statistical findings, but to illustrate how often taxation appears in combination with subsidiarity-related arguments and how these changes over time. In particular, the data help to identify periods when the ECtHR applied a "stronger" margin of appreciation, for example in cases involving fiscal penalties or discriminatory tax measures during the post-2008 economic crisis. Thus, the quantitative trends support the qualitative analysis, helping to explain how judicial subsidiarity operates in tax-related human rights judgements.

The diagram below (Figure 1) shows that references to subsidiarity in tax-related cases have not been constant over time.

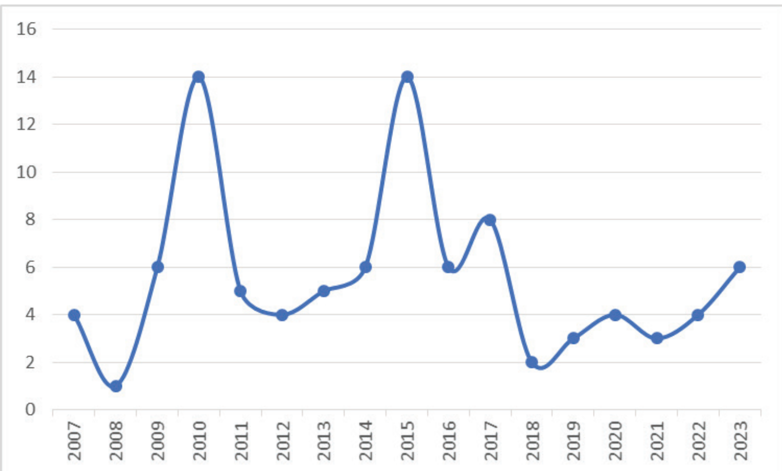

Figure 1. Trends in ECtHR judgments mentioning taxation and subsidiarity (2007–2023)

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[1] Pre-2007 judgments were excluded because they predate the major subsidiarity reforms (Protocol No. 14 and the Interlaken Process), making them less relevant for analysing current subsidiarity practice.

[2] This period was selected because the Court's jurisprudence on taxation and subsidiarity becomes more structured after the landmark cases *Ferrazzini v. Italy* (2001) and *Jussila v. Finland* (2006). After 2007, the Court develops a clearer and more consistent approach to fiscal matters, Article 6 applicability, and the margin of appreciation. Earlier case law is less relevant for analysing contemporary trends and was therefore excluded from the systematic dataset.

There are two peaks/visible increases around the years 2010 and 2015. They might be explained by the political and economic changes in Europe, foremost by:

– the post-2008 financial crisis – as during that crisis many states introduced emergency fiscal measures such as austerity, tax increases and special payments; and

– the so-called "second wave of fiscal consolidation" measures. This became obvious around 2014–2015. It was the result of fiscal changes following the 2008 financial crisis, with many taxation issues being brought before national courts and later reaching the sub-national level, e.g. the ECtHR.

At the same time, the data shows that the ECtHR does not follow a purely deferential approach. In several cases included in the dataset and commented in the article (e.g., *Bulves AD v. Bulgaria*, Shchokin v. Ukraine), the ECtHR found that fiscal measures overstepped the State's margin of appreciation. This helps to confirm that the principle of subsidiarity does not function as an "automatic" deference in tax matters.

Instead, the principle of subsidiarity is used together with the principle of proportionality and/or foreseeability in order to assess – whether domestic tax measures respect Convention standards.

Finally, the quantitative findings based on the data above allow to suggest a broader analytical point: the actuality of the principle of subsidiarity intensifies in periods of economical/fiscal stress. When States design unusual or harsh tax interventions, they often justify them with the reference to the democratic legitimacy, budgetary necessity, or economic stability. These arguments directly provoke claims of subsidiarity at the ECtHR, which explains why the relevant case law becomes more visible (and contains more cases) during these periods. Thus, these empirical trends reinforce the doctrinal conclusion that, when applied to taxation, the principle of subsidiarity is a dynamic principle rather than a fixed rule.

To conclude this section – all of the above leads to an important point: judicial subsidiarity relies on the assumption that domestic institutions function properly. If domestic courts do not conduct a proportionality test or do not respond effectively to taxpayers' claims, the ECtHR has no basis for restraint. Even though taxation is institutionally centralised, judicial subsidiarity becomes weaker when national remedies do not offer a relevant examination of the complaint.

This section of the article, therefore, demonstrates: the ECtHR's approach to taxation is neither extremely deferential nor purely interventionist. It is structured by the existing tension between institutional and judicial subsidiarity. The ECtHR accepts that taxation is primarily a matter for national authorities. So, it intervenes only when domestic systems fail to ensure legality, foreseeability, and fair balance. In this sense, the principle of subsidiarity is a rather flexible one – that's why its application in tax cases depends strongly/mostly on context. The most important question is not whether the State enjoys a wide margin of appreciation in general, but whether it in particular acted within a predictable legal framework and provided convincing reasons for its decision. The ECtHR does not intervene unless these conditions are met. If they are not met, however, the principle of subsidiarity no longer "protects" the State.

Conclusions

This article examined how the European Court of Human Rights applies the principle of subsidiarity in taxation cases and how this principle interacts with the protection of individual rights under the European Convention on Human Rights. The analysis confirms that subsidiarity in this field is not a simple instruction for judicial restraint, but a flexible, case/context-dependent principle. It has two different dimensions:

– an institutional one, linked to the distribution of powers between domestic authorities; and

– a judicial one, linked to the ECtHR's role in supervising national decisions.

The study shows that both dimensions appear in fiscal cases, but they do not always lead to the same practical outcomes.

The review of the selected cases (*Darby v. Sweden* (1990), *Gasus Dosier v. the Netherlands* (1995), *Ferrazzini v. Italy* (2001), *Jussila v. Finland* (2006), *Bulves AD v. Bulgaria* (2009) and *Shchokin v. Ukraine* (2010)) demonstrates that the ECtHR has gradually moved toward a more differentiated approach. While the ECtHR still recognises a state's wide margin of appreciation in taxation, it also intervenes when fiscal measures become unpredictable, disproportionate, or discriminatory. This is especially evident when taxation intersects with penalties, procedural guarantees or situations in which individuals may face significant financial consequences. In such cases, subsidiarity does not prevent the ECtHR from reviewing the case; rather, it guides it in determining how far national authorities have respected Convention principles before the ECtHR steps in.

The quantitative analysis (based on HUDOC search and manual verification) adds a further insight. During 2007–2023 two peaks in subsidiarity-related cases concerning taxation were identified – one in 2010, another one in 2015. They might be explained by the 2008 economic crisis in Europe, when States adopted exceptional fiscal measures (one – right after the crisis, one – later, after the national remedies on the taxation cases might be exhausted and the problem arrived to the ECtHR). These periods show that economic crises make the subsidiarity principle more visible and more contested. During such periods, the ECtHR targets to balance two competing values: deference of democratic choices in economic policy vs. protection of individuals from excessive financial burdens. The data therefore confirms that the principle of subsidiarity, when it comes to taxation, is defined not only by legal doctrine – but also by political and economic contexts/realities.

Taken together, the doctrinal, jurisprudential, and empirical findings suggest that subsidiarity in taxation is a dynamic principle. It enables domestic flexibility, but it also establishes limits that protect individuals from disproportionate interference. The ECtHR's approach shows neither only deference nor total interventionism. Instead, national solutions are respected unless they conflict with core Convention requirements such as legality, foreseeability, equal treatment, and proportionality.

This development also relates to a broader debate on the legitimacy and boundaries of subsidiarity within the Convention system. The increasing emphasis on procedural subsidiarity, the margin of appreciation, and the ECtHR's supervisory function shows that subsidiarity in taxation cannot be reduced to a "technical formula". It represents a deeper question about the distribution/divison of responsibility in human rights protection. Taxation is traditionally considered a state function, yet individuals look for the protection when national fiscal policy have severe personal impact. This tension will continue to shape the ECtHR's approach in the coming years – as the economic crisis deepens.

In conclusion, the article argues that, when applied to taxation, the principle of subsidiarity is both a limiting (it limits the role of the ECtHR where domestic systems offer adequate safeguards) and empowering one (it also enables the ECtHR to act when those safeguards fail). Understanding this dual nature is essential for legal scholars and national authorities developing fiscal policies that comply with the Convention. The ECtHR's case law confirms that tax measures remain transparent, proportionate and respectful of individual rights, even in the context of sensitive economic issues.

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У статті досліджується принцип субсидіарності в оподаткуванні із зосередженням на його зв'язку з практикою Європейського суду з прав людини. Оподаткування впливає на соціально-економічну структуру суспільства. Застосовуючи принцип субсидіарності, Суд підтримує фіскальну автономію держав-членів, одночасно захищаючи права людини, особливо відповідно до статті 1 Протоколу № 1 до Європейської конвенції з прав людини. У статті проаналізовано ключові рішення Європейського суду з прав людини, такі як *Ferrazzini v. Italy*, *Bulves AD v. Bulgaria* та *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, з метою висвітлення напруженості між фіскальними повноваженнями держави та особистими майновими правами. Статистичні дані, отримані на основі даних HUDOC, висвітлюють тенденції у податкових справах, пов'язаних з принципом субсидіарності, та підкреслюють адаптивність цього принципу до змінюваних викликів у сфері управління. Результати демонструють, яким чином принцип субсидіарності реалізується на практиці, зокрема через балансування ЄСПЛ між справедливістю оподаткування та повагою до національного суверенітету. Аналіз також виявляє географічні відмінності у податкових справах, пов'язаних із субсидіарністю, що ілюструє різні виклики, з якими стикаються держави-члени. Такий зв'язок підкреслює важливість принципу субсидіарності для розвитку належного врядування та захисту прав людини.

***Ключові слова*:** субсидіарність, оподаткування, права людини, Європейський суд з прав людини, фіскальна автономія, пропорційність, національний суверенітет, Європейська конвенція з прав людини.