

‘... IT IS NOT ITS TASK TO ACT AS A COURT OF FOURTH INSTANCE’: THE CASE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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This article discusses the so-called fourth instance doctrine under Article 6 of the European Convention on Human Rights, focusing in particular on its role in fair trial cases. It attempts to determine when the European Court of Human Rights has given weight to the fourth instance doctrine. Owing to the dynamic and free-range nature of the Court’s interpretative methods, challenges are often mounted on the basis of the fourth instance doctrine and the interpretation of Article 6 (fair trial). This article examines the case law, amounting to forty-four cases, on the provision of fair trials. It divides the role of the fourth instance doctrine into four distinct categories: (1) ‘clear fourth instance nature’; (2) ‘length of proceedings’; (3) ‘balancing approach’; and (4) ‘disregard of fourth instance approach’. Lastly, the article evaluates whether or not the application of strict fourth instance doctrine arguments in fair trial cases can be justified.

Keywords: ECHR, ECtHR, fourth instance doctrine, right to a fair trial, effective interpretation.

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I. INTRODUCTION

The European legal system, in which the European Court of Human Rights ('the Court') is situated, rests on the principle of subsidiarity to a great extent. This means that the Contracting States are responsible for enforcing the rights and freedoms protected under the European Convention on Human Rights ('the Convention'). The fourth instance doctrine constitutes the principle of subsidiarity¹ and adheres to it on the basis that the Contracting States are the main actors under the Convention. Under the fourth instance doctrine the Court does not address errors of fact or law allegedly made by a national court, unless and insofar as such errors infringe the rights and freedoms protected by the Convention.²

The Court regularly invokes the principle of subsidiarity and its doctrinal corollary, the margin of appreciation doctrine.³ The latter means that States are allowed a certain margin for discretion in order to take into account the special circumstances of each State. It has been stated that in order to maintain its institutional credibility, the Court must refrain from interfering with the margin of appreciation granted to Contracting States.⁴ One might assume that the fourth instance principle, the margin of appreciation and the principle of subsidiarity reflect different aspects of the Court's competence, as there would otherwise be no need for the three different principles. It has, however, been argued that they are essentially

¹ See Herbert Petzold, 'The Convention and the Principle of Subsidiarity', in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993), 41-62.

² Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), 257-76.

³ These principles also form part of the Convention, and are not only based on the case law of the Court. See Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) which adds the principle of subsidiarity to the Preamble of the Convention ('Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'). Protocol No. 15 was opened for signature on 24 June 2013 and will enter into force as soon as all State Parties to the Convention have signed and ratified it. On the margin of appreciation doctrine, see, eg Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001).

⁴ Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010), 3-4. Furthermore, the margin of appreciation has been seen as a method that hinders the reception of international law in the ECHR system (*ibid*, 7-9).

synonymous. Christoffersen stresses that the different concepts are generally confined to separate areas of case law, but it would be a mistake to assume that this makes any substantive difference.⁵

That said, I contend that there is a distinction to be drawn between these three principles. The principle of subsidiarity, the margin of appreciation doctrine and the fourth instance doctrine represent different aspects of national sovereignty.⁶ In other words, national sovereignty lies at the heart of these principles, but the approach differs in each case. The fourth instance doctrine relates to the question of whether it is possible to appeal a national court's decision, while the subsidiarity principle has a broader meaning.⁷ As Carozza states, the principle of subsidiarity needs a broad formulation and there are several layers within the principle.⁸ Consequently, I argue that the fourth instance doctrine belongs to the first layer of the subsidiarity principle. In this layer local communities are left to protect and respect human rights, provided they are capable of achieving those ends themselves. Also the margin of appreciation doctrine belongs to the first layer. In this case, the subsidiarity principle gives the national authorities a degree of discretion over the interpretation and implementation of Convention rights and freedoms.⁹

⁵ Christoffersen (n 2), 239-40; see also Petzold (n 1) and Paul Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' (1997) EHRLR 364-79. Cf. Sweeney sees the margin of appreciation doctrine as separate but closely connected to the principle of subsidiarity (James A. Sweeney, *The European Court of Human Rights in the Post-Cold Era: Universality in Transition* (Routledge 2013), 33); Breitenmoser also makes a distinction between the margin of appreciation doctrine and subsidiarity principle, Stephan Breitenmoser, 'Subsidiarität und Intressenabwägung im Rahmen der EGMR-Rechtsprechung', in Stephan Breitenmoser and others (eds), *Human Rights, Democracy and the Rule of Law*, Liber amicorum Luzius Wildhaber (Dike Verlag 2007) 119-42.

⁶ See, also, Paolo Carozza, 'Subsidiarity as a structural principle of international human rights law' (2003) 97 *AJIL* 38-79, at 69-70 who describes several important differences between the margin of appreciation doctrine and subsidiarity principle. Carozza also points out that many use the term subsidiarity principle to refer generally to the idea of deferring decisions to local authorities.

⁷ The admissibility criteria concretise the subsidiarity principle: Article 35(1) of the Convention provides that the Court can only hear cases when the applicant has exhausted all available national remedies. The subsidiarity principle is also known in EU law, but its content differs from that applied in the Convention system. See on the subsidiarity principle in EU law, Takis Tridimas, *The General Principles of EU Law* (2nd edn; OUP 2006), 183-8.

⁸ Carozza (n 6), 57-8.

⁹ The second layer of subsidiarity supports the integration of local and supranational interpretation and implementation into a single community of discourse. The third and final layer of subsidiarity is founded on the idea that to the extent that local

The difference between the fourth instance doctrine and the margin of appreciation doctrine is rather complex. In practice, the difference is often a matter of degree; both doctrines allow considerable discretion to the national authorities.¹⁰ The discernable difference that sets them apart is that the argumentation in cases concerning the margin of appreciation doctrine is more extensive than the argumentation in fourth instance cases.¹¹ For this reason, compared to the fourth instance doctrine, the margin of appreciation doctrine has a more developed body of case law and is more often used in the Court's praxis.

The central difference is that the margin of appreciation doctrine is linked to argumentation by consensus. In short, the margin of appreciation is concerned with whether there is a consensus between the states, or not. If there is consensus, then the margin will be narrower and when there is no consensus, then the margin afforded to the states is wider. By contrast, there is no such tool to measure the scope of application of the fourth instance doctrine.¹² Furthermore, the application of the margin of appreciation doctrine is more detailed and precise in the Court's case law. The extent of the margin is closely evaluated, whereas the fourth-instance nature of the case is evaluated in a rather rough and brief manner. The fourth instance doctrine focuses its evaluation on whether the complaint, which concerns the national proceedings, contains elements that are of a fourth-instance nature. In other words, it evaluates if the claim that the decision of the national proceedings was erroneous. The fourth instance doctrine usually concerns Article 6 cases, while the margin of appreciation doctrine concerns every Article in the Convention, especially Articles 8, 9, 10 and 11.¹³

bodies are unable to accomplish the ends of human rights, the larger branches of international community have a responsibility to intervene, *ibid* 58.

¹⁰ David Harris and others, *Law of the European Convention on Human Rights* (3rd edn; OUP 2014), 16.

¹¹ See the Court's argumentation of the margin of appreciation doctrine eg *S.A.S v. France*, 43835/11, 1 July 2014, GC, paras 123-59 and compare it to the argumentation with the fourth instance doctrine eg *Tautkus v Lithuania*, 29474/09, 27 November 2012, para 57.

¹² The existence of consensus will, however, not automatically restrict the margin of appreciation of the state concerned. Much depends on the circumstances of the case and especially on the question of whether a particularly important facet of an individual's existence or identity is at stake. See more e.g. Egbert Myjer, 'Pieter van Dijk and His Favourite Strasbourg Judgment. Some Remarks on Consensus in the Case Law of the European Court of Human Rights' in Marjolein van Roosmalen and others (eds), *Fundamental Rights and Principles*, Liber amicorum Pieter van Dijk (Intersentia 2013) 49-71, at 65; see also Harris and others (n 10), 11.

¹³ Harris and others (n 10), 14-6.

The fourth instance doctrine is also applied by other quasi-judicial and judicial bodies, which employ human rights to determine the admissibility of a complaint. Phrases such as ‘this commission/court will not sit as a court of fourth instance over domestic legal decisions’ are typically seen in such situations.¹⁴ These phrases mean that the international forum is not to act as a quasi-appellate court as to the correctness of a national court’s judgment under its national law. This fourth-instance formula states briefly that the international forum will not second-guess the national court’s findings of fact or whether the national court has applied national law properly.¹⁵

The Court has proved itself to be a dynamic and far-reaching interpreter of the provisions of the Convention. It has adopted several methods of interpretation, which emphasise the Convention’s objectives, as well as its ‘living’ nature and responsiveness to social change.¹⁶ However, it regularly reminds states that it does not possess *de jure* power to revise the Convention, although it increasingly appears to consider that it has an important oracular, rights-creating function.¹⁷ This often gives rise to a contradiction between the Court’s interpretations and the fourth instance doctrine, since it has been argued that its far-reaching interpretations encroach on the sphere of national authorities.¹⁸

In sum, it has been argued that the Court must, on the one hand, protect

¹⁴ See, eg Human Rights Committee, Communication No. 1763/2008, *Pillai v Canada*, Views adopted on 25 March 2011, para 11.2; Communication No. 1881/2009, *Masih v Canada*, Views adopted on 24 July 2013, dissenting opinion of Committee member Mr Shany, joined by Committee members Mr Flinterman, Mr Kälin, Sir Rodley, Ms Seibert-Fohr and Mr Vardezelashvili, para 2; Inter-American Court of Human Rights (I/A Court H.R.) Case No. 12.683, *Melba del Carmen Suárez Peralta v Ecuador*, 26 January 2012, para 83; Inter-American Court of Human Rights (I/A Court H.R.) Case No. 12.004, *Marco Bienvenido Palma Mendoza et al. v Ecuador*, 24 February 2011, para 53.

¹⁵ See H. Victor Condé, *A Handbook of International Human Rights Terminology* (2nd edn; University of Nebraska Press 2004), 91-2; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn; OUP 2013), 20-1.

¹⁶ See Franz Matscher, ‘Methods of Interpretation of the Convention’, in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993), 63-81; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010), 319-58; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009).

¹⁷ See Alex Stone Sweet and Helen Keller, *A Europe of Rights* (OUP 2008), 6.

¹⁸ For more on this tension, see eg Wilhelmina Thomassen, ‘Judicial Legitimacy in an Internationalized World’, in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings* (T.M.C. Asser Press 2009) 399-406, 402.

fundamental rights to the highest degree possible and must do so in a dynamic and progressive way. On the other hand, it must take due account of its position as a supranational court for 47 different States, whose opinions on fundamental issues may vary dramatically.¹⁹ The Court's interpretation of the Convention provides a basis to evaluate its role in general and, consequently, to evaluate questions of legitimacy in particular, and whether its jurisdiction in relation to national courts is justified.²⁰ I argue that the Court's reasoning takes centre stage and that it either gains or loses its legitimacy on the basis of its judicial interpretations.

This article surveys the case law on fair trial cases with specific reference to Article 6 of the Convention, which directly requires the Court to evaluate fourth instance questions in the context of procedural human rights interpretations, an approach not taken elsewhere in the Convention. The focus is on the tensions and problems involved in balancing the fourth instance doctrine against an expansive interpretative approach of the right to a fair trial. This article has two aims. Firstly, it endeavours to systematise the role of the fourth instance doctrine in fair trial cases. Secondly, it conducts a critical evaluation of the justifiability of the fourth instance doctrine in these cases.

The evaluation of the justifiability of the fourth instance doctrine leads to an analysis of the Court's argumentation. The justification of a legal decision has been divided according to the internal justification and external justification. The internal justification relates to the consistency of the deliberation and the judicial reasoning but does not address why one fact is considered relevant, while another is deemed irrelevant and is therefore ignored.²¹ The external justification means that the judge must justify the chosen norm and the substance given to that norm. He or she must also decide which facts are taken into account—in other words,

¹⁹ It must be noted that there will be 48 Contracting Parties after the European Union accedes to the European Convention on Human Rights. The accession became a legal obligation under the Treaty of Lisbon, see Article 6(2) of the Consolidated version of the Treaty on European Union [2012] OJ C326/1. Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights', in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (T.M.C. Asser Press 2009) 407-36, 429.

²⁰ Marc Bossuyt, 'Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 HRLJ (2007) 321; Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' 23 HRLJ (2002) 161.

²¹ On internal justification, see Robert Alexy, *A Theory of Legal Argumentation, The Theory of Rational Discourse as Theory of Legal Justification* (trs by Ruth Adler and Neil MacCormick, Clarendon Press 1989), 220-30; Alexander Peczenik, *On Law and Reason* (2nd ed; Springer 2009), 158-9.

which facts are legally relevant—and justify their choice.²² Justifiability implies that a person faced with a practical statement can ask ‘why’ there was an Article 6 violation in the first place, and therefore demand reasons that support such a finding.²³ This article concentrates on the external justification, which has been characterised as an attempt to achieve comprehensive, general legitimacy for a judgment.²⁴ In context of the Convention, justification means that the reasoning must be transparent and that all competing interests must be taken into account, thereby incorporating *pro* and *contra* types of argumentation. Moreover, since it is a human rights Convention, the focus should be on the content of the rights in dispute and not only procedural aspects. This also applies when evaluating the justifiability of the fourth instance doctrine in the Court’s case law.

Methods borrowed from the theory of rational argumentation are used in analysing the relevant case law, and reveal a clear tension owing to the Court’s inconsistency in its decisions on the breadth of domestic obligations and the extensiveness of fair trial rights. The Court usually takes either the fourth instance doctrine or the right to a fair trial into account in its judicial reasoning, while leaving all other considerations aside. The question of legitimacy is involved in both instances. The fourth instance doctrine refers to formal legitimacy.²⁵ It acts as a brake on the Court’s interpretations of the Convention by ensuring that it bears in mind the constitutional limits on its competence. From the fourth instance viewpoint, legitimacy is assessed in terms of formality, focusing on procedural steps as opposed to substance. If all the required procedural steps are taken at the national level, then no criticism is required. Consequently, the Court guarantees its own legitimacy through a formalistic approach in which it pays attention to procedural requirements only. By contrast, the legitimacy question manifests itself differently when it comes to the interpretation of rights, in which the Court’s legitimacy is viewed from the opposite position. As Letsas has recently argued the living instrument interpretation does not threaten the legitimacy of the Court. On the contrary, the Court loses legitimacy without it.²⁶ Legitimacy in this

²² On external justification, see Alexy (n 21), 228-30; Peczenik (n 21), 158-60.

²³ Peczenik (n 21), 44-5, 166.

²⁴ Mirjami Paso, ‘Rhetoric Meets Rational Argumentation Theory’ 2 *Ratio Juris* 27 (2014) 236, 239.

²⁵ For more on formal legitimacy, see Thomassen, (n 18), 402-3; Tom Barkhuysen and Michiel van Emmerik, ‘Legitimacy of European Court of Human Rights Judgments: Procedural Aspects’, in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings* (T.M.C. Asser Press 2009), 437-49.

²⁶ George Letsas, ‘The ECHR as a Living Instrument: its Meaning and Legitimacy’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe, The*

sense stresses substance, which means that the Court gains legitimacy by evaluating issues of content as opposed to purely procedural matters. It is not enough for the national authorities to take all necessary procedural steps, since the focus in this approach is on the content of these procedures. The Court's reasoning in respect of the fourth instance doctrine is viewed from a substantive legitimacy viewpoint.

Section 2 of this contribution outlines the scope and interpretation of Article 6 and the fourth instance doctrine in the Court's practice. Section 3 surveys the case law and categorises the judgments relating to the fourth instance doctrine in fair trial cases into four groups. This categorisation reveals that a strict approach to the fourth instance doctrine could threaten the effective protection of the right to a fair trial. Therefore, in Section 4, a more flexible and practical approach to the fourth instance doctrine is suggested.

II. ARTICLE 6 AND THE FOURTH INSTANCE DOCTRINE

I. *Interpretation of Article 6*

While Article 6(2) and 6(3) contain specific provisions setting out minimum rights applicable in respect of those charged with a criminal offence, Article 6(1) applies both to civil and criminal proceedings. The core of Article 6(1) is the following passage:

In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

Article 6 is the provision of the Convention most frequently invoked by applicants.²⁷ Many of the terms used in Article 6(1) bear autonomous meaning and require interpretation. There is consequently substantial case law on the provision's application and the Court has identified separate requirements and positive obligations that derive from it. This contribution restricts itself to presenting only the main requirements derived from the provision.

European Court of Human Rights in a National, European and Global Context (Cambridge University Press 2013), 126, 141.

²⁷ In 2000, almost 70 per cent of all new applications included at least one complaint under Article 6. The Court no longer keeps these kinds of statistics but it is likely that the proportion is still broadly the same. Some indicators provide that in 2012 there were in total 480 violations of Article 6 (there were 1,093 violations in total). See statistics from the Court's website: www.echr.coe.int.

From the early 1970s, the Court has held that Article 6(1) includes a universal right to access to justice, even though this is not expressly stated in the Article.²⁸ The Court also made it clear that ‘civil rights and obligations’ have an autonomous meaning under the Convention and this concept may also extend to administrative and executive decision-making.²⁹ Furthermore, the requirement of a fair trial ‘by an independent and impartial tribunal established by law’ is the Court’s definition of the meaning of impartiality (the prior involvement of a judge, objective impartiality),³⁰ independence (administrative agencies and disciplinary bodies)³¹ and the term ‘established by law’.³² Article 6(1) also requires that such determinations must be made in a ‘fair and public hearing’. Publicity is seen as one of the guarantees of a fair trial.³³ In addition to this, while absent from the Convention, fairness has been held to require ‘equality of arms’.³⁴

The Court has also held that a ‘fair and public hearing’ includes the right to examine witnesses,³⁵ the right to legal representation,³⁶ the right not to incriminate oneself³⁷, and the requirement that national courts must give sufficient reasons for their decisions.³⁸ Article 6(1) also provides that everyone is entitled to a hearing ‘within a reasonable time’. There have been numerous cases on the promptness of proceedings.³⁹ It is possible to

²⁸ *Golder v the United Kingdom*, 4451/70, 21 February 1975; *Posti and Rabko v Finland*, 27824/95, 24 September 2002.

²⁹ *Pellegrin v France*, 28541/95, 8 December 1999, GC; *Vilho Eskelinen and Others v Finland*, 63235/00, 19 April 2007, GC.

³⁰ *Fey v Austria*, 14396/88, 24 February 1993; *AB Kurt Kellermann v Sweden*, 41579/98, 26 October 2004.

³¹ *Belilos v Switzerland*, 10328/83, 29 April 1988; *Incal v. Turkey*, 22678/93, 9 June 1998, GC.

³² *Oleksandr Volkov v Ukraine*, 21722/11, 9 January 2013.

³³ *Pretto and Others v Italy*, 7984/77, 8 December 1983. See also on the sub-rights derived from the right to a fair hearing, Eva Brems, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’ 1 *Human Rights Quarterly* 27 (2005) 294, 295-8.

³⁴ *Dombo Bebeer B.V. v the Netherlands*, 14448/88, 27 October 1993.

³⁵ *Van Mechelen and Others v the Netherlands*, 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997.

³⁶ *Granger v the United Kingdom*, 11932/86, 28 March 1990.

³⁷ *Saunders v the United Kingdom*, 19187/91, 17 December 1996, GC.

³⁸ *Hadjianastassiou v Greece*, 12945/87, 16 December 1992; *Van de Hurk v the Netherlands*, 16034/90, 19 April 1994.

³⁹ *Zimmermann and Steiner v Switzerland*, 8737/79, 13 July 1983; *König v Germany*, 6232/73, 28 June 1978; *Bottazzi v Italy*, 34884/97, 28 July 1999.

waive some, but probably not all, of these rights under Article 6(1).⁴⁰ The scope of the rights guaranteed under Article 6 is therefore rather wide and is constantly being refined and redefined within the Convention system. It is impossible to provide an exhaustive list of the rights contained in Article 6 since the Court's decisions constantly create new rights and shape old ones. Its interpretations have, arguably, moved away from the original text of the fair trial provision.

As this brief overview of the progressive content of Article 6 demonstrates, the Court has developed several tools and techniques to underpin its extension of rights and freedoms provided for in the Convention. The most frequently cited methods of interpretation are as follows: (1) the living-instrument approach; (2) the theory of autonomous concepts; (3) the practical and effective approach; and (4) the common ground method.⁴¹ All these interpretative methods were created by the Court's case law. Furthermore, all the decisions reached in these cases reject the idea that the rights enshrined in the Convention must be interpreted like they were in the 1950s. Article 1 of the Convention is the starting point for the Court's interpretation, and states the following: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

It is noteworthy that the Court's approach to interpretation, taken as a whole, can be described as creative and dynamic. It abandoned the strict textual approach to interpretation some time ago and advanced special methods of interpretation.⁴²

2. *The Fourth Instance Doctrine*

The fourth instance doctrine was developed in the Convention system in the late 1950s and 1960s.⁴³ In the *Belgian Linguistic* case, the Court held

⁴⁰ *Zumtobel v Austria*, 12235/86, 21 September 1993; *Jones v the United Kingdom*, 30900/02, 9 September 2003.

⁴¹ See Letsas (n 16); Harris and others (n 10), 7-21; Clara Ovey and Robin CA White, in Jacobs & White, *The European Convention on Human Rights* (5th edn; OUP 2010), 73-8; Christoffersen (n 2), 54-63; Gerards (n 19), 428-35; Alistair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today: Extending the Scope of Convention Rights and Freedoms beyond Could Have Been Foreseen by the Drafters of the ECHR', in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013), 17-37.

⁴² Christoffersen (n 2), 49-50; Alex Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53, 73.

⁴³ See eg *X v Belgium*, 458/59, 29 March 1960. See more Christoffersen (n 2), 238-9, 274.

that:

It [...] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiarity nature of the international machinery [...] The national authorities remain free to choose the measures which they consider appropriate [...] Review by the Court concerns only the conformity of these measures with the requirements of the Convention.⁴⁴

The Court adopted the Commission's approach in the 1970s, and in its leading case *Schenk*,⁴⁵ the Court stated the following:

According to Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention.⁴⁶

The fourth instance doctrine stems from two main sources. Firstly, it is a simple matter of efficiency in the use of resources. Secondly, at the level of legitimacy, it is recognised that democratically non-accountable judges in Strasbourg should not use their jurisdiction to override national authorities.⁴⁷ The main rule is clear: the facts of the case brought before the Court will not be questioned. This means in practice that the Court accepts that the national authorities investigate the facts of the case. However, if the national court's decision violates the rights and freedoms protected by the Convention then it is necessary for the Court to step in.⁴⁸

In addition to upholding national sovereignty, the fourth instance doctrine

⁴⁴ Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (Merits) (Belgium Linguistic case), 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968, para 10.

⁴⁵ *Schenk v Switzerland*, 10862/84, 12 July 1988.

⁴⁶ *ibid*, para 45. For more recent case law, see, eg *Tautkus v Lithuania* (n 11), in which the Court emphasised that it is not the task of the Court to assess the facts which led a national court to adopt one decision over another. The application of the fourth instance doctrine also means that an applicant's argument that was not accepted by the national court cannot be upheld by the Court (para 57).

⁴⁷ *Arai-Takahashi* (n 3), 235-6.

⁴⁸ Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (3rd edn; Sweet & Maxwell 2012) 129, 134, 645; Andreas Føllesdal, Birgit Peters and Geir Ulfstein, 'Introduction', in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013), 15-7.

also respects the principle of democracy. Respecting the choices and evaluations made by the national authorities reflects respect for the democratically elected members of the parliament and the people who have democratically voted for their representatives.⁴⁹ The Preamble to the Convention states that on the one hand, fundamental rights and freedoms are best maintained by an effective political democracy and, on the other, by a common understanding and observance of the human rights upon which they depend.⁵⁰

The Court frequently reiterates that it is not its role to act as quasi-appellate court as to the correctness of a national court's judgment under its national law.⁵¹ Unlike a national court of appeal, it is not concerned about whether the conviction was safe, whether the sentence was appropriate, or whether the level of damages awarded was in accordance with national law, and so forth.⁵² However, questions relating to the fairness of the domestic proceedings under Article 6 of the Convention blur the lines.

The Court has considered that insofar as the remaining 'fairness' complaints under Article 6 have been substantiated, this raises issues that are of no more than a fourth instance nature, and which the Court has limited power to review under Article 6.⁵³ For example, if the Court considers the domestic court failed to consider certain factors when assessing the legal nature of the case, it risks going beyond its competence and acting as a court of fourth instance.⁵⁴ But how can the Court evaluate

⁴⁹ Judicial minimalism has the same aim and affect: judging narrowly and superficially leaves things open for further decision in the future. This also promotes democracy: by saying no more than is strictly necessary, minimalism leaves issues open for political discussion. For further discussion of the Court's judicial minimalism, see Aagje Ieven, 'Privacy Rights in Conflict: In Search of the Theoretical Framework behind the European Court of Human Rights' Balancing of Private Life against Other Rights' in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Intersentia 2008), 55-60.

⁵⁰ See more Alistair Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy', (1999) 51 PL 703; Susan Marks, 'The European Convention on Human Rights and its "Democratic Society"', (1995) 66 BYIL 209.

⁵¹ See eg *Pelipenko v Russia*, 69037/10, 1 October 2012, para 65: 'the Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, by their very nature, particularly qualified to settle issues arising in this connection [...]'; see also Wildhaber (n 20), 162.

⁵² For more on this subject, see Ovey and White (n 41), 243.

⁵³ See *García Ruiz v Spain*, 30544/96, 12 January 1999, GC, para 28; *Fruni v Slovakia*, 8014/07, 21 June 2011, para 128.

⁵⁴ See, eg the concurring opinion of judge Dedov in the case of *Brežec v Croatia*, 7177/10, 18 July 2013.

fairness in the first place without, in fact, acting as a court of fourth instance? Evaluating the overall fairness of national procedure leads the Court to make a concrete assessment of the arguments and the application of national laws and their interpretation by national authorities.⁵⁵ This creates an unclear and confusing situation. On the one hand, the starting point is obvious, the national authorities play the lead role in investigating and interpreting national law. On the other hand, the fact that the Court steps in if the national interpretation violates provisions of the Convention muddies the waters. In such cases, who is the arbitrator that decides when the line is crossed? Questions about the fairness of the proceedings and its outcome can be easily assessed by reference to the facts of the case at hand. Arguments concerning, for example, the appropriateness of the imposed punishment are open to criticism as instances of fourth-instance assessments.⁵⁶ It seems that the fourth instance doctrine draws a fine line, whose precise position must be decided by the Court on a case-by-case basis. I argue that the doctrine defines the limits within which the human rights interpretation can be made. In other words, it provides a point of departure for subsequent interpretation. I also argue that the Court in some cases acts as a fourth instance court.⁵⁷

III. CASE STUDY: THE ROLE OF THE FOURTH INSTANCE DOCTRINE

1. *Case Categories*

The forty-four cases chosen for the purposes of this study were found in the HUDOC database by using the search terms ‘fourth instance’ and ‘effective.’ No time limits were applied.⁵⁸ Based on a close reading of the

⁵⁵ It has been pointed out that a question of law and a question of fact are hard to distinguish. See the dissenting opinion of judge Zupančič (*Hermi v Italy*, 18114/02, 18 October 2006): ‘Here at the European Court of Human Rights we continue to make the point that we are not a fourth-instance court and that we do not wish to deal with any facts which are subject to the guiding principle of immediacy in a trial. Nevertheless, a new major premise in legal terms will always call for new elements making up the minor premise, that is, some kind of facts.’

⁵⁶ See the concurring opinion of judge Kalaydjieva in the case of *Maktouf and Damjanović v Bosnia and Herzegovina*, 2312/08, 34179/08, 18 July 2012, GC.

⁵⁷ Costa considers the fourth instance doctrine to be one of the devices that delimit the Court’s domain *vis-à-vis* national authorities. See Jean-Paul Costa, ‘On the Legitimacy of the European Court of Human Rights’ Judgments’ (2011) 7 *EuConst* 173, 179.

⁵⁸ The search terms ‘fourth instance’ and ‘effective’ were chosen because they helped locate the relevant cases. The word ‘effective’ is widely used by the Court both in the practical and effective interpretations as well as in other interpretations, such as in positive obligations and living instrument argumentation. See, eg the dissenting opinion of judge Kalaydjieva in the case of *Dimitar Shopov v Bulgaria*, 17253/07, 16

cases, four categories were identified in order to systematically categorise the role of the fourth instance doctrine under Article 6. This categorisation was carried out by applying the methods of rational argumentation theory, which offers a deeper insight into the substantive reasons given by the Court.⁵⁹ Argument analysis is a method that focuses on the Court's reasoning, which results in the researcher moving to the level of legal culture. This allows more general remarks to be made about the use of the fourth instance doctrine in the Court's practice.⁶⁰

The first category is 'clear fourth instance nature'. Here the Court's task is easy, since one can easily observe that questions before the Court are purely fourth-instance-related so the Court is prohibited from looking at them. The second category is 'length of proceedings'. Here the Court's task is relatively straightforward and the Court must assess whether the length of the proceedings at national level was unreasonable. The third category is 'balancing approach'. In these cases the Court takes the view that it has no grounds to interfere because the assessment of the evidence or establishment of the facts made by the national courts is not manifestly unreasonable or in any way arbitrary. The threshold for interference is relatively high. Here, the Court tends to place an emphasis on the fourth instance doctrine over the right to a fair trial. The fourth category is 'disregard of fourth instance approach'. In the cases belonging to this category, the Court emphasises the fair trial provision over the fourth instance doctrine by finding positive obligations under Article 6. In these two latter categories one can find arguments both for and against the fourth instance doctrine and the right to a fair trial.

Based on the results of my search, I have decided to present the most representative examples of the role of the fourth instance doctrine in each particular category. In other words, these examples are chosen on the basis that they best demonstrate the character of the particular category at hand.

April 2013, 16. The search terms, however, clearly omit some relevant cases, since it would be impossible to apply search terms that would cover all potential relevant cases. The task of searching for cases was conducted from 1 August 2013 until 1 November 2013.

⁵⁹ Paso (n 24), 240; Aulis Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (D Reidel Publishing Co 1987). See also Alan McKee, *Textual Analysis: A Beginner's Guide* (SAGE Publications 2003); see also on discursive analytic research, Alexa Hepburn and Jonathan Potter, 'Discourse Analytic Practice', in Clive Seale and others (eds), *Qualitative Research Practice* (SAGE Publications 2007), 168-84; Ruth Wodak, 'Critical Discourse Analysis', in Clive Seale and others (eds), *Qualitative Research Practice* (SAGE Publications 2007), 185-201.

⁶⁰ In respect of the levels of the law, especially on the level of legal culture, see Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002), 161-83.

2. *Category one: Clear fourth instance nature*

These cases almost immediately reveal themselves as falling squarely within the fourth instance doctrine and the Court will consider them no further. Claims, which are clearly of a fourth instance nature, include general claims where there is no suggestion that the national court has misinterpreted the domestic legislation or balanced the evidence incorrectly.

In *Tomić*, twelve applicants complained about the decision of the domestic court proceedings.⁶¹ The Montenegrin Government maintained that these complaints were of a fourth-instance nature and therefore inadmissible before the Court. The Court agreed with the assessment,⁶² and it was, therefore, not necessary to justify its decision. It sufficed to refer to the fourth instance formula as follows: ‘it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may infringed rights and freedoms protected by the Convention’.⁶³ This is a classic example of an issue that is clearly a case of the fourth instance doctrine so the Court cannot investigate the decision of the national proceedings.

The complex *Karpenko* case involved several complaints under Article 6.⁶⁴ The applicant alleged that the criminal proceedings, in which he was accused of murder, the possession of firearms and forgery charges, were unfair as the courts had erred in their assessment of the facts and evidence and had incorrectly applied domestic law. The Court reiterated that under the fourth instance doctrine its task was not to act as a court of appeal or a fourth instance court, and pointed out that it is for the domestic courts to exclude evidence it considers irrelevant.⁶⁵ It then assessed the evidence on which the charges were based, noting that there were multiple documents, witnesses and expert testimonies and that the national judgment was well-reasoned. The Court also noted that the applicant was present throughout the proceedings and was able to cross-examine witnesses and challenge the evidence.⁶⁶ On the basis of these facts, the Court considered that: ‘in so far as the remainder of the “fairness” complaints under Article 6... has been substantiated, it raises issues which are no more than a fourth-instance

⁶¹ *Tomić and Others v Montenegro*, 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09, 7316/10, 17 April 2012.

⁶² *ibid*, paras 62-3.

⁶³ *ibid*, para 62. In respect of the alleged violation of Article 6 as regards the outcome of the proceedings, see also *FC Mretebi v Georgia*, 38736/04, 31 July 2007, paras 31-33.

⁶⁴ *Karpenko v Russia*, 5605/04, 13 March 2012. Other complaints under Article 6 are discussed below.

⁶⁵ *ibid*, para 80.

⁶⁶ *ibid*, para 81.

nature, and which the Court has a limited power to review [...]’⁶⁷ It concluded that this part of the application must be rejected.

Fruni dealt with the impartiality and independence of the courts.⁶⁸ The applicant complained that he was not granted a fair hearing by an independent and impartial tribunal established by law, as provided for in Article 6(1). More precisely, he complained, *inter alia*, that his trial and conviction was politically motivated, and that the court had taken inadmissible evidence into account. The Court went through the points of the complaint with reference to the facts of the case, and held as follows with respect to the fourth instance doctrine: ‘[T]he admission of evidence is a matter for domestic courts. It is also for domestic courts to decide what evidence is relevant [...]’⁶⁹

The Court observed that the applicant’s conviction was based on extensive documentary, witness and expert evidence, and found nothing that undermined the fairness of the procedure. Consequently, it rejected the application and observed: ‘in so far as the remainder of the “fairness” complaints under Article 6 [...] has been substantiated, it raises issues which are of no more than a fourth-instance nature’.⁷⁰

Fair trial provisions were widely invoked in *Shalimov*.⁷¹ The applicant complained that the proceedings were unfair, that the domestic courts were not impartial and independent, and that they had falsified the case materials against him and misinterpreted the evidence. The Court reiterated the fourth-instance formula—that it is not its task to act as a court of fourth instance—and also noted that the domestic courts are best placed to assess the credibility of witnesses and the relevance of evidence.⁷² The applicant had not substantiated any of the allegations. The Court held that the mere fact that the court had decided against the applicant was not sufficient to conclude that it was not impartial and not independent.⁷³ There was consequently no balancing issue and the case was clear and undisputed. Complaints about the domestic court’s interpretations of the evidence provide a fitting example of an issue, which, according to the fourth instance doctrine, do not fall under the Court’s jurisdiction.

⁶⁷ *ibid*, para 82.

⁶⁸ *Fruni v Slovakia* (n 53).

⁶⁹ *ibid*, para 126.

⁷⁰ *ibid*, para 128.

⁷¹ *Shalimov v Ukraine*, 20808/02, 4 March 2010.

⁷² *ibid*, para 67.

⁷³ *ibid*, paras 68-9.

3. *Category two: Length of proceedings*

The length of proceedings amounts to a category of its own in fair trial cases. In cases where the national authority has delayed the proceedings beyond a reasonable length of time, the Court can, irrespective of the doctrine of fourth instance, conclude that the national trial has been unfair due to the unreasonableness. In the Court evaluation of the length of the proceedings, the heart of the fourth instance doctrine remains untouched. The Court's analysis in this regard is rather straightforward: if the length of the proceedings was unreasonable, then there is a violation of Article 6(1). There are very few problems with this interpretation, and thus these questions are rather easy and quick to resolve.

In *Sebahattin Evcimen* the proceedings before the domestic courts had lasted nine years and eight months and took place at two levels of the court system.⁷⁴ The Court's approach to evaluating the reasonableness of the length of the proceedings involved taking into account the circumstances of the case, its complexity, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.⁷⁵ The Court pointed out the obligations of the state: 'it is the role of the domestic courts to manage their proceedings so that they are expeditious and *effective*.'⁷⁶ Consequently, it concluded that the national courts had not acted with due diligence overall, and that the Turkish Government had not put forward any facts or arguments capable of persuading it to reach a different conclusion. Consequently, the Court unanimously ruled that the length of the proceedings was excessive and failed to meet the reasonable time requirement.

In *Shalimov* the applicant's complaint was based on several grounds under Article 6, including, *inter alia*, that the criminal proceedings against him had taken an unreasonably long period of time. The Court's evaluation started by reiterating that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the particular case and with reference to the criteria as laid down in the Court's case law.⁷⁷ The Court then turned to the facts of the case, which amounted to criminal proceedings against the applicant that took four years, eleven months and three days to complete, and included multiple periods during which little or no action was taken. It appeared that it had taken more than a year for the domestic authorities to conduct additional medical and ballistic examinations in the case. Furthermore, no action had

⁷⁴ *Sebahattin Evcimen v Turkey*, 31792/06, 23 February 2010.

⁷⁵ *ibid*, para 30.

⁷⁶ *ibid*, para 32 (emphasis added).

⁷⁷ *Shalimov v Ukraine* (n 71), para 76.

been taken between the preparatory hearing of 15th of April 2002 and the hearing on the merits on 9th of September 2002; a period of almost five months. The Court emphatically stressed that:

[S]uch delays are attributed to the domestic authorities and are not justified by the complexity of the case or the by the applicant's behaviour. Furthermore, special diligence was required [...] given that the applicant was in detention during the period in question.⁷⁸

The Court emphasised that the State was obliged to provide a fair trial within reasonable time. I consider this to be purely a fair trial issue and questions relating to the fourth instance doctrine are irrelevant. The Court concluded that '[t]he foregoing considerations are sufficient to enable the Court to conclude that the proceedings... were excessively long'.⁷⁹

4. *Category three: Balancing approach*

This category of cases requires the Court to balance the effectiveness of the fair trial provision with the limits imposed by the fourth instance doctrine. This is not an easy task to accomplish, since it is possible to frame the arguments according to the fourth instance doctrine or the practical and effective right to a fair trial. However, the Court maintains a relatively high threshold for interference in respect of these cases, requiring that the assessment of the evidence or establishment of the facts by the national courts may not be 'manifestly unreasonable or in any other way arbitrary'.⁸⁰

In *Tomić*, the applicants claimed that the domestic courts violated Article 6 in rejecting their claims while at the same time permitting identical claims by other applicants.⁸¹ They submitted copies of the domestic courts' rulings in six other cases to support their claim. The Court's assessment commenced with the following statement:

[I]t is not its role to question the interpretation of domestic law by the national courts. Similarly, it is not [...] its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those

⁷⁸ *ibid*, para 77.

⁷⁹ *ibid*, para 78; see similarly *Štavbe v Slovenia*, 20526/02, 30 November 2006, paras 43-44; *Josephides v Cyprus*, 33761/02, 6 December 2007, paras 71, 76; *Christodoulou v Cyprus*, 30282/06, 16 July 2009, para 59; *Richard Anderson v the United Kingdom*, 19859/04, 9 February 2010, para 29.

⁸⁰ See eg *Ebanks v the United Kingdom*, 36822/06, 26 January 2010, para 74.

⁸¹ *Tomić and Others v Montenegro* (n 61).

courts.⁸²

The Court indicated the relevant threshold is as follows:

[C]ertain divergences in interpretation could be accepted as an inherent trait of any judicial system which [...] is based on a network of trial and appeal courts [...] However, profound and longstanding differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty [...]⁸³

The Court laid down certain criteria to be followed in order to assess whether inconsistent decisions of domestic Supreme Courts violated the fair trial requirement under Article 6(1). These criteria comprised in establishing whether ‘profound and long-standing differences’ existed in the Supreme Court’s case law, whether the domestic legislation provided measures to overcome these inconsistencies, and whether these measures had been applied and, if appropriate, to what effect.⁸⁴ Next, the Court examined the six national cases, which the applicants referred to, and concluded that only three decisions ruled in favour of claimants, whose situation was similar to that of the applicants. It also noted that the Supreme Court never examined these decisions. The Court also examined the case law of the national High Court and observed that it had heard a total of eighty-eight appeals, of which eighty-four decisions were against the claimants and only four in favour. The Court concluded that: ‘It would appear that these four favourable decisions could be considered an exception and inconsistent in comparison with the other eighty-four, rather than the other way round’.⁸⁵

The Court found some inconsistencies in the national case law, which it held could not be seen as ‘profound and long-standing differences’. On this basis, it concluded that there was no violation of Article 6(1). This case illustrates that the threshold under which inconsistencies in national case law may violate the fair trial provision, which I argue has been raised relatively high.

The Grand Chamber’s votes were finely balanced in *Şabin*, in which ten judges, with seven dissenting, supported the majority vote.⁸⁶ The key issue in this case was whether the fourth instance doctrine took precedence over

⁸² *ibid*, para 53.

⁸³ *ibid*, para 53.

⁸⁴ *ibid*, para 54.

⁸⁵ *ibid*, para 57.

⁸⁶ *Nejdet Şabin and Perihan Şabin v Turkey*, 13279/05, 20 October 2011, GC.

the ‘practical and effective’ requirements of Article 6(1). The majority voted in favour of the fourth instance doctrine, with the dissenting opinion favouring the effectiveness of rights approach. The applicants claimed that the proceedings before the domestic courts were unfair and argued that it was possible that the same facts could give rise to different legal assessments that varied from one court to another, which amounted to a violation of Article 6(1).

The facts of the case were that there had been a military plane crash and the courts awarded some, but not all, of the victims’ families a pension. The majority of the judges of the Court held that the fourth instance doctrine was the decisive principle,⁸⁷ and the Court reiterated on several occasions that a conflict in national case law does not automatically result in a violation of Article 6(1).⁸⁸ It emphasised that it had found no evidence of arbitrariness, stating that:

[E]xamining the existence and the impact of such conflicting decisions does not mean examining the wisdom of the approach the domestic courts have chosen to take [...] its role [...] is limited to cases where the impugned decision is manifestly arbitrary.⁸⁹

The Court concluded that the ‘interpretation made by the Supreme Military Administrative Court [...] cannot be said to have been arbitrary, unreasonable or capable of affecting the fairness of the proceedings, but was simply a case of application of the domestic law’.⁹⁰ Finally it stressed its role: ‘it must avoid any unjustified interference in the exercise by the States of their judicial functions or in the organisation of the judicial systems’.⁹¹ The majority held that there had been no violation of Article 6(1).

The dissenting opinion stressed that different interpretations must not place the public in a situation of legal uncertainty, where the outcome of a case is dependent on a mechanism incapable of guaranteeing consistency in court decisions.⁹² It prioritised the requirement of a fair trial and had little to say about the question of subsidiarity in the case.⁹³ By contrast, the

⁸⁷ *ibid*, paras 49-50, 68-70, 88.

⁸⁸ *ibid*, paras 51, 88.

⁸⁹ *ibid*, para 89.

⁹⁰ *ibid*, para 93.

⁹¹ *ibid*, para 94.

⁹² Joint dissenting opinion of judges Bratza, Casadevall, Vajić, Spielmann, Rozakis, Kovler and Mijović in *Nejdet Şabin and Perihan Şabin v Turkey* (2011), para 6.

⁹³ *ibid*, para 5. See the similarly dissenting opinion of judge Šikuta joined by judge Myjer in *Popivčák v Slovakia*, 13665/07, 6 December 2011, para 12: ‘[T]his is not a fourth-instance case but rather a case of lack of access to a court [...]’.

majority view emphasised the formal aspects of the fourth instance doctrine. However, the dissenting opinion neglected to address how the fair trial provision must be interpreted in light of the Preamble to the Convention, which declares the rule of law is part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty.⁹⁴ The Preamble to the Convention also recognises the democracy principle, which means that respecting the evaluation made by the national authorities entails respect for the democratically elected members of parliament. The fourth instance doctrine, among other things, ultimately serves this democracy principle.

Based on my reading of the majority's decision, the judges were determined to uphold the independence of the national court at all costs. Even taking into account the constitutive principles of the fourth instance doctrine, I argue that the decision was unacceptable because it essentially pronounces that the national court's decision on the same matter may differ from chamber to chamber of the same court. The majority was of the view that this was neither arbitrary nor likely to affect public confidence.

In *Sebahattin Evcimen* questions about the fairness of the hearing arose.⁹⁵ Fairness entails giving each party a reasonable opportunity to present his or her case and to have knowledge of and the right to comment on all evidence adduced or observations submitted. The applicant complained that he had not received a fair hearing, arguing that the domestic courts had erred in the establishment of the facts and in their interpretation of the law. More precisely, the applicant claimed that the national decision was based on insufficient evidence. The Court reiterated the fourth instance formula:

[I]t is not its task to act as a court of appeal or, as is sometimes said, as a court of fourth instance, for the decisions of domestic courts [...] the latter are best placed to assess the credibility of witnesses and the relevance of evidence to the issues in the case.⁹⁶

Taking a strict approach to the fourth instance doctrine, the Court, after examining the facts of the case, decided as follows:

Following a thorough examination of the case file, the Court finds no element which might lead it to conclude that the domestic court

⁹⁴ *Nejdet Şahin and Periban Şahin v Turkey* (n 86), para 57.

⁹⁵ *Sebahattin Evcimen v Turkey* (n 74).

⁹⁶ *ibid*, para 25.

acted in *an arbitrary or unreasonable* manner in establishing the facts or interpreting the domestic law.⁹⁷

The complaint was manifestly ill-founded and was accordingly rejected. The Court's wording indicates that the Court was critical of the domestic proceedings; otherwise, the Court would have referred to the clear fourth-instance formula. A strict approach to the fourth instance doctrine sets a relatively high threshold: there must be something so manifestly arbitrary or unreasonable in the domestic proceedings for the Court to interfere. This required further elucidation, which was not forthcoming in this decision. The judgment remained at a general level and made no evaluation on the questions of arbitrariness and unreasonableness.⁹⁸

The quality of the evidence used in criminal proceedings was at issue in *Bykov*.⁹⁹ The problematic question here was whether the proceedings as a whole were fair, taking into account the manner in which the evidence was obtained. In this case the Grand Chamber had already found a violation of Article 8 (right to private life) in the State agents' covert operation. Evidence against the applicant was obtained in a covert operation and was subsequently used in the criminal proceedings. The Grand Chamber had to decide whether the evidence obtained in violation of Article 8 can be used in the criminal proceedings and fulfils the requirements of fairness under Article 6. Its decision was not unanimous. The majority, by eleven to six, emphasised that the proceedings must be taken as a whole and that there had been no violation of Article 6.¹⁰⁰ The Court's evaluation commenced with the reminder that:

its only task is to ensure the observance of the obligations [...] it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention.¹⁰¹

The Court made the fourth instance doctrine clear by continuing:

It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence [...] may be admissible or, indeed, whether the applicant was guilty or not. The

⁹⁷ *ibid*, para 26 (emphasis added).

⁹⁸ Cf. *Ebanks v the United Kingdom* (n 80) where the arbitrariness and unreasonableness is better dealt with.

⁹⁹ *Bykov v Russia*, 4378/02, 10 March 2009, GC.

¹⁰⁰ *ibid*, paras 89-90 and 104.

¹⁰¹ *ibid*, para 88 (emphasis added).

question [...] is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair [...]¹⁰²

After outlining the main principles the Court turned to the facts of the case. It addressed the applicant's claim that the evidence obtained from the covert operation breached his defence rights and thus gave rise to a violation of the right to a fair trial under Article 6. It also noted that the evidence obtained as a result of the covert operation was not the sole basis for the applicant's conviction, and concluded that: '*nothing* has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary'.¹⁰³

This case demonstrates the difficulties inherent in evaluating the evidence in the domestic proceedings, whilst remaining within the limits of the fourth instance doctrine. Furthermore, the way in which the Court formulated its decision was, in my opinion, rather pretentious. The pretentiousness is revealed when the Court underlines that '*nothing*' has been shown to support the conclusion that the applicant's defence rights were not properly complied with in relation to the fair trial standards. Rather than undermining the specific circumstances, a violation of Article 8 in such covert operations should be evaluated properly in order to assess a possible violation of Article 6. The Court remains silent on the issue that the covert operation had in itself violated other Convention articles.¹⁰⁴ Evaluating this argumentation from the fair trial view leads one to conclude that the right to a fair trial remains theoretical or merely illusory, since the Court certainly had grounds to interfere.

5. *Category Four: Disregard of Fourth Instance Approach*

The cases in this category prioritise the provision of a fair trial over fourth instance questions. In *Lalmahomed* the applicant claimed in the domestic proceedings that he should have been acquitted on the grounds of mistaken identity.¹⁰⁵ The national court dismissed this claim as implausible without further investigation and refused leave to appeal. The Court reiterated that under Article 6, 'for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand

¹⁰² *ibid*, para 89.

¹⁰³ *ibid*, para 98 (emphasis added).

¹⁰⁴ The dissenting opinion criticises this omission. See the partly dissenting opinion of judge Spielmann, and the concurring opinions of judges Rozakis, Tulkens, Casadevall and Mijović in *Bykov v Russia* (2009).

¹⁰⁵ *Lalmahomed v the Netherlands*, 26036/08, 22 February 2011.

the judgment or decision that has been given'.¹⁰⁶ It used rather strong language:

[t]he Court cannot overlook the fact that the single-judge chamber of the Court of Appeal [...] refused the applicant leave to appeal on the ground that he [did] not consider plausible the applicant's statement that his identity details [were] systemically misused by someone else'¹⁰⁷

The Court, for its part, considered it more appropriate to deal with the matter, having previously highlighted the fourth instance doctrine: '*as long as the resulting decision is based on a full and thorough evaluation of the relevant factors [...] it will escape the scrutiny of the Court*'.¹⁰⁸

The Court unanimously came to the conclusion that the applicant's claim that his identity had been misused ought not to have been discounted without further examination. The national court's judgment violated the fair trial provision as a whole because it failed to fully investigate the case. Consequently, there was a violation of Article 6(1) taken together with Article 6(3)(c).¹⁰⁹ This case can be seen as a harsh and unfortunate example of a national court's failure to base its judgment on a full and thorough evaluation. Due to neglect at national level the Court had no choice but to assume *de facto* the role of a domestic court.

Jovanović dealt with the right to access the courts.¹¹⁰ The applicant complained that his national Supreme Court had arbitrarily refused to consider his appeal when he had the right to use this remedy. The Court reiterated that Article 6 does not compel states to establish courts of appeal. However, if such courts exist the guarantees contained in Article 6 must be upheld, *inter alia*, by ensuring effective access to them. This right is, however, not absolute. Certain limitations are permissible, but these must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. The Court therefore emphasised proportionality.¹¹¹

The facts of this case were that the national Supreme Court barred the applicant from filing an appeal. It ruled without further clarification that the assessment of the value of the dispute showed it was clearly below the

¹⁰⁶ *ibid*, para 43.

¹⁰⁷ *ibid*, para 42.

¹⁰⁸ *ibid*, para 37 (emphasis added).

¹⁰⁹ *ibid*, paras 46-8.

¹¹⁰ *Jovanović v Serbia*, 32299/08, 2 October 2012.

¹¹¹ *ibid*, para 46.

applicable statutory threshold. The Court held that there had been an interference with the applicant's right to access a court and proceeded to assess whether this interference had been proportionate.¹¹² It placed weight on the fact that the national Supreme Court had not held a preliminary hearing. Furthermore, regarding the applicant's alleged procedural errors, the Court emphasised that it was the plaintiff and not the applicant who had set an unrealistic value in respect of the dispute, which the applicant apparently challenged before he had concluded his own response to the claim. The value of the dispute was decisive, as there was a certain threshold required for the lodging of an appeal on points of law. The applicant was therefore entitled to believe that an appeal on points of law would be available to him in due course and if necessary.¹¹³ At this juncture, the Court showed that it was fully aware of the fourth instance requirements by stating as follows:

It is, of course, primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is not, save in the event of evident arbitrariness, to question it.¹¹⁴

The Court then diverged from the strict fourth instance limits by giving guidance to the national court on how to interpret domestic law:

The authorities should respect and apply domestic legislation in a foreseeable and consistent manner and the prescribed elements should be sufficiently developed and transparent in practice in order to provide legal and procedural certainty [...]¹¹⁵

Since there had clearly been shortcomings in terms of transparency and legal certainty in the national proceedings, the Court unanimously held that there had been a violation of Article 6(1). It is noteworthy that the last paragraph of the Court's judgment stated, while finding a violation, that 'it being understood that it is not this Court's task to determine what the actual outcome of the applicant's appeal on points of law would have been had the Supreme Court accepted to consider it on its merits'.¹¹⁶ While emphatically trying to avoid being a fourth instance court, the Court acted

¹¹² The Court solved the legitimate aim question relatively quickly: the statutory threshold for appeals to the Supreme Court is a legitimate procedural requirement having regard to the very essence of the Supreme Court's role to deal only with matters of the requisite significance (ibid, para 48).

¹¹³ ibid, para 49.

¹¹⁴ ibid, para 50.

¹¹⁵ ibid, para 50.

¹¹⁶ ibid, para 51.

to the contrary. It also used rather contradictory language in making its decision under Article 41 with regard to it not being a court of fourth instance:

The Court reiterates that *the most appropriate form of redress* for a violation of Article 6(1) would be to ensure that the applicant [...] is put in the position in which he would have been had this provision not been disregarded. Consequently, it considers that *the most appropriate form of redress* would be to reconsider the applicant's appeal [...]¹¹⁷

The Court's language here undeniably resembles that of a constitutional court: it gives instruction to the national court to reconsider the case. As result, this particular case amounts to a revelation because it reveals the difficulties involved in interpreting procedural rights while staying within the limits of the fourth instance doctrine. One or the other must yield, and in this case it was the fourth instance doctrine that triumphed.

A positive obligation to put in place a system for enforcement of judgments under Article 6 arose in *Pelipenko*.¹¹⁸ Here, the applicant complained that because the bailiffs failed to take any necessary steps to enforce the execution of the final judgment against the applicants. The Court commenced by reiterating that execution of a judgment given by any court must be regarded as an integral part of the 'trial' for the purpose of Article 6. It then noted that the state has a positive obligation to put in place a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay. It also stated that:

[W]hen final judgments are issued against 'private' defendants, the State's positive obligation consists of providing legal arsenal allowing individuals to obtain, from their evading debtors, payment of sums awarded by those judgments.¹¹⁹

The Court emphasised that the State's positive measures must be adequate and sufficient. Consequently, when it is established that measures taken by the national authorities were adequate and sufficient, the state cannot be held responsible for a 'private' defendant's failure to pay the judgment debt. The Court also took the fourth instance doctrine into account and stated:

¹¹⁷ *ibid*, para 59 (emphasis added).

¹¹⁸ *Pelipenko v Russia* (n 51).

¹¹⁹ *ibid*, para 49.

The Court [...] is not called upon to examine whether the internal legal order of the States is capable of guaranteeing the execution of judgments given by courts. Indeed, it is for each State to equip itself with legal instruments which are adequate and sufficient to ensure the fulfilment of positive obligations imposed upon the State [...] The Court's *only task* is to examine whether the measures applied [...] were adequate and sufficient.¹²⁰

Considering the facts of the case at hand, the Court unanimously held that by refraining from taking such adequate and effective measures for several years, as required in order to secure compliance with the enforceable judicial decision, the national authorities had violated Article 6(1) by depriving its provisions of all useful effect.¹²¹ The fourth instance formula takes a different form in this case, and highlights one of the positive obligations as stipulated in Article 6(1). In essence, the Court's threshold for interference permits the state to choose the measures required in order to secure adequate and effective enforcement of judicial decisions. This also serves the democracy principle.¹²²

In *Karpenko* the applicant complained that he had been denied a fair trial. He had not been given an opportunity to publically cross-examine the four co-accused, who were alleged accomplices in the robberies for which he was charged, because none of four attended the trial or testified before the court.¹²³ The Court first went over the general principles relating to the rights of the defendant deriving from the fair trial provision, noting that these require that the defendant be given an adequate and proper opportunity to challenge and question a witness testifying against him.¹²⁴ It then conducted an in-depth assessment of all the statements given in the pre-trial stage by ten witnesses, in a relatively similar manner to that of the appellate court.¹²⁵ The applicant's conviction was based, to a decisive extent, on two of the witness statements given at the pre-trial stage. The Court remained unconvinced by the Russian Government's arguments as to why the witnesses were not present at trial.¹²⁶ It considered the national

¹²⁰ *ibid*, para 51 (emphasis added).

¹²¹ *ibid*, para 56.

¹²² This case could also be viewed from the margin of appreciation doctrine: the Court leaves a certain margin of discretion to the state authorities to choose the means to fulfil their obligations. This case is a good example to demonstrate the close relationship between the fourth instance doctrine and the margin of appreciation doctrine. See *Harris and others* (n 10) 16.

¹²³ *Karpenko v Russia* (n 64).

¹²⁴ *ibid*, paras 61-2.

¹²⁵ *ibid*, paras 63-9.

¹²⁶ The Court stated that: '[it] has serious doubts as to whether the Town Court's

court's reasons to be superficial and uncritical, thereby alluding to a positive obligation under Article 6:

[T]o take positive steps, in particular, to enable the accused to examine or have examined witnesses against him. Such measures form a part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in *an effective manner* [...]¹²⁷

The choice of words by the Court was robust and unambiguous. After framing the positive obligation under the effectiveness principle, it ruled that the national court's decision to justify the witnesses' absence was not sufficiently convincing and that the authorities had failed to take reasonable measures to secure their attendance at trial.¹²⁸ It ruled that the applicant had not been granted a fair trial and that as a result, there was a violation of Article 6(1) when read with Article 6(3)(d).

The applicant had also complained under Article 6 that the national courts refused to ensure his attendance in proceedings concerning his parental rights. The Court paid particular attention to the nature of the dispute in this particular case, which concerned the termination of parental rights that required assessment of the very special legal and factual relationship existing between a parent and a child.¹²⁹ The Court commenced by reiterating that the principles of adversarial proceedings and equality of arms, which are elements of a fair hearing, require that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party.¹³⁰ However, it pointed out that in non-criminal matters there is no absolute right for a parent to be present at trial, except with respect to a limited category of cases, such as trials where the character and lifestyle of the person concerned are directly relevant to the substance of the case, or where the decision involves the person's conduct.¹³¹ The Court referred to effectiveness, stating that it was 'not convinced that the representative's appearance before the courts secures an *effective, proper and satisfactory* presentation of the applicant's case'.¹³² Finally, it held, again emphasising effectiveness, that 'the domestic courts deprived the applicant of the

conclusion that it was impossible to secure the witnesses' attendance can indeed be accepted as warranted.' *ibid*, para 74.

¹²⁷ *ibid*, para 75 (emphasis added).

¹²⁸ *ibid*, para 75.

¹²⁹ *ibid*, para 92.

¹³⁰ *ibid*, para 89.

¹³¹ *ibid*, para 90.

¹³² *ibid*, (emphasis added).

opportunity to present his case *effectively*'.¹³³ Consequently, there had been a violation of Article 6(1). The Court refrained from ruling on the fourth instance doctrine.

In *FC Mretebi*, the applicant's complaint to the Court was that its national Supreme Court had refused to waive the excessive court fees, thus denying him access to justice, which, in turn, violated Article 6.¹³⁴ The Court handed down a judgment, following a close vote of four to three. The majority took the view that the applicant was obliged, in effect, to abandon its appeal before the Court of Cassation because he was unable to pay the court fees. The question was whether these court fees restricted the right to access to justice disproportionately. The Court noted that the national Supreme Court had given no reason as to why it could not waive the fees, and ruled that:

[A]ssessing the facts of the case as a whole, the Court concludes that the Supreme Court failed to secure a proper balance between, on the one hand, the interests of the State in securing reasonable court fees and, on the other hand, the interests of the applicant in vindicating its claim through the courts.¹³⁵

The dissenting opinion stressed the Court's role and criticised the majority's reasoning:

*It is not for our Court to impose on national jurisdictions 'to request parties more information' or 'to try to obtain, either from the applicant or the competent authorities, any supplementary proof in the examination of a civil case.'*¹³⁶

The dissenting opinion viewed the case from the fourth instance perspective and therefore came to the opposite conclusion. This case clearly demonstrates the way in which the Court acts *de facto* as a court of fourth instance. It imposes obligations on national jurisdictions to request parties to provide more information and to obtain supplementary proof in the trial of civil cases. However, the dissenting opinion also proceeded to evaluate questions of a fourth-instance nature, asking whether there was sufficient evidence to prove the applicant's insolvency.¹³⁷

¹³³ *ibid*, para 94 (emphasis added).

¹³⁴ *FC Mretebi v Georgia* (n 63).

¹³⁵ *ibid*, para 49.

¹³⁶ Joint dissenting opinion of judges Türmen, Mularoni and Popović in *FC Mretebi v Georgia* (2007) (emphasis added).

¹³⁷ *ibid*.

IV. CONCLUSIONS

The Court's argumentation concerning the fourth instance doctrine in the first two categories – 'clear fourth instance nature' and 'length of proceedings' – is well-defined and unproblematic from the justifiability position. Issues which are clearly of a fourth instance nature should be ruled inadmissible. In these cases, arguments concerning the fair trial provision have little weight. Issues concerning the length of the proceedings are also clear. There is little to weigh up in order to determine that the length of the proceedings was unreasonable, since a decision by the Court that proceedings took too long does not go to the heart of the fourth instance doctrine.

The next two categories – 'balancing approach' and 'disregard of fourth instance approach' – reveal the tensions and problems involved in balancing the fourth instance doctrine against an expansive approach to the interpretation of the right to a fair trial. In these cases, in particular, the judicial reasoning given must be transparent and take account of both sides in order for the judgment to be justifiable and convincing.¹³⁸ Cases in the category of 'balancing approach' can be criticised on the basis that rights should be practical and effective and that the provision under Article 6 should be interpreted more dynamically. In contrast, cases in the category of 'disregard of fourth instance approach' can be criticised from the fourth instance doctrine and formal legitimacy perspectives. The fourth category also demonstrates how the Court occasionally acts *de facto* as a court of fourth instance. On the one hand, the Court is very strict in the way it articulates its role, according to which it is not a fourth instance court and it is not its task to evaluate the national court's findings or interpretations. On the other hand, its case law shows that the Court has been rather active and bold in investigating and broadening the obligations and rights laid down in Article 6. For example, it has stated that as long as the national decision is based on a full and thorough evaluation, it will not interfere.¹³⁹

Article 6 is a relatively sensitive provision because it requires legal proceedings to be fair in the broadest sense of the word but it is the national authorities themselves that are responsible for these proceedings.

¹³⁸ The third and fourth categories deal with cases that are considered to be hard cases and must be well justified. See eg Peczenik (n 21), 15, 305, Alexy (n 21) 228-30.

¹³⁹ See *Lalmahomed v the Netherlands* (n 105), para 37. The 'as long as' formula is famous in the German Constitutional Court's judgments concerning the protection of fundamental rights in the European Union legal order (BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*, 29 May 1974; BVerfGE 73, 339 2 BvR 197/83 *Solange II- Beschluß*, 22 October 1986).

In the same way as other Convention articles, Article 6 is interpreted dynamically and effectively. The tension lies in the fact that in evaluating the fairness of proceedings, the Court cannot avoid evaluating the acts and interpretations of the national authorities. In so doing, the Court may inevitably find itself fulfilling the role of a fourth instance or even a constitutional court. For example, its ruling in *Jovanović*, in which it reiterated that the most appropriate form of redress for violation of Article 6 is to ensure that the national court reconsiders the applicant's appeal, the Court used language typical of a constitutional court.¹⁴⁰

Karpenko and *Pelipenko* are interesting examples as they demonstrate the way in which the Court has unanimously interpreted the fair trial provision by emphasising the effectiveness principle as well as the positive obligations derived from it.¹⁴¹ There are no explicit signs in the Court's reasoning that it took the fourth instance doctrine into account. Its consideration of the statements given by the ten witnesses in *Karpenko*, in particular, show the Court acting in a role similar to that of a fourth instance court.

The Court has acknowledged this problem, for instance in the Grand Chamber's approach in *Şahin*,¹⁴² which divided the judges into two blocs. The majority emphasised a strict approach to the fourth-instance formula, while the minority stressed public confidence and the effective interpretation of the right to a fair trial. *Bykov* was another Grand Chamber case in which the judges' decision was not unanimous.¹⁴³ In this case the majority placed greater weight on a strict approach to the fourth-instance formula, and the minority argued that the right to a fair trial must be interpreted in such a way as to give effect to this right.¹⁴⁴

In my opinion, it is obvious that the Court cannot both strictly avoid acting as a fourth instance court and at the same time interpret the right to a fair trial provision effectively. Either it should apply a lower threshold in cases concerning the fourth instance doctrine and continue to interpret Article 6 in an effective manner, or it should stick with its strict fourth-instance formula and refrain from interpreting Article 6 in an effective way. The latter is by no

¹⁴⁰ *Jovanović v Serbia* (n 110), para 59. See also Evert A Alkema, 'The European Convention as a constitution and its Court as a constitutional court' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective* (Carl Haymanns Verlag KG 2000), 61-2.

¹⁴¹ *Karpenko v Russia* (n 64); *Pelipenko v Russia* (n 51).

¹⁴² *Nejdet Şahin and Perihan Şahin v Turkey* (n 86).

¹⁴³ *Bykov v Russia* (n 99).

¹⁴⁴ See the partly dissenting opinion of judge Spielmann, joined by judges Rozakis, Tulkens, Casadevall and Mijović, in *Bykov v Russia* (2009), GC, paras 10-5.

means desirable or probable as far as the protection of human rights is concerned.

Legitimacy arguments can be used to support both possible positions. In the context of the fourth instance doctrine, legitimacy stresses formality and the limits placed on the Court's competence, while the rights perspective emphasises substantive legitimacy. From the perspective of the latter, legitimacy is gained through the effective protection of human rights. It would be more appropriate to consider first how the line should be drawn in each case and then openly and transparently give reasons for choosing between the fourth instance doctrine and the right to a fair trial. One should not forget that the bedrock of the fourth instance doctrine is the principle of democracy and national sovereignty. These core principles are not articulated by the Court *per se* but are of fundamental importance. For the fourth instance doctrine and its application in the Court's case law to be justified, it requires that all competing interests must be taken into account, including *pro* and *contra* types of argumentation, and are balanced carefully. Furthermore, the underlying values should be stated transparently. Owing to the strict and declaratory nature of fourth instance doctrine, it does not fulfil these requirements.

Pelipenko indicates a step towards a more flexible and practical approach to the fourth instance doctrine, in which the Court interpreted it to mean that the state has authority to choose the measures needed to secure adequate and effective enforcement of judicial decisions.¹⁴⁵ A strict approach to the fourth instance doctrine threatens, in my opinion, the effective protection of human rights. If the starting point of legal interpretation is dominated by an extremely strict approach to the fourth instance doctrine, then it is on the wrong track from the outset. The Court should continue using the fourth instance doctrine in the first two approaches: 'clear fourth instance nature' and 'length of proceedings'. The last two categories, 'balancing approach' and 'disregard of fourth instance approach' are more critical and complex: the application of the fourth instance doctrine is a matter of balancing as well as transparent reasoning of the scope of the fourth instance doctrine in relation to the effective application of the right at issue. The strict fourth instance doctrine, which simply emphasises that there must be 'something arbitrary or manifestly unreasonable' in the domestic proceedings in order the Court to interfere, should not be used at all by the Court.¹⁴⁶ Finally, words such as 'arbitrary or manifestly unreasonable' should be openly explained and evaluated on a case-by-case basis.

¹⁴⁵ *Pelipenko v Russia* (n 51), para 51.

¹⁴⁶ See *Sebabattin Evcimen v Turkey* (n 74), para 26; *Rybczyńscy v Poland*, 3501/02, 3 October 2006, para 37.