Given the Court at Strasbourg's Jurisprudence, Are Fair Trials Achievable Under the ECHR?

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Introduction

> 'The Court of Strasbourg is a lighthouse, a lookout'
> - Jean-Paul Costa[1]

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR), is the 'essential reference point for the protection of human rights in Europe'.[2] Concluded by the Council of Europe on 4 November 1950, the ECHR defines rights and freedoms which the contracting parties 'shall secure to everyone within their jurisdiction' under Article 1 of the ECHR and sets up the mechanisms for controlling contracting parties' compliance with the obligations to secure these rights and freedoms.[3]

This paper will explore Article 6 of the ECHR, not in terms of its practical guidance, but from the point of view of its jurisprudence in achieving fair trial rights in the Member States. Given the remit of such analysis, this paper will not seek to explore all aspects of the jurisprudence of the Court given all the rights and guarantees incumbent within the said Article, but instead concentrate on specific rights to focus on whether or not the Court has been effective in those areas in achieving fair trial rights. Firstly, it will provide an outline study of the jurisprudence of the Court and the tools available to it in reaching its decisions and consider such issues as the Court's teleological effectiveness, its autonomous approach, the exercise of balancing involving the principle of proportionality and the controversial doctrine of the margin of appreciation. Secondly, and in a closer examination of some of the rights granted under Article 6, the paper will further explore the concept of 'overall fairness', and its development within the jurisprudence of the Court and how it has been applied when considering the right to legal advice, the right to an interpreter and the right to examine witnesses so far as securing fair trial rights, and in doing so will also examine some dissenting judgements. Finally, it will assess the overall effectiveness of the Court's approach and whether or not it has, in fact, achieved 'fair trial rights'.

Understanding the Jurisprudence of the Court

As a treaty, the Convention must be interpreted according to the international law rules in the interpretation of treaties.[4] They are to be found in the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).[5]

Article 31(1) of the Vienna Convention states that the basic rule is that a treaty

1 Jean-Paul Costa, *La Cour Européenne Des Droits De L'Homme: Des Juges Pour La Liberté* (Dalloz 2013) 257. Costa is a former President of the ECtHR (2007-2011). Translation from Marie-Luce Paris, 'The European Convention on Human Rights: Implementation Mechanisms and Compliance' in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 91.

2 Recommendation Rec. (2004) 4 of the Committee of Ministers to Members States on the European Convention on Human Rights in university Education and Professional Training [2004] 114th Session.

3 Paris (n 1) 91.

4 See e.g. *Golder v UK* A 18 (1975); 1 EHRR 524 PC [29] and *Johnston and Other v Ireland* A 112 (1986); 9 EHRR 203 [51].

5 David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley (eds), *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 6.

> 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

In accordance with the Vienna Convention, considerable emphasis has been placed on a teleological interpretation[6] of the Convention, i.e. 'one that seeks to realise its object and purpose'. This has been identified in general terms as 'the protection of individual human rights'[7] and the maintenance and promotion of 'the ideals and values of a democratic society'.[8] Both of these considerations are confirmed by the Convention Preamble, which also identifies 'the achievement of greater unity between its Members' as the aim of the Council of Europe.[9]

In its *Soering* judgement, the Court connected this principle of effectiveness to the nature and objectives of the Convention and to its own work in interpreting its provisions:

> In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [*effectiveness principle*]… Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective … In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[10]

Thus, Gerards confirms,[11] with reference to the *Belgian Linguistics* case of 1968, where the Court emphasised that the 'general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights'[12] and the *Airey* case in 1979 where the Court rephrased the principle of effectiveness in a formula that it still uses today that 'the convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[13] It was highlighted that the notion of effectiveness provides the Court with important guidance in interpreting the Convention and in assessing the reasonableness and acceptability of interferences with the Convention rights.

According to Article 1 of the Convention, the primary responsibility for offering effective protection of the Convention rights lies with the national authorities, who must 'secure the Convention rights to everyone within their jurisdiction'. This has been called the principle of 'primarity'.[14] The Court's task is mainly one of checking whether the national authorities have complied with the obligations they have undertaken under the Convention. This is referred to as the principle of 'subsidiarity'.[15] While not previously mentioned in the Convention, it has long been established in the Court's jurisprudence, and as of August 2021, together with the margin of appreciation doctrine, it is now included as a principle within the Convention's Preamble, pursuant to Protocol 15.[16] The principle of subsidiarity provides a theoretical basis for deference by the Strasbourg Court when considering compliance by State parties with their Convention obligations.[17] It also underlies the Strasbourg Court's view that,

> …in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention…[18]

and that the Court is not a fourth instance court of appeal from national courts. In the words of the Court, 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention'.[19] Therefore, a claim that an error involves a breach of the right to a fair hearing in Article 6 will not succeed, as Article 6 provides a procedural guarantee only; it does not guarantee that the outcome of the proceedings will be correct on the facts or in law.[20]

An important consideration which lies at the heart of the Court's interpretation of the Convention and which is key to realising its 'object and purpose' is the need to ensure the effective protection of the rights guaranteed.[21] In *Artico v Italy,*[22] the Court stated that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'. In that case, the Court found a breach of the right to legal aid in Article 6(3)(c) because the legal aid lawyer appointed by the state proved totally ineffective.[23]

A potential stumbling block in a coherent jurisprudence lies within the Court's approach to the principle of consistency in interpretation which is limited by the text of the Convention. In *Stec and Others v*

6 Nikos Vogiatizis, 'Interpreting the Right to Interpretation under Article 6(3) € ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights?' (2021) 00 Human Rights Review 7.
7 *Soering v UK* A 161 (1989); 11 EHRR 439 [87].
8 *Kjeldsen, Busk Madsen, and Pedersen v Denmark* A 23 (1976); 11 EHRR 439 [87].
9 Harris et al (n 5) 7.
10 *Soering v UK* (n 7).
11 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 4.
12 *Belgian Linguistics Case* (1968) 1474/62, I.B. 5.
13 *Airey v Ireland*, ECtHR 9 October 1979, 6289/73 [24].
14 J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009).
15 Explanatory report: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (coe.int) [9]. For an explanation as to the term 'subsidiary'—Harris et al (n 5) 17-18.
16 European Convention on Human Rights - Official texts, Convention and Protocols (coe.int)– Entry in force since 01.08.2021 – Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) - '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'.
17 Harris et al (n 5) 17.
18 *Varnava and Others v Turkey* hudoc (2009) 164.
19 *Garcia Ruiz v Spain* 1999-I; 31 EHRR 589 [28], cited in Harris et al (n 5) 18.
20 Harris et al (n 5) 18.
21 ibid.
22 *Artico v Italy* A 37 (1980; 3 EHRR 1 [33]. Cf. *Airey v Ireland* A 32 (1979); 2 EHRR 305 [24].
23 Harris et al (n 5) 18.

UK the Court stated that the 'Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions'.[24] Harris (*et al.*) note that although the Court relies heavily upon the 'object and purpose' of the Convention, it has occasionally found its freedom to do so is limited by the clear meaning of the text.[25] For example, in *Wemhoff v Germany*[26] it was held that Article 5(3) does not apply to appeal proceedings because of the wording of Article 5(1)(a). Exceptionally, in *Pretto and Others v Italy*, the Court went against the clear working of the Convention in order to achieve a restrictive result by acknowledging 'that members States have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts…for example deposit in a registry accessible to the public'. There it held:

> The Court, therefore, does not feel bound to adopt a literal interpretation. It considers that in each case, the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1.[27]

In essence, the unqualified requirement in Article 6(1) that judgements be 'pronounced publicly' does not apply to a Court of Cassation. The Court considered that it must have been the intention of the drafting states to respect the long-standing tradition of the Council of Europe, despite no clear evidence in the *travaux préparatoires.*[28] Harris (*et al.*) considers that the Court's approach may have been influenced by the fact that the text of Article 6 was probably drafted with only trial proceedings in mind.[29] In another decision of the Court, it adopted the position that the text of the Convention may be amended by state practice. The Court in *Soering v UK*[30] at, paragraph 103 said as follows:

> The Convention is to be read as a whole, and Article 3 should therefore be construed in harmony with the provisions of Article 2. On this basis, Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1.

It then considered the law in the United Kingdom with respect to capital punishment, and in finding that the death penalty cannot be imposed for murder (Murder (Abolition of the Death Penalty) Act 1965, section 1) the

> …subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Article 3.[31]

At the time of the ***Soering*** judgement, the Court highlighted that 'de Facto the death penalty no longer exists in the time of peace in the Contracting States to the Convention', and in those where it did, it was not carried out. It interpreted this 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice…is reflected in Protocol No. 6 to the Convention, which provides for the abolition of the death penalty in time of peace… has been ratified by thirteen Contracting States to the Convention'.[32]

The Court has emphasised that a European, autonomous definition for such notions and concepts that are also used in national constitutions and legislation should prevail.[33] The Court has expressly stated that the integrity of the objectives of the Convention would be endangered if the Court were to take the national level of protection, or the national definition of certain notions, as a point of departure for its own case law. In particular, as Gerards highlights, this would pose the risk that the States might try to evade the Court's supervision by narrowly defining the terms and notions that determine the Convention's applicability.[34] However, despite this, the Court in *Engel*[35] left the decision as to whether effective protection of the right to a fair trial would be at risk by moving parts of the criminal law to disciplinary law to the national authority. Similarly, in *Vo,* the Court deliberately decided to avoid having to make the decision of when 'life' can be held to begin by leaving it within the margin of appreciation doctrine,[36] justifying its position by stating that

> …firstly…such protection has not been resolved within the majority of the Contracting States…and secondly, that there is no European consensus on the scientific and legal definition of the beginning of life…[37]

In principle, the Court's methodology was the opposite of an autonomous approach adopted in *Engel,* namely that the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law.[38]

A similar concern recently arose in the case of *R v Brecani*[39] in the United Kingdom (UK) concerning a 17-year-old defendant in a conspiracy to supply cocaine. The defendant relied on the two-limb statutory defence under the Modern Slavery Act (MSA) 2015, s.45(4).[40] The appeal concerned the status of a Victim of Trafficking

24 *Stec and Others v UK (*2006)-V: 43 EHRR 1027 [48] GC. Cf *Klass and Others v Germany* A 28 (1978); 2 EHRR 214 PC.
25 Harris et al (n 5) 19.
26 *Wemhoff v Germany A 7 (1968)*; 1 EHRR 55.
27 *Pretto and Others v Italy A 71 (1983)*; 6 EHRR 182 [26].
28 Harris et al (n 5) 19.
29 ibid 19.
30 *Soering v UK* (n 7).
31 While state practice had not reached this point by the time of the *Soering* case, in the *Al-Saadoon and Mufdhi v UK (2010) 61498/08* case the Court later concluded that it had, so that the numbers of ratification of the Thriteenth Protocol prohibiting capital punishment and other state practice were '*stongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'* [120].
32 *Soering v UK* (n 7) 103.
33 H.C.K. Senden, *Interpretation of Fundamental rights in a Multilevel Legal System. An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011) 169, 298, cited in Gerards (n 11) 67.
34 *G.I.E.M. S.R.L and Others v Italy* (2018), ECtHR (GC) 1826/06, 216 cited in (n 11) 67-68.
35 *Engel and Others v the Netherlands,* ECHtHR 24 June 2010, 30141/04.
36 An explanation is provided at page 11.
37 *Vo v France,* ECtHR (GC) 8 July 2004, 53924/00, 82-84 cited in (n 11) 71-72.
38 George Letsas 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 European Journal of International Law 2, 279, 282.
39 [2021] EWCA Crim 731.
40 *R v. Brecani* [2021] EWCA Crim 731 - MSA 2015 s.45(4) – (i) that the defendant was a child who had been trafficked from Albania and this his

as determined by 'a competent authority'. In *VCL and AN v UK* the ECtHR stated that 'Evidence concerning an accused's status as a victim of trafficking is…a 'fundamental aspect' of the defence which he or she should be able to secure without restriction'.[41] By contrast, the 'status' which the ECtHR afforded appeared to mean that as determined by the competent authority. However, the Court of Appeal in *Brecani,* in providing a broad formulation of the ratio, stated that 'caseworkers in the 'competent authority' are not experts in human trafficking or modern slavery and for that fundamental reason cannot give opinion evidence in a trial…'.[42] This decision has the potential to cause injustice and put the UK in breach of its international obligations, such as whether it was appropriate for the UK to prosecute a victim of trafficking following a determination by a single competent authority in line with the Council of Europe Convention and the Palermo Protocol to the UN Convention on Transnational Organised Crime rather than on domestic legislation alone.[43] As Mennim and Ward suggest, if the ECtHR reaffirms or clarifies its view in *VCL,* the Court of Appeal or the Supreme Court will need to (re-) consider the same point.[44] The *Brecani* case highlights the concern raised by Gerards' earlier, that can result in narrowed interpretations to circumvent compliance with a Contracting Party's Article 6 obligations.

How Proportionality is Employed

Stein argues that balancing is central to the reasoning process of the ECtHR, yet it is considered by many to be in tension with the Court's chief aim of protecting fundamental rights.[45] Balancing in the jurisprudence of the ECtHR is essentially synonymous with proportionality assessment, the adjudication method used by the Court in the vast majority of its cases, this is despite its absence from the text of the ECHR. The use of proportionality in assessing violations of Convention rights has become the norm in the Court's adjudication process.[46] However, while this may be the case, Stein argues that far from the textbook structured proportionality review, which is generally a constructed test made up of three independent, yet interrelated sub-stages (suitability, necessity/least restrictive means and proportionality in the strict sense/balancing test), proportionality as adopted by the ECtHR, is a flexible, open-ended balancing test in which competing claims of individual rights and collective goals are weighed against each other on a case-by-case basis.[47] The principle is often employed under the second paragraphs of Articles 8-11, where a state may restrict the protected right to the extent that this is 'necessary in a democratic society'. This formula has been interpreted as meaning that the restriction must be 'proportionate to the legitimate aim pursued'.[48] Similarly, proportionality has been invoked when setting the limits to an implied restriction that has been read into a Convention guarantee[49] and, in some cases, in determining whether a positive obligation has been satisfied. It has also been employed in considering non-discrimination under Article 14[50] and derogation from the Convention under Article 15.[51]

Stein further contends that the resort to an all-inclusive balancing test carries controversial side effects that impact the review stages preceding the proportionality assessment, namely the 'definitional' stage and the 'legitimate aim' stage.[52] In respect of the former stage, Stein cites Gerards and Senden,[53] who argue that the ECtHR often completely skips this stage or pays lip service to it by accepting that the case falls within a Convention right without providing an explanation. When the Court does address the definition of the right, it often merges this analysis with the assessment of the justification for its limitation, thus avoiding the need to draw the scope of the right independent of competing policy considerations.[54]

The second notable side effect, Stein identifies,[55] concerns the 'legitimate aim' in which illegitimate policy aims are filtered out. At times, quoting Šušnjar, the legitimacy of the aim is assumed, explicitly or implicitly.[56] Further, Gerards notes that although mentioned in each case, the Court has rarely found an aim to be illegitimate and has refrained from developing sub-requirements to help to elucidate the requirements entailed in the different prescribed aims.[57] Sadurski holds that even in the rare instances in which the Court expresses mild doubts concerning the aim, it brackets or disregards these doubts and proceeds to assess the proportionality of the application of the challenged measure/law.[58] The result of this process is that the illegitimacy of the aim is integrated into the proportionality assessment and is not the outcome of independent scrutiny.[59] The failure to articulate unjustified aims elevates collective goals, regardless of their incompatibility with what we value as essential to a given right.[60]

When deciding on the proportionality of a 'general measure' enacted by a legislature, the Court has taken into account the quality of the parliamentary review in the respondent state that requires the measure. In the *Animal Defenders International v UK* case, the dissenting judgements expressed unease at the Court's approach, stating their concern that the 'double standard within the context of a Convention whose minimum standards should be equally

involvement in a conspiracy to supply cocaine was a direct consequence of his having been a victim of slavery or relevant exploitation; and (ii) that reasonable person in the same situation as he was and having his relevant characteristics would have acted as he did.

41 *VCL and AN v UK*, App. No's 77587/12 and 74603/12, 161.

42 ibid 54.

43 Sean Mennim and Tony Ward, 'Expert Evidence, Hearsay and Victims of Trafficking: *R v Brecani* [2021] EWCA Crim 731' (2021) 85(6) The Journal of Criminal Law 471, 474.

44 ibid 475-476.

45 Shlomit Stein, 'In Search of Red Lines in the Jurisprudence of the ECtHR on Fail Trial Rights' (2017) 50 Isr. L. Rev. 177, 182.

46 ibid citing (n 31) - Marc-Andre Eissen, 'The Principle of Proportionality in the Case Law of the European Court of Human Rights' in Ronald St J Macdonald, Herbert Petzold and Franz Matscher (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 125, 146.

47 (n 43) and (n 30).

48 *Handyside v UK A* 24 (1976); 1 EHRR 737 PC [49].

49 *Fayed v UK* A 294-B (1994); 18 EHRR 393,71 (Article 6(1)).

50 *Belgian Linguistics;* case A 6 (1968); 1 EHRR 241 [284].

51 *Lawless v Ireland* (Merits) A 3 (1961); 1 EHRR 15 & *Ireland v UK* A 25 (1978); 2 EHRR 25 PC.

52 *VCL* (n 43) 183.

53 ibid 184, citing Janneke Gerrard, and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 International Journal of Constitutional Law 619, 632-634.

54 *VCL* (n 43) 184, citing ibid 639.

55 ibid 184.

56 Davor Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Brill 2010) 90.

57 Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights' in Nick Huls, Naruice Adams and Jacco Bomhoff (eds), *The Legitimacy of highest Courts' Rulings: Judicial Deliberations and Beyond* (TMC Asser Press 2009) 407, 417, 62.

58 *VCL* (n 43) 184, citing Wojciech Sadurski, 'Is There Public Reason in Strasbourg?', research paper, Sydney Law School, 6 May 2015, 15/46 3-5.

59 ibid 10.

60 *VCL* (n 43) 185, citing Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 488.

applicable through all the States parties to it…very difficult to understand'.[61] The dissenting judges expressed their concern that the 'fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the court to apply the established standards that serve for the protection of fundamental human rights'. They went further and stated:

> 'It is immaterial for a fundamental human right, and for that reason for the Court, whether an interference with that right originates in legislation or in a judicial or administrative act or omission. Taken to its extreme, such an approach risks limiting the commitment of State authorities to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. Where the determination of the public interest and its best pursuit are left solely and exclusively to the national legislator, this may have the effect of sweeping away the commitments of High Contracting Parties under Article 1 of the Convention read in conjunction with Article 19, and of re-asserting the absolute sovereignty of Parliament in the best pre-Convention traditions of Bagehot and Dicey. The doctrine of the margin of appreciation, which was developed to facilitate the proportionality analysis, should not be used for such purpose'.[62]

As evidenced above, a further doctrine, which plays a crucial role in the interpretation of the Convention, is the margin of appreciation. The essence of this doctrine is that a state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action bearing on a Convention right.[63] The doctrine was first explained by the Court in *Handyside v UK*.[64] As Harris (et al.) highlight, the doctrine is a controversial one.[65] When applied widely, for example, to tolerate questionable national practices or decisions, for example, *Barfod v Denmark*,[66] it may be argued that the Court has abdicated its responsibilities.[67] However, underlying the doctrine is the understanding that the legislative, executive, and judicial organs of a state to the Convention basically operate in conformity with the rule of law and human rights and that their assessment and presentation of the national situation can be relied upon in cases that go to Strasbourg.[68] Given this premise, Harris (et al.) suggest that the doctrine can be justified and accords with the principle of subsidiarity, albeit not used in other human rights systems globally.[69]

In the next part of the paper, I will consider how the court's jurisprudence is employed within the ambit of Article 6, in particular, Article 6(1), Article (2) and Article 6(3)(c) and (d) of the Convention and reflect on whether or not the concept of 'overall fairness' has been applied before assessing the overall effectiveness of the Court's approach and whether or not it has, in fact, achieved 'fair trial rights'.

61 *Animal Defenders International v UK* Hudoc (2013) [1] – Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano.
62 ibid 10.
63 Harris et al (n 5) 14 and (n 15) as to the amendments to the Preamble under Protocol 15.
64 Stein (n 46) 48-49.
65 Harris et al (n 5) 16.
66 *Barford v Denmark* A 149 (1989) 13 EHRR 493 [28-36].
67 Harris et al (n 5) 16-17.
68 ibid 17.
69 ibid and (n 122).

Article 6 Jurisprudence

Article 6[70] does not contain a limitation clause. It does however enshrine the right to a fair trial, a broad term which includes a cluster of correlated procedural rights, starting from the more abstract, such as the right to an independent and impartial tribunal (Article 6(1)[71] and the presumption of innocence (Article 6(2)[72] to something more concrete, such as the right to legal assistance and the right to examine witnesses (Articles 6(3)(c) and (d).[73] The Court has also read into Article 6(1) certain implied rights, such as the right to effective participation[74] and equality of arms[75] which Samrartzis states can be similarly pinned on a sliding scale of abstraction.[76] However, according to Hoyano, despite the idiosyncratic list, it failed to include the privilege against self-incrimination and pre-trial disclosure of evidence possessed by the prosecution, which the ECtHR had to read into Article 6 to give it instrumental content.[77]

The text of Article 6 does not provide a method by which to determine whether the infringement of a right protected under Article 6 is justified. This ambiguity is amplified by the fact that Article 6 is not an absolute right.[78] Further and more intriguing is the fact that parties may derogate from it under Article 15. Article 6(1) provides a generalised right to a 'fair and public hearing'; Article 6(2) guarantees the presumption of innocence of all accused of a criminal offence; and Article 6(3) particularises five 'minimum rights' (see Annex I for the full text of Article 6). A fair trial guarantee does not require providing the most favourable circumstances imaginable for the defence, according to Hoyano.[79]

'Fairness' within the Concept of a Fair Trial

In the context of rights relating to a fair trial, Goss holds that the ECtHR has displayed a tendency to refer to the 'standards of proportionality' and 'very essence' practically interchangeably, as in *Goth v France (2002)*,[80] so there is hardly any significant distinction

70 See Annex I for the full transcript of Article 6.
71 Article 6(1) - In the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.
72 Article 6(2) - Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
73 Article 6(3) - Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
74 *Stafford v UK* Application No 16757/90, Merits and Just Satisfaction, 23 February 1994.
75 *Neumeister v Austria* Application No 1936/63, Merits, 27 June 1968.
76 Andreas Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European convention on Human Rights' (2021) 21 Human Rights Law Review (2012) 2, 410.
77 Laura Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial;' (2014) Criminal Law Review 1, 8.
78 Samartzis (n 76) 410.
79 Hoyano (n 77) 6.
80 *Goth v France* (2002) App No. 56316/99 – See Mennim (n 43) 186 and

between what constitutes a disproportionate infringement and what constitutes an impairment of the very essence of the right.[81] Goss's condemnation goes further:

> This irrational flexibility means that the Court can approach an individual application in an unpredictable multitude of ways: the Court may be deferential or not; the relevant test may be said to be one part of Article 6 or several; the relevant basis for the implied rights may be said to be one thing or another; and the alleged violation may be assessed using any one of a number of incoherent approaches … If the Court wished to deploy different approaches in similar situations, or different approaches in different situations, the interests of predictability and consistency simply demand that it adequately explain itself"[82]

Hoyano takes the view that Strasbourg's conception of the *purpose* of the fair trial guarantee is restrictive in that it is only designed to secure justice from national courts in the overall procedure afforded by their legal system rather than justice in the result.[83] According to Samartzis,[84] overall fairness is the unifying standard by which the Court has come to determine the relation of the rights. For example, to access a lawyer and examine witnesses under Article 6(3)(c) and (d), respectively, and the general right to a fair trial under Article 6(1).[85] Overall fairness, Samartzis submits, is an open-ended concept that emerged early on in Strasbourg jurisprudence and initially was conceived as an additional guarantee to the minimum rights of Article 6(3) ECHR.[86] In recent years, overall fairness has evolved into a distinct stage of the test[87] by which the Court finds a violation of Article 6(3)(c) and (d). However, Samartzis concludes that its meaning remains elusive or, as Hoyano describes it's: a 'protean and multidimensional term'.[88]

In the cases of *Salduz v Turkey*[89] and *Ibrahim and Others v UK*[90], the ambiguous meaning given to 'overall fairness' by the Court serves, according to Samartzis,[91] to undermine the rule of law and facilitate judgements that misconceive the nature of the right. The *Salduz* test was generally understood to expand the protection afforded under Article 6(3)(c): the accused was to have a near-absolute right to access a lawyer before the trial, subject to a robust 'compelling reasons' test. Incriminating statements given without the benefit of legal advice and assistance should not be used for a conviction. In *Ibrahim and Others,* the Court reiterated the *Salduz* rule, specifying that it involved two stages. Firstly, the right to access a lawyer at the pre-trial stage can be restricted if there are compelling reasons to that effect. This is a stringent test:[92] factors relevant to its satisfaction are (a) whether the restriction has a statutory basis, (b) the quality of the legal provisions, and (c) the exceptional character of the restriction. Secondly, the Court examines the impact of the restriction on the overall fairness of the proceedings. This stage, Samartzis maintains, does not presuppose the presence of competing reasons. Instead, the Court recognised that the restriction might, in exceptional circumstances, be permissible even in their absence.[93] Thus, it rendered overall fairness the overriding consideration in finding a violation of Article 6 ECHR, of which the 'compelling reasons' test is but an aspect. Similarly, the Court conceived Article 6(3)(c) as an aspect of the fair trial stipulated by Article 6(1) rather than as an independent procedural right.[94]

Samartzis further examines 'overall fairness' in the case of *Schatschashwili v Germany.*[95] The case questioned the compatibility with Article 6(1) and Article 6(3)(d) ECHR concerning trial statements of absent witnesses whom neither the accused nor his counsel had the opportunity to examine in the preliminary proceedings. Like *Ibrahim and Others,* the Court adopted a similar approach and formulated its methodology as a three-stage test[96] in accordance with the principles developed in *Al-Khawaja and Tahery v UK.*[97] The first part of the test considered whether there was a good reason for the witnesses' absence. The second part was to determine whether the statements were the sole or decisive evidence for the conviction of the accused, and in the final part, the Court reviewed the overall fairness of the proceedings. From the assessment, the presence of counterbalancing measures was considered crucial, with the 'sole or decisive rule' under the second limb being no longer absolute. While the Court made a finding of a violation of Article 6 in this particular case, it noted that the absence of good reasons for non-attendance alone did not itself render the trial unfair even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case as this would amount to the creation of a new indiscriminate rule.[98] Samartzis emphasises that once again, the Court reduces one of the stages into the overall fairness assessment instead of being replaced with a concrete rule.[99]

(n 63) – where the court ruled that the requirement of surrendering to custody as a requirement of admissibility of appeal deprived the petitioner of liberty, and 'undermined the very essence of the right to appeal by placing a disproportionate burden on the appellant that upset the fair balance that had to be maintained between the need to enforce judicial decisions and the need to ensure access to the Court of Cassation and that the defence was able to exercise its rights'.

81 Mennim (n 43) 186, citing Ryan Goss, *Criminal Fair Trial Rights* (Hart, 2014) 198-201.

82 Ryan Goss, *Criminal Fair Trial Rights* (Hart 2014) 206-207, cited in 'Criminal fair Trial Rights: Article 6 of the European Convention on Human Rights' Crim. L R., 2015, 3, 243-246, 243.

83 Hoyano (n 77) 8.

84 Samartzis (n 76) 410.

85 For example, *Atlan v United Kingdom (2002)* 34 EHRR 33, 39.

86 Samartzis (n 76) 413, citing *Nielsen v Denmark* where the European Commission of Human Rights held that, irrespective of whether there has been a violation of the minimum rights of Article 6(3), 'the question whether the trial conforms to the standard laid down by paragraph 1 much be decided on the basis of the consideration of the trial as a whole..'. – *Nielsen -v Denmark* Application No 343/57, Commission (Plenary) Report, 15 March 1960 [52].

87 As to the second stage of the *Salduz v Turkey* case (n 87) following an analysis in the first stage of where access to a lawyer can be restricted for compelling reasons. This second stage does not presuppose the presence of compelling reasons, instead the Court recognised that the restriction may, in exceptional circumstances, be permissible even in their absence.

88 ibid 413 citing Hoyano (n 58) 4.

89 *Salduz v Turkey [GC]* Application No. 36391/02, Merits and Just Satisfaction, 27 November 2008.

90 *Ibrahim and Others v UK [GC]* Application Nos 50, 541/08, 50, 571/08, 50, 573/08 and 40, 351/09, Merits and Just Satisfaction, 13 September 2016.

91 Samartzis (n 76) 412.

92 ibid 414.

93 ibid 415, citing from the *Ibrahim* judgement (n 70) 265.

94 ibid 415.

95 *Schatschashwili v Germany [GC]* Application No. 9154/08, Merits and Just Satisfaction, 15 December 2015 cited by Samartzis (n 76) 415-416.

96 ibid 107.

97 *Al-Khawaja and Tahery v UK [GC]* Application No.'s 26766/05 and 22228/06.

98 *Schatschashwili v Germany* (n 95) 111-113.

99 Samartzis (n 76) 416.

In further consideration of the overall fairness in the assessment of proceedings the court in *Murtazaliyeva v Russia*[100] insisted that its preservation ensured that the three-pronged test that it introduced did not become excessively rigid or mechanical in its application.[101] The Court asserted that the significance of the testimony that is sought must be weighed against its ability to influence the outcome of the trial. Owen points out that the three-part test: (a) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (b) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (c) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings, is problematic. He highlights that its introduction continues to place the burden upon the defendant to justify why the witness must be heard as opposed to the prosecution showing why the witness should not.[102] He further identifies that what is of particular relevance is that the requirement is now imposed upon defendants to be able to show that evidence that a witness would provide can reasonably be expected to strengthen the case for the defence. This concept, as noted by Judge Pinto de Albuquerque, who, in his dissenting opinion, commented that the three-pronged test is a prima facie liberal test that is applied in an illiberal manner.[103] Further, Judge Bošnjak, in his partly dissenting opinion, expressed concern about the fact that it is often 'impossible' to determine what effect the testimony of a witness will have upon a court before that testimony is heard.[104]

In 2017, the Grand Chamber applied the two-stage test analysis under *Ibrahim and Others* in *Simeonovi v Bulgaria* and found no violation of Article 6(3)(c), although the applicant, in that case, was denied access to a lawyer without any compelling reason.[105] In a further decision of the Court in November 2018 in *Beuze v Belgium*[106] where the applicant was subject to a systematic and mandatory restriction on his right to access his lawyer at the investigation stage, the Court had to explain:

> whether a clarification [as to the two stage test of analysis made in *Ibrahim*] is of general application or whether, as claimed by the applicant in the said case, the finding of a statutory restriction is in itself, sufficient to have been a breach of the requirements of Article 6(1) and Article 6(3)(c).[107]

In the majority of the Court's opinion,[108] the mere existence of a systematically applied general and mandatory restriction on the right to access to a lawyer does not in itself result in a violation of Article 6(3)(c). However, in the joint concurring opinion of Judges Yudkivska, Vučinić, Turković and Hüseynov, they highlighted that the *Salduz* type of case, of which *Beuze* was one, and *Ibrahim and Others* case were two very different cases.[109] The Grand Chamber acknowledged this in the judgement in *Beuze*,[110] yet it decided to view such 'fundamentally different situations through the same lens without ever analysing those differences in any depth'. The concurring judges believed that

> …these two situations, when it comes to guaranteeing minimum rights to the assistance of a lawyer during pre-trial proceedings, deserve to be treated differently and were treated differently before the present judgement.[111]

The concurring judges took the view that the judgement in *Beuze* departed from the standards of a fair trial as determined in *Salduz* and *Ibrahim and Others*, taken together. They went further and took the view that the judgement distorted and changed the *Salduz* principle and devalued the right that the Court established previously.[112] They considered

> That moreover, the present judgment also weakens, if not overrules, the jurisprudence in which the Court has laid down several other conditions which the domestic authorities must respect in restricting the Article 6 safeguards, including the right of access to a lawyer: first, that no restriction should be such as to destroy or extinguish the very essence of the relevant Article 6 right; second, that the restrictions may, in general, be imposed if they pursue a legitimate aim; third, that the restriction should be reasonably proportionate to the aim sought to be achieved.[113]

Celiksoy takes the view that the *Beuze* judgement presented a dilemma in terms of whether the *Salduz* test or the *Ibrahim and Others* test had to be followed by the ECtHR.[114] If it followed the former approach and found an automatic violation of Article 6(3)(c) due to the restriction on the right to access a lawyer in the absence of compelling reasons, it would have contradicted the *Ibrahim and Others* test, which always requires a two-stage analysis.[115] In adopting the latter test, it was at the cost of the principles in the *Salduz* case and therein 'devaluing' the jurisprudence of the court over a period of ten years.[116] The real problem, Celiksoy contends, arose from the majority's methodology and reasoning by insisting that both tests under both cases were the same when in fact, as cited supra, the Court acknowledged that they were separate.[117] The majority had missed an opportunity to re-establish both the *Salduz* and *Ibrahim and Others* tests as two separate but complementary principles.[118] In *Doyle v Ireland*[119] the dissenting judgement of Judge Yudkivska highlighted that the decision in *Beuze*[120] was based on a misguided interpretation of the Court's own jurisprudence. In *Doyle,* the Court, relying on *Ibrahim and Others* and *Beuze*[121] in applying the overall

100 *Murtazaliyeva v Russia* [2018] ECHR 1047.
101 Samartzis (n 76) 416-417.
102 Jordan Owen, 'Questioning of Witnesses' (2019) E.H.R.L.R. 2019, 2, 217-221, 220.
103 ibid 221 citing Judge Pinto de Albuquerque at para 18 of his dissenting judgment in *Murtazaliyeva v Russia* (n 98)
104 *Murtazaliyeva v Russia* (n 100) 220-221.
105 *Simeonovi v Bulgaria* [2017] ECHR 438.
106 *Beuze v Belgium* [2018] ECHR 925.
107 Ergul Celiksoy, 'Overruling '*the Salduz Doctrine*' in *Beuze v Belgium*: The ECtHR's further retreat from the *Salduz* principles on the right to access to lawyer' [2019] 10 New Journal of European Criminal Law 2019 4, 342-362, 343, citing *Beuze* ibid 116.
108 See judgement of the majority in *Beuze v Belgium* (n 106) in its findings at the conclusion of the judgements (after para. 200).
109 See dissenting judgement [2] under 'Introduction' heading.
110 *Beuze v Belgium* (n 106) 116 and Cf. [2] of Concurring Opinion.
111 ibid.
112 ibid 19.
113 ibid 20 of the Concurring Opinion.
114 Celiksoy (n 107) 352.
115 ibid.
116 ibid.
117 *Beuze v Belgium* (n 106).
118 Celiksoy (n 116).
119 *Doyle v Ireland* [2019] ECHR 377.
120 ibid under heading 'B. *Beuze's* unfortunate legacy'.
121 ibid under heading 'C Overall fairness in the present case – 1. The applicant's severely restricted communication with his solicitor'.

fairness assessment, concluded that its strict scrutiny revealed that the proceedings were fair as a whole and there was no violation under Articles 6(1) and Article 6(3)(c) of the ECHR. Remarkably, in his dissenting judgement Judge Yudkivska concluded:

> …the overall fairness of the proceedings in the present case was irreparably compromised.[122]

These are, without doubt, strong words when compared to the majority decision.

Celiksoy submits that in his assessment of the *Beuze* judgement the case sends an implied message to the states that there is no need to recognise the right of access to a lawyer as a rule since even the application of a systematic statutory restriction of a general and mandatory note will not in itself constitute a violation of Article 6(3)(c).[123] Samartzis surmises that the novelty of the overall fairness line of authority lies in that overall fairness may override the meaning of Article 6, not only to expand but, surprisingly also, to negate the minimum fair trial guarantees of Article 6(3).[124] He argues further that, on one account, the Court's overall fairness jurisprudence focuses on the accuracy of the trial's outcome, which is indicated by the fact that the result of the overall fairness assessment coincides with whether or not the Court is convinced that the applicant was in fact guilty.[125] With the exception of *Schatschaschwili v Germany*, every relativisation of the Court's bright-line tests has come with a finding of no violation of Article 6 in cases where the guilt of the accused appears indisputable.[126] One has to question whether or not the high bar required of successfully challenging Article rights 6 in light of the ***Doyle*** judgement[127] is capable of being met given the propensity of the ECtHR to rely on (properly considered) reasoning of domestic courts in its decision-making process.

Vogiatzis argues that every violation of the right to interpretation undermines the overall fairness of the proceedings[128] and gives effect to the requirement of the rule of law. In its first judgement on Article 6(3)(e), the Court found that paying for interpretation costs 'may have repercussions for [the accused person's] exercise of the right to a fair trial as safeguarded by Article 6.[129] But, as Vogiatzis highlights, it was in *Kamasinski*[130] where the link between interpretation rights and fairness was solidified: the 'guarantees in paragraphs 2 and 3 of Article 6…represent constituent elements of the general concept of a fair trial embodied in paragraph 1'. Placing the guarantee in the context of a fair trial under Article 6(1) enabled the ECtHR to deduce the principle that the right to interpretation applied not only to oral statements at the trial hearing but also to 'documentary material and pre-trial proceedings'.[131] In *Amer*,[132] the Court reiterated that the interpretation right at the pre-trial stage ensures a *fair trial*, and a key consideration for the interpretation of this right is the defendant's linguistic knowledge and the nature of the offence.[133] Despite this positive development of the link between the right to an interpreter and a fair trial, in *Panasenko,*[134] the Court appeared to unduly focus on the conduct of the accused at trial as opposed to thoroughly scrutinising states for failing to meet their positive obligations. It relied on the fact that the applicant did not specify the extent of the problems with interpretation at the trial, which impaired his broader right to a fair trial.[135] While *Vizgirda*[136] may have accentuated states' positive obligations, *Panasenko*[137] highlights the extent to which the Court will go to undermine the applicant's rights. The Court, further, having drawn inspiration from EU law, has not gone as far, Vogiatzis suggests, as duplicating the provisions/standards prescribed by Directive 2010/64 EU.[138]

Conclusions

As highlighted above, in the *Animal Defenders'* case, the dissenting judgement of the Court raises a fundamental issue concerning the Court's approach generally within the context of the Convention, and that is that a minimum standard should be equally applicable to all the States' parties. States which seek to interfere in those fundamental rights, whether legislated upon or judicially decided, as evidenced in the recent decision of *R v Brecani*, have the effect of States avoiding their obligations under Article 1 and giving solace to the pre-Convention pervasive view that Parliament is sovereign. The Doctrine of Appreciation, which is used frequently in connection with the principle of proportionality, has the effect of weakening the Court's role and, therein, the rights afforded to individuals under the Convention. A reliance on States compliance with the rule of law and its obligations under the Convention borders on collective naivety if the Court does not wish to appear to be abrogating its responsibilities and instead should seek to impose consistency and compliance across the board.

Goss' evaluation of the indistinctive assessment adopted by the Court has its merits, while the language used by the Court in its jurisprudence of 'overall fairness', as summarised by Samartzis, equally does not provide sufficient clarity to its meaning, as evidenced in *Ibrahim and Others* and *Beuze*. Equally, the Court in *Murtazaliyeva* introduced a reversal of the burden onto the defendant on why a witness must be heard, a fact highlighted by Judge Bošnjak in his partly dissenting opinion. It is difficult at times to reconcile the reasoning of the Court, particularly in these cases wherein it sought to undermine its own jurisprudence by compromising the 'overall fairness' of proceedings, as Judge Yudkivska emphasised in *Doyle*. The impact of these decisions is enormous and has the effect of eroding or extinguishing basic fundamental rights as well as encouraging, at the very least, attempts by national governments or national courts to implement laws and/or interpret judgements that can undermine rights and freedoms guaranteed under the Convention, thereby upsetting the harmony first sought and advanced in *Stec and Others v UK*.

122 ibid D – Conclusion of the dissenting judgement of Judge Yudkivska.
123 Samartzis (n 84) 359.
124 Harris et al (n 5) 471.
125 Samartzis cites *Al-Khawaja* (n 97) 155-158*; Ibrahim and Others* (n 90) 277-279; *Murtazaliyeva* (n 100) 169-176 and *Simeonovi* (n 105) 132-145.
126 Samartiz (n 76) 471.
127 Judge Yudkivska (n 122).
128 Nikos Vogiatizis, 'Interpreting the Right to Interpretation under Article 6(3)(e) ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights?' (2021) Human Rights Law Review 2021, 00, 1-25, 12.
129 ibid 14 citing *Luedicke, Belkacem and Koc v Germany*, Applications 6210/73, 6877/75 and 7132/75, 28 November 1978, 42.
130 *Kamasinski v Austria*, Application 9783/82, 19 December 1989 [62].
131 ibid 76; Judge Yudkivska (n 127) 14-15.
132 *Amer v Turkey*, Application 25,720/02, 13 January 2009, 77-78.
133 *Soering v UK* (n 7) 15.
134 *Panasenko v Portugal*, Application 10,418/03, 22 July 2008.
135 *Soering v UK* (n 7) – the court in that case found that the claim was 'manifestly ill-founded' and was rejected; ibid 60-64.
136 *Vizgirda v Slovenia* (2018) 59868/08, 3 of the dissenting opinion of judges Kucsko-Stadlmayer and Bošnjak.
137 *Soering v UK* (n 7) 60-64.
138 Judge Yudkivska (n 127) 22.

Annex I

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and facilities for the preparation of his defence;
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[139]

139 The text of the ECHR is available on the website of the Treaty Office of the Council of Europe at <http://conventions.coe.int/> under 'Full List of Treaties of the Council of Europe' (ETS no. 005) accessed 7 December 2021.