Reasoning in Domestic Judgments in New Democracies

A View from Strasbourg

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Abstract

One of the shortcomings in the functioning of the justice systems in new democracies consists of insufficient reasoning in judgments. The European Court of Human Rights (Court) had to deal with the issue in cases in which applicants invoked Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The Court's case law developments concerning the issue are analysed in this article. The general rule emerged in leading cases and was subsequently followed. It says there is an obligation incumbent on national courts to provide reasons for their judgments. Therefore, insufficient reasoning in a judgment given at the domestic level of jurisdiction provides grounds for finding a violation of Article 6 of the Convention. The problem of lack of adequate reasoning in domestic judgments has been given attention among scholars, judges and practising lawyers in new democracies. The Court's jurisprudence provides guidance to solutions aimed at improvement of the administration of justice in those countries, which are Member States of the Convention.

Keywords: European Court of Human Rights, Article 6, new democracies, reasoning in domestic judgments.

1. The Approach

Commentators of the Convention have not considered the reasoning in domestic judgments from the standpoint of challenges that the new democracies have been facing.[1] However, there are specific challenges to the judiciary in those countries,

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1 *Cf.* W.A. Schabas, *The European Convention on Human Rights,* Oxford, Oxford University Press, 2015, pp. 297-298; Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, pp. 430-431. Both volumes contain special headings on reasoning in domestic judgments when treating Art. 6 of the Convention, but neither speaks separately of new democracies in that respect. *Cf.* also C. Grabenwarter, *European Convention on Human Rights – Commentary*, München, C. H. Beck, 2014, pp. 138-139, without a special heading.

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and the problem has been identified among scholars.[2] The Court pursued a trend of connecting the issue of reasoning in domestic judgments to some other related subjects, *e.g.* incoherent jurisprudence, which calls for research of the state of judiciary in new democracies on a broader level. Comparing the new to the old democracies indeed merits an in-depth study.[3]

Recent publications concerning new democracies of South-East Europe confirm what has just been said. Two researchers from Belgrade University School of Law, Spaić and Dajović, launched a project to research the issue of reasoning in judgments with special reference to the Court's cases against Montenegro.[4] In their view, the right to a reasoned judgment at domestic level is a right under Article 6 of the Convention, which made the authors undertake the effort to enumerate Convention standards on reasoning in judgments.[5]

Judge Majić, currently a sitting judge at the Belgrade Court of Appeals, endeavoured to display the shortcomings of domestic judgments in respect of reasoning. He is among those who tend to upgrade the quality of national law by improving the reasoning in domestic judgments. His book on the *Art of Drafting First Instance Judgments in Criminal Cases* made success and has four editions to date.[6] Judge Majić advocates the right to a reasoned judgment in terms of the national law. Regretfully he had to confess the existence of a deteriorating trend as regards reasoning in judgments in criminal cases in his country. In some judgments rendered by the Serbian courts, there was a mere stating of facts instead of proper reasoning.[7]

2. Introducing Democracy

Shifting from a totalitarian regime to democracy takes years and decades. It has been remarked that the long and complex process of change from totalitarian regimes to democracy hasn't indeed been completed so far.[8] New democracies tended to introduce a judiciary modelled after the pattern of stable democracies, where it enjoys authority founded on its judgments. The paramount element of the judgments is the reasoning on which they rely. It primarily brings authority to the judgments, as well as to the whole of the judiciary.

2 V. Beširević (Ed.), *Study on the Case Law of the European Court of Human Rights Applicable in Administrative Disputes*, Montenegro. ReSPA Danilovgrad, 2017, pp. 249-253.

3 I. Ziemele, 'Conclusions', *in* I. Motoc & I. Ziemele (Eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, Cambridge, Cambridge University Press, 2016, p. 499.

4 B. Spaić & G. Dajović, *Right to a Reasoned Judgment – Practice of the European Court of Human Rights,* Podgorica s.a. The publishing year not indicated; the most recent Court's ruling cited seems to be one of 2016. *Cf.* p. 54.

5 *Ibid*., pp. 49-50.

6 M. Majić, *Veština pisanja prvostepene krivične presude*, Službeni glasnik, Beograd, 2017, pp. 111-171 (as regards reasoning).

7 *Ibid.*, p. 112.

8 I. Motoc, 'Introduction', *in* I. Motoc & I. Ziemele, 2016, p. 5.

Modern democracy rests on legitimate authority. The test whether a judge kept his interpretation of law within legitimate limits and did not overstep his powers lays with the judge's reasoning. Therefore, by analysing the reasoning in judgments, one can assess whether the judiciary of a nation state meets the requirements of the rule of law. Those who implement law and exercise state power are bound to preserve the authority, which for its part cannot be exercised outside the scope of legitimate government.[9] The reasoning in judgments thus provides legitimate authority to the judiciary.

It appears however that new democracies need some assistance to put their judiciary systems in line with the requirements of the rule of law. Notably, the art of reasoning in judgments was not among the commitments of the previous authoritarian regimes, which means the reasoning should improve within the framework of transitional justice. The author of this article was in the position to witness efforts of international bodies aimed at the improvement of the quality of reasoning in judgments at the national levels of jurisdiction in South-East Europe.[10] The insufficient or even inexistent reasoning in judgments given at the national levels of jurisdiction provided grounds to the Court to find violations of the Convention. The Court's approach to the problems of judiciary was prudent and it has been praised for having developed "an impressively nuanced approach to transitional dilemmas".[11] A review of its case law can display the issues that have arisen, as well as the approach to particular challenges.

3. Court's Jurisprudence on Reasoning in Domestic Judgments

3.1. The Forerunner

The forerunner in this area was *Hadjianastassiou v. Greece*. The issue of reasoning in domestic judgments was raised in that case, albeit it was not thoroughly dealt with. The applicant was an aeronautical engineer, who was a captain of the Greek Air Force. He was court martialled for disclosure of military secrets concerning his own designs of a guided missile. The Court of Cassation declared his appeal against the judgments of the military courts inadmissible.[12] He complained under Article 6 of the Convention, *inter alia,* of the failure of the courts martial to give reasons in their judgments.[13] The Court found a violation of Article 6 of the Convention. In a *dictum* it made an announcement of its future stance on the issue of reasoning in domestic judgments, stating, "The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision".[14]

9 *Cf.* M. Fabre-Magnan and F. Brunet, *Introduction générale au droit*, puf, Paris, 2017, p. 33.

10 Several workshops and seminars were sponsored by the Council of Europe, as well as by the Regional School of Public Administration, with a seat in Danilovgrad (Montenegro), financed by the European Union.

11 A. Buyse & M. Hamilton (Eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge, Cambridge University Press, 2011, p. 16.

12 *Hadjianastassiou v. Greece,* no. 12945/87 (1992) paras. 6-20.

13 *Ibid.,* para. 29.

14 *Ibid.,* para. 33.

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3.2. Leading Cases

The Court determined its principal position on reasoning in domestic judgments in three cases given judgments in 1994. The first was *Van de Hurk v. The Netherlands*. A Dutch farmer had a dispute with the administration in his country. Having lost the case at home, he filed with the Court complaining of two alleged violations of Article 6 of the Convention. The first concerned the independence of the tribunal and the second the fairness of the proceedings.[15] The Court ruled in the applicant's favour as regards the first complaint. In respect of his second complaint, the Court found no violation. However, the Court's ruling on the issue contained its principal stance. It reads, "Art 6.1 obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument."[16] That became a firm rule of the Court's case law in this area. The judgment in *Van de Hurk* was delivered in April, and in December 1994, the issue of reasoning in domestic judgments re-emerged before the Court in two cases against Spain, given judgments on the same day.

Ruiz Torija was about the termination of lease and the eviction of the applicant who was a lessee of a bar. The second instance court gave judgment failing to rule on the issue whether the action was time-barred. The applicant pleaded in writing before Spanish courts that the action against him was time-barred. The second instance court quashed the first instance decision and gave a fresh ruling on the merits, disregarding the plea, despite the fact that it was under obligation to review all submissions made in the first instance. The Court found a violation of Article 6 of the Convention because the second instance court

> neglected to deal with the submission that the action was out of time or whether it intended to dismiss it and, if that were its intention, what its reasons were for so deciding.[17]

Giving judgment in *Ruiz Torija*, the Court made reference to *Van de Hurk*, reiterating the rule that "Art 6.1 obliges the courts to give reasons for their judgments". The Court reinterpreted the second part of the rule by adding an extension, which reads,

> The question whether a court has failed to fulfil the obligation to state reasons, deriving from Art 6.1 of the Convention, can only be determined in the light of the circumstances of the case.[18]

In *Hiro Balani*, a trademark was at issue. The applicant complained of the Supreme Court's failure to address in its judgment the submission based on the priority of her trade name.[19] The question for the Court was whether "the silence

15 *Van de Hurk v. The Netherlands*, no. 16034/90 (1994), para. 40. The applicant complained on three counts, but the Court compressed the second and the third into one; *see* para. 61.

16 *Ibid*., para. 61.

17 *Ruiz Torija v. Spain*, no. 18390/91 (1994), para. 30.

18 *Ibid.,* para. 29.

19 *Hiro Balani v. Spain*, no. 18064/91 (1994), paras. 19-20 and 24.

of the Supreme Court (could) reasonably be construed as an implied rejection". The Court established that the question "required a specific and express reply". In the absence of such a reply, it was impossible to ascertain whether the Supreme Court neglected to deal with the submission or intended to dismiss it. If the latter were the case, it was impossible to realize what were the reasons for the dismissal. The Court referred to *Van de Hurk,* underlining that it was only in the light of the circumstances of the case that one could determine whether the domestic jurisdiction failed to fulfil its obligation to state reasons.[20] The Court found a violation of Article 6 of the Convention because the domestic court failed to render a reasoned judgment.

The Court's principal stance on the issue was thus spelt out in three judgments rendered back in 1994. The rule says that it is incumbent on domestic courts to give reasons for their judgments. Some additions complete the rule. Domestic courts are not obliged to give a detailed answer to every argument of the parties, but that is nevertheless subject to the Court's scrutiny in the light of the circumstances of the case.

3.3. Follow-Up Cases

In *Dulaurans v. France*, a revocation of mandate given to a real estate trader was at stake. The lady applicant made a submission that was considered to be inadmissible because introduced belatedly at an advanced stage of the domestic proceedings. The Cassation Court failed to state reasons for its decision. The absence of reasoning in the Cassation Court's judgment made the Court conclude that the highest instance of France committed a manifest error.[21] Having established that, the Court found a violation of Article 6 of the Convention, referring to the rule in *Van de Hurk*.[22] It was incumbent on the Cassation Court to provide reasons for the stance taken on a certain issue.

In *Hirvisaari v. Finland*, the applicant was a person entitled to a disability pension, who had a dispute with the authorities. He lost his case in Finland, and complained before the Court that the domestic organs had not given adequate reasons for their decisions. The Court first referred to the rule in *Garcia Ruiz v. Spain* and then proceeded to a detailed analysis of the reasoning given in the case at the national level of jurisdiction.[23] The Court's conclusion was that the reasoning "could not be regarded as adequate". This was due to the fact that the applicant had earlier received a full invalidity pension, whereas the national organs made reference in their decisions to a partial pension, which created confusion. The Court found that to be *prima facie* contradictory reasoning, and as such incompatible with the requirements of Article 6 of the Convention. On that grounds the Court ruled for the applicant. As in *Dulaurans*, the Court had to make assessment of the reasoning given at the domestic level.

20 *Ibid*., paras. 27 and 28.
21 *Dulaurans v. France,* no. 34553/97 (2000), para. 38.
22 *Ibid*., paras. 39 and 33.
23 *Hirvisaari v. Finland*, no. 49684/99 (2001), paras. 30-33.

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The reference the Court made in this case deserves attention. The Court referred to *Garcia Ruiz v. Spain*. In that case, the Court found no violation on the grounds that the domestic courts' reasoning was sufficient. The Court invoked its own principal stance and referred, *inter alia*, to the rulings in *Ruiz Torija, Hiro Balani* and *Van de Hurk*.[24] *Garcia Ruiz* is thus also a follow-up case standing in the line of jurisprudence from *Van de Hurk*. The Court found no violation of Article 6 in that case, although it applied the rule that was shaped in the three leading cases. They were referred to in *Garcia Ruiz*. In *Hirvisaari*, the Court did not make an immediate reference to the leading cases, but used the reference per intermediary instead.

In *Suominen v. Finland*, the lady applicant complained of having been deprived of a fair hearing guaranteed by Article 6 of the Convention because

> she was prevented from presenting all the evidence she wanted to present. The District Court refused to admit the evidence at the main hearing, without giving a reasoned written decision, although it had made an oral decision to the contrary at the preparatory hearing.[25]

The Court referred to *Ruiz Torija*, and found a violation of Article 6 of the Convention, also putting this judgment in line with *Hirvisaari*. The Court's reasoning tended to explain the general rule on reasoning in domestic judgments, referring to *Hirvisaari*. The Court emphasized that the function of a reasoned decision was twofold. First, it was to demonstrate to the parties "that they have been heard". Second, "a reasoned decision affords a party the possibility to appeal against it".[26] The ruling in *Suominen* can therefore be regarded as bringing a new element to the Court's general stance.

One of the follow-up cases concerned criminal proceedings at the domestic level. The applicant did not complain of insufficient reasoning, but of its complete absence. The latter complaint was, however, present at least to some extent in *Dulaurans*. The case was against Greece, and the applicant who had to stand criminal trial complained under Article 6 of the Convention that the final judgment given in his case at the domestic level of jurisdiction was not reasoned. The Court found for the applicant, stating that the Court of Appeals of Athens only reproduced a legislative provision, allegedly applicable to the case, and provided no reasoning at all in favour of its stance.[27] To come to this conclusion in *Sakkopoulos*, the Court referred to the rule in *Ruiz Torija*.[28] This reference appears more often than the one to *Van de Hurk* in the Court's jurisprudence posterior to 1994. It is probably due to the fact that the Court found a violation on this particular issue in the former and did not find it in the latter case.

24 *Garcia Ruiz v. Spain,* no. 30544/96 (1999), para. 26.
25 *Suominen v. Finland,* no. 37801/97 (2003), para. 25.
26 *Ibid.*, paras. 34 and 37.
27 *Sakkopoulos v. Greece,* no. 61828/00 (2004), paras. 47 and 51.
28 *Ibid.*, para. 50.

Another relevant case also concerned criminal proceedings. It was *Taxquet v. Belgium*, a somewhat complicated affaire in which the question of jury trial was raised. The case was presented to the Grand Chamber of the Court. The applicant complained under Article 6 of the Convention because "his conviction by the Assize Court had been based on a guilty verdict which did not contain reasons and could not be appealed against to a body with full jurisdiction".[29] The Court found a violation of Article 6, providing ample reasoning for its ruling. It made references to its previous judgments given in cases of *Suominen, Ruiz Torija* and *Van de Hurk*. The Court noted that reasoned decisions "serve the purpose of demonstrating to the parties they have been heard", which was an element introduced by the judgment in *Suominen.* The Court went on to include another extension to the general rule, stating that the reasoning contributed "to a more willing acceptance of the decision", and also that the judges were obliged to give reasons based on objective arguments. This can be regarded as an improvement of the rule, which was a result of a fine setting of the Court's arguments on the subject. The judgment in *Taxquet* is primarily important for having entrenched the Court's stance on the reasoning in judgments given by jury. Such judgments were no exception, and had to be reasoned as well.[30]

3.4. Cases Concerning New Democracies

In *Luka v. Romania*, the applicant was the chief of the IT department of a company, dismissed from work, but reintegrated on the grounds of a domestic court's judgment. He nevertheless left the firm sometime after reintegration.[31] He had a claim for damages against his former employer, which he eventually lost. Before the Court he complained of violations of Article 6 on three different counts. The only one of interest here is the complaint based on the allegedly unfair proceedings. The applicant complained that the domestic courts failed to consider his crucial argument, invoking unconstitutionality of a judgment of a domestic court.[32] The Court stated at the outset that Article 6 of the Convention required reasoned judgments at the domestic level of jurisdiction. This was done with reference to *Hirvisaari* and *Van de Hurk*. The Court also remarked that the argument put forward by a party to the domestic proceedings must be pertinent.[33] On the grounds of such considerations, the Court found a violation of Article 6 of the Convention on this count. The Court's stance was that a pertinent argument deserved a specific and explicit response.[34] For its own reasoning the Court referred to *Hiro Balani*.

The applicant in *Boldea v. Romania* was a university lecturer, who in a session of a university body argued there had been plagiarism in a work of a colleague. He was sued and condemned to payment of a certain amount of money. Filing with the Court, he relied on Article 6 of the Convention, complaining of having been

29 *Taxquet v. Belgium,* no. 926/05 (2010) GC, para. 61.
30 *Ibid*., paras, 90-91, 98-100.
31 *Luka v. Romania,* no. 73316/01 (2005), paras. 5-17.
32 *Ibid.,* para. 51.
33 *Ibid.,* paras. 55-56.
34 *Ibid.,* para. 61 (violation) and para. 58 (the Court's stance).

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condemned in the absence of relevant evidence and without obtaining a proper response to his arguments from the domestic courts.[35]

The respondent Government did not contest the obligation incumbent on the domestic courts to provide reasoning, but insisted that domestic courts were not under obligation to respond to each and every argument, as well as that the whole issue should be considered in the light of the circumstances of the case. For the former argument, the Government referred to *Van de Hurk,* and for the latter to *Ruiz Torija*.[36]

The Court first referred to *Van de Hurk,* and went further on to invoke the ruling in *Ruiz Torija, i.e.* the principle that it was in the light of the circumstances of a case to determine whether domestic courts fulfilled their obligation to give a reasoned judgment.[37] The Court remarked that the sentence at the domestic level was rendered without any reference to factual elements of the case. It also stated that the domestic courts disregarded the applicant's submissions. The first instance court failed to interpret the elements of a misdemeanour, as well as to analyse the evidence put forward by the applicant. The Court conceded there was a margin for domestic courts, which allowed those not to provide answers to each and every argument put forward by the parties, and referred to *Garcia Ruiz* in that respect.[38]

The Court found that the court of appeal at the domestic level failed to give an answer to the reasons expressed in the appeal, especially in the light of the complaint that the decision given in the first instance had not been reasoned. Once again, the Court referred to *Van de Hurk* and *Ruiz Torija,* concluding that the decisions rendered at the level of national jurisdiction were not sufficiently reasoned.[39] Subsequently, there had been a violation of Article 6 of the Convention. It is remarkable how the Court's main rule was interpreted in this case. The Government insisted on one part of the rule, whereas the Court considered it as a whole. *Garcia Ruiz* is usually invoked to underline the part of the general rule, which allows an exception in respect of reasoning. The Court reiterated its validity but decided that the exception did not apply to the case.

The case of *Kuznetzov and Others v. Russia* concerned registration, lease of premises and a forcible ending of a religious meeting. The applicants invoked several articles of the Convention, but it is their complaint under Article 6 that is of interest here.[40] The Court ruled there was a violation of Article 6 of the Convention, and in doing so referred to *Ruiz Torija, Suominen* and *Hirvisaari*. The main failure of the domestic judgments consisted in the fact that the domestic judiciary remained silent on the crucial point, namely that it was two police officers who instructed the first applicant to end a religious meeting.[41] The domestic courts

35 *Boldea v. Romania,* no. 19997/02 (2007), para. 20.
36 *Ibid*., para. 23.
37 *Ibid*., paras. 28-29.
38 *Ibid*., para. 32.
39 *Ibid*., paras. 33-34.
40 *Kuznetsov and Others v. Russia*, no. 184/02 (2007), paras. 7-31 (Facts) and 79-85 (Art. 6 complaint).
41 *Ibid*., paras. 83-85.

provided some reasoning, but neglected the most important issue, which led the Court to find the reasoning insufficient.

In *Tatishvili v. Russia,* the residence registration was at stake. That issue was linked to the application for a Russian passport filed with the authorities in Moscow by the lady applicant.[42] She was a stateless person of Georgian origin and a former USSR citizen. She had been refused by the administration, challenged the refusal and afterwards lost her case before the courts. The first instance court ruled against the applicant on two grounds. Firstly, there was allegedly a problem with the applicant's residence registration. This went contrary to the fact that the applicant had submitted in writing the flat owner's consent to move into the apartment. Secondly, the applicant had, in the first instance court's view, Georgian citizenship, which the applicant had never obtained indeed. The Moscow City Court upheld the judgment and adopted its reasoning.

The applicant complained under Article 6 of the Convention, "The domestic courts' findings had been arbitrary and contrary to the facts." The domestic courts based their findings on a 'treaty' between Russia and Georgia on visa-based exchanges, which never existed. Besides the applicant produced the flat owner's written consent to move into the apartment, but the courts nevertheless found that her right to remain in the flat had not been sufficiently established.[43]

The Court referred to *Ruiz Torija, Suominen* and *Hirvisaari*, reproducing its main approach to this class of cases.[44] The Court found further on that the flat owner's consent was validly produced in the domestic proceedings. As to the 'treaty' between Russia and Georgia on visa requirements, the domestic courts omitted to verify whether such a treaty was in existence. Although the applicant claimed before the national judiciary that the first instance decision was devoid of factual and/or legal basis, the Moscow City Court gave its judgment on appeal in a summary fashion and without reviewing the applicant's arguments.[45]

The Court ruled there was a violation of Article 6 of the Convention in this case because of the "manifestly deficient reasoning" of the first instance court and the "subsequent approval of such inadequate reasoning" by the appellate court.[46] The domestic instances, on the one hand, disregarded the facts and, on the other hand, their reasoning on law was peculiar. It relied on an inexistent treaty, as well as on the assumption that the legal rules applicable to Georgian citizens should apply to the applicant, despite the fact that the lady was indeed stateless.

In *Kushoglu v. Bulgaria,* the complaints were filed under Article 1 First Additional Protocol to the Convention, as well as under Article 6 of the Convention. However, having taken position on the former, the Court stated in the judgment it was not necessary to examine the latter complaint.[47] It was in the course of examining the issue under Article 1 First Protocol that the Court referred to its

42 *Tatishvili v. Russia*, no. 1509/02 (2007), paras. 7-19 (Facts).
43 *Ibid*., paras. 55-56.
44 *Ibid*., para. 58.
45 *Ibid*., paras. 60-62.
46 *Ibid*., para. 63.
47 *Kushoglu v. Bulgaria*, no. 48191/99 (2007), para. 64.

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general rule on the reasoning in domestic judgments. The two applicants were forced to emigrate from Bulgaria to Turkey towards the end of the communist regime. They sold their house to the municipality of the little city they lived in. The transaction was made in all haste, as they had to leave. Subsequently, the municipality re-sold the house to an individual. These events took place in 1989 and 1990, respectively. After the shift of regime in Bulgaria, the applicants brought actions to declare the sale of the house to the municipality null and void and recover their property. The main issue was whether they could use the action of *rei vindicatio*.[48]

The Regional Court reasoned that *rei vindicatio* claim had to be dismissed, on the grounds that there were no defects in the second transaction, by which the municipality sold the house to an individual in 1990. The Supreme Court upheld the judgment, adopting its reasoning.[49] The applicants complained of arbitrariness of the domestic courts. The Court established there was manifest unlawfulness and ruled in the applicants' favour. Ruling on the issue, the Court referred to the judgments in *Suominen* and in *Hirvisaari*.[50] The Court could not accept the "legal conclusions reached"' by the domestic courts and invoked the principle of its own case law requiring domestic courts to adequately state the reasons on which their judgments are based.

In *Kushoglu,* the Court disagreed with the line of reasoning in judgments given at the national level because it relied on manifest unlawfulness. There is some similarity in this regard with the case of *Tatishvili*, where the Court also based its decision on the arbitrariness found at the domestic level of jurisdiction. It was clear in *Kushoglu* that the reasoning on law given by the domestic courts, and not on facts, was decisive for the Court.

The applicant in *Atanasovski v. FYROM* was reassigned to a post without providing reasons. He lost the case at home and complained before the Court *inter alia* of the unreasoned judgement of the Supreme Court. The respondent Government pleaded the Supreme Court was allowed to overrule its previous jurisprudence, which it in fact had done. Referring to *Garcia Ruiz, Hiro Balani, Suominen* and *Tatishvili,* the Court found a violation of Article 6 of the Convention.[51] In its view, the Supreme Court was allowed to depart from its previous case law, but only in the presence of "a more substantial statement of reasons, justifying the departure".[52]

In *Barać and Others v. Montenegro,* a group of employees of a firm sued the employer for compensations they were entitled to by virtue of the labour legislation in force. The Court of First Instance granted their claims. The High Court reversed the judgment on the grounds that the provisions of the Labour Amendments Act 2004 were applicable. The Supreme Court rejected the applicants' appeal on points of law. The High Court gave judgment on 26 April 2006 and the

48 *Ibid*., paras. 7-26 (Facts).
49 *Ibid*., paras. 17-19.
50 *Ibid*., paras. 52, 58.
51 *Atanasovski v. FYROM*, no. 36815/03 (2010), paras. 21, 34, 36, 39.
52 *Ibid*., para. 38.

Supreme Court on 12 September 2006. Neither of the two domestic instances took account of the fact that the Constitutional Court had declared unconstitutional the provisions of the Labour Amendments Act 2004 and annulled those provisions by a ruling of 28 February 2006, which was published in the Official Gazette on 18 April 2006.[53]

The applicants complained that the judgment given in their case was based on a statute, which had no longer been in force. The Court found a violation of Article 6 of the Convention on the grounds that the domestic courts' reasoning was laid down on invalid legal basis, because the reasons given by the courts were "not envisaged in the domestic legislation".[54] The Court invoked the rule in *Dulaurans* in support of its stance, although as an auxiliary reason, added to the main one stemming from an old Belgian case in which the competent domestic body based its decision on a ground that was not provided in the relevant legislation at all.[55] Therefore, domestic judgments lacked proper reasoning.

The Court rendered its judgment in this case by majority. Two judges dissented on the merits.[56] The dissenters put forward, invoking the rule in *Garcia Ruiz*, that "a mere claim that a national court has made an error of fact or of law will not suffice for a violation of Article 6". They nevertheless conceded, "there may be a violation of Article 6 if a decision is arbitrary or manifestly unreasonable". The dissenters contested the interpretation of the precedents invoked by the majority of judges, both in *De Moor* and *Dulaurans*. The dissenters' stance reveals one of the crucial elements of the present study, for they rightly pointed out to the difference between reasoning on facts and reasoning on law, as well as to the complex issue of drawing a line between the two. It nevertheless remains doubtful whether they understood the notion of arbitrariness in a comprehensive way. The dissenters seem to have adopted a rather narrow concept of arbitrariness if it could not encompass taking decisions on the basis of law, which is no more in force.

In *Tomić and Others v. Montenegro,* the applicants were employees of the Aluminium Plant, who were found unfit for work due to a work-related disease. They were granted disability pensions, but filed for damages against the employer, claiming the difference between the amounts of a disability pension and the salary. Some of the claimants were successful at the domestic level of jurisdiction, while others were not. The main element in the High Court's and the Supreme Court's reasoning was that since the applicants' right to a pension was recognized "they were no longer employed and thus had no salary".[57] This way of reasoning suffers formalism and represents legal reasoning only in appearance. It was clear that the applicants referred to the salaries they had once had before they were struck by the work-related disease.

53 *Barać and Others v. Montenegro,* no. 47974/06 (2012), paras. 7-12.
54 *Ibid*., paras. 22, 32-34.
55 *De Moor v. Belgium*, Series A no. 292-A (1994), para. 55.
56 *Barać and Others,* 2012, Joint Dissenting Opinion of Judges Kalaydjieva and De Gaetano.
57 *Tomić and Others v. Montenegro,* no. 18650/09 (2012), para. 12.

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The applicants, however, primarily complained of the inconsistent case law at the national level of jurisdiction.[58] The issue of inconsistent case law in new democracies is a topic, which deserves a separate study. It has its own line of evolution in the Court's jurisprudence.[59] The Court's case law on that issue remains nevertheless divergent to some extent and requires a thorough insight. The Court conceded there was inconsistent domestic case law.[60] The facts somehow seemed to be supportive of the applicants' theses, but the Court unanimously decided otherwise, finding no violation of Article 6 of the Convention. The peculiarity of the Court's crucial stance lies in using a precedent belonging to the line of its case law, which concerns the reasoning in judgments to resolve the issue of inconsistent domestic jurisprudence. The Court referred to *Garcia Ruiz*, stating its function was not to deal with errors of fact or law allegedly committed by the national courts, "unless and in so far as they may have infringed rights and freedoms protected by the Convention".[61] However, incoherent jurisprudence usually encompasses arbitrariness, which is by no means acceptable in the realm of Article 6 of the Convention. The question therefore remains whether *Garcia Ruiz* was a proper lever for a judgment that gave a ruling on incoherent domestic case law?

In *Anđelković v. Serbia,* the Court made use of a technique similar to the one we met in the previous case. It resolved a problem without an immediate recourse to the principal rule in the respective class of cases. An employee had a claim against the employer for the outstanding holiday pay. He won his case in the first instance, but the appellate court reversed the judgment. The employee complained before the Court that the dismissal of his claim was based on reasons, "which had not been correct in law"[62]

The respondent Government conceded there was inconsistent domestic case law, but claimed that the differences in judgments were not profound and longstanding. They referred to the Court's decision in *Karuna v. Ukraine*, alleging the applicant's status was analogous. The issue in *Karuna* was a re-calculation of pension of a former military officer. The Court distinguished the case from *Karuna*.[63] The appellate court had disregarded the applicable employment law, which led the Court to conclude that the reasoning of the domestic court "had no legal foundation" and therefore stood "outside of any reasonable judicial discretion". The domestic court's core argument was that accepting the applicant's claim would mean treating the applicant more favourably than his colleagues "who had not received payment of outstanding holiday pay either".[64] The domestic court disregarded the provisions of domestic legislation. The Court found a violation of Article 6 of the Convention on the grounds of insufficient reasoning on law because

58 *Ibid*., para. 40.

59 *Cf. Beian v. Romania*, no. 30658/05 (2007), *Stefanica v. Romania,* no. 38155/02 (2010), *Vinčić and Others v. Serbia,* no. 44698/06 (2009), *Rakić and Others v. Serbia*, no. 47460/07 (2010), *Iordan Iordanov and Others v. Bulgaria,* no. 23530/02 (2009) among many others.

60 *Tomić and Others*, 2012, paras. 35-38.

61 *Ibid*., para. 62.

62 *Anđelković v. Serbia*, no. 1401/08 (2013), paras. 6-15.

63 *Ibid*., para. 26.

64 *Ibid*., para. 27. The Court referred to the judgment in *De Moor* in this paragraph of the judgment.

the arguments put forward by the domestic courts were outside judicial discretion.

In *Jovanović v. Serbia,* the validity of a life-long maintenance contract was at stake. The applicant had concluded such a contract with his mother. When she passed away, the applicant's brother contested the validity of the contract and sued the applicant. The practice of life-long maintenance contracts is widely spread in Serbia. The person receiving maintenance for life usually transfers a valuable piece of property to the other contracting party providing maintenance. The applicant was the defendant in the dispute so that the other party, bringing an action with a court, determined the value of the dispute at 15 EUR.[65]

In the course of proceedings at the national level, the applicant required determination of "a realistic value of the dispute", which the first instance court set at the amount of 6.700 EUR. The applicant lost the case before two instances and appealed to the Supreme Court on points of law. The Supreme Court dismissed the applicant's appeal on the grounds that the value of the dispute was below statutory threshold. The Supreme Court took account only of the value of the dispute that had been stated in the plaintiff's initial submissions and disregarded the first instance court's ruling on the determination of the value. Despite such a rejection and once the procedure at the domestic level was terminated, the first instance court issued an order to the applicant to pay the fees calculated at the value of 6.700 EUR.[66]

Examining the application under Article 6 of the Convention, the Court ruled that the Supreme Court had barred the applicant's access to review proceedings without clarification as to the assessment of the value of the dispute. The applicant was entitled to rely on the determination of the dispute value as it had been settled in the course of the proceedings, based on a formal decision.[67] The Court found a violation of Article 6 of the Convention on the ground of insufficient reasoning in the Supreme Court's decision. The Court expressed the view that its task was not "to resolve problems of interpretation of domestic legislation". It nevertheless went further on so as to put forward that its task indeed was "to verify whether the effects of such interpretation are compatible with the Convention". Referring to *Kushoglu,* the Court added that domestic courts and authorities "should 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".[68] The Supreme Court's decision in this case had been taken in an unforeseeable and non-transparent manner.

The Court's ruling in *Jovanović* calls for comments. The Court seems to be trying to create a link between the issue of reasoning in judgments and some other related ones, such as, *e.g.* legal certainty and the foreseeability of the application of law. Both have been identified in the Court's jurisprudence with special refer-

65 *Jovanović v. Serbia,* no. 32299/08 (2012), para. 7.
66 *Ibid*., paras. 13-21.
67 *Ibid*., paras. 47-49.
68 *Ibid*., para. 50.

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ence to the cases in which new democracies were respondent states. Such issues indeed provide challenges to the interpretation and implementation of law in those countries.

Ajdarić v. Croatia was a Criminal Law case. The Court used the technique of reproducing large parts of the judgments rendered by the domestic courts, while stating the facts.[69] The domestic courts mostly reproduced a witness's testimony without any explanation as to why the courts found the witness credible and what in fact was their proper way of reasoning. The Court found a violation of Article 6 of the Convention and made references to its judgments in *Dulaurans* and in *Garcia Ruiz*.[70]

The Court pointed out the fact that several important circumstances, deserving attention and consideration of the domestic courts, had received no echo in the domestic judgments. Domestic courts found the applicant guilty of murder of first degree, basing the judgment mostly on a witness statement. The witness had allegedly heard secret conversations in lowered voices between the applicant and another inmate in a prison hospital. His statements were unclear and they were rather witness's own conclusions than statements of facts. The witness had had conflicts with the participants in the conversation. His statements were contradictory to those of other witnesses and uncertain about the dates. The witness could not properly determine the position of the applicant's bed in the room and also made confusion about the victims and the perpetrators when reproducing the alleged conversations.[71] The Court found that the domestic courts had failed to verify the evidence as well as the witness's credibility. Their approach to the reasoning was inadequate, especially because of the fact that the witness in question "suffered from emotional instability and histrionic personal disorder".[72] The Court concluded that the criminal proceedings as a whole constituted a violation of Article 6 of the Convention.

The problem of reasoning in domestic judgments usually arises when the Court is invited to proceed on complaints under Article 6 of the Convention. Exceptionally, the issue may show up in respect of complaints filed under other articles. An example of the kind is the case of *Brežec v. Croatia*. The facts of the case concerned some institutions of socialist law in former Yugoslavia. The employees were entitled to obtain apartments from their employers, being public enterprises, under the system of protected tenancy. The lady applicant had been given an apartment in protected tenancy, but she was unable to prove her title. She nevertheless remained to live in the flat for decades. When the whole building was sold to some entrepreneur, the applicant faced the eviction claim. Having lost her case at home, she filed a complaint with the Court under Article 8 of the Convention.[73] The Court found a violation of that provision.

69 *Ajdarić v. Croatia*, no. 20883/09 (2011), paras. 4-23 (Facts).
70 *Ibid*., paras. 33-34.
71 *Ibid*., paras. 37-50.
72 *Ibid*., para. 47.
73 *Brežec v. Croatia,* no. 7177/10 (2013), paras. 8-21.

The analysis of the reasoning given in the judgments of domestic courts showed that it was restricted to the statement that the applicant had not had a certain entitlement under national laws. The domestic courts failed to analyse the proportionality of the measure, which applied at the national level, ordering the applicant to leave the flat after having lived in it for forty years. The Court went on to conclude that failing to examine the applicant's arguments, the national courts "did not afford the applicant adequate procedural safeguards".[74] Thus, it was clear that the Court resolved the case with regard to inadequate reasoning in domestic judgments. Since the complaint was under Article 8 of the Convention, the Court referred to its own case law in respect of that article. It was nevertheless the problem of reasoning in domestic judgments that guided the Court in this case.

The case of *Cerovšek and Božičnik v. Slovenia* is somewhat peculiar. The two applicants had been condemned for theft by a judge who retired after having pronounced oral verdicts. Written grounds for the verdicts were given a few years later by judges who had not reached the verdict. The latter fact provided grounds for their complaints before the Court.[75] With reference to *Hadjianastassiou* and *Taxquet,* the Court stated that the proper administration of justice encompassed the duty to give reasons and found a violation of Article 6 of the Convention. It consisted in the failure of the judge who conducted the trial to provide written grounds.[76]

4. Conclusions

The reasoning in judgments has two aspects – reasoning on facts and reasoning on law. To borrow the expression from an Argentinian author, Gordillo, *"it is necessary to reason factually and legally to explain the case's hypothesis."*[77] In some cases that were under discussion in this article, the Court was not satisfied with the reasoning on facts given by the courts at the domestic level of jurisdiction. The examples are *Boldea, Kuznetsov and Others, Tatishvili*, as well as *Ajdarić*. Either the Court established that the domestic judgments were not linked to the elements of the case or rendered contrary to the facts, or also still, that the crucial facts were simply neglected by the domestic courts.

In other cases, the Court based its ruling on insufficient reasoning on law. There was manifest unlawfulness in *Kushoglu*. In *Barać and Others,* domestic judgments had been laid down on arguments not envisaged by the legislation in force. In *Anđelković,* the reasoning of domestic courts was outside reasonable judicial discretion. Similarly, in *Jovanović*, the Court disagreed with the implementation of domestic law, because it was not foreseeable and consistent. In *Atanasovski,* the Supreme Court did not provide sufficient justification for overruling previous

74 *Ibid*., paras. 49-50.
75 *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12; 68949/12 (2017), paras. 6-17 and 30.
76 *Ibid*., paras. 40, 47-48.
77 A. Gordillo, *An Introduction to Law*, London, Esperia, 2003, p. 43.

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jurisprudence. Finally, in *Brežec,* the Court established lack of proportionality in the approach to the facts of the case, as well as the lack of procedural safeguards.

Another specific element marked the Court's approach to the cases discussed. In some of them, the Court dealt with certain issues, which fall outside the scope of Article 6 of the Convention. The outstanding example is *Brežec*, in which the Court gave a ruling under Article 8, basing it on insufficient reasoning. In *Kushoglu,* the Court decided on the issue under Article 1 First Protocol, declaring it was not necessary to examine the case under Article 6. In *Jovanović,* the Court treated the issues of legal certainty and foreseeability of law, whereas in *Tomić and Others,* it dealt with the issue of inconsistent domestic case law. The issues of legal certainty and inconsistent domestic case law are indeed the closest to the one of reasoning in domestic judgments.

The Court's general rule states that there is an obligation arising from Article 6 of the Convention incumbent on domestic courts to provide reasons for their judgments. It has been accompanied by the stance, which leaves out the possibility of interpreting the absence of reasoning as implied rejection of an argument. The fine-tuning of the general rule occurred in a *dictum* in *Suominen*, which stated that the function of reasoning was to provide possibility of appeal. This seems to be close to the Common Law doctrine of judges' opinions, which provide guidelines to the implementation of law in general.[78] Another fine-tuning appeared in *Jovanović*. The application of domestic legislation must take place in a foreseeable and consistent manner, so as to achieve legal certainty. Reasoning in domestic judgments is indispensable for raising arguments in appeal, and the whole of reasoning, appealing and stating arguments before courts serves the purpose of legal certainty.

The Court's role consists in ensuring the engagements undertaken by the Member States. Although the Court cannot directly solve the problems of the administration of justice in new democracies, its judgments foster the most important values of modern society.[79] By posing standards and requirements indispensable for the rule of law, the Court's case law shows the new democracies the path to follow.

78 F. Schauer & S. Goltzberg, *Penser en juriste – Nouvelle introduction au raisonnement juridique*, Dalloz, Paris, 2018, p. 176.

79 Buyse & Hamilton, 2011, p. 300.