EXCESSIVE FORMALISM BY COURTS

DEPARTMENT FOR THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The European Court has underlined that the right of access to a court is an inherent aspect of the safeguards enshrined in the European Convention on Human Rights, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. The right of access to a court must be "practical and effective", not "theoretical or illusory".

Possible limitations to the above right must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right be impaired. Furthermore, a limitation will not be deemed compatible with the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In view of this, the European Court has noted that, when applying procedural rules, the courts must avoid excessive formalism that would impair the fairness of the proceedings.

The present Thematic Factsheet provides examples of general and individual measures reported by States in the context of the execution of the European Court's judgments focusing on the following specific issues: excessively formalistic rules of procedure; excessively formalistic interpretation of procedural requirements; assessment by courts of statutes of limitation; payment of court fees; clerical errors; and excessively formalistic decisions concerning detention.

1. Excessively formalistic rules of procedure

The case concerned the Court of Cassation's refusal to grant the applicant company payment deferral of court fees on the grounds that the Civil Procedure Code prohibited such exemption for commercial entities, which resulted in the non-examination of the company's cassation appeal against a decision upholding the imposition of certain tax fines. Following the Court's judgment, the case was reopened. The Tax Inspectorate's and the Commercial Court's subsequent conclusions established that the applicant company had failed to meet the requirements of the tax legislation. In 2009, the exclusion of commercial entities from the right of deferral of payment of court fees was revoked in the Civil procedure Code. Simultaneously, the relevant provision in the Law on State Fees was also repealed.	**ARM / Paykar Yev Haghtanak (21638/03)** **Judgment final on 02/06/2008** ***Final Resolution CM/ResDH(2011)185***
The case concerned the procedural requirement that appeals on points of law could only be lodged by advocates licensed to act before the Court of Cassation. The Court considered that the impossibility to be granted free legal aid in order to comply with such a procedural requirement made right of access to the Court of Cassation conditional on the applicant's financial situation. In 2008, the Constitutional Court declared the relevant provisions of the Code of Civil Procedure and of the Advocacy Act as well as of the Criminal Procedure Code and the Judicial Code unconstitutional and abolished the rule by which only licensed advocates could act before the Court of Cassation without free legal aid. Moreover, in 2015, the Constitutional Court examined other relevant provisions, inter alia of the Administrative Code, determining unconstitutional the rule by which a party may only have access to the Court of Cassation through an attorney and reiterated that the legal requirement is only legitimate if legislation provides for the possibility for all concerned parties to benefit from free legal assistance.	**ARM / Shamonyan (18499/08)** **Judgment final on 07/10/2015** ***Final Resolution CM/ResDH(2016)104***
In this case, the Court found that the applicant's right of access to the Court of Cassation was disproportionately restricted due to the dismissal of his appeal on points of law combined with the rejection of his request for legal assistance, making it inevitable that his appeal be declared inadmissible for failure to appear. Law No. 4689/2020 provided that the admissibility of the appeal in cassation ceased to constitute a requirement for the admission of requests for legal aid for the appeal.	**GRC / Peca (No. 2) (33067/08)** **Judgment final on 10/09/2010** ***Final Resolution CM/ResDH(2020)258***

2. Excessively formalistic interpretation of procedural requirements

The excessive formalism in this case was due to the fact that the Conseil d'État declared inadmissible the applicant association's request for review of a planning permission on the grounds that it did not contain a statement of the facts and did not provide the Conseil d'État and the judge examining the case with sufficient information. The Court noted, *inter alia* that the applicant association had annexed the decision granting planning permission to its application, which contained a detailed statement of the facts, and that it could not have provided a more comprehensive statement. In 2011, the President of the Conseil d'État confirmed that the Court's judgment was used as inspiration for recent case-law banning excessive formalism when assessing the admissibility of applications before it. Concrete case-law examples were submitted in the Action Report.	**BEL / L'Erablière A.S.B.L. (49230/07)** **Judgment final on 24/05/2009** ***Final Resolution CM/ResDH52013)224***
The case concerned the dismissal by a domestic court of the applicant's defamation claim under the Media Act on the grounds that his legal representative had allegedly failed to submit a power of attorney when requesting the publisher to issue the correction of the impugned statement at stake. In 2014, the Constitutional Court changed its case-law, finding the access to court impaired when civil actions under the Media Act were declared inadmissible on the ground that the claimants' representatives had not enclosed a power of attorney when requesting the adversary to publish a correction of the disputed information. The Supreme Court's case-law followed in 2017. The judgment was disseminated to all judges of first instance and appeal courts for information.	**CRO / Buvač (47685/13)** **Judgment final on 06/09/2018** ***Final Resolution CM/ResDH(2019)72***
In this case the Court found a disproportionate hindrance of the applicant's access to a court on account of the Family Court of Appeal's excessively formalistic refusal to examine the applicant's appeal on the merits owing to an irregularity in the title of the notice of appeal which, however, did not prevent the identification of the appeal. In 2016, the Family Courts Procedural Rules were amended and new forms for appeals were introduced. Moreover, the Family Court of Appeal adapted its case-law to prevent excessive formalism. The judgment was translated, published and widely disseminated to various domestic authorities, including the Supreme Court, the Ministry of Justice and Public Order, the Bar Association and the Parliamentary Committees of Legal Affairs and Human Rights.	**CYP / Savvides (14195/15)** **Judgment final on 14/12/2021** ***Final Resolution CM/ResDH(2022)318***
The case concerned the Supreme Court's inadmissibility decision, which retroactively and automatically applied a novel interpretation of the formal requirements for a notice of appeal, without giving the applicant the opportunity to remedy any newly arising deficiency. Following the Court's judgment, the applicant requested the reopening of the impugned proceedings. In March 2022, the Supreme Court upheld the applicant's revision appeal, agreeing on the admission of the applicant's originally rejected cassation appeal. The Organic Law 7/2015 amended the legal framework on the cassation appeal, clarifying the wording on the notice of appeal and removing possible previous legal uncertainty.	**ESP / Gil Sanjuan (48297/15)** **Judgment fiinal on 26/05/2020** ***Final Resolution CM/ResDH(2022)278***

Examples of recent case law of the Supreme Court on the admissibility of cassation appeals showed the incorporation of the principles affirmed by the European Court in the present judgment.	
This group of cases concerned the denial of access to a court on account of the inconsistent or particularly strict interpretation of rules of procedure by the Supreme Court and the Constitutional Court in civil proceedings. In the lead case, the applicants had the possibility to initiate legal action for State responsibility. The reopening of the civil proceedings concerned was not possible due to the principle of legal certainty. Following the judgment, the Constitutional Tribunal established criteria by which to assess whether a declaration of inadmissibility of an application or appeal is insufficiently reasoned, arbitrary, the result of an obvious error or an excessively strict interpretation of procedural rules. Furthermore, it established the exceptional circumstances in which non-compliance with procedural rules does not automatically result in a declaration of inadmissibility of the application or appeal concerned, *inter alia* with regard to the party's or the party's lawyer's diligence, the complexity of the case and the time limits for filing the appeal. Examples of recent relevant case-law of both the Constitutional and the Supreme Courts, referring to the European Court's jurisprudence, were submitted.	**ESP / Stone Court Shipping Company, S.A. group (55524/00)** **Judgment final on 28/01/2004** ***Final Resolution CM/ResDH(2012)100***
The case concerned the dismissal of a civil party's appeal in criminal proceedings due to the designation of a new lawyer for which a rule of procedure had not been complied with. The infringement stemmed from the specific circumstances of the case and, in particular, from an excessive formalism in the application of Article 115 of the Code of Criminal Procedure by the courts. The judgment was published and disseminated to the Ministry of Justice and other authorities concerned with a view to drawing the attention of the domestic courts to the need to adopt a concrete and measured approach in the application of the procedural rule at issue.	**FRA / Duceau (29151/11)** **Judgment final on 30/09/2016** ***Final Resolution CM/ResDH(2017)342***
The case concerned the Court of Cassation's dismissal, in international child return proceedings, of the applicant's appeal on points of law for formal reasons which were attributable to the public prosecutor with the Court of Appeal. As an individual measure, a request for the reopening of the proceedings was unnecessary in the circumstances of the case as one of the children had reached majority by 2016 and the divorce agreement had granted visiting and accommodation rights to the applicant concerning the other minor child. In 2014, the relevant procedural rules were revoked by decree: Article 979 of the Civil Procedure Code no longer requires that the contested decision be formally notified to the Registry of the Court of Cassation to bring an appeal, thereby avoiding its inadmissibility as a disproportionate penalty. The judgment was published and disseminated to the domestic courts concerned.	**FRA/ Henrioud (21444/11)** **Judgment final on 05/02/2016** ***Final Resolution CM/ResDH(2016)249***
In both these cases, the Court found that, by dismissing the applicants' appeal for cassation due to a case-law principle concerning the "vague character" of the grounds of appeal, the Court of Cassation had failed to address the specific issues raised and had thus unduly obstructed the applicants' right of access to a court. Following the first judgment and having regard to the direct effect that the European Court's case-law enjoys in Greek law, the publication and dissemination of the judgments to all judicial authorities appeared to be sufficient as a general execution measure. However, in 2010, the Plenary Session of the Court of Cassation adopted a formal decision on admissibility criteria of	**GRC / Liakopoulou (20627/04)** **Judgment final on 23/10/2006** ***Final Resolution CM/ResDH(2009)68*** **GRC / Alvanos and Others (38731/05)**

applications in cassation and changed its case-law accordingly, calling upon the judge-rapporteurs concerned to use their competence to repair and correct certain errors and lacunae in order to assess the overall admissibility of cassation appeals in a fair and lenient manner.	**Judgment final on 20/06/2008** ***Final Resolution CM/ResDH(2016)178***
The case concerned the inadmissibility declaration by the Court of Cassation of the first applicant's appeal on point of law with regard to the drafting criteria for such appeals, on the grounds that the applicant's pleas included neither the references of the supporting documents nor the title of the defects complained of. In 2022, taking into account the present judgment, the Plenary of the Court of Cassation stated that the principle of self-sufficiency of the appeal in cassation under the Code of Civil Procedure must not be interpreted in an excessively formalistic manner affecting the substance of the disputed right. Examples of several similar decisions of the Court of Cassation issued in 2022 were provided.	**ITA / Succi and Others (55064/11)** **Judgment final on 28/01/2022** ***Action Report DH-DD(2022)1329***
In this group of cases, the Court found that the precision required by the Court of Cassation in the formulation of the plea of cassation at issue was not essential for its ability to exercise its review and would considerably weaken the protection of the rights of litigants before it. In 2010, the 1885 Act on appeals and cassation procedure was amended to establish that the wording of the plea in cassation "may be supplemented by legal developments to be taken into consideration", which was not the case at the time of the facts of the cases. Pursuant to this amendment, the Court of Cassation's case-law relaxed its interpretation of formal requirements. Legal developments, including those not contained in the statement of the plea in cassation, are thus also taken into consideration and duly analysed by the Court of Cassation. Furthermore, the amendment also addressed the issue of the absence of a bar of lawyers specialised in cassation matters, explaining in detail the formalities to be completed when lodging an appeal in cassation, thus contributing to improved compliance with the formalities inherent to cassation appeals.	**LUX / Kemp and Others group (17140/05)** **Judgment final on 24/07/2008** ***Final Resolution CM/ResDH(2012)93***
The case concerned the dismissal by the Supreme Court of the applicant's appeal on points of law on the grounds that he was not entitled to lodge it on his own behalf without being represented by an attorney, even though he was himself an attorney. On 14/12/2014, the Supreme Court of Cassation granted the applicant the right to reopen the impugned proceedings and examined the case on the merits. On 16/12/2010, the Constitutional Court found a violation of the right to a fair trial in a case involving a practising lawyer whose appeal on points of law had been dismissed by the Supreme Court. In addition, in 2011, the impugned provision of the Civil Procedure Act was amended providing that a party lodging an extraordinary remedy must be represented by legal counsel, except if the party is a practising lawyer.	**SER / Masirevic (30671/08)** **Judgment final on 11/05/20014** ***Final Resolution CM/ResDH(2015)151***
The case concerned the dismissal by the Court of Cassation of the applicants' request for rectification of a judgment in inheritance proceedings on the grounds that the value of the property did not reach the statutory threshold taking into account the initially declared value and not the actual value determined by the expert. In 2016, the procedure of rectification of a judgment, which had been the underlying reason of the violation at hand, was abolished.	**TUR / Hasan Tunc and Others (19074/05)** **Judgment final on 30/04/2017** ***Final Resolution CM/ResDH(2018)188***

3. Assessment by courts of statutes of limitation

In this case, the Court of Cassation dismissed as time-barred additional submissions to the applicant's appeal on points of law in criminal proceedings with a brief reasoning ignoring the concrete circumstances of the case. In 2009, the Criminal Procedure Code was amended to extend time limits for lodging appeals on points of law with the Court of Cassation and to provide for clear rules on time limits for filing additional submissions in appeal proceedings. The Constitutional Court's and Cassation Court's case-law evolved accordingly. In 2012, with reference to the present judgment, the Constitutional Court declared that, in order to avoid arbitrariness and legal uncertainty, missed deadlines for reasons beyond the control of the person entitled to lodge a complaint shall be recovered *ex jure* and automatically. The Court of Cassation followed the same approach, stating that the restoration of an appeal time limit which had been missed for valid reasons shall be recovered automatically, which was was taken into account in the 2021 Criminal Procedure Code.	**ARM / Mamikonyan (25083/05)** **Judgment final on 04/10/2010** ***Final Resolution CM/ResDH(2015)142***
This case concerns the unreasoned dismissal of the applicant's petition for review (cassation) in criminal proceedings by the Supreme Court of Cassation due to an isolated judicial mistake. The European Court noted that the dismissal of the applicant's petition could not be seen as a justified enforcement of a legitimate procedural limitation of the right of access to a court as the judge did not indicate the start or end dates by which the appeal should have been submitted, which was difficult to reconcile with the requirement that court decisions should adequately state the reasons on which they are based. The petition for review in criminal proceedings was regulated in the 1998 Criminal Procedure Code, which reformed the previous system of appeals against convictions and sentences. In 2012, the Supreme Court of Cassation provided to all its judges detailed guidance on its practice with regard to the dismissal of petitions for review, emphasising that such decisions must be motivated in detail. In case of inaccuracies, like erroneously calculated deadlines, the interested party may appeal to the President of the Criminal Division of the Supreme Court of Cassation to cancel the dismissal.	**BGR / Angel Angelov (51343/99)** **Judgment final on 15/05/2007** ***Final Resolution CM/ResDH(2013)153***
The cases concerned the Constitutional Court's dismissal as outside the statutory time limit of the applicant's constitutional complaint about the lower courts' alleged unfairness of proceedings, which could only be lodged after the prior Supreme Court's rejection of the applicant's appeal on points of law. With regard to individual measures, as from 2014, Article 133 of the Constitution offered a possibility for the reopening of similarly impugned Constitutional Court proceedings. The Constitutional Court changed its practice of calculating the statutory time limit for lodging a constitutional complaint in line with the Court's conclusions in this judgment. Hence, the statutory time limit for lodging a constitutional complaint alleging unfairness of proceedings is considered to be met not only in respect of the decision on appeal on points of law but also in respect of the lower-court decision against which the appeal on points of law has been lodged.	**SVK / Franek (14090/10)** **Judgment final on 11/05/2014** ***Final Resolution CM/ResDH(2015)12*** **SVK / Kovárová (46564/10)** **Judgment final on 23/09/2015** ***Final Resolution CM/ResDH(2016)138***

In this case, the Court of Cassation declared inadmissible the detained applicant's appeal on points of law on the grounds that the statutory time limits had expired, after the assize court judgment *in absentia* had been served through publication in the Official Gazette due to the applicant's "unclear" whereabouts. As of 2008, the National Judiciary Network Information System (UYAP), an integral part of the e-justice system, works in full capacity and enables justice services to be carried out in the shortest time with the least cost in a transparent, effective, reliable, objective and auditable way. The network includes all courts, prosecution offices, prisons, and other relevant judicial bodies and institutions in its scope.	**TUR / Davran (18342/03)** **Judgment final on 03/02/2010** ***Final Resolution CM/ResDH(2017)115***
The case concerned the Supreme Military Court's dismissal as being outside the time limit, of the applicant's claim for compensation in respect of a head wound he had suffered as a conscript in the army in 1990, but which had only been detected in a medical examination in 2007, on the basis of an excessively formalistic interpretation of the five-year time limit provided for in the Supreme Military Administrative Court Act. In 2017, the military jurisdiction (including the Military Court of Cassation and the Supreme Military Administrative Court) was abolished by constitutional amendment and civil administrative courts acquired the competence to settle issues falling under military administration. With regard to personal injury cases, the Supreme Administrative Court referred in its case-law to the "date on which the victim becomes able to assess the consequences of the damage" in line with the European Court's case-law. With regard to individual measures, in reopened proceedings, the applicant was partially granted compensation for the injury incurred.	**TUR / Esim (59601/09)** **Judgment final on 17/12/2013** ***Final Resolution CM/ResDH(2019)105***
The case concerned the Court of Cassation's dismissal, under the Code of Obligations, of the applicant's claims for compensation following an oil explosion damaging his property, on the grounds that the applicant had submitted his claims after the expiration of the one-year time limit despite the fact that that, in the immediate aftermath of the incident, the information as to its cause and origin was limited to mere speculation. The 2012 Code of Obligations extended the legal time limit to two years, starting from the date on which the person suffering damage becomes aware of the loss, damage or injury and of the identity of the person liable for it but, in any event, ten years after the date of its occurrence. As regards individual measures, the applicant was granted compensation for pecuniary damage in reopened judicial proceedings.	**TUR / Kursun (22677/10)** **Judgment final on 30/01/2019** ***Final Resolution CM/ResDH(2022)424***
The case concerned the undue restriction of a limited liability company's right of access to a court due to the excessive formalism of the Higher Commercial Court in refusing to review the applicant company's appeal on points of law, finding the appeal inadmissible for failure to apply for an extension of the time limit despite the fact that such a request had been set out in a cover letter resubmitting the appeal following payment of the full court fees. In 2017, the High Commercial Court disseminated the Court's judgment to the lower courts as well as to the judges of the Judicial Chamber for Commercial Cases of the Supreme Court. In the wider context of an overall reform of the judicial system in 2017, several procedural codes were renewed, in particular the Code of Commercial Procedure, which now provides for clear procedural requirements for appeals in cassation and for requests for the renewal of time limits.	**UKR / Frida, LLC (24003/07)** **Judgment final on 08/03/2017** ***Final Resolution CM/ResDH(2018)190***

4. Payment of court fees

This group of cases concerned the domestic court's unjustified refusals to examine the merits of the applicants' civil claims for compensation of damages on the grounds that the court fees had not been paid and partial reduction or postponement of payment had not been granted despite adequate information having been provided for the courts to evaluate the applicants' financial situations. The shortcomings identified in the present cases constitute isolated incidents in the case-law of domestic courts. Recent examples of ECHR-compliant Supreme Court case-law have been submitted. The issues raised have also been discussed by representatives of the Ministry of Justice and the Supreme Court. Both judgments have been included in the curricula of the Judicial Training Centre.	**LVA /Blumberga group (70930/01)** **Judgment final on 14/01/2009** ***Final Resolution CM/ResDH(2015)124***
The case concerned the lack of access to a court on account of the rejection of the applicant's appeal against a district court decision by the County Court on the basis that she had not paid the stamp duty within the statutory time limit, despite the fact that payment had been made in due time. Given that the violation in the present case was the result of inadequate conduct of the domestic courts, the judgment's dissemination was considered sufficient to remedy the problematic aspects found.	**ROM / Hietsch (32015/07)** **Judgment final on 23/12/2014** ***Final Resolution CM/ResDH(2015)129***

5. Clerical errors

These cases concerned denial of access to a tribunal due to the excessively formalistic rejection as inadmissible of the applicants' appeals in criminal proceedings before criminal courts, including the Court of Cassation. In particular, the *Kallergis* case concerned the Court of Cassation found that an appeal registration report was lacking due to an error of the registrar. Following the Court's judgment finding a breach of the applicant's right of access to a court, his appeal in cassation was heard on the merits and was rejected in reopened proceedings. In 2018, the Court of Cassation's President issued a Circular addressed to all criminal judges' providing guidance on the interpretation of inadmissibility grounds to avoid excessive formalism. In 2021, the Code of Criminal Procedure was amended to provide that shortcomings and errors attributed to the registrar responsible for the drafting of the report do not constitute grounds for inadmissibility of the appeal. In the event of a failure to meet a formality by the appellant or his lawyer, the competent prosecutor is obliged to invite them to provide clarifications or to rectify the error within a specific deadline. The Explanatory Report to the 2021 amendment explicitly refers to the present judgment. As regards *Vamvakas,* the 2019 Code of Criminal Procedure provided the possibility to lodge an appeal either by providing a declaration to the clerk of the court having delivered the challenged judgment or a document detailing the reasons for appeal.

GRC / Kallergis (37349/07)

Judgment final on 02/07/2009

Final Resolution CM/Reds(2022)124

GRC / Vamvakas group (36970/06)

Judgment final on 16/01/2009

Final Resolution CM/ResDH(2021)380

6. Excessively formalistic decisions concerning detention

The case concerned the court of appeal's refusal to review the applicants' appeals against detention on the sole grounds that the criminal case was no longer considered to be in its pre-trial stage and had been transferred to the court. The Court found that the refusal to examine an appeal against detention constituted an unjustified denial of access to the court of appeal on grounds not envisaged by the domestic law. In 2008, after the facts of the case, the Court of Cassation changed its case-law, ruling that the right of appeal may not be restricted on the sole grounds that the appeal had been lodged within the scope of judicial control but beyond the pre-trial proceedings or during the court proceedings of the case. The 2022 Criminal Procedure Code addressed the issue in a special provision.	**ARM /Poghosyan group (44068)** **Judgment final on 20/03/2012** ***Action Report DH-DD(2014)326***
The case concerned the dismissal of a claim for non-pecuniary damage for unlawful administrative detention by the police on the basis that the applicants' suffering mental damage had not been sufficiently demonstrated, in particular through the provision of expert medical evidence. The Court held that the administrative courts, adhering strictly to the principle *affirmanti incumbit probatio*, had ruled in stark contrast to cases in which the same courts had held that the mere fact of unlawful detention must be regarded as giving rise to non-pecuniary damage, which is the correct approach under Article 5 § 5 ECHR. To promote the application by domestic courts of the "correct approach" identified by the Court, a government communication was reiterated to the Supreme Administrative Court stressing the need to unify domestic jurisprudence in the light of this approach.	**BGR / Dzhabarov and Others (6095/11)** **Judgment final on 30/06/2016** ***Final Resolution CM/ResDH(2017)362***

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