The Doctrine of Excessive Formalism in the Legal Theory and Practice of the European Court of Human Rights

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Abstract: As a means of organising certain existing disputes and resolving conflicts within society, it has made the institution of procedural formalities necessary since the beginning of history. The existence of formalities in a proceeding, whether judicial or extrajudicial, serves to limit certain situations in the course of the process. It is well known that there are several principles that regulate the formalities of procedure, mainly by establishing procedural limits. These reason values are thus aimed at achieving the principles of purpose. The methodological basis of the article is the dialectical method of cognition based on materialistic dialectic with the use of such general scientific methods as analysis, synthesis, induction, deduction, abstraction, specification, analogy, hypothesis building method, and the system-structural method. The study has resulted in the identification of cases of excessive formalism by courts when applying the rules of procedural law. The practical significance of the results obtained is to prevent such mistakes by law enforcement authorities in the future. As a result of writing this article, the author has established that the main manifestations of excessive formalism are the creation by the court of procedural obstacles to the implementation of procedural rules by the parties to the case, strict interpretation by national legislation of the procedural rules, and return of an administrative claim on formal grounds. It is proved that excessive formalism in resolving the issue of acceptance of a statement of claim leads to a violation of the right to fair judicial protection.

Keywords: Excessive formalism, judicial process, principles of law.

THEORETICAL PART

Of course, this topic has a very broad scope, and also because of the ambiguity of the expression "formalism", it is so ramified that it relates, in turn, to almost all major philosophical problems. Here, I would like to analyse the specific meaning of legal formalism: formalism as a characteristic of lawyers' reasoning, a characteristic related to the central role of rules or regulations in practical legal reasoning.

Recently, at least two authors have spoken of legal formalism in this sense, and they have done so with the explicit aim of defending, at least to some extent, this aspect of lawyers' reasoning, thereby putting themselves on a collision course with the mainstream, which today, as in the past, carries the word "formalism" with negative connotations. The authors I am referring to are the Italian Mario Jory and the American Frederick Schauer. For both of them, formalism (as redefined by them) is the key to understanding the usual ways and characteristics of legal thinking. Both Jory and Schauer believe that formalist reasoning is not an exclusive attribute of the legal field, but it manifests itself in the latter in such a modern, deeply rooted and comprehensive form that it constitutes a truly distinctive element.

One can continue to speak of formalism, of decisions based on rules, even if the opacity of the latter with respect to the underlying rationale or considerations external to them, and thus their resistance to recalcitrant cases is not categorical, but only presumptive, i.e., such that it results from the generality of cases. Except where the absurdity, injustice or unreasonableness that would result from a decision based on the rule applicable to the case is so great as to justify its departure in favour of the underlying rationale (or any reason external to it if the rationale is considered insufficient). In other words, he believes that formalism is compatible with the occasional, albeit qualified, interpretation of rules as defeasible, that is, that they may yield to considerations unrelated to their textual content, at least in the face of particularly pressing circumstances. Thus, he takes sides in the recent debate, as lively as it is confusing, on the subject of victory, viewing the latter as a way of dealing with rules that is not necessary at all, but only possible and accidental. In this way, the American author believes that he can defend the autonomy of legal thinking and its dependence on rules by reconciling their binding nature with a limited openness to extra-normative and, arguably, extra-legal considerations. With this approach, he believes that he can refute Dworkin's objections to the "rule model" and Gartian positivism, at least in part (Alexander, 2007).

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Schauer calls this approach to rules presumptive legal positivism. In this case, legal positivism would be understood not as a conceptual or theoretical thesis about the nature of law or as a type of approach to law, but as an empirical and explanatory thesis about the usual ways of decision-making by lawyers (Schauer, 1998) Presumptive legal positivism would offer a plausible explanation for the widespread practice in the American legal system in which a formalistic approach is combined with rule-sensitive particularism not only in the common law but also in the legislative law itself. It can be said that even this type of system is characterised by a limited scope, a relative separation from other social spheres, despite the sometimes acknowledged openness to outside considerations (Schauer, 2004).

Schauer's approach to formalism, as I mentioned in the second section of this text, focuses on the opposition between the letter and the spirit of the law. The American philosopher makes extensive use of the notion of literal meaning, presenting it as something that always dispense with considerations external to the text, in particular, the justifications of normative content embedded in them. He also seems to believe that if a literal meaning exists, it constitutes a normal, necessary and sufficient basis for justifying legal decisions, except in exceptional cases. Of course, he takes into account the possibility that, when the normative wording is ambiguous, in order to choose one of the many possible meanings, it is necessary to resort to considerations related to the purpose of the norm itself. In addition, he adds that the legal environment may ascribe to decision-makers the power to pay attention also or only to the rationale underlying the rules, or to factors external to them and, obviously, to the law itself. But, in short, formalism as understood seems to work only in cases where decision-makers' reasoning is guided by the literal meaning of the statutory provisions (Zorzetto, 2013). In doing so, however, it seems to me that he makes the mistake of equating formalist technique with a particular approach to interpretation, or, if you will, with a particular "theory" of interpretation, one that is called textualism in the legal field from which it originated and that had Justice Scalia as its greatest standard-bearer (Scalia, 1989). This is why he interprets formalism as closely linked to strict legality, a goal that can only be achieved if the interpreter remains attached to the literal meaning of the texts.

Schauer's approach, however, is somewhat problematic on the one hand, and too demanding on the other. What is problematic is the very notion of literal meaning, which, far from being a semantic given that can be unambiguously characterised, is at best a label for a highly controversial semiotic problem. Claudio Luzzati recently listed, and only as an example, sixteen very different notions of literal meaning (Velluzzi, 2016). The fact that in Schauer's economy of discourse the literal meaning is presented in constant opposition to rule justification undoubtedly helps to limit the scope of this concept, but does not dispel the doubts associated with it, since, as we know, the concept of rule justification is not at all peaceful.

This indicates that the scientific support of this issue does not fully meet social expectations and needs to be improved. Under such circumstances, the issue of studying excessive formalism in court proceedings has become relevant, since it will be of a certain scientific interest, resulting in the acquisition of new knowledge, identification of cases of excessive formalism, and improvement of legal relations in the field of administrative court proceedings, which is the purpose of the article. The above is achieved by studying the problematic issues related to with the statement of claim as the main object of excessive formalism and by analysing the case law in this area of public relations, which is the task of the study.

Analysis of Court Practice

In its judgement of 31 July 2020 (case "Santos Calado *et al.* v Portugal" - 55997/14, 68143/16, 78841/16, 3706/17), the European Court of Human Rights considered four complaints of Portuguese citizens regarding the inadmissibility of appeals they filed with the Constitutional Court.

The ECtHR found that there had been a violation of the ECHR and, in particular, the right of access to court in two of the requests: Application no. 55997/14 (Dos Santos Calado) and Application no. 68143/16 (Amador de Faria e Silva and others).

In order to determine what is meant by "excessive formalism", the ECtHR has relied on three aspects: (i) whether the means of appeal are foreseeable; (ii) after identifying procedural errors, whether the person concerned has suffered an unreasonable burden due to such errors; (iii) and whether the formalism was excessive, for example, as a result of a particularly strict interpretation of the procedural rule, which prevented the case from being considered on the merits and constituted a violation of the right to an effective judicial protection.

In the first application considered by the ECtHR (Application No. 55997/14 (Dos Santos Calado)), the Portuguese Constitutional Court ruled that the appeal was inadmissible on the grounds that it was filed on the basis of an erroneous provision of the rule governing the issue contained in the Law on the Constitutional Court. An objection was filed against this decision, which was also rejected.

The European Court has emphasised that the right of access to a court is an integral aspect of the guarantees set out in the European Convention on Human Rights, referring to the principles of the rule of law and the prevention of arbitrariness that underpin much of the Convention. Any restrictions on the above right must not limit an individual's access in such a way or to such an extent that it affects the very essence of the right. Thus, the European Court has noted that, when applying procedural rules, courts should avoid excessive formalism that could undermine the fairness of the proceedings.

The applicant also filed a motion to amend the appeal decision, reiterating that the reference to the erroneous paragraph of the article of the Law on the Constitutional Court was a simple clerical error and that the grounds of appeal related to the alleged unlawfulness clearly followed from the appeal motion filed. He also requested that his clerical error be treated as an omission and, accordingly, that he be notified of its correction. But this request for reform was also rejected by the Constitutional Court.

The ECtHR then found that the approach taken by the Constitutional Court was excessively formal and that it disproportionately restricted the applicant's right to have her appeal examined on the merits. The Court also understood that the Constitutional Court could have asked the applicant to correct the omission and clerical error by indicating the relevant clause of the rule.

Thus, the ECHR considered that there had been a violation of the right of access to the tribunal provided for by the ECHR.

In the second application analysed by the ECtHR [Application no. 68143/16 (Amador de Faria e Silva and others)], the Portuguese Constitutional Court ruled, also in summary, on the inadmissibility of the appeal on the grounds that the applicants had not raised the alleged unconstitutionality in the context of the counter-claims of the judicial appeal issued by the North Central Administrative Court - the so-called burden of preliminary investigation. The Claimants also complained about this decision, arguing that they could not have raised the issue of the alleged unconstitutionality earlier, as the difference that gave rise to it was only removed after the North Central Administrative Court's decision. The Portuguese Constitutional Court dismissed the complaint, holding that the applicants could have expected the decision of the North Central Administrative Court to be reversed.

However, the ECtHR held that the plaintiffs had raised the issue of unconstitutionality in the context of counterclaims and that the Portuguese Constitutional Court had also applied excessive strictness in requiring a prior and adequate raising of the issue of unconstitutionality, thus depriving the parties of the opportunity to consider the issue on the merits before this Court.

In its judgment of 9 June 2022, the European Court of Human Rights convicted the French state of violating the right to a fair trial. This case is a good opportunity to review the theory of "excessive formalism" developed by the European Court of Human Rights in the context of the right of access to court.

In this case, the applicant was engaged in real estate development through a group of companies and initiated arbitration proceedings to resolve a financial dispute between it and Édifice de France. By an award dated 15 November 2013, the arbitrator ordered the applicant to pay almost EUR 2,000,0000 to the company. The applicant therefore brought an action for annulment on paper against that award before the Douai Court of Appeal. The admissibility of this action was challenged by his opponents on the grounds that the document should have been filed electronically. In two decisions dated 7 March 2016 and 18 January 2018, the Court of Appeal of Dué firstly recognised the admissibility of the claim for cancellation on paper and secondly set aside the award. On 26 September 2019, the Court of Cassation appealed against these two decisions and set aside these two decisions.

Indeed, the court of cassation, pursuant to the provisions of Article 930-1 of the Code of Civil Procedure, considered that "the admissibility of a claim for setting aside an arbitral award is conditioned by its submission to the court by means of electronic communication". Thus, on 17 March 2020, the applicant filed an application with the European Court of Human Rights, alleging a violation of Article 6 and

his right of access to court. In fact, the European Court largely upheld these claims, ruling that the specific circumstances of the case sometimes require a derogation from the obligation (which is considered legitimate in principle) to file an appeal by electronic means.

This case is particularly interesting because it is in the context of regulatory and jurisprudential law, which deals with the fundamental issue of access to the law and a judge in the context of an increasingly digital democratic society. Indeed, it is not unimportant to recall that on 3 June 2022, the Council of State issued an opinion and decision on the generalisation of the dematerialised residence permit application procedure. In a pragmatic approach aimed at effectively guaranteeing the rights of users, the administrative judge requires the government to provide alternative solutions so as not to de facto deprive disadvantaged foreigners who do not have real or satisfactory access to the Internet of the right to apply for a residence permit (CE, Section, 2022). Although this decision is not explicitly stated in the commented judgment, the fact remains that the legal reasoning adopted is not inconsistent with that of the European Court, at least in some respects. Indeed, in line with its traditional case law aimed at guaranteeing rights "not theoretical or illusory, but concrete and effective" (Affaire Airey c. Irlande).The European Court of Justice demonstrates, unlike the Court of Cassation, healthy pragmatism (I) and sophistication (II) of case law in the service of the effectiveness of the fundamental right of access to a judge.

This is not the first time that the European Court has been asked to consider the concept of excessive formalism. In this case, this concept plays a significant role in both the admissibility (A) and the merits of the application (B).

The Government considered that the application was inadmissible for failure to exhaust domestic remedies. This argument was serious, as the applicant had not explicitly "formulated a complaint alleging a violation of Article 6 in his defence before the Court of Cassation" (§ 34). By the Court's own admission, none of the parties to the dispute had raised the issue of a violation of Article 6 of the Convention before the Court of Cassation, which was nevertheless preoccupied with a dispute over the right of appeal. However, beyond this word (Article 6), the European Court retains the case (fair trial). Indeed, the Court considers that the discussion between the parties concerned the difficulties of filing a claim online with the Court of Appeal of Douai, and thus "the right of access to the court was the subject of dispute mainly in the arguments presented by the applicant before the Court of Cassation" (§ 38). Thus, the Strasbourg Court concluded that the complaint alleging a violation of Article 6 had been substantively examined by the domestic courts, which allowed exhaustion of the available domestic remedies.

In doing so, the Court gives concrete expression to its case law, which has remained unchanged for almost half a century, according to which the exhaustion of remedies rule should be applied "with a certain degree of flexibility and without excessive formalism" (§ 36). In line with the ECtHR judges' paradigm, the approach is not only formal, but also substantive: it does not matter that Article 6 has not been directly applied since the adversarial debate concerned issues that de facto fall within the scope of the right to a fair trial. Such a generous assessment of the conditions for admissibility allows the Court not to declare inadmissible an application which it considers to be well-founded. Referring to the applicant's implicit arguments - the Court considers that Article 6 was indeed examined in the "main way" - European judges refuse to allow a strict assessment of the conditions for exhaustion of remedies. The possibility of not declaring an application inadmissible on the grounds that the complaint was lodged with a national court was already mentioned by the Court in a previous judgment, not explicitly but indirectly. Indeed, in the case of Association les Témoins de Jehovah (CEDH, 2010) the Court notes that the complaint alleging a violation of Articles 14 and 9 had indeed been "lodged with the Criminal Court and the Court of Appeal, but it was not raised before the Court of Cassation, including in depth". It is likely that this explanation meant that the complaint alleging a violation of the Convention on which the applications were based was capable of satisfying the exhaustion of remedies requirement.

The judgment in Xavier Lucas fully confirms this hypothesis and continues the policy of the case-law to relax the admissibility conditions. It has been well established that a complaint can be raised "on the merits" (Affaire Guzzardi c. Italie) or "at least in substance" (CEDH, 1987), and that it can now be violated "in a fundamental way". This interpretive dynamism is not surprising, since, as rightly recalled in the CGAS judgment of 15 March 2022, the Court interprets Article 35-1 of the Convention "realistically" (CEDH, 2022). The leniency of the case law here is

entirely driven by the logic of efficiency: The court does not intend to paralyse the exercise of the right to individual appeal, which is one of the "cornerstones of rights", on the altar of regulatory rigidity (CEDH, 2005).

"The Court's case-law does not endorse excessive formalism," as Judges Popovic, Yudkivska and De Gaetano summed up perfectly in their separate joint opinion in the Vucovic case (CEDH, 2014).In order to give concrete and effective effect to the Convention, the Court is careful not to deprive applicants of the guarantees they claim through an excessively strict application of the procedural rules governing the judicial process. In the Zubac judgment, the Court made it clear that "excessive formalism" can undermine the guarantee of a "concrete and effective" right" (CEDH, 2018). The Court's flexibility is illustrated not only in the context of the exhaustion of remedies rule, but also in the context of the right to a tribunal.

The Court is careful not to deprive applicants of the guarantees to which they are entitled as a result of an overly strict application of the procedural rules governing the trial.

In this case, the applicant noted that he did not have the material possibility to file an appeal with the Court of Appeal of Dué through the e-advocacy platform. However, despite the specific substantive circumstances of the case, the Court of Cassation held "that the applicant's annulment claim should have been filed electronically in accordance with Articles 1495 and 930-1 of the CCP" (§ 45). It is precisely this mechanical and irreconcilable application of the provision that gives rise to the conclusion that there has been a violation of Article 6. However, the significance of this conviction should not be misunderstood. This case is not about the fundamental dematerialisation of access to justice. Indeed, the Court states that it is "convinced that digital technologies can contribute to a better administration of justice and be placed at the service of the rights guaranteed by Article 1 § 6" (§ 46). Thus, by requiring the filing of an application electronically, the state interference with the right of access to court does pursue a legitimate aim (§ 46). Similarly, a restriction on the exercise of this right was indeed considered foreseeable in light of the provisions of Article 930-1 of the CPC, which expressly requires the transmission of procedural documents by electronic means. However, some doubts may arise as to whether a claim for setting aside an arbitral award is indeed covered by this provision. In this regard, the Court held that neither the resolution on the application of this article of 30 March 2011 nor the local procedural agreement of 10 January 2013 can be interpreted as establishing an exception to the obligation to file an electronic appeal in an action to set aside an arbitral award.

In this judgment in the case of Xavier Lucas v. France (Affaire Xavier Lucas c. France) The European Court of Justice has demonstrated tact and sophistication. Indeed, by taking care not to offend (or even insult) the French Court of Cassation with particularly offensive semantics (A), the European Court of Justice is not, in fact, relinquishing the control it exercises over the highest national courts and thus positioning itself as the de facto last resort in wider Europe (B).

The analysis of the judgment shows that the European Court, despite the fact that it essentially condemns the interpretation adopted by the Court of Cassation, tries not to offend the sensitivity of the supreme court of the French national judicial system. Thus, the European Court did not forget to note that, with regard to the foreseeability of the interference, the Court of Cassation "gave clear reasons for its reasoning" and "did not see any serious reason to depart from the conclusion reached" (§ 50). Such a division of good legal points is part of judicial diplomacy, which avoids verbal abuse that does not contribute to the calmness of the judges' dialogue. It is also important to note that in § 57 of the judgment, the Strasbourg judges, even while preparing to uphold the judge's apparent excess of formalism, took the time and care to remind that the European Court should not "question the legal reasoning followed by the Court of Cassation in order to invalidate the judgment rendered by the Dué Court of Appeal" (Lazaud, 2006).

This clarification was not necessary in this case. The European Court could well have stated without further ado that the Court of Cassation, in the light of the circumstances of the case, "demonstrated a formalism which was not required by the guarantee of legal certainty and the proper administration of justice and must therefore be considered excessive" (§ 57). Nevertheless, a reminder and respect for what is partly a res judicata power of the Court of Cassation has the merit of existence and undoubtedly avoids any nuisance that unnecessarily prejudices the national court. The linguistic courtesy shown by the European Court of Justice should be emphasised, as this has not always been the case.

Indeed, the European Court has been far less smug about the Court of Cassation in the past. In the case of Dulaurance v. France, the harshness of the Court's remarks about the Court of Cassation was a painful memory for the judge. After the Court of Cassation had declared the applicant's application inadmissible on the sole ground that it was novel, the European Court taught a real procedural lesson, concluding with a horrified expression that it had made a "manifest error of judgement" (CEDH , 2000).The harshness of this sentence, which was all the more undesirable for the judge as it was based on an expression taken from the case law of the Council of State, provoked "a terrible conflict with the Court of Cassation" (J-P. Costa, 2007).

Subsequently, in the 2015 judgment in Bauchan v. Ukraine, the Court returned to the Dulaurance case, explaining what constitutes a clear error of judgement: it is a "manifest" error of fact or law made by a national court "in the sense that no reasonable judge could have made it" (CEDH , 2015).

In the same vein, the Commission's report of 12 October 1994 (Fouquet v. France) stated that the Court of Cassation "clearly committed an error of judgement" by failing to draw all the necessary inferences from the fact that the applicant's claims included, in addition to the alternative claim, the main claim (CEDH, 1994).

On the other hand, outside of this case law policy, the very position of a European judge inevitably forces one to review the conventionality of national court judgments. Indeed, as stated, in particular, in the Momusso judgment, France "may be held liable independently of the national authority to which the alleged violation of the Convention in the national system is appealed" (CEDH, 2007). However, national courts are, of course, a national authority (which is of paramount importance in the Court's view). As a consequence, there is, in principle, no justification for treating a violation of the Convention differently on the basis of its administrative, political or judicial origin, other than the natural respect for the judiciary. Since the responsibility of a state rests on the conduct of its courts, it is not surprising that condemnation of the latter should in fact be analysed as condemnation of the case law of domestic courts. Moreover, given the concomitant movement towards conventionalisation and fundamentalisation, these hypotheses of direct challenges to national case law are not destined to run out of steam. Thus, without saying so explicitly and without fully assuming it, the European Court is likely to become a Court of "European public policy".

CONCLUSIONS

Excessive formalism in deciding whether to accept a claim or complaint is a violation of the right to to a fair trial. It is necessary to avoid excessive overly formalistic attitude to the requirements stipulated by law, as access to justice must be not only factual but also real. The level of access provided by national legislation should be sufficient to ensure the right to a court of law, taking into account the principle of the rule of of law in a democratic society. In order for access to be effective to be effective, a person must have a clear practical opportunity to challenge actions that interfere with his or her rights.

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