

UNLOCKING JUSTICE: ACCESS TO COURT AND LITIGATION COSTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: Litigation costs constitute a standard human rights issue under the right of access to a court, as enshrined in Article 6(1) of the European Convention on Human Rights. This article provides a detailed overview of the factors and considerations that the European Court of Human Rights examines in its proportionality analysis of litigation costs for civil rights claims, particularly those factors that may disrupt the balance between the right of access to a court and legitimate aims. These factors and considerations include excessive formalism in court fees, stamp duties, or security for costs that impose disproportionate financial burdens; unreasonable cost calculations, particularly concerning claim success and non-pecuniary damages; excessive and unjustified litigation costs claimed by state authorities; and the failure to consider a litigant's vulnerability. These factors serve as benchmarks and red flags, triggering human rights scrutiny in the assessment, allocation, and justification of litigation costs in civil rights cases.

Keywords: Access to court, Litigation costs, Excessive fees, Prohibitive costs, Vulnerability, European Convention on Human Rights.

1. INTRODUCTION

The effective protection of human rights depends on the right to a fair trial which, *inter alia*, requires the access to a court. A critical yet often overlooked limitation of the access to a court, as guaranteed under the right to a fair trial in Article 6 of the European Convention on Human Rights (ECHR or Convention), is the cost of litigation. However, such costs do not, in themselves, constitute a restriction on the right of access to a court that is inherently incompatible with Article 6(1), and states enjoy a wide margin of appreciation in matters concerning litigation costs (Hirvelä and Heikkilä, 221, pp. 65, 68). Litigation costs are understood as all necessary or unavoidable expenses incurred during legal proceedings such as court costs (court filing fees and stamp duties), representation fees (including lawyers' fees), expenses related to gathering evidence, and other procedural costs (e.g. security for costs, conditional fee arrangements, and success fees). These costs can significantly affect not only an individual's decision to seek justice but also the potential benefits of pursuing a case, thus impacting the effective protection of rights. Therefore, evaluating these costs is crucial for understanding how to effectively protect rights and handle legal claims in domestic courts. While costs are inherent to every legal procedure, ensuring access to justice at reasonable price is a key issue in maintaining the right to a fair trial.

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Although Article 6(1) does not explicitly mention access to court or litigation costs, the European Court of Human Rights (ECtHR or the Court) commonly examines litigation costs incurred before national courts as a limitation of the right of access to a court. Such costs may also be assessed as limitations under other provisions of the European Convention on Human Rights (ECHR). While Article 6(1) permits limitations by implication,² these must pursue a legitimate aim and maintain a reasonable relationship of proportionality between the means employed and the objective sought.³

This article analyses the key factors, circumstances, and considerations relevant to determining how litigation costs can adversely affect the right of access to a court under the civil limb of Article 6(1) of the ECHR. The analysis focuses on civil claims concerning ‘civil rights and obligations’, as defined by Article 6. Although this concept is autonomous,⁴ it also includes rights and obligations recognised as such under domestic law. Consistent with the object and purpose of the ECHR, the Court has interpreted the civil limb of Article 6 to encompass certain rights and claims that, under national law, fall within public law or are adjudicated in administrative, disciplinary, constitutional, or specialised proceedings (Schabas, 2015, pp. 273–274).

This study is based on comprehensive research into ECtHR case law concerning litigation costs under the civil limb of Article 6. It examines approximately 50 publicly available ECtHR cases selected to illustrate the key issues discussed. This case analysis has brought these factors and patterns to light.

In order to contribute to the discussion on the human rights aspects of litigation costs, this article provides a detailed overview of the factors⁵ and recurring patterns of circumstances that lead to violations of the Convention due to litigation costs, alongside the relevant considerations in the Court’s assessment. This represents a shift in perspective, as the Court has generally considered most restrictions as proportionate (Grabenwarter, 2013, p. 128) and litigation costs *per se* compatible with Article 6.⁶ These factors and patterns are central to the Court’s proportionality analysis in balancing the right of access to a

² *Golder v. United Kingdom*, ECtHR, Application no. 4451/70, 21 February 1975, para. 38.

³ *Guérin v. France*, ECtHR, Application no. 25201/94, 29 July 1998, para. 37; *Malahov v. Moldova*, ECtHR, Application no. 32268/02, 7 June 2007, paras. 26–28.

⁴ ‘The Court reiterates that the concept of “civil rights and obligations” cannot be interpreted solely by reference to the respondent State’s domestic law; it is an autonomous concept deriving from the Convention.’ - *Grzęda v. Poland*, ECtHR (GC), Application no. 43572/18, 15 March 2022, para. 287.

⁵ The term “factor” is used by the Court: ‘[T]he amount of such fees assessed in the light of the particular circumstances of a given case, including the applicant’s ability to pay them, and the stage of proceedings at which such a restriction is imposed, are factors which are material in determining whether or not a person enjoyed his right of access.’ - *Kreuz v. Poland*, ECtHR, Application no. 28249/95, 19 June 2001, para. 60; *Podbielski and PPU Polpure v. Poland*, ECtHR, Application no. 39199/98, 26 July 2005, para. 64; *Paykar Yev Haghtanak Ltd v. Armenia*, ECtHR, Application no. 21638/03, 20 December 2007, para. 48; *Laçi v. Albania*, ECtHR, Application no. 28142/17, 19 October 2021, para. 51. Also: ‘Having regard to all these factors, the Court concludes that the applicant’s right of access to a “tribunal” within the meaning of Article 6 § 1 was infringed.’ - *Ait-Mouhoub v. France*, ECtHR, Application no. 22924/93, 28 October 1998, para. 58.

⁶ *Harrison Mckee v. Hungary*, ECtHR, Application no. 22840/07, 3 June 2014, para. 22.

court against a legitimate aim. Factors that typically prompt the Court's scrutiny include excessive formalism in the imposition of court fees, stamp duties, or security for costs; unreasonable cost calculations, mostly concerning the assessment of the success of claims in general and of claims for non-pecuniary damages in particular; excessive or unjustified litigation costs claimed by state authorities representing the state in legal proceedings; and failure to consider a party's vulnerable position in litigation. These factors are relevant for the Court's proportionality analysis.

The article is structured as follows. Section 2 provides background on how litigation costs have emerged as a human rights issue despite the ECHR's lack of explicit guarantees regarding access to court or litigation costs. It also establishes a framework for assessing litigation costs in relation to the right of access to a court. Section 3 examines the factors relevant to proportionality, including excessive and disproportionate formalism in the assessment of stamp duties, court fees, and security for costs, these being the initial expenses typically required of parties seeking legal relief. It also considers unreasonable cost calculations, particularly regarding the litigation success in general and for non-pecuniary damages in particular, excessive or unjustified litigation costs claimed by state authorities, and the failure to account for the vulnerability of litigants.

2. BACKGROUND: LITIGATION COSTS AS A HUMAN RIGHTS ISSUE

None of the rights and freedoms in the ECHR expressly guarantees the right of access to court or contains any reference to litigation costs. Both access to court and litigation costs have been commonly associated with Article 6(1) of the Convention thanks to *Golder v. United Kingdom* and *Airey v. Ireland* respectively. In *Golder* the Court found that the principle that a civil claim must be capable of being heard by a judge is recognized as a fundamental principle of law, similarly to the international law principle that forbids the denial of justice. Article 6(1) of the Convention should be interpreted in light of these principles, ensuring not just the fairness of the proceedings already before a court but also guaranteeing access to the court itself. Therefore, the Court has concluded that the right to access a court is an inherent and independent part of guarantees in Article 6(1), emphasizing that procedural guarantees are meaningless without access to judicial proceedings.⁷ However, this right needs to be 'practical and effective' as the Court found in *Airey v. Ireland*.⁸ In this case, the applicant, unable to afford a lawyer, faced the prospect of representing herself in a separation case against her husband before the High Court of Ireland, where no legal aid was available for such cases. Absence of financial support for legal representation in complex litigations was found to be in breach of Article 6(1) of the Convention, but also that litigation costs and the right to legal aid are actionable under the Convention. As Mark Villiger (2022, p. 350) notes: 'it is impressive how early on this occurred and that in the nearly 50 years since, despite early criticism, the right of access to court has never substantially been called in question.'

⁷ *Golder v. United Kingdom*, paras. 35-36.

⁸ *Airey v. Ireland*, ECtHR, Application no. 6289/73, 9 October 1979.

Litigation costs are therefore typically examined under the right of access to court in Article 6(1) and other fair trial guarantees, such as the principle of equality of arms⁹ and the overall fairness of the procedure.¹⁰ Additionally, litigation costs may implicate the right to property,¹¹ freedom of expression,¹² or other rights,¹³ particularly if they raise issues related to or in connection with these rights and guarantees.

Generally, ‘litigation costs’ encompass all expenses that are necessary or unavoidable during legal proceedings before national authorities. This broad term typically includes court costs, representation fees (such as lawyers’ fees), and expenses related to gathering evidence, collectively representing the financial burden associated with litigation (Reinman 2012, p. 8). According to Principle 25.1. of the UNIDROIT Principles of Transnational Civil Procedure: “‘Costs’ include court filing fees, fees paid to officials such as court stenographers, expenses such as expert-witness fees, and lawyers’ fees’.”¹⁴ The Court observed that litigation costs include a variety of expenses in relation to proceedings, including court fees, stamp duties, security for costs, conditional fee arrangements and success fees,¹⁵ that are to be paid either prior to the proceedings or as the final decision on costs, the latter sometimes assessed against the total amount awarded as compensation.

As Paulsson (2005, p. 246) observes, ‘[j]ustice is unlikely ever to come instantly at no cost to the deserving party, but that observation does not justify complacency.’ Indeed, the right of access to court is not absolute and may be subject to limitations permitted by implication,¹⁶ including financial ones, provided that these limitations do not diminish access to such an extent that the essence of the right is impaired.¹⁷ The cases revolving

⁹ ‘One may distinguish between the effective access to court, on one hand, and equality of arms on the other, as different rationales for obligation of a State to provide for free legal assistance or legal aid scheme.’ - Schabas (2015, p. 285); also, Silva de Freitas (2021).

¹⁰ *Stankiewicz v. Poland*, ECtHR, Application no. 46917/99, 6 April 2006.

¹¹ The right to property can serve as an independent ground for assessing the impact of litigation costs on the applicant (e.g. *Perdigão v. Portugal*, ECtHR, Application no. 4768/06, 16 November 2010; *Musa Tarhan v. Turkey*, ECtHR, Application no. 12055/17, 23 October 2018; *National Movement Ekoglasnost v. Bulgaria*, ECtHR, Application no. 31678/17, 15 December 2020; *Bursać and Others v. Croatia*, ECtHR, Application no. 78836/16, 28 April 2022), or the claim based on excessive litigation costs can be entertained under both Article 1 P1 and Article 6(1) of the Convention (e.g. *Klauz v. Croatia*, ECtHR, Application no. 28963/10, 18 July 2013; *Cindrić and Bešlić v. Croatia*, ECtHR, Application no. 72152/13, 6 September 2016; *Coventry v. United Kingdom*, ECtHR, Application no. 6016/16, 11 October 2022). The right to property usually comes into play when applicant received compensation that was excessively reduced or even exceeded by litigation costs ordered against him.

¹² *Tolstoy Miloslavsky v. the United Kingdom*, ECtHR, Application no. 18139/91, 13 July 1995; *MGN Limited v. United Kingdom*, ECtHR, Application no. 39401/04, 18 January 2011.

¹³ In *Airey v. Ireland* the ECtHR found violation of Articles 6(1) and 8.

¹⁴ ALI/UNIDROIT *Principles of Transnational Civil Procedure*, 2004.

¹⁵ *MGN Limited v. United Kingdom*, ECtHR, Application no. 39401/04, 18 January 2011; *Coventry v. United Kingdom*.

¹⁶ *Campbell and Fell v. United Kingdom*, ECtHR, Application nos. 7819/77, 7878/77, 28 June 1984, para. 90 (noting that ‘that recognition resulted from the fact that the right in question was inherent in the first sentence of Article 6 para. 1 (art. 6-1) but was not defined therein’).

¹⁷ On justifiable limitations, including the financial ones, see Villiger (2022, pp. 347-349).

around litigation costs against the standards set up by the Convention demonstrate that the focus of the Court has been less about the rules on allocation and assessment of costs as such, giving in to margin of appreciation of states, but has been instead more about their flexibility, proportionality and effectiveness in relation to the circumstances of the case. Arguably the Court applies a more flexible approach to requirements not specified in the Convention, such as the right of access to court or litigation costs, in the context of civil limb of Article 6 (Lillo Lobos 2022, pp. 134-135). However, excessive formalism or the absence of adjustment instruments in the face of excessive costs and particular position of an individual and circumstances of the case could be subject to scrutiny under Article 6(1) of the ECHR.¹⁸

The Court starts with the presumption that access to court is not an absolute right, that it can be subject to limitations permitted by implication,¹⁹ including financial limitations,²⁰ as it requires resources and regulations of the state.²¹ The Court also evaluates a legitimate aim and proportionality,²² i.e., whether burden sharing is detrimental for the applicant in the sense that a disproportionate burden distribution restricts the very essence of the right.²³ Finally, it reviews the effect of these costs on the litigant and their compatibility with the Convention.²⁴ Therefore, the scope of review is broad and complex and relies on a range of considerations, such as the rationale of the effective right of access to court, national rules on litigation costs, their flexibility and formalism, latitude left to states with respect to organizing and financing judiciary, circumstances of a particular case, financial position of a litigant, availability of legal aid, and the amount of costs assessed in particular case, which is ‘the material factor in determining whether or not a person enjoyed the right of access to court’²⁵. Accounting for and calibrating all relevant factors can be a demanding task for assessing whether the litigation costs in particular case could tip the balance of burden sharing and amount to breach of Article 6.

3. KEY FACTORS AND CONSIDERATIONS IN THE COURT’S PROPORTIONALITY ANALYSIS OF ACCESS TO JUSTICE

There are certain identifiable factors that regularly require scrutiny in the assessment of litigation costs. These factors are illustrated by cases that address specific issues related to litigation costs, such as excessive formalism in the assessment of prior financial requirements for gaining access to court; assessment of litigation success in general,

¹⁸ *Nalbant and Others v. Turkey*, ECtHR, Application no. 59914/16, 3 May 2022, para. 40.

¹⁹ *Ait-Mouhoub v. France*, ECtHR, Application no. 22924/93, 28 October 1998, para. 52; *Kreuz v. Poland*, ECtHR, Application no. 28249/95, 19 June 2001, para. 53.

²⁰ *Brualla Gómez de la Torre v. Spain*, ECtHR, Application no. 26737/95, 19 December 1997, para. 33; *Teltronic-CATV v. Poland*, ECtHR, Application no. 48140/99, 10 January 2006, para. 47.

²¹ *Klauz v. Croatia*, para. 85; *Cindrić and Bešlić v. Croatia*, para. 96.

²² *Mihajlović v. Croatia*, ECtHR, Application no. 21752/02, 7 July 2005, para. 41; *Černius and Rinkevičius v. Lithuania*, ECtHR, Application nos. 73579/17 and 14620/18, para. 66.

²³ *Laçi v. Albania*, ECtHR, Application no. 28142/17, 19 October 2021, paras. 50, 52, 54, 60.

²⁴ *Kreuz v. Poland*, para. 56.

²⁵ *Klauz v. Croatia*, para. 82; *Čolić v. Croatia*, ECtHR, Application no. 49083/18, 18 November 2021, para. 44.

and in relation to claims for non-pecuniary damages in particular; unjustified litigation costs of a state as the party in the proceedings; and the disregard for the vulnerability of litigants. Although these cases highlight the relevance of various factors, each group of cases emphasizes specific considerations that will be addressed below.

3.1. Excessive formalism and disproportionate costs: stamp duties, court fees, security for costs

As previously discussed, litigation costs represent a limitation on the right of access to a court, potentially resulting in a breach of this right if the proportionality between the right and a legitimate aim is compromised. One key factor in the proportionality test, often addressed by the Court, is the impact of excessive formalism in assessing and levying pre-proceeding expenses on access to court. Since these expenses constitute the initial litigation costs, they will be examined first.

Payments due prior to initiating the procedure, such as stamp duties, advance court fees and security for costs, directly affect access to court. Such expenses, if excessive, may on their own restrict the right to institute proceedings before courts. They are also relevant for the overall assessment of the effect of litigation costs on ‘whether the proceedings in a civil case seen as a whole have complied with the requirements of Article 6 § 1 of the Convention’.²⁶ Failure to pay prescribed financial duties forecloses possibility to pursue a claim and thus restricts access to court. However, examination of whether court fees restrict access to court is not limited to the initial filing but extends to all submissions within the proceedings,²⁷ including the enforcement proceedings.²⁸

The Court generally finds that the right of access to court under Article 6(1) of the Convention allows for limitations permitted by implication and that ‘the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Article 6 § 1 of the Convention’.²⁹ The Court has accepted that various limitations, including financial ones such as court fees or security for costs, may be placed on the access to a court, but ‘such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.’³⁰ Moreover, prior financial restrictions on access to court, unrelated to a claim's merits or its prospect of success, are subject to a particularly rigorous scrutiny.³¹

²⁶ *Stankiewicz v. Poland*, para. 60.

²⁷ *Podbielski and PPU Polpure v. Poland*, ECtHR, Application no. 39199/98, 26 July 2005 (withdrawal of the fee exemption for the appellate proceedings was found to be in breach of the right of access to court in light of the individual circumstances of the applicant and the amount of fee due.).

²⁸ *Apostol v. Georgia*, ECtHR, Application no. 40765/02, 28 November 2006.

²⁹ *Kreuz v. Poland*, para. 60.

³⁰ *Teltronic-CATV v. Poland*, ECtHR, Application no. 48140/99, 10 January 2006, para. 47.

³¹ *Podbielski and PPU Polpure v. Poland*, para. 65; *Teltronic-CATV v. Poland*, para. 61.

The Court monitors the rules for calculating stamp duties and court fees, the availability of legal aid and exemption options,³² and the amount due prior to submitting the claim. Failure to pay the stamp duty or fees for the experts and witnesses may result in the outright dismissal of the claim and, in certain cases, disproportionately limit the right to apply to a court in civil proceedings. In *Kreuz v. Poland* it was held that the excessive fee (equal to annual salary in Poland) for the claim for damages, the fee the applicant was unable to pay, led to abandonment of the claim and thus constituted a disproportionate restriction of his right of access to court.³³ In *Weissman and Others v. Romania* the Court held that access to court was denied due to excessively high court fees necessary to initiate domestic proceedings, rendering it impossible for the applicants to seek restitution for rent collected by the State regarding their building.³⁴ Such financial burden impaired ‘the very essence of the right of access to a court.’³⁵ It follows that the strict application of the rule based solely on a set statutory percentage of the sum at stake, which results in excessive stamp duties without considering the financial ability of the applicants or the specific circumstances of the case,³⁶ leads to a situation where applicants must abandon their claim. In *Smolić v. Croatia* the national courts dismissed the applicant’s claim for failing to pay expert fees, without considering his financial situation or exemption options. The Court found this restriction impaired the essence of his right of access to a court.³⁷ In *García Manibardo v. Spain* the applicant’s appeal was declared inadmissible owing to the statutory duty on persons, other than those who received legal aid, to deposit amount equal to the appealed compensation award as a formal requirement for submitting the appeal. The Court concluded that this requirement disproportionately restricted the applicant’s access to available remedies and thus her right to access to a court.³⁸ These cases demonstrate that rigid statutory requirements and excessive formalism³⁹ can lead to disproportionate restriction of the right to have a case heard by the court.

Similarly, in *Laçi v. Albania*, the Court found that the violation of the right of access to court was the result of the persistent failure of domestic courts to assess eligibility for exemption from stamp duty compounded by shortcomings in the operation of the State Commission for Legal Aid and a prevalent reluctance among judges to grant exemptions, as noted by monitoring bodies of the Council of Europe. In this case the applicant was unable to proceed with his claim due to the protracted decision-making on his request for stamp duty exemption which was 120 times his monthly income.⁴⁰ In the case of *Mehmet*

³² *Smolić v. Croatia*, ECtHR, Application no. 51472/12, 15 March 2018, para. 55.

³³ *Kreuz v. Poland*, para. 60.

³⁴ *Weissman and Others v. Romania*, ECtHR, Application no. 63945/00, 24 May 2006. The lack of access to a court due to excessive court fees (violation of Article 6(1)) turned out to be a systemic problem for Romania as subsequently there were 15 more repetitive cases for which *Weissman* was the leading case. See <https://hudoc.exec.coe.int/ENG#%7B%22execidentifier%22:%5B%22001-108303%22%5D%7D>. Romania subsequently amended its rules on stamp duties in civil proceedings.

³⁵ *Weissman v. Romania*, para. 42.

³⁶ *Georgel and Georgeta Stoicescu v. Romania*, ECtHR, Application no. 9718/03, 26 July 2011.

³⁷ *Smolić v. Croatia*, para. 61.

³⁸ *García Manibardo v. Spain*, ECtHR, Application no. 38695/97, 15 February 2000, paras. 43-45.

³⁹ The Court elaborated the criterion of excessive formalism with respect to procedural rules and access to court in *Zubac v. Croatia*, ECtHR, Application no. 40160/12, 5 April 2018, paras. 96-99.

⁴⁰ *Laçi v. Albania*, ECtHR, Application no. 28142/17, 19 October 2021, para. 54.

and *Suna Yiğit v. Turkey*, the applicants, who had no income, sought compensation after their daughter experienced severe complications from surgery. The court fees imposed were four times the monthly minimum wage. Their request for exemption and legal aid was denied since they were able to obtain representation by a lawyer (who agreed to be paid a portion of any awarded compensation rather than upfront fees) despite the fact that applicants did not have any income or immovable property. Subsequently, their claim for damages was dismissed for failure to pay court fees. The Court found the fees disproportionate and burdensome, and emphasized that having legal representation did not imply the applicants could afford the fees.⁴¹

The effect of fees needs to be assessed in each situation against the financial position of litigants. In *Malahov v. Moldova* national courts ordered the applicant to pay court fees 90 times her monthly income although it was first found that she was unable to pay court fees, and despite the fact that national legislation provided courts with option to exempt litigants from court fees due to their poor financial situations – imposition of the court fees was a disproportionate restriction of her right to access to a court.⁴² Failure to account for individual financial circumstances resulting in the dismissal of the claim for damages caused by state authorities can also bring about the breach of the right of access to court.⁴³ Such stance can sometimes disclose discrimination against particular vulnerable groups and thus result in breach of the right of access to court under Article 6(1) in conjunction with Article 14.⁴⁴

In *Nalbant and others v. Turkey* the bank successfully brought the proceedings against the applicants for payment of the loan. When the applicants appealed and sought exemption from court fees, their request was denied. The Court criticized the imposed fees for their appeal as excessive, noting they were one-quarter of the total court fees and highlighting the lack of legal provisions for flexible fee calculation or a maximum fee cap. The Court thus found violation of the right of access to court due to excessive court fees in commercial appeal proceedings.⁴⁵ However, with respect to applicants' companies, the Court observed that the domestic courts rejected the exemption request of the applicant companies without conducting a sufficiently thorough assessment. Instead, the domestic courts simply relied on the absence of any provision in domestic law for granting legal aid to commercial entities and interpreted such caveat as 'indiscriminate restriction of court fee exemptions to be applied across the board for all legal persons with a commercial purpose'.⁴⁶ For the Court, the blanket exclusion of court fee exemptions raises, in itself, an issue under Article 6(1).⁴⁷

⁴¹ *Mehmet and Suna Yiğit v. Turkey*, ECtHR, Application no. 52658/99, 17 July 2007.

⁴² *Malahov v. Moldova*, ECtHR, Application no. 32268/02, 7 June 2007, paras. 31-36.

⁴³ *Bakan v. Turkey*, ECtHR, Application no. 50939/99, 12 June 2007.

⁴⁴ *Anakomba Yula v. Belgium*, ECtHR, Application no. 45413/07, 10 March 2009.

⁴⁵ *Nalbant and others v. Turkey*. The Court suggested the reopening of the domestic proceedings. The applicants availed themselves of this remedy provided for under Turkish civil procedure rules. In the new proceedings no court fees were charged. – Action Plan of Turkey with respect to execution of the *Nalbant and others* judgment, 20 February 2023, paras. 7-8. Available at: [[https://hudoc.exec.coe.int/ENG#%7B%22execidentifier%22:%5B%22DH-DD\(2023\)228E%22%5D%7D%7B%22%22%7D](https://hudoc.exec.coe.int/ENG#%7B%22execidentifier%22:%5B%22DH-DD(2023)228E%22%5D%7D%7B%22%22%7D)].

⁴⁶ *Nalbant and others v. Turkey*, para. 45.

⁴⁷ *Ibid.* Also: *Paykar Yev Haghtanak Ltd. v. Armenia*, ECtHR, Application no. 21638/03, 20 December 2007, para. 49.

However, the Court found no violation of Article 6(1) in *Granos Organicos Nacionales S.A. v. Germany* which dealt with the refusal to grant exemption from court fees to a foreign company for initiating legal action in German courts against two German companies. Arguably, no violation was found on the ground that the unequal treatment of foreign legal persons was justified by the principle of reciprocity, and because of failure of applicants to request temporary exemption from court fees that was allegedly available to both foreign and national persons under certain circumstances. In this case the Court established that there was no European consensus on the matter: ‘there does not appear to be a consensus or even a consolidated tendency among the State parties to the Convention as regards the granting of legal aid to legal persons. The law of a substantial number of States does not provide any form of legal aid to legal persons.’⁴⁸ However, in *Nalbant and others v. Turkey* the Court found that despite the lack of European consensus the right of legal persons to such exemptions under Article 6(1) is not excluded, most notably not the guarantees in respect of excessive court fees.⁴⁹ Moreover, the Court expressed concern regarding the potential impact of blanket bans on legal aid for legal persons.

Legal aid as such thus may come under the ambit of the right to access to a court although it can also be scrutinized within the standard of equality of arms.⁵⁰ Institution of a legal aid scheme for non-criminal litigations falls within the generous margin of appreciation the limits of which can be discerned in the Court’s case law. In the seminal *Airey v. Ireland* case, the Court held that although Article 6 does not mention the right to legal assistance or legal aid with respect to civil litigation ‘Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.’⁵¹ In that particular case the Court found that the absence of any legal aid scheme led to violation of Article 6(1). Conversely, when a litigation is not complex and the applicant possesses sufficient knowledge, denial of legal aid will not be contrary to Article 6(1).⁵² In *Andronicou and Constantinou v. Cyprus* the absence of legal aid scheme was countered by the *ad hoc ex gratia* offer of the legal aid by the Attorney General to the financially despondent applicants in the particular case, the offer that was refused, and for the Court

⁴⁸ *Granos Organicos Nacionales S.A. v. Germany*, ECtHR, Application no. 19508/07, 22 March 2012, para. 47, also para. 53.

⁴⁹ *Nalbant and others v. Turkey*, para. 39.

⁵⁰ In *Bertuzzi v. France* (ECtHR, Application no. 36378/97, 13 February 2003) and *Steel and Morris v. UK* (ECtHR, Application no. 68416/01, 15 February 2005) the Court found the violation of the principle of equality of arms under Article 6 due to absence of legal aid that prevented applicants from having legal representation in complex proceedings. In *Coventry v. the United Kingdom*, the principle of equality of arms was breached due to excessive and arbitrary burden on unsuccessful uninsured defendants in conditional fee arrangement litigation due to recoverability of success fees and insurance premiums.

⁵¹ *Airey v. Ireland*, para. 26.

⁵² *McVicar v. The United Kingdom*, ECtHR, Application no. 46311/99, 7 May 2002, paras. 46-62. However, one of the issues was whether the blanket refusal of legal aid in defamation cases was compatible with Article 6(1). The Court responded to this issue by relying on circumstances of the case finding that the applicant was able to present his defence effectively before the High Court.

that was sufficient to find that applicants did have access to court although state was its opposing party in the proceedings.⁵³

Financial restrictions to instituting proceedings could also be placed in the form of security for costs to be incurred by the other party to the proceedings as an advanced payment which is the condition for submitting the claim. Failure to deposit a required amount may result in dismissal of the claim and thereby limit access to the court. While security for costs should not be equated with court fees, given that the latter are collected by courts and constitute a portion of State revenues—unlike security for costs, which serves to protect the defendant from an inability to recover costs—the impact, timing, and burden of these two financial obligations are perceived as equivalent from the claimant's standpoint and in terms of access to the court.

Therefore, it is not surprising that the Court addressed security for costs as an issue arising under Article 6(1). Security for costs could be imposed as a matter of general procedural rules equally applicable to all potential parties to proceedings but also as a *cautio judicatum solvi* mandatory only for foreign claimants in international proceedings. *Cautio judicatum solvi* 'ensures that a defendant's possible costs relating to such international proceedings will be covered. Such costs could, in theory, be difficult to recover due to the fact that the claimant has no ties to the forum and/or no assets.' (Kiestra 2014, p. 122) The Court's case law on *cautio judicatum solvi* is scarce⁵⁴ with only passing references that a disproportionate amount on this ground could restrict access to court.⁵⁵ It is arguable that *cautio judicatum solvi* is permissible under the right of access to a court, subject to requirements applicable to similar restrictions. (Kiestra 2014, p. 122)

With respect to security of costs the Court applied the same standard as regarding other financial limitations of the access to court. The Court routinely mentions security for costs as a legitimate restriction of the right of access to court provided that imposed measure is not disproportionate in the particular circumstances of the case. For example, in *Tolstoy Miloslavsky v. UK*, the Court found that requiring GBP 124,900 as security for costs within two weeks, to pursue an appeal, did not infringe the right of access to court, emphasizing the defendant's financial capacity as a key consideration.⁵⁶ Conversely, in the case which dealt with the applicant's inability to join the criminal proceedings as a civil party due to excessive security for costs, the Court found that the imposition of such a large sum (FRF 80,000 in 1993) as disproportionate, considering that the applicant, who had not received any response for his repeated requests for legal aid, lacked any financial resources.⁵⁷ This requirement effectively denied him the opportunity to pursue his case.⁵⁸

⁵³ *Andronicou and Constantinou v. Cyprus*, ECtHR, Application no. 25052/94, 9 October 1997, paras. 199-201.

⁵⁴ Part of explanation lies in the fact that the obligation to deposit sums on this ground is not applicable within EU with respect to its nationals and residents (Brussels I Regulation and Lugano Convention) but also with respect to persons domiciled in State Parties to the Hague Convention on Civil Procedure.

⁵⁵ *Les travaux du midi v. France*, Application no. 12275/86, 2 July 1991, p. 57.

⁵⁶ *Tolstoy Miloslavsky v. the United Kingdom*, ECtHR, Application no. 18139/91, 13 July 1995.

⁵⁷ *Ait-Mouhoub v. France*.

⁵⁸ *Ibid.*, para. 57.

It can be concluded based on the discussed case law that the Court has accepted ‘that it falls within the State’s margin of appreciation to establish its court fee system in such a way as to link court fees for pecuniary claims to the amount in dispute. The system, however, has to be sufficiently flexible to allow a party to benefit from full or partial exemption from the payment of court fees or a reduction in the court fees.’⁵⁹

However, these early costs and expenses, in whatever form they appear, constitute but one element of the overall assessment of the right of access to court in terms of litigation costs as argued in this article. While some elements may offer exact financial estimates, like arguably stamp duties, costs fees or even security for costs, others might be less predictable but are equally relevant for the access to court in terms of final litigation costs, as will be demonstrated in the following sections.

3.2. Unreasonable cost calculation in claims for non-pecuniary damages

The Court seems to leave a considerable margin of appreciation to states when regulating matters of litigation costs. There are national rules on litigation costs in civil proceedings that are adopted by most European states which leaves the Court with fewer options to tackle such rules due to the operation of the concept of the European consensus. One of such rules is the ‘loser pays’ principle according to which the ruling on costs mirrors the success of the party to the civil proceedings.⁶⁰ The Court upheld the validity of the rule as a matter of principle⁶¹ and found that the principle is not contrary to the Convention.⁶² It even seems that this is the rule the Court favours over splitting the costs rule regardless of the outcome of the litigation,⁶³ but the Court nevertheless carefully examines how the ‘loser pays’ rule has been applied in the particular case.⁶⁴

However, the application of the general principle of calculating such costs is not without difficulties in relation to claims for non-pecuniary damage. Rigid rules on calculating fees or overall litigation costs based solely on the value stated in the initial claim can clash with the right of access to court, as already demonstrated in the previous section. The issue seems to be even more complex with respect to non-pecuniary claims given that

⁵⁹ *Nalbant and others v. Turkey*, para. 40.

⁶⁰ ‘Most systems operate a loser pays rule, which means that a defeated party should *prima facie* indemnify, or contribute substantially towards, the other side's legal costs. The rule has an attractive simplicity: it operates as an instrument of strict liability. The rule also reflects basic justice: responsibility for the winner's costs rests with the party who brought or defended a losing cause.’ – Andrews (2014, p. 295).

⁶¹ *Klauz v. Croatia*, para. 89.

⁶² *Cindrić and Bešlić v. Croatia*, para 96; *Bursać and Others v. Croatia*, para. 81.

⁶³ *Stankiewicz v. Poland*.

⁶⁴ In the *Coventry* case the Court found that the application of the ‘loser pays’ principle in the circumstances of the case breached both Article 6(1) and Article 1 of Protocol 1, due to obligation of the uninsured losing party to cover the success fees and insurance premiums of the successful party (*Coventry v. United Kingdom*, paras. 97-98). The amount that was to be paid was disproportionate. The legal framework that enabled the recoverability of these costs was put in place to facilitate the access to court to litigants without sufficient financial means. In other words, the system was put in place to replace the legal aid scheme but with undesired detrimental effects.

non-pecuniary damage is inherently difficult to assess. In the *Stankov v. Bulgaria* case the central issue was whether the calculation of fees amounting to 90% of the received compensation for unlawful detention was justified in terms of the right of access to court. National courts upheld the applicant's claim for non-pecuniary damage occasioned by his detention but the stringent rules on calculating the fees eventually deprived the applicant of effective remedy and thus of the access to court. Given that the fees were to be charged at a rate of 4% of the dismissed claim,⁶⁵ it turned out that the applicant's fault was in submitting the overinflated claim. However, this was done in circumstances where there was no settled case law or clear guidelines for such claims, and where no additional costs were incurred due to the amount of the claim. Admittedly, 'non-pecuniary damage is inherently difficult to assess'⁶⁶ so the automatic and inflexible calculation of fees, with such adverse effect on damages received, is disproportionate to the legitimate aim of the good administration of justice.⁶⁷

A similar issue was raised in *Klauz v. Croatia* case – the claim for non-pecuniary damage against the state was upheld in substance but the amount of received compensation was drastically reduced by 79% due to litigation costs on the basis of the success rule calculated by difference between the claimed and awarded compensation. Unlike in Bulgaria in relation to the *Stankov* case, in Croatia there was a settled jurisprudence for the amount of awarded damages that could have signalled the applicant how much he would have been awarded if successful with his claim. The applicant reduced the claim following the initiation of the proceedings, but national courts based their litigation costs decision on the initial claim. These litigation costs included this time not only fees but also legal representation costs of the losing party, the state itself. For the Court it was again overly inflexible and formalistic against all the circumstances of the case, and against the fact that non-pecuniary damage is generally difficult to assess,⁶⁸ so the submission of an excessive claim for damages could not justify such reduction of the awarded compensation.⁶⁹ The Court found a breach not only of Article 6(1) but also of Article 1 of Protocol 1, due to the lack of proportionality between the rights in question and the legitimate aim, which was, in itself, justified.

The trouble of calculating non-pecuniary damages against the risk of high litigation costs is equally present in proceedings against private parties and is equally eligible for the scrutiny by the Court. In *Čolić v. Croatia* the applicant faced an order for costs in private civil proceedings that were twice the amount of the compensation awarded for non-pecuniary damage. The applicant succeeded in his private claim for damages against a private individual who physically assaulted him, but the national courts found that the applicant had 'quantitatively succeeded' by securing only about 25% of the

⁶⁵ *Stankov v. Bulgaria*, ECtHR, Application no. 68490/01, 12 July 2007, paras. 19-20, 57.

⁶⁶ *Stankov v. Bulgaria*, para. 62. Also, *Čolić v. Croatia*, para. 54; *Klauz v. Croatia*, para. 88.

⁶⁷ *Stankov v. Bulgaria*, para. 67.

⁶⁸ *Klauz v. Croatia*, para. 88.

⁶⁹ *Ibid.*, para. 93.

claimed amount⁷⁰ although the initial claim was reduced by nearly two thirds at the very beginning of the proceedings.⁷¹ Given the inherent difficulty in assessing the claims for non-pecuniary damage as well as difficulty to strictly apply the ‘loser pays’ rule in such cases,⁷² against the mechanical application of the rule and the absurd results of what was in essence a successful litigation for the applicant,⁷³ the Court found that decision on costs of national courts was disproportionate and thus contrary to the right of access to court but also to the right to a peaceful possession. The Court also found that the application of the relevant domestic legislation exceeded the acceptable margin of appreciation granted to domestic courts.⁷⁴ The Court reiterated that guarantees of access to court apply equally to both private disputes and those involving the state.⁷⁵

Imposition of a considerable financial burden after the conclusion of the proceedings may constitute a restriction on the right to access to a court.⁷⁶ This is particularly true if these costs are calculated solely based on the original claim amount, especially in cases involving claims for non-pecuniary damages, which are inherently difficult to quantify. Moreover, if the possibility of increasing the claim amount is prevented in subsequent proceedings, such financial burdens might disproportionately restrict access to the courts. This is the case despite the reasonable basis of the ‘loser pays’ rule. Calculation of litigation costs in cases of claims for non-pecuniary damages thus requires a special consideration given its possible restrictive effect on the access to court.

3.3. Excessive and unjustified litigation costs of a State

The ‘loser pays’ principle as such, as demonstrated above, has been upheld by the Court as both well-established and reasonable. One rationale for the rule is its deterrent function aimed at fending off frivolous and abusive claims, which on more than one occasion has been found justified by the Court.⁷⁷ Even in cases where a state is a defendant in civil proceedings, the same purpose of the ‘loser pays’ principle could be seen as equally applicable because the State does not have limitless resources to participate in proceedings so it is in principle entitled to costs as any other party.⁷⁸ However, this general approach, which equates states with private parties in litigation costs, sometimes requires closer scrutiny and reconsideration, as will be discussed in this section.

In several cases against Croatia this turned out to be a separate issue and one of the contributing factors for the assessment of costs against the right to access to a

⁷⁰ *Čolić v. Croatia*, para. 58.

⁷¹ *Ibid.*, paras. 5, 6, 8, 56.

⁷² *Ibid.*, para. 54.

⁷³ *Ibid.*, para. 58-59.

⁷⁴ *Ibid.*, para. 59.

⁷⁵ *Ibid.*, para. 53.

⁷⁶ *Čolić v. Croatia*, paras. 42, 60; *Klauz v. Croatia*, para. 77; *Stankov v. Bulgaria*, para. 54; *Zustović v. Croatia*, ECtHR, Application no. 27903/15, 22 April 2021, para. 98.

⁷⁷ *Stankov v. Bulgaria*, para. 57, *Klauz v. Croatia*, para. 84-85.

⁷⁸ *Klauz v. Croatia*, para. 85, *Cindrić and Bešlić*, para. 96.

court and the right to property.⁷⁹ In these cases, the state was represented by the State Attorney's Office which was entitled to fees based on scale of advocates' fees i.e. it was entitled to charge the same fees as private attorneys. This was the rule established by the law and followed by domestic courts. The question thus was whether the state can assume the same position as private attorneys in terms of litigation fees given that it is financed from the budget, but also because the state prescribes special (lower) rates for fees payable to private attorneys who act as *ex officio* defending lawyers. In other words, the question is whether the state as such treats State Attorney, other entities and private attorneys equally in all other matters so that charging fees cannot be taken as a departure from the equality standard.

In *Klauz v. Croatia* the Court held that imposition on the applicants to pay the costs of the state representation may be viewed as a restriction hindering the right of access to court when such costs consisted of fees chargeable for the representation of the state by the State Attorney's Office in the civil proceedings and payable into the state budget.⁸⁰ In *Klauz* the Court addressed the issue of the costs of representation of the State Attorney from the position that such costs, although calculated as advocate's fees, were to be treated as court fees the amount of which could represent disproportionate limitation of the right to access to a court. In other words, costs of state representation fall closer to state limitations of the access to court than to advocate's fees despite the usual disclaimer that the state as a party to the proceedings is entitled to recover costs of its representation because it does not have limitless resources and should be in principle entitled to the protection from ill-founded claims.⁸¹ It seems that the Croatian Supreme Court, in subsequent cases, accepted that it was contrary to Article 6(1) of the Convention to order the payment of legal representation fees to the State, that was represented by the State Attorney, in specific circumstances of the case, and that this was the main rationale of the ECtHR in *Klauz* and chief ground for state responsibility.⁸²

The Court followed its reasoning in later cases where the matter of state representation costs was brought up. For example, in *Cindrić and Bešlić v. Croatia* case, the Court also held:

‘[T]he national courts ordered the applicants to pay for the State's representation the amount that would be awarded to the opposing party as advocates' fees. The Court attaches considerable importance to the fact that the opposing party in the proceedings at issue was the Croatian State, represented by the State Attorney's Office and that the costs of that office in

⁷⁹ *Bursać v. Croatia, Cindrić and Bešlić v. Croatia, Klauz v. Croatia*.

⁸⁰ *Klauz v. Croatia*, para. 77.

⁸¹ *Klauz v. Croatia*, para. 85. Similar caveats allowing states to recover their representation costs, protect its judicial system and deter frivolous or abusive claims are to be found in *Cindrić and Bešlić v. Croatia*, para. 96; *Musa Tarhan v. Turkey*, para. 80, *Stankov v. Bulgaria*, para. 67.

⁸² Supreme Court of Croatia, case no. Rev 725/14-2 of 23 October 2014, see *Čolić v. Croatia*, para. 19; also, Supreme Court of Croatia, case no. Rev-3002/2014-3 of 11 July 2018, *Čolić v. Croatia*, para. 21.

the civil proceedings at issue were assessed on the basis of the Advocates' fees. However, as rightly pointed out by the applicants, that office, since it is financed from the State budget, is not in the same position as an advocate.⁸³

This position was verbatim transposed to other cases, such as *Bursać v. Croatia*⁸⁴ where the Court found the violation of the right to property and on that account decided not to entertain the claim under Article 6(1). The Court also noted that there were available mechanisms which could alleviate the burden imposed on the applicants, ranging from not claiming the litigation costs by State Attorney or at least not seeking the enforcement of the costs order. These were manifestly available options not resorted to by Croatian authorities.⁸⁵

It must be reiterated that a number of variables are to be assessed when examining whether the costs of state representation amount to unjustifiable restriction of the right to have access to a court. In *Cindrić and Bešlić v. Croatia* these were the facts that the claim was not manifestly unfounded in light of the existing case law, that the defendant state was represented by State Attorney (not advocate), and that the costs had a disproportionately adverse effect on financially fragile plaintiffs.⁸⁶ However, it remains that the Court singled out the fact that the charge of advocates' fees by the State Attorney was not justified referencing implicitly to other considerations underpinning its conclusion, such as that costs were to be paid to the state budget, were not contributions to the court system as such,⁸⁷ that the right to fees is withheld when State Attorney is a party to the proceedings but not when it represents state,⁸⁸ that the office of State Attorney is financed from the state budget,⁸⁹ and that domestic courts refused to award costs to companies with in-house lawyers.⁹⁰ *Cindrić and Bešlić v. Croatia* remains the case that is relied upon by the Court for finding the violation when the applicants were ordered to pay the costs of the state's representation by the State Attorney's Office.⁹¹ Since the state's representation costs are unrelated to the court system, but the applicants had to reimburse them into the state's

⁸³ *Cindrić and Bešlić v. Croatia*, para. 108.

⁸⁴ *Bursać v. Croatia*, para. 101.

⁸⁵ 'By way of observation the Court notes that in cases such as the present one the State has a number of additional possibilities to achieve the necessary flexibility. The Court first refers to the Government of Croatia's decision and decree of 2009 and 2013 respectively, mentioned in paragraphs 43 and 44 above. Moreover, precisely because the State is a party to the civil proceedings in such cases, the State Attorney's Office may opt not to claim costs or, if the costs order is issued, not to seek payment of those costs or enforcement of the costs order (see *Kresović and Others v. Croatia* (dec.), no. 5864/12, § 19, 12 September 2017).' - *Bursać v. Croatia*, para. 106.

⁸⁶ *Cindrić and Bešlić v. Croatia*, para. 110.

⁸⁷ *Ibid*, para. 92.

⁸⁸ *Ibid*, para. 102.

⁸⁹ *Ibid*, para. 108.

⁹⁰ *Ibid*, para. 108.

⁹¹ *Zustović v. Croatia*, para. 98. Croatia subsequently agreed to the payment under friendly settlement in several cases where the applications concerned the domestic courts' decisions ordering the applicants to pay the costs of the State's representation in the civil proceedings in which they sought damages. See Resolution CM/ResDH(2023)371 adopted by the Committee of Ministers on 7 December 2023 at the 1483 rd meeting of the Ministers' Deputies.

budget, the case was assessed under the general principle of the first paragraph, unlike costs related to the court system which are assessed under the second paragraph of Article 1 of Protocol No. 1 (Harris et al., 2023, p. 886).

A separate category includes costs of the proceedings in disputes against the state originating from acts in the exercise of its public authority. Refusal to award costs to applicant who prevailed in disputes against a state in relation to its exercise of public authority, in procedures usually conducted before administrative authority or constitutional courts, may constitute a restriction of the access to a court or the right to property. If the costs are imposed on applicant despite the success in the case against a state, because procedural rules do not provide for reimbursement of costs to successful claimants against a state, for the Court that might be sufficient for finding violation of Articles 6⁹² or Article 1 of Protocol No. 1.⁹³

In *Zustović v. Croatia* domestic rule on costs and expenses in administrative procedures was that each party was to bear its own costs regardless of the outcome of the procedure. However, given that the success of the private party in these cases implies the responsibility of the state in relation to its exercise of public authority, there is no legitimate aim in equal distribution of costs regardless of the outcome.⁹⁴ The finding of the Court in a similar but earlier case, *Černius and Rinkevičius v. Lithuania*, was the same with the only difference that the limitation on the reimbursement of litigation costs in such cases was seen as a legitimate aim⁹⁵ but the breach was found due to the lack of proportionality⁹⁶ – applicants successfully challenged fines but were refused the reimbursement of the costs, due to operations of procedural rules, so the financial burden was treble to the one they originally faced. Notably, in both these cases the Court challenged national procedural rules on allocation of costs in administrative procedures and before administrative courts to the point it held that the breach would have happened ‘regardless of the amount of these costs.’⁹⁷ A more general principle was highlighted by the Court in both these cases: ‘the risk of any mistake made by the State authority must be borne by the state itself and that errors must not be remedied at the expense of the individuals concerned’.⁹⁸ In *Dragan Kovačević v. Croatia*, the Court sided with the applicant who complained about having to bear the costs of legal representation before the Constitutional Court despite his successful constitutional complaint which led to the reversal of the civil court judgment on the deprivation of his capacity that was launched by the social services. It was found that the applicant had to bear a disproportionate financial burden, and such restriction was not justified by the legitimate aims pursued.⁹⁹

⁹² *Černius and Rinkevičius v. Lithuania*, ECtHR, Application nos. 73579/17 and 14620/18, 18 February 2020, paras. 65-74.

⁹³ *Musa Tarhan v. Turkey*, para. 71-89.

⁹⁴ *Zustović v. Croatia*, para. 106.

⁹⁵ *Černius and Rinkevičius v. Lithuania*, para. 69.

⁹⁶ *Ibid*, para. 70.

⁹⁷ *Černius and Rinkevičius v. Lithuania*, para. 74, *Zustović v. Croatia*, para. 100.

⁹⁸ *Černius and Rinkevičius v. Lithuania*, para. 71, *Zustović v. Croatia*, para. 100.

⁹⁹ *Dragan Kovačević v. Croatia*, ECtHR, Application no. 49281/15, Judgment of 12 May 2022, paras. 79-85.

The ‘loser pays’ principle applies even when the state is a party to legal proceedings, as it has limited resources and should not be burdened by baseless claims. However, treating the state exactly like private parties in litigation costs raises concerns, particularly when state representation is funded by public money. Several cases have highlighted tensions between the ‘loser pays’ rule and fundamental rights such as access to justice and property rights the Court determined that equating state attorneys’ fees with private legal fees could constitute an unjustifiable restriction on access to justice. These cases illustrated how imposing legal costs on individuals, particularly financially vulnerable plaintiffs, could be disproportionate, especially when such fees are paid into the state budget rather than directly funding the judiciary. The ECtHR has also scrutinised procedural rules governing costs in disputes involving the state’s exercise of public authority and established that individuals should not bear the financial consequences of state errors. The Court has consistently reinforced that states must ensure that legal cost structures do not disproportionately disadvantage individuals, particularly in disputes involving public authority.

3.4. (Mis)evaluation of litigation success

The success of the claim directly impacts litigation costs under the ‘loser pays’ principle according to which costs proportionally follow the success of the claim. Successful party is entitled to recover the costs from its opponent but success in litigation may sometimes be difficult to assess. What are the variables for determining success other than quantitative in terms of the ratio between the claimed and awarded sum? Another issue is whether the opposite equally applies – are unsuccessful claimants to bear all litigation costs? In addition, are all unsuccessful claims equally unsuccessful or is each such claim unsuccessful in its own way?

For the ECtHR, success in litigation must be reflected in the net value received by the successful litigant, which means the net sum left to the applicant after the deduction of all litigation costs.¹⁰⁰ Even the success with respect to civil rights claims in administrative and constitutional procedures, so-called one-party procedures, requires the adjustment of costs to avoid the detrimental effect on the overall success of applicants.¹⁰¹ Therefore, successful claims are seen as successful both in terms of merits and litigation costs, as far as the ECtHR is concerned.

The ECtHR seems to be cautious in applying the outright reversal of the ‘loser pays’ rule or the ‘costs follow the event’ principle. The Court reads not only the operative part of national judgments but rather assesses a case as a whole. For the Court there are different degrees of unsuccess which range from manifestly ill-founded claims to plausible causes of action which eventually failed especially when the failure of the originally plausible

¹⁰⁰ ‘[T]he court fees’ system applied by the Bulgarian courts had the effect of depriving the applicant of almost all of the compensation the State had been ordered to pay him for his unjustified pre-trial detention.’ – *Stankov v. Bulgaria*, para. 58.

¹⁰¹ *Zustović v. Croatia, Dragan Kovačević v. Croatia*.

claim cannot be attributed to the claimant. Once the rejected claim is found to be plausible, the Court will assess the relationship of proportionality between litigation costs and the application of the 'cost-follow-the event' rule, which will now be further discussed.

The cases of *Cindrić and Bešlić v. Croatia*, and *Bursać and Others v. Croatia* are quite illustrative of the Court's approach. In *Cindrić and Bešlić v. Croatia*, the applicants brought an unsuccessful civil action against the State in connection with the killings of their parents in the then occupied part of Croatia. They were ordered to pay around EUR 6,800 in litigation costs. However, the Court found that the applicants' civil claim against the State was not entirely devoid of substance or manifestly unreasonable bearing in mind the provisions of the relevant legislation in force at the time. The crux of the issue was how to qualify the murders in the then occupied territories, i.e. as acts of terror or as war related damage. Liability of the state was to arise only in relation to the former. While in certain earlier cases Croatian courts upheld claims against state based on interpretation that such acts were acts of terror,¹⁰² and consequently awarded damages, the case law and the interpretation subsequently changed to war related damages with the effect of refusal of the claim. Since the interpretation of these provisions changed in the course of the proceedings before domestic courts, it was this interpretation that intervened in their case to their detriment. Therefore, the applicants could not foresee that such change would occur during the proceedings.¹⁰³ The Court thus found the breach of Article 1 of Protocol 1 because the applicants had to bear a disproportionate burden in weighing in their individual rights and legitimate aim pursued.¹⁰⁴ On the basis of the same arguments the Court also found the breach of the right of access to court within the meaning of Article 6(1) of the Convention.

In the case of *Bursać and others v. Croatia* the applicants, who took refuge following the military campaign in Croatia during which their father was killed as a civilian, allegedly by Croatian military and police forces, in 2005 sought damages before Croatian courts in connection with their father's killing. Five years into the proceedings their claim was rejected as time-barred due to the expiration of the objective five-year statutory limitation under the Civil Act. The applicants, however, argued that their claim was based on another piece of legislation, the 2003 Liability Act, which established state responsibility arising from the war and related crimes. According to the 2003 Liability Act, 'if the statutory limitation period for a claim for damages began to run before 6 November 1999, it must continue to run after the entry into force of that Act, and the time that has elapsed before the suspension is to be counted in the statutory limitation period. The Liability Act does not require prior determination of individual criminal responsibility for the damage.'¹⁰⁵ However, the claim based on this legislation was also rejected. The argument offered by domestic courts was that there was no criminal conviction that could positively prove the war crime character of the killing. In the end the applicants were ordered to pay the litigation costs in the amount of approximately EUR 8,000.

¹⁰² *Cindrić and Bešlić v. Croatia*, paras. 49, 106.

¹⁰³ *Ibid.*, para. 107.

¹⁰⁴ *Ibid.*, paras. 110-111.

¹⁰⁵ *Bursać v. Croatia*, para. 32.

Unlike in *Cindrić and Bešlić v. Croatia* case, the case law of the Croatian courts was consistent in rejecting claims similar to the applicants' claim in *Bursać and others v. Croatia*. Croatian courts consistently applied the general statutory prescription rule of five years and required the criminal conviction, both before and after the adoption of the Liability Act. However, the ECtHR still found that the applicants had a plausible claim based on the existing legislation.¹⁰⁶ The ECtHR believed that the 2003 legislation gave rise to hopes of the victims of gross human rights violations precisely because of different rules on statutory limitations.¹⁰⁷ Given that circumstances of the case gave rise to suspicions of grave human rights breaches and war crimes, and considering the legislation on which they relied, the Court found that it 'cannot be said that the applicants' civil claim for damages, lodged in September 2005, was from the outset manifestly unreasonable, or devoid of any substance.'¹⁰⁸

The Court rejected the national courts' manoeuvring around the clear wording and purpose of the new legislation, and the leeway given by this piece of legislation that was further exacerbated by 'unattainable burden of proof which the civil courts imposed on plaintiffs seeking compensation for wartime damage.'¹⁰⁹ Litigation costs were accrued partly because the proceedings lasted longer than needed given that the State Attorney raised the objection of statutory limitation quite late,¹¹⁰ and the applicants were further denied their request for writing-off litigation debts. On these grounds the Court found violation of Article 1 of Protocol 1 rather than of Article 6(1), although the reasoning fits the bill of the right of access to court.

Therefore, there are nuances the Court is prepared to consider when evaluating the plausibility of claims, but this does not change the fact that plausibility of a claim is a factor for assessment of litigation costs. Plausible claims are not manifestly ill-founded, frivolous or raised in bad faith. The question is whether and to what extent national procedural rules offer mechanisms to separate manifestly ill-founded and abusive claims from plausible ones. Such mechanisms could conserve resources, protected by the 'loser pays' principle, much earlier and to the benefit of all parties, but most notably to the benefit of the system.

3.5. Disregard for the vulnerability of litigants

In addition to the factors described above, there appears to be an additional and recurring factor in the Court's assessment of the fairness of national decisions on litigation costs. This factor is related to the vulnerable position of litigants. The concept of vulnerability has been acknowledged in ECtHR case law and has developed along multiple lines, from identity-based group vulnerability to a more contextual, positional understanding (Boutier, 2024). While the ECtHR's approach to conceptualising vulnerability is not always entirely

¹⁰⁶ *Ibid*, para. 91.

¹⁰⁷ *Ibid*, para. 92.

¹⁰⁸ *Ibid*, para. 95.

¹⁰⁹ *Ibid*, para. 96.

¹¹⁰ *Ibid*, para. 102.

consistent, it nonetheless extends beyond specific groups to encompass a wider range of contexts and individuals (Timmer, 2013, pp. 152-162). This broader consideration of positional vulnerability and individual circumstances provides a valuable framework for assessing the relevance of vulnerability in relation to litigation costs. Thus, vulnerability may arise due to individual hardships stemming from financial difficulties, mental disability, legal incapacity, membership in a marginalised group or refugee status, as well as from gross human rights violations which led to the victimhood. In addition, national rules on legal aid or attorney schemes could also potentially contribute to the vulnerable position of the applicant in national judicial setting that can be further deteriorated by formalistic application of national rules on litigation costs. Vulnerability in general plays a significant role in the Court's proportionality analysis (Timmer, 2013, 164) and failing to consider the vulnerability of applicants may impose an excessive individual burden on them, potentially tipping the scale toward a violation of Article 6.

The Court plainly stated that for the assessment of litigation costs in relation to the right of access to court 'another factor of importance is the applicant's individual financial situation.'¹¹¹ In *Cindrić and Bešlić v. Croatia* case the monthly income of the applicants' household combined was three times less than the litigation costs awarded against them.¹¹² In *Bursać v. Croatia* the applicant had been exempted from paying the court's fees on the basis of his poor financial status before ordered to pay litigation costs to the state in the amount of approximately EUR 8,000.¹¹³ Their vulnerability was further exacerbated by their status of victims of the gross human rights violation for whom the procedure was allegedly set up.¹¹⁴ In *Laçi v. Albania* the applicant with monthly allowance of EUR 57 was ordered to pay the stamp duty in the amount of EUR 6,840 with disregard to his financial situation.¹¹⁵ In *Malahov v. Moldova* domestic courts established that applicant was unable to pay court fees but still made her pay the fees that were over 90 times her monthly income, which led the Court to conclude that domestic courts failed to carry out a proper assessment of the applicant's financial ability.¹¹⁶ Equally, the total lack of means in face of an otherwise excessive amount of security for costs represents 'the key fact' in assessment of the right to have recourse to a court.¹¹⁷

The financial position of applicants is generally matter of consideration of the Court in cases dealing with litigation costs and access to court.¹¹⁸ However, there is a group

¹¹¹ *Cindrić and Bešlić v. Croatia*, para. 109; *Bursać v. Croatia*, para. 103.

¹¹² *Cindrić and Bešlić v. Croatia*, para. 89.

¹¹³ *Bursać v. Croatia*, paras. 16, 119.

¹¹⁴ *Bursać v. Croatia*, para. 92.

¹¹⁵ *Laçi v. Albania*, paras. 54-60. For the Court the facts of the case demonstrated that the applicant was manifestly eligible for the exemption of stamp duty but was refused the privilege that eventually thwarted his claim for non-pecuniary damage caused by the death of his wife due to explosion in a military facility.

¹¹⁶ *Malahov v. Moldova*, Application no. 32268/02, 7 June 2007, paras. 32-35.

¹¹⁷ *Ait-Mouhoub v. France*, para. 61.

¹¹⁸ This should explain why in *Tolstoy Miloslavsky* case the large amount for the security for costs due to be paid within a short period of time for submitting an appeal was not found to be contrary to Article 6(1) in given circumstances. *Tolstoy Miloslavsky v. United Kingdom*, paras. 62-67.

of cases, as exemplified above, where financial status is of particular importance given the precarious financial hardship of applicants which singles them out as a specifically vulnerable group. The Court seems to give weight to this factor not only in terms of general financial assessment but also in terms of their vulnerability. The Court is ready to step in if the situation required readjustment of the general rules so that the system is adaptable enough to allow for potential exemptions or reductions in fees, either in full or in part.¹¹⁹

The problem of financial vulnerability is usually addressed through the schemes of legal aid that is generally available within national settings but with significant differences in terms of access and effectiveness. The Court addressed a variety of ways how the lack of legal aid can potentially affect the right to a fair trial.¹²⁰ The question here is whether the recourse to legal aid, not expressly mandated for civil rights cases, could outweigh the financial vulnerability and prevent litigation costs disrupting access to court. Legal aid is constituted precisely for enabling effective access to court and to address precarious financial standing of potential applicants. Article 47 of the EU Charter of Fundamental Rights, which corresponds to Article 6 of the European Convention on Human Rights, provides ‘Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’ While states are not under obligation to set up a legal aid scheme as such under the European Convention on Human Rights,¹²¹ individuals are not under obligation to apply for legal aid when it exists to claim financial hardship. In the *Černius and Rinkevičius v. Lithuania* case the Court found that ‘legal aid as afforded by the State was an individual right and not an obligation that had to be exercised’¹²² – an applicant needs not rely on legal aid to claim financial vulnerability for the assessment of burden sharing of litigation,¹²³ so the Court rejected ‘the Government’s suggestion that the applicants should have chosen to be represented by a person of a lesser calibre than an advocate, in order to mitigate the costs.’¹²⁴

However, it is not only the financial vulnerability that figures as the rationale for assessment and allocation of litigation costs. There are other circumstances which place individuals in a vulnerable situation, such as a disability, gross violations of human rights,

¹¹⁹ *Nalbant and Others v. Turkey*, paras. 39–45.

¹²⁰ *Airey v. Ireland*; *Gnahoré v. France*, ECtHR, Application no. 40031/98, 19 September 2000, para. 38; *Steel and Morris v. the United Kingdom*, Application no. 68416/01, 15 February 2005, para. 72; *Anakomba Yula v. Belgium*, ECtHR, Application no. 45413/07, 10 March 2009, paras. 37–39.

¹²¹ The Court points out that Article 6(1) of the Convention guarantees effective access to court for determining civil rights and obligations but allows states the freedom to decide on its implementation. Although a legal aid scheme is one option, it is not the Court's role to prescribe or mandate specific measure. See *Andronicou and Constantinou v. Cyprus*, ECtHR, Application no. 25052/94, 9 October 1997, paras. 199–201.

¹²² *Černius and Rinkevičius v. Lithuania*, para. 70.

¹²³ This approach of the Court was criticised in the Joint Dissenting Opinion of the Judges Wojtyczek and Sabato in *Dragan Kovačević v. Croatia* case.

¹²⁴ *Černius and Rinkevičius v. Lithuania*, para. 70.

membership in marginalised groups,¹²⁵ or a status of alien, refugee or migrant (Baumgärtel and Ganty, 2024). In case of *Dragan Kovačević v. Croatia* it was the applicant's status of a person with a mental disability who was 'evidently a vulnerable individual who needed to be legally represented to effectively protect his rights',¹²⁶ his vulnerability being further compromised by the low income consisting only of disability benefits.¹²⁷

Excessive litigation costs for victims of human rights violations is an unacceptable procedural consequence if it reduces compensation for violations of acts of ill-treatments committed by officials in the exercise of official duties, 'an act prohibited by Article 3, which ranks among the most fundamental provisions of the Convention.'¹²⁸ In *Bursać v. Croatia* the applicants incurred costs in the litigation that was set up for victims of gross human rights violations within the legal framework that allegedly removed statutes of limitations for grave breaches of human rights. With respect to costs in litigations for such human rights violations the Court articulated the following principle:

'The Court observes that no international instrument explicitly prohibits ordering victims of grave breaches of fundamental human rights to bear the costs of related civil proceedings for damages in which they have been unsuccessful. However, such decisions appear to be at odds with the obligation of States to minimise the risk of re-traumatising victims of grave breaches of fundamental human rights, as set forth in key international instruments, including the United Nations Basic Principles and Guidelines on the Right to a Remedy and General Comment No. 3 on Article 14 of the Convention against Torture.'¹²⁹

Extraordinary vulnerability of migrants and refugees is the result of their personal, legal and economic insecurity. The complexity of their hardship provides several grounds for mitigating the litigation costs, but it can also represent a genuine vulnerability status. Article 16(1) of the Geneva Convention on Refugees stipulates that a refugee shall have free access to the courts of law on the territory of all Contracting States. This provision implies that refugees will be granted the same status as nationals in terms of fees¹³⁰ and

¹²⁵ For example, women with low incomes and women in poverty have been identified by the Committee on the Elimination of Discrimination of Women as a vulnerable group in relation to the access to court. See *General recommendation No. 33 on women's access to justice*, CEDAW /C/GC/33, 3 August 2015. African Commission on Human and Peoples' Rights in Section G (Access to Judicial Services) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), requires of states special measures for rural communities, women, groups with distinct culture and groups that have been the victims of past discrimination so that their access to judicial services is not impeded *inter alia* by 'the imposition of unaffordable or excessive court fees'. See also Chenwi (2022).

¹²⁶ *Dragan Kovačević v. Croatia*, para. 36.

¹²⁷ *Ibid.*, para. 72.

¹²⁸ *Klauz v. Croatia*, para. 96.

¹²⁹ *Bursać and others v. Croatia*, para. 98.

¹³⁰ 'However, "free access" does not have to be access free of payment—States are allowed to require refugees to pay court fees. However, Art. 29 of the 1951 Convention provides that these may not be higher than those that nationals would pay in the same circumstances.' – Elberling (2011, p. 939).

its application is not conditioned upon the residence in the forum state.¹³¹ Paragraph 2 of Article 16 provides refugees with the same treatment as nationals in countries where a refugee has a habitual residence, which is the guarantee interpreted as the right of refugees to legal assistance and legal aid to the extent they are available to nationals.¹³² The same provision expressly exempts refugees from duty of submitting security for costs. Under the EU Directive on Common Procedures for Granting and Withdrawing International Protection, state parties must offer free ‘legal assistance and/or representation’ for at least the initial review or appeal following a negative status determination, although this right is subject to certain conditions and limitations.¹³³ These instruments recognize the heightened vulnerability of refugees and implicitly of other aliens at risk such as migrants who unlawfully reside in the state of forum. Based on such considerations of vulnerability, the ECtHR found that the refusal by the domestic courts to grant legal aid in proceedings to a Congolese woman to bring an action to contest her estranged husband’s paternity of her child, on the ground that she was not lawfully and regularly resident in Belgium, amounted to a discriminatory denial of access to justice.¹³⁴

Several international instruments identify certain categories of human rights victims who should be protected from excessive litigation costs to ensure their effective access to justice. This demonstrates that the connection between victims’ vulnerability and litigation costs has received wider recognition beyond the scope of the European Convention, further validating the position of the ECtHR. The EU Agency for Fundamental Rights in its 2020 Business and Human Rights – Access to Remedy report emphasized the vulnerable position of victims of business-related human rights breaches, who may face substantial financial risks when taking legal action due to high costs especially in cases against large companies. To improve access to justice, the Agency made several suggestions such as making litigation costs proportionate to damages, offering free legal representation, aid and assistance, and setting limits on the losing party’s financial obligations.¹³⁵

The same risks place victims who seek access to environmental justice in a vulnerable position. Both these risks and victims’ position have been specifically addressed in several international instruments. For example, Article 9 of the Aarhus Convention¹³⁶ requires that states provide victims and general public with access to justice in environmental matters. The Aarhus Compliance Committee interpreted this provision as an obligation of states to remove or reduce financial barriers to environmental justice in finding that restrictive rules on legal aid which excluded small NGOs challenged ‘the inherent meaning of free legal

¹³¹ *Ibid.*, 938, paras. 26-28.

¹³² *Ibid.*, p. 941, para. 38. Although this provision refers solely to ‘legal assistance’ it is understood that the term ‘legal assistance’ also includes legal aid. See, Hathaway (2021, p. 261).

¹³³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, *Official Journal of the European Union*, L180/60 of 29 June 2013, Articles 20–21.

¹³⁴ *Anakomba Yula v. Belgium* (violation of Article 6(1) in conjunction with Article 14).

¹³⁵ EU Agency on Fundamental Rights, Business and Human Rights – Access to Remedy, Report, 2020, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf

¹³⁶ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447 (1998).

aid, which aims to facilitate access to justice for the financially weaker. The Committee finds that instituting a system on legal aid which excludes small NGOs from receiving legal aid provides sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice.¹³⁷ Recently approved the EU Corporate Sustainability Due Diligence Directive, part of the EU Green Deal, provides for corporate civil liability in relation to environment and human rights. This directive also ‘addresses certain practical and procedural barriers to justice for victims of adverse impacts, including ... prohibitive costs of civil liability proceedings.’¹³⁸

4. CONCLUSION

Litigation costs constitute a limitation on the right of access to a court, thereby placing cost-related decisions made by national courts within the human rights framework. Both the right of access to a court and the prohibition of excessive costs fall within the implicit guarantees of Article 6(1) of the ECHR as well as other rights and freedoms protected under the Convention. However, the ‘right to a court’ is not absolute; it may be subject to certain restrictions, as the administration of justice inherently requires state regulation. Consequently, litigation costs are not *per se* incompatible with the Convention. While Article 6 of the ECHR ensures that individuals have a practical and effective right to bring civil claims before a court, it also grants states a considerable margin of appreciation in determining how to implement this guarantee, subject to compliance with the Convention's requirements.

This margin of appreciation, combined with a set of legitimate aims, allows for financial restrictions on access to a court. Legitimate aims include the state’s interest in collecting court fees to process claims, protecting parties through cost-recovery rules that reflect the outcome of proceedings, deterring frivolous claims, and advancing broader interests in the proper administration of justice. The ECHR assesses whether national authorities strike an appropriate balance between, on the one hand, the imposition of litigation costs and, on the other, the safeguarding of an applicant’s right to pursue claims through the judicial system.

The Court’s case law demonstrates that certain factors and considerations exceed even a generous margin of appreciation in matters of litigation costs, thereby failing the proportionality test. These include excessive formalism in levying court fees, stamp duties, or security for costs that result in disproportionate financial burdens; unreasonable calculations of costs, particularly in relation to the success of claims in general and claims for non-pecuniary damages in particular; excessive and unjustified litigation costs claimed by state authorities representing the state in legal proceedings; and a failure to consider

¹³⁷ ECE/MP.PP/C.1/2010/4/Add.2, para. 66.

¹³⁸ European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), recital 82.

the vulnerable position of a litigant. The identified factors serve as key signposts and benchmarks in developing a human rights-based approach, ensuring that these costs do not become an undue barrier to justice.

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