

THE PRINCIPLE OF EQUALITY OF ARMS – PART OF THE RIGHT TO A FAIR TRIAL

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Abstract

The principle of equality of arms is a jurisprudential principle issued by the European Court of Human Rights and is a part of the right to a fair trial written in the (European) Convention for human rights and fundamental freedoms. With this article the author wants to analyze this principle from jurisprudential and legal point of view.

Keywords: *equality of arms; fair trial; contradictory; jurisprudential principal; defense organization*

INTRODUCTION

Equality of arms is a jurisprudential principle of the European Court of Human Rights (from now on called the Court). This principle is a part of the right to fair trial, regulated by art. 6 of the (European) Convention for human rights and fundamental freedoms (from now on called the Convention).

With this article we will debate differences between the ways this principle finds its application and the ways the principle of contradictory does. It is very interesting to see the resembling and the difference between these two principles, the way they interact within a fair trial.

Also, we will analyze and highlight the safeguards in the Romanian legislation which contain connotations of the principle of equality of arms. Together with these guaranties, we will debate also on the prosecution responsibility to bring to light the truth in every case always be respecting the law.

It is important to see the evolution the principle of equality of arms in the Court's jurisprudence, which since 1959 has continually enriched the content of this principle and has strongly contributed to its correct interpretation and differentiation.

1. THE PRINCIPLE OF EQUALITY OF ARMS AS ESSENTIAL ELEMENT OF A FAIR TRIAL

1.1. The Court, using the privilege of the “elements that are always present within a right” theory, has significantly enriched the content of the right to a fair trial, governed by art. 6 of the Convention.

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Thus, the right to a fair trial is divided now in three pylons¹⁾. The central pylon refers to the procedural safeguards *stricto sensu*, the equality of arms, the independence and the impartiality of the court, the publicity and celerity of the criminal trial. The text of the Art. 6 contains also two other material rights, the right to access a court, the right for the enforcement of decisions. Also, in a decision²⁾, the Court considers the right to access a court an inherent component of the right to a fair trial.

1.2. We will concentrate our research on the principle of equality of arms, called by the Court³⁾ a fundamental principle of the fair trial. („*Toute personne a droit a ce que sa cause soit entendue equitalement*”).

1.3. In terms of European law, equality of arms involves giving each part the reasonable possibility to present its cause, in those conditions that will not put this part in disadvantage against its opponent.

Therefore, the principle of equality of arms allows penalizing all inequalities in communicating certain documents to part (example: sending only to the prosecutor and not also to the defense the police reports⁴⁾).

1.4. Hence, the parts must have the possibility to present in an equal manner all the evidence they hold. As a consequence, a difference in treatment as far as the witness interrogation is concerned may violate the principle of equality of arms, any disparity in documents communication may be sanctioned in the name of this principle. As well, it is mandatory to respect the principle of equality of arms during the appeals.

1.5. The Court affirmed that, as the other guarantees provided by art. 6 par. 1 in the Convention, the principle of equality of arms applies to any proceedings be it contentious or gracious. When it is verified if the principle of equality of arms is respected by the national courts, during a concrete procedure, the Court doesn't not have as purpose to rule on the case, no matter the object (criminal prosecution or complaint concerning the civil rights and obligations).

¹⁾ F. Sudre, 2005, *Droit Européen et international*, Ed. Presses Universitaire de Rance, 7e édition refondue, p. 338.

²⁾ European Court of Human Rights, decision from 11th of February 1975, *Golder versus England*, par. 41. All decision we will refer to in this article are available online at www.echr.coe.int.

³⁾ European Court of Human Rights, decision from 17th of January 1970, *Delcourt versus Belgium*, par. 21.

⁴⁾ European Court of Human Rights, decision from 27th of April 2000, *Kuopila versus Finlada*, par. 37.

1.6. Following a theory of the Court we consider that the principle of equality of arms is an essential element of the broad notion of the right to a fair trial, which directly interacts with the principle of contradictory in both civil and criminal matters.

1.7. The French doctrine has revealed the idea⁵⁾ that the wording of this principle should be replaced with “principle of balance in the rights of parts” (“équilibre des droits des parties”), as this form, being more abstract, is able to complete better the requirements of the fair trial. In the same theory it was said that the use of the word “arms” referring to the combatants of the criminal trial, brings the thought of the gladiators in the center of the arena, forced to comply with the procedural rights equilibrium.

Despite this critique on the expression “equality of arms”, the doctrine and the Court stay devoted to this already recognized formula.

2. THE PRINCIPLE OF THE EQUALITY OF ARMS IN INTREACTION WITH THE PRINCIPLE OF CONTRADICTIONITY

2.1. The jurisprudence of the Court has stated that the principle of equality of arms is an element of the larger notion of the right to a fair trial, which incorporates also the fundamental right of the contradictory nature of the court⁶⁾.

The principle of the equality of arms is extremely important as it implies compliance with the right to defense or the necessity of a contradictory debate, these being strong guarantees in which the principle lies. The Strasbourg Court has reminded that the evidences must be presented, in principle, to the litigant, in public session with an eye to a contradictory debate.

2.2. The contradictory, closely related to the idea of equality of arms, imposes to the judge to watch that any element, which can influence the solution of the cause, to be the object of a debate between the parts. Each part must have not only the faculty to make known the elements on which his claim is based, but the faculty to know and to discuss any evidence or conclusion presented to the judge with the purpose of influencing his decision. Is not relevant if the element able to lead to a certain decision is brought to discussion by the parts or *ex officio* by the court, even in this last scenario, the judge being obliged to impose its discussion.

2.3. In the opinion of the Court, the contradictory impose, in criminal field, the possibility for the defendant to fight the statements made by the victim by a confrontation or by having the possibility to obtain the questioning of the victim

⁵⁾ M. Jean-Pierre Dintilhac, *L'égalité des armes dans les enceinte judiciaires*, available online at http://www.courdecassation.fr/_rapport/rapport03/etudes&doc/7-etude-M-Dintilhac.htm.

⁶⁾ P. Nicolopoulos, 1989, *La procédure devant les juridictions répressives et le principe du contradictoire*, RSC, p. 3.

during the trial, statement that show the fact that the principle of equality of arms applies also in the defendant – victim relation. Also, in order to realize the criminal contradictory, the states are obliged to adjust their internal procedures so that, the existing evidence to be produced during the public trial, so they can be the object of the contradictory debate between the defendant and the prosecutor, in front of the judge. In this context, it was said that the evidences, especially those that are testimonial, must be produced in front of the first judge, being insufficient having them presented only for the prosecutor, even if during this procedure the defendant had the right to contest the evidences.

2.4. For example, the Court has considered that the Romanian state had violated the principle of contradictory⁷⁾, as the Supreme Court of Justice based its decision on an accounting expertise relating to which one of the parts has not received the summons.

2.5. The jurisprudence of the Court has also stated that the principle of equality of arms represents an element of the larger notion of the fair trial, which incorporates the fundamental right to a contradictory trial. The right to a fair and contradictory trial supposes the possibility to access the information concerning the observations or documents presented by the other parts, and the possibility to bring them into public debate.

The principle of equality of arms shouldn't be confused with the principle of contradictory. The relation between these two principles must be clarified concerning the similarities, differences and their interactions.

2.6. The Court states⁸⁾ on the differences between the two principles in regards to the case where the miscommunication of a document from the cause's file affects only one of the parts, when the other part had access to that document. It is specified that in these situation we are confronted with a violation of the principle of equality of arms. The parts must be treated in an equal manner, without having one part enjoying a right to which the other didn't had access. Opposed to this case, if the both parts didn't had the possibility to study a useful information that already reached the judge, the violation concerns the principle of contradictory.

2.7. The Strasbourg Court has analyzed and still analyzes the intervention of the Public Ministry in a fair trial and accentuates its real function⁹⁾. So if the

⁷⁾ European Court of Human Rights, decision from 11th November 2006, *Dima versus Romania*, par. 40.

⁸⁾ European Court of Human Rights, decision from 18th of February 1997, *Niderost - Huber versus Switzerland*, par. 21.

⁹⁾ European Court of Human Rights, decision from 30th October 1991, *Borgers versus Belgium*, par. 23.

prosecutor guarantees the objectivity of its interventions it means that all his conclusions have a special authority and they are never neutral for the interested part. To the notion of part *strict sensu*, is being opposed the notion of part *lato sensu*, denoting the person of which intervention in the trial is not neutral, but concerns an influence on the judge. The European Judge applies to the Public Ministry the principle of equality of arms and the principle of contradictory, with the purpose to organize the relation between the parts, from where we can extract the behavior as a part – *lato sensu* – in a fair trial.

3. THE PRINCIPAL OF THE EQUALITY OF THE ARMS IN THE DEFENSE ORGANIZATION

3.1. As per art. 6, alin. 1 from the Romanian Criminal Procedure Code, the right to defense is guaranteed during the entire criminal trial for the defendant and the other parts. Close to the main scope of this constitutional principle, the defense has also an important meaning concerning the principle of equality of arms. Thereby, art. 6, alin. 1 from the Romanian Criminal Procedure Code refers to the obligation that the prosecution has in assuring for the defendant the possibility to prepare the defense, before being questioned. In the art. 6, par. 5 from the Romanian Criminal Procedure Code it is stated the possibility for the defendant to be assisted by an attorney.

From these legislative provisions we can detach the conclusion that the defendant can use an attorney's advices and help with the purpose of building his defense against charges that are brought. This is a very important possibility as the attorney has the knowledge, the necessary studies, equilibrating the balance between the defendant and the prosecutor. In conclusion, by guaranteeing this right, the defendant is being offered the possibility to prove its innocence on equal terms with the criminal investigation body by using its own forces or by an attorney.

3.2. Equally, in the same spirit, the Convention stipulates in art. 6 paragraph 3, section 3 that the defendant has the right to defend himself or to chose an attorney, and if the doesn't have the financial resources to pay the attorney, he should be provided with a lawyer free of charge.

3.3. Resorting to the theory of positive obligations¹⁰⁾, the Court reminds to the signatory states that assuring the defense in the spirit of the principle of equality of arms and the principle of contradictory represents "a positive measure" that ensure compliance with the rights enounced in article 6 from the Convention.

¹⁰⁾ F. Sudre, *op. cit.*, p. 236.

4. PROCEDURAL SAFEGUARDS IN THE SPIRIT OF THE PRINCIPLE OF EQUALITY OF ARMS

4.1. Starting from guaranteeing the right to defense by assuring an attorney or offering the possibility to choose one or to represent yourself, our internal legislation is strewn with procedural safeguards that come to support the principle of equality of arms.

If we start our demonstration with the first statement of the accused or defendant and finish with his last word, we can distinguish certain turning points during the prosecution or during the trial which support the defense and offers equitable means to build defense for the accused.

4.2. Prominent for the court research is the moment of the first statement of the accused or defendant. Offering the possibility to make a statement means introducing him into the course of the criminal trial. During this moment, the accused or the defendant can find out the charges that are brought to him, can reveal certain facts essential for the investigation, can deny the charges and can inform the prosecutor on the circumstances that sustain his innocence. As we already mentioned (par. 3.1), being assisted by an attorney during the first statement is a possibility at the disposal of the accused or defendant during the prosecution or the trial.

4.3. During the prosecution it is recognized both internally and internationally the right for the accused or defendant to remain silent and not make any declaration. We must specify the fact that this right covers only the stage of persecution not the stage of the criminal trial¹¹⁾. More, this right, to remain silent (*le droit de ne pas temoigner contre soi-même*) is only applicable in criminal trials¹²⁾.

4.4. As per art. 250 from the Romanian Criminal Procedure Code, after putting into motion the criminal action, if the prosecution finished its researched, they have the obligation to present the prosecution material (all the evidence that were collected during the investigation on this stage). So, in the spirit of the principle of equality of arms, the prosecution informs the defendant on the evidence and on the legal qualification of the criminal act. In this stage, the accused can raise new claims or make more statements, so he can contest the content that the prosecution material has and can let the prosecution know information he considers relevant.

¹¹⁾ European Court of Human Rights, decision from 8th of February 1996, *Murray versus England*, par. 56-57.

¹²⁾ European Court of Human Rights, decision from 10th of November 2003, *Otto BV versus Postnbank NV*, par. 60, 92.

4.5. The proceedings of the trial stage begin by hearing the defendant. As a guarantee for the right to defense, for the right to advocacy, the court starts by hearing the defendant, and continues by hearing the other parts from the trial and the prosecution.

4.6. Besides from the possibility to make a statement that the defendant has during the hearing, the court allows him, as per 341 from the Romanian Criminal Procedure Code, to have a final word before closing the debate. This final word represents also the last public moment of the criminal trial. In the spirit of the right to a fair trial and culmination of the presumption of innocence, the defendant received the final opportunity to combat the charges that are brought to him.

4.7. We must specify that the hearings of the witnesses in the prosecution investigation stage, as the first statement of the defendant are procedural sequences that must be conducted only within the law, without exerting force or pressure. If the legal limits are exceeded, then the criminal investigation is no longer under the protection of the principle of equality of arms or of the right to a fair trial.

4.8. From these procedural sequences, we can perceive legislator's intent to offer the possibility for the accused to defend himself, to equilibrate the balance that used to lean in favor of the prosecution, in order to prove his already alleged innocence¹³⁾ during the criminal trial.

Thus, we can draw the conclusion that being compliant with the principle of equality of arms and with the principle of a fair trial is one of the obligation also inscribed in the Romanian Criminal Procedure Code. More, we can say the Code is being lined with legislative levers build only with this purpose.

5. ROLE OF THE PROSECUTION IN COMPLIANCE WITH THE PRINCIPLE OF EQUALITY OF ARMS

5.1. The prosecution role involves also the function of guarantor of equality before the law, theory which sends to the principle of the fair trial and principle of equality of arms in criminal field (art. 6 of the Convention, art. 10 from universal Declaration of Human Rights and art. 14 of International covenant on Civil and Political Rights).

5.2. The principal of a fair trial send to the necessity to reconcile the state's intervention and the prosecution intervention – intervention that can be translated by the will to punish all violation of the criminal law – with that search for the truth by the prosecutor¹⁴⁾. From this point of view, we could say that the principle

¹³⁾ F. Sudre, *op. cit.*, p. 374.

¹⁴⁾ A.Cluny, *Public Ministry and the principle of equality*, available online at <http://medel.bugiweb.com/usr/ClunyBruxelles.pdf>.

of equality of arms must be conceived as a brake designed to safeguard the citizen against disproportion to the coercive force of the state.

5.3. From here forward, we can deduce that the principle of equality of arms („*parité des armes*”) was conceived as an equity instrument and is intended to refer to values and criteria of proportionality. It involves certain procedural safeguards, certain rights of the accused or the defendant, safeguards that ensure a fair and not abusive investigation for all causes under research.

5.4. As regards the participation in the debates of prosecution, the presence of the general attorney in the deliberations of the Court of Cassation was deemed contrary to the requirements stipulated in art. 6 of the Convention (in some countries it is customary for the Public Ministry to assist in the deliberation but not to speak or vote). The Strasbourg court considered that, irrespective of the recognized objectivity of the general attorney or the general prosecutor, this one, recommending the rejection of an appeal, was becoming an objective ally or adversary of one of the parts, and his presence during the deliberation, was offering, even if just apparently, an additional opportunity to support his conclusions in the council chambers.

5.5. The Court¹⁵⁾ has decided that the participation of the general attorney during the deliberation of the court breaks art. 6 par. 1 from the Convention. In this decision, the prosecution was highlighting that the public presentation of a magistrate’s opinion would not affect the duty of impartiality, in extent that the general attorney, during the deliberation, represents only one opinion among other magistrates and could not influence the others. For the Court, the presence of the general attorney is reprehensible in itself, whether active or passive.

6. EQUALITY OF ARMS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

6.1. The redactors of the Convention have subscribed the right to a fair trial between the fundamental rights: “*Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial*”.

Even if the expression “equality of arms” is not found in the body of the Convention, the Court uses it to express trust in equity, independence and impartiality, but also as an autonomous component of the fair trial. From here, we can conclude that the distinction between the equality of arms and the principled condition the principle of a fair trial is not always easy, as far as the jurisprudence of the Court.

¹⁵⁾ European Court of Human Rights, decision from 7th of July 2001, *Kress versus France*, par. 56.

6.2. The European Commission first concluded on the principle of equality of arms in 1959¹⁶⁾: “*Le droit à un procès équitable implique que toute partie à une action civile et a fortiori à une action pénale, doit avoir une possibilité raisonnable d'exposer sa cause au tribunal dans des conditions qui ne la désavantagent pas d'une manière appréciable par rapport à la partie adverse*”. What is essential is that none of the part to be adversely affected by report to other parts.

6.3. Following this jurisprudential step, the Court refers¹⁷⁾ for the first time to the equality of arms as a component of the fair trial in front of an independent and impartial court. Also, the Court gives¹⁸⁾ to the word of “equity” its etymological meaning of “*aequitas*”. So, it formulates the principle “*per a contrario*” judging that a trial would not be equitable if it would run in “*conditions likely to place a part in an unfair situation*”.

6.4. The Strasbourg Court decides¹⁹⁾ that the equality of arms is applicable in all procedures that put into question civil right and obligations, even if the content of this principle does not have civil or criminal implication²⁰⁾.

6.5. As the Court considers that the field where this principle applies has a general nature, it hasn't received an absolute character: there is no need for the states to establish a strict procedural equality between the parts, but only make sure that the parts have a situation reasonably equal. What is important is that none of the parts has a privileged position during the trial, referring here to the prosecution also²¹⁾.

6.6. If we would refer to the prosecution, the Court estimates that the equality of arms does not regard only the parts but any intervention able to influence the court's decision in a certain way. On the same ground, the Court decides²²⁾ that the

¹⁶⁾ European Court of Human Rights, decision from 30th of June, 1959, *Szwabowicz versus Sweden*, par. 30.

¹⁷⁾ European Court of Human Rights, decision from 27th of June 1968, *Neumeister versus Austria*, par. 43.

¹⁸⁾ European Court of Human Rights, decision from 17th of January 1970, *Delcourt versus Belgium*, par. 18.

¹⁹⁾ European Court of Human Rights, decision from 23th of June 1993, *Ruiz Mateos versus Spain*, par. 30.

²⁰⁾ European Court of Human Rights, decision from 27th of October 1993, *Dombo Beheer B.V. versus Nederland*, par. 31.

²¹⁾ European Court of Human Rights, decision from 22nd of September 1994, *Hentrich versus France*, par. 7-8.

²²⁾ European Court of Human Rights, decision from 17th of March 1998, *X versus Netherland*, par. 35-36.

situation of communicating only to the general attorney the report of the reporting counselor is a breach not compliant with the principle of equality of arms.

6.7. The Strasbourg Court has decided that in the situation where the prosecutor formulates its conclusions that a certain law disposition applies and the solution heads in a certain direction, there is no violation of the art. 6, as long as the part with an opposite position had access to same information. Within several decisions²³⁾, concerning the role of the general attorney (commissaire du gouvernement) under the French State Council (Conseil d'Etat), the Court refers to the influence this character has on the deliberation. In the cause versus Belgium, the defendant didn't had the opportunity to answer to the alleged charges, his right to defense was restraint because he did not had the possibility to debate on the adverse findings of the prosecution, hence resulting violation of several aspects of art. 6 (principle of equality of arms, principle of contradictory).

6.8. As far as the opinion of the Court in the field of equality of arms concerning the administration of evidences, it was decided that²⁴⁾ the principle was not respected in the situation where not all parts have the opportunity to question in a fair way witnesses. In the same spirit, the Court has decided at the expense of the prosecution²⁵⁾ regarding the court competence to dispose or to deny a court research measure. In the same case, the court denied for one of the parts the request to administrate a research measure, violation the principle of equality of arms.

Even the failure to communicate, by the claimant, of certain documents with high importance for the trial (example: written point of view of the general attorney of the High Military Administrative Court, classified documents in a trial at the High Military Administrative Court) was sanctioned by the Court as a breach in the principle of equality of arms²⁶⁾. Applying the same mechanism in similar causes²⁷⁾, from the breach perspective, the Court considered that the claimant was not protected by the safeguards from the art. 6 paragr. 1 from the Convention.

²³⁾ European Court of Human Rights, decision from 7th of June 2001; *Kress versus France*, par. 56; European Court of Human Rights, decision from 31st of October 1991, *Borgers versus Belgium*, par. 22.

²⁴⁾ European Court of Human Rights, decision from 27th October 1993, *Dombo Beheer versus Netherland*, par. 30.

²⁵⁾ European Court of Human Rights, decision from 24th of October, *H. contra. France*, par. 46-47.

²⁶⁾ European Court of Human Rights, decision from 21st of April 2009, *Cauza Miran versus Turkey*, par. 13.

²⁷⁾ European Court of Human Rights, decision from 31st of October 2006, *Aksoy (Eroğlu) versus Turkey*, par. 93.

6.9. Regarding the evidences, the Court decided the principle of equality was violated in the case where it was not permitted for one of the parts to interrogate a different specialist than the one already proposed and questioned in that trial²⁸⁾, whom testified against that part. The expert's testimony had considerably influenced the trial's course and the final decision. So, in the spirit of the art. 6 par.1 from the Convention, the European Court decided there was a violation of the right to a fair trial.

6.10. As far as the respect of the principle to a fair trial during the appeal is concerned, the Court had decided that offering the possibility to file for appeal only to the general attorney, the superior of the prosecutor that participated in the initial trial, without offering this possibility to the claimant too is not compliant with the limits of the equality of arms²⁹⁾.

As a consequence, the principle must be applied in the first and second appeal too.

Conclusion

The differentiation we tried to do between the principle of equality of arms and the principle of contradictory, as well as the integration of the equality of arms into the principle of the fair trial are necessary in order to define the place that the equality of arms has as a jurisprudential principle of the Court.

By noting and focusing on the legislative levers the Romanian legislator had introduced in the Romanian criminal procedural code, we tried to point out the terms in which the protection of equality is realized in the Romanian criminal trial.

To these legislative safeguards we connected the important role that the prosecution plays as far as finding the truth in a criminal cause, watching at the same time, to respect all the principles deriving from the right to a fair trial, including the equality of arms.

Also, it was interesting to see the development that the principle of equality of arms had along the European jurisprudence, starting from 1959 until present time, earning new valences and lot of trust from European legislations.

We could say that many times, the Court has sanctioned mistakes regarding the principle of equality of arms. During the criminal trial, this principle had a major influence in assuring that the truth always comes, the law being respected as far as the fact and the guiltiness are concerned.

In consequence, in the spirit of the art. 6 from the Convention and in order to closely watch the Court jurisprudence, the internal legislation are obliged to be compliant in order to avoid other errors.

²⁸⁾ European Court of Human Rights, decision from 6st of May 1985, *Bonisch versus Austria*, par. 21-23.

²⁹⁾ European Court of Human Rights, decision from 27th of January 2009, *Precup versus Romania*, par. 27, 29.

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