EQUALITY OF ARMS- A SPECIFIC FOCUS ON THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS

A- BASIS AND OBJECTIVES OF THE EQUALITY OF ARMS PRINCIPLE

One of the specific features of the human rights is diverging from the view of giving privilege to state authority to view of liberal thinking.

The right to a fair trial before a tribunal as guaranteed by Article 6 clearly stresses this aspect of European Convention of Human Rights.

Specifically, equality of arms principle makes a further focus on this subject. Namely, this principle requires an equitable balance between the parties of the case. If one of the parts is a state it will be more important. Because there is a significant inequality in favour of the state in terms of overwhelming resources.

Therefore according to this principle, there shouldn’t be an unfair superiority or advantage between the parties of the case during the trial.

This does not mean that the parties must be put in exactly the same position as to each other. It implies however, the necessity of to be given the opportunity to have information about case course (for example on the evidences and observations submitted by the other party) and joining to process efficiently for both prosecution and defence.

1 See among others, Rowe and Davis v. the United Kingdom [GC], No. 28901/95, Para. 60, ECHR 2000-II: “It is a fundamental aspect of the right to a fair trial that criminal proceedings, ...should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”
This principle has been derived from the article 6 of the Convention. The first paragraph of Article 6 implies equality of arms by stressing the right to a fair trial via terms of independent and impartial tribunal\(^2\).

The principle of the equality of arms between the prosecution and defence is a feature of the wider concept of a fair trial\(^3\). So this principle should not be interpreted only relevant with evidences, it can play a role in every stage of proceedings and with regard to many subjects\(^4\).

In this respect, content of the third paragraph of Article 6 is related with this principle and explains the basis of the principle more clearly than the first paragraph. This paragraph of Article 6 include; supplying information about accusation for the accused, providing time and facilities to the accused for defence, the right to defence oneself in person or through legal assistance, the right to summon or examine witnesses and the right to the free assistance of an interpreter.

On this basis, with the purpose of ensuring equality of arms, article 6 paragraph 3 complements the judicial protection provided under article 6 paragraph 1.

The European Court of Human Rights identifies the principle of equality of arms in one of its judgment as:

“...as regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”\(^5\)

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\(^2\) Article 6(1): “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ....”


In another judgment concerning Article 6 § 3 (c) and Article 6 § 3 (b), the Court referred to the principle of equality of arms as can be seen below:

“In examining questions under Article 6 § 3 (c) the Court takes account of the treatment of the defence as a whole rather than the position of the accused taken in isolation, with particular regard to the principle of equality of arms as included in the concept of a fair hearing”, “The ‘rights of defence’, of which Article 6 § 3 (b) gives a non-exhaustive list, have been instituted, above all, to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence”.

While there is no exhaustive definition as to what the minimum requirements of “equality of arms” are, there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to: a) adduce evidence, b) challenge hostile evidence, c) present arguments on the matters at issue.

According to the explanations above, it should also be stated that, the guarantees enshrined in article 6 § 3 are not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.

B- SOME VIOLATIONS FOUND BY THE COURT REGARDING THE PRINCIPLE OF EQUALITY OF ARMS

In case of not to make any advance notification to the applicant resulting that the applicant would not be able to attend the hearings in person, so a violation occurs due to the applicant was placed at a significant disadvantage because of his absence from the hearings: violation of Article 6 § 1 (Mitkus v. Latvia, 2 October 2012, § 114-115).

6Mayzit v. Russia, Judgment, ECHR, 20 January 2005, para.64, 79.
7DovydasVitkauskas, GrigoriyDikov, Protecting the right to a fair trial under the European Convention on Human Rights, Council of Europe Human rights handbooks, Council of Europe, 2012, p.48.
8Ibid.,para. 77.
Failure to take any measure to secure the applicant's effective participation to the proceedings and lack of an opportunity for the applicant to present his arguments in a defamation case before a court either in person or through representation caused to violation: violation of Article 6 § 1 (Mokhov v. Russia, 9 January 2013, §§ 48, 50).

In circumstances where the applicant's conviction is based primarily on an assumption, the principle of equality of arms and, more generally, the right to a fair trial, imply that the applicant should be afforded a reasonable opportunity to challenge the assumption effectively. The refusal of domestic court to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial: violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 (Popov v. Russia, 13 July 2006, §§ 183, 188).

The proceedings must be adversarial and must always ensure equality of arms between the parties (the prosecutor and the detainee). Even if the Public Prosecutor’s submissions did not contain any relevant new aspect and did not infringe Article 5 § 4, whether or not a submission by the prosecution deserves a reaction is a matter for the defence to assess. In this respect, due to the written comment of the Public Prosecutor was not served on the applicant and thus the applicant was not given the guarantees appropriate to the kind of deprivation of liberty, there has been a breach of Article 5 § 4 of the Convention (Lanz v. Austria, 31 January 2002, §§ 40, 44, 45).

Equality of arms was not ensured if the defence was denied access to documents in the case file which were essential in order effectively to challenge the lawfulness of the detention. The Court found that the offer of an oral account of the facts and of the evidence and the provision of a four-page overview were insufficient when defence counsel had not been given access to the parts of the case file on which the suspicion against the applicant was essentially based: violation of Article 5 § 4 (Mooren v. Germany, [GC], 9 July 2009, §§ 121, 124).
C- A BRIEF OVERVIEW OF VIOLATIONS RELATED TO TURKEY IN RESPECT OF THE PRINCIPLE OF EQUALITY OF ARMS IN LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS

Some judgments of ECHR in connection with the principle of equality of arms will be examined and the violations found by the Court will assessed below.

1- Case of Göç v. Turkey
   a- Case Description:

On 25 July 1995 the applicant was taken into police custody and detained at the İzmir Security Directorate. He was accused of stealing and falsifying court documents relating to a concluded divorce case. On 31 July 1995, the public prosecutor decided not to bring charges against the applicant for lack of evidence. Then the applicant filed a complaint against the Treasury requesting compensation for his detention and alleged that, inter alia, while in detention, he had been tortured and ill-treated by being beaten. During the judicial process the opinions of the Public Prosecutor was not served on the applicant.

In the applicant’s case the Court finds that Article 6 § 1 has been violated on account of the non-communication to the applicant of the Principal Public Prosecutor’s opinion.

   b- Assessment:

In this case the Court regarded the complaint in respect of the right to an adversarial procedure as well as the equality of arms principle. The Court stated in its judgment that, however, while the Principal Public Prosecutor also advised in favour of the applicant and this neutral approach may have ensured equality of arms between the parties at the appeal stage, it still remained the case that the applicant disputed the amount of damages awarded by the lower court. He was therefore entitled to have full knowledge of any submissions which undermined his prospects of success before the Court of Cassation.
As can be seen, according to the Court, the principle of the equality of arms requires; in case of a disadvantageous situation against one party during the trial, that party should be serviced related opinions or documents and have opportunity to object them. They also have to be granted access to the file, which are essential for an effective challenge to the legality of the detention.

2- Case of Bağrıyanık v. Turkey

a- Case Description:

In December 1995 the applicant was arrested and remanded in custody on suspicion of being a member of an illegal organisation. Investigations were subsequently carried out and it was decided that the applicant should remain in detention pending trial. The applicant complained under Articles 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security) and 6 § 1 (right to a fair trial within a reasonable time).

The Court, inter alia, held that there had been a violation of Article 5 § 4 on account of the fact that the applicant’s appeals against the decisions to prolong his detention had been examined in the course of proceedings in which neither the applicant himself, nor anyone representing him, had participated.

b- Assessment:

In its judgment, with emphasising the principle of equality of arms the Court stated that, according to case law, a court examining an appeal against detention must provide guarantees of a judicial procedure. The trial must be adversarial and ensure in all cases of "equality of arms" between the parties, the prosecutor and the detained.

On this base the Court established that the requirements have not been met for this case because it was held on the applicant's objection to the decisions of his detention in a proceeding in which the applicant himself or a person representing him was not able to participate.
In this occasion the Court stressed the necessity of participation in a trial for accused and having opportunity of defending himself in person or by a representative on the base of equality of arms principle.

As can be seen above, the Court found the violation on account of lack of equality of arms relating to the necessity of adversarial trial. In this connection, we can infer that the principle of equality of arms includes the fundamental right that criminal proceedings should be adversarial.\(^9\)

3- Case of Altınok v. Turkey

a- Case Description:

On 12 April 2007 the applicant was arrested following a complaint accusing him of fraud and forgery. The following day he was brought before the criminal magistrates’ court, which ordered his pre-trial detention. Until he was released on 12 May 2008, his detention was extended. On 29 December 2008 Mr Altınok was found guilty as charged by public prosecutor and was sentenced to three years and nine months’ imprisonment. Before the European Court the applicant complained that the lodging of an objection against a decision by the assize court to refuse his request for release and to order his continued detention had been ineffective.

The Court found -inter alia- a violation of Article 5 § 4 because the remedy provided for in domestic law had not observed the principle of equality of arms between the parties.

b- Assessment:

The Court emphasised that Article 5 § 4 entitled any arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which were essential for the lawfulness of their deprivation of liberty. Proceedings concerning an appeal against detention must be adversarial and ensure equality of arms between the parties, that is, between the

prosecutor and the detained person. The other party must be aware that observations had been filed and have an opportunity to comment on them.

However, when the Assize Court had asked the public prosecutor to submit a written opinion in the course of its examination of the objection lodged by Mr Altınok, and when the prosecutor had filed written submissions to the effect that the request for release should be refused, a copy of the submissions had not been sent to Mr Altınok or his lawyer, neither of whom had thus had the opportunity to reply to the opinion.

Therefore, in this case and similar cases, the problem is failure to provide detainees or their lawyers with a copy of the public prosecutor’s opinion during the examination of an objection. In this connection defendants must be entitled, as a party to the proceedings, to receive a copy of such submissions in order to be able to state their opinion on the issue of detention under the same conditions as the prosecutor.

4- Case of Alkan v. Turkey
   a- Case Description:

Under the guardianship of his father, the applicant initiated compensation proceedings before the Supreme Military Administrative Court, claiming that his illness had been caused by the ill-treatment to which he had been subjected in the army. He also requested legal aid for the court fees. The Supreme Military Administrative Court rejected the applicant’s legal aid request, stating that the requirements had not been met in the applicant’s case. The applicant in this case relies on Article 6 § 1 (access to court) and Article 13 (right to an effective remedy).

The Court holds that the unlawful refusal of the applicant’s legal aid request deprived him of the possibility of submitting his case before a tribunal. In this respect, the Court concludes that there has been a disproportionate restriction of the applicant’s right of access to court.
b- Assessment:

The Court stated in this case that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. **It is central to the concept of a fair trial**, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to *enjoy equality of arms* with the opposing side.

It also reiterated that the right of access to court is not, however, absolute and may be subject to restrictions but, while the Contracting States enjoy a certain margin of appreciation in that respect, the ultimate decision as to the observance of the Convention’s requirements rests with the Court.

Therefore, in the instant case the Court found that the denial of legal aid to the applicant deprived him of the opportunity to present his case effectively before the court and contributed to an unacceptable inequality of arms with opposite side.

In this way the Court has established a relation between the principle of equality of arms and the right of access to court.

5- Case of Ünel v. Turkey

a- Case Description:

The applicant, who was the director general at a ministry between 1997 and 2000, was arrested while committing an act of corruption in a police operation. At the end of the proceedings, he was found guilty of corruption and sentenced to a term of imprisonment of four years and two months and a fine.

The Court held that the proceedings in question, has not met the requirements of a fair trial and that there has been a violation of Article 6§§1 and 3d.
b- Assesment:

The European Court established that the applicant had repeatedly asked for some evidences to be examined at a hearing, and certain witnesses to be summoned and heard. However, the domestic courts refused these requests on the grounds that they were irrelevant and that the evidence in the case file was sufficiently clear to establish his guilt.

The European Court found in this respect, due to lack of a balance between the prosecution and defense, the proceedings had not met the requirements of a fair trial as certain material evidence relevant to the establishment of the applicant’s guilt had not been produced or discussed adequately at the hearing in his presence.

As can be seen, in this case the Court considered a breach of the principle of equality of arms related to the unfairness of criminal proceedings against the applicant on the bases of ability to observe and contest the evidence.

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