THE PRINCIPLE OF EQUALITY OF ARMS AND TURKEY’S PROBLEMATIC AREAS WITHIN THE FRAMEWORK OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Report by
Oktay BAHADIR
Judge
Ministry of Justice
Directorate General for International Law and External Relations
Human Rights Department

1. THE MEANING OF EQUALITY OF ARMS

One of the essential components of the right to a fair trial guaranteed under Article 6, paragraph 1 of the European Convention on Human Right (ECHR/Convention) is equality of arms, as the case-law of the European Court of Human Right (ECtHR/Court) clearly shows.

The right to fair hearing supposes compliance with the principle of equality of arms. This principle applies to civil as well as criminal proceedings. “Equality of arms” requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-a-vis another party.¹ And so, importance is to be attached inter alia to the appearance of the fair administration of justice.² In short, the equality of arms guarantees ability to know and test evidence on equal conditions with the other party. In general terms, this principle incorporates the idea of a “fair balance” between the parties.

While there is no exhaustive definition as to what are the minimum requirements of “equality of arms”, 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, for example, adduce evidence, challenge hostile evidence, and present arguments on the matters at issue.³ The opposing party must

not be given additional privileges to promote its view, such as the right to be present before a court while the other party is absent.4

The presence of a prosecutor in civil proceedings opposing two private parties can be justified if the dispute affects also the public interest or if one of the parties belongs to a vulnerable group in need of special protection.5

The requirement of equality of arms enjoys a significant autonomy but is not fully autonomous from the domestic law since Article 6 takes into account the inherent differences of accusatorial systems, for instance, to the extent that it is for the parties to decide in that system which evidence to present or witnesses to call at trial-and inquisitorial systems, where the court decides what type and how much of the evidence is to be presented at trial. An applicant in an inquisitorial system, for instance, cannot rely on the principle of the equality of arms or Article 6 § 3d in order to call any witness of his choosing to testify at trial.6

1.2. Aspects of Equality of Arms

1.2.1. Opportunity to receive and respond to submissions

The right to an adversarial trial has also been held to mean that in a criminal case both prosecution and defence must be given the opportunity to have knowledge of and comment on the observation field and the evidence adduced by the other party. While there are various ways by which national law may seek to achieve this, whatever method is chosen should ensure that other party will know if observations are filed and will get a real opportunity to comment.7

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1.2.2. Opportunity to present or give evidence

Where a party is permitted to confine its submissions in a summary fashion which deprives the other party of an effective opportunity to counter them, there may be a breach.8

1.2.3. Unequal status of witnesses

The position of experts must be attended by a fair balance between the parties. The mere fact that official experts in expropriation proceedings worked for the administrative authority was not a ground in itself for justifying fears that they did not act with neutrality. Otherwise it would place unacceptable limits on the possibility to obtain expert advice.9 In respect of court appointed experts, potential problems may arise where the expert has been involved in the prosecution, but whether a violation arises will depend on whether he in fact exercised a privileged role.10

1.2.4. Procedural inequalities

Potentially, issues might arise where one party enjoys, by their position, advantages over the conduct of the proceedings or access to material.11 However, these may to some extent be unavoidable where State authorities are concerned and the ECtHR seems to take a pragmatic approach as to whether the applicant has in fact been disadvantages.

1.2.5. Legislative interference

Where a State intervenes by passing a law to ensure the favourable outcome of pending proceedings in which it is a party, there may be a striking inequality of arms.

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2. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ABOUT TURKEY

2.1. Violations of Equality of Arms

Mehmet Yolcu v. Turkey, 15 November 2012, no. 33200/05: The applicant, Mehmet Yolcu, is a Turkish national who was born in 1957 and lives in Malatya. At the relevant time, he was a university research assistant. The case concerned an administrative procedure following the Vice-Chancellor’s refusal to appoint him to the post of lecturer in Arab language and literature in the Theology Faculty at the Inonu Public University. Relying, in particular, on Article 6 § 1 the applicant complained about the failure to communicate the opinion of the Chief Public Prosecutor at the Supreme Administrative Court in the context of his appeal against the administrative court’s judgment, and his application for rectification of that judgment.

The ECtHR held that there has been a violation of Article 6 on account of the failure to communicate the opinion of the Chief Public Prosecutor.

Gürkan v. Turkey, 29 March 2011, no. 1154/04: This case mainly concerned the non-communication to the applicant of an interim decision by the Supreme Administrative Court and the replies submitted by the administration to that decision.

The ECtHR held that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication to the applicant of the interim decision of the Supreme Administrative Court and the submissions of the administration in reply.

Karakoyun and Turan v. Turkey, 11 December 2007, no. 18482/03: The applicants, Mehmet Nuri Karakoyun and Mehmet Salih Turan, are Turkish nationals who were born in 1971 and 1977 respectively and live in Istanbul. The case concerned their conviction in criminal proceedings and the temporary ban on publication of their weekly newspaper. The applicants also complained that the opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to them. The Court concluded unanimously that there had been a violation of Article 6 § 1 (right to a fair trial).
Salduz v. Turkey, [GC], 27 November 2008, no. 36391/02: The applicant, Yusuf Salduz, is a Turkish national who was born in 1984 and lives in İzmir (Turkey). He complained that he had been denied legal assistance while in police custody and that he had not had access to the written opinion of the Principal Public Prosecutor at the Court of Cassation. On 27 March 2002 the Principal Public Prosecutor at the Court of Cassation submitted his written opinion to that court, calling for the judgment of the İzmir State Security Court to be upheld. Neither the applicant nor his representative was given access to that opinion. On 10 June 2002 the Court of Cassation dismissed an appeal by the applicant.

The Court considered, for the reasons given by the Chamber in its judgment of 26 April 2007, that the applicant’s right to adversarial proceedings has been breached. There had therefore been a violation of Article 6 § 1.

Kök v. Turkey, 19 October 2006, no. 1855/02: In 1995 the applicant, a medical doctor, brought administrative proceedings seeking to obtain recognition by the Turkish Ministry of Health of a period of specialised medical training she had undergone in Bulgaria. When her request was refused, she appealed to the Supreme Administrative Court. In considering the appeal, the Supreme Administrative Court requested details from the Ministry of Health regarding the legislation governing persons in a similar situation to the applicant and the administrative acts adopted on the subject. On 16 March 2001 the Ministry sent a letter, which was not forwarded to the applicant, analysing the applicant’s legal position and stressing that she did not satisfy the requirements laid down in the matter. The Supreme Administrative Court dismissed the applicant’s appeal. The applicant complained of the unfairness of the proceedings to which she had been a party. She relied on Article 6 § 1 (right to a fair hearing).

The Court observed that the observance of the right to a fair hearing would have meant allowing the applicant to submit comments on the information provided by the Health Ministry on 16 March 2001. No such opportunity had been afforded to her. Accordingly, the Court held unanimously that there had been a violation of Article 6 § 1 in that regard.
**Göç v. Turkey, 9 November 2000, no. 36590/97:** On 25 July 1995 the applicant was taken into police custody and detained at the Izmir 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 this 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.

2.2. **Equality of Arms not Violated**

**Diriöz v. Turkey, 31 May 2012, no. 38560/04:** In 2003 the applicant was sentenced to imprisonment for murder, attempted murder and causing injury with a firearm. Before the ECtHR, the applicant complained, inter alia, that the principle of equality of arms had been breached in so far as the prosecutor had stood on a raised platform, whereas he and his lawyer had been placed, as was the rule, at a lower level in the courtroom. He also complained that the prosecutor had entered the courtroom at the same time as the judges and by the same door, whereas his lawyer had had to use the public entrance.

The ECtHR held that the fact complained of was not sufficient to breach the principle of equality of arms in so far as, although a privileged “physical” position had been conferred on the prosecutor, the accused had not been placed at a disadvantage regarding the defence of his interests. Conclusion is inadmissible (manifestly ill-founded).
3. CONCLUSION

As infer from the case law of the Court, Turkey's main problem concerning the equality of arms is failure to communicate the opinion of the public prosecutor to the parties. Turkey has solved this problem by making legislative changes.

In addition, on 11 April 2013 by amending the law (Article 270 of Law No. 5271), in the case of object to detention, when the Public Prosecutor submit his/her observation, this observation shall communicate to suspect, accused or his/her lawyer. Thus, an effective appeal mechanism against the detentions was provided and compliance with the principle of equality of arms was ensured.

Now, Turkey does not seem a major problem arising from the legislation on equality of arms. However, in practice, such as the expert's report or interim decisions, occasionally, are not communicated to the parties. This issue can be solved by means of projects and continuing education activities through increasing awareness of the ECtHR judgments.