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THE 'EQUALITY OF ARMS' IN MACEDONIAN CRIMINAL PROCEDURE

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ABSTRACT

The right to a fair trial is implemented in our criminal procedure and is one of the core values of our criminal justice system. This right is absolute and can't be limited on any legal base. Its essence is fair and public hearing by an independent and impartial court with guaranteeing of all the minimum rights of the defendant. One of those minimum rights is the right of equity of arms between the parties, the prosecutor and the defense. In our Law on Criminal Procedure, it is provided that the defense has the same rights and duties as the prosecutor except those rights that belong to the prosecutor as a state authority. Therefore, the purpose of this article is elaborating the right of 'equity of arms' and its misunderstanding in practice. Hence, we intend to show some case studies in which some evidence are not considered by the court just because they are not proposed by the prosecutor and they are crucial for the verdict.

1. LEGAL BACKGROUND ON THE PRINCIPLE "EQUALITY OF ARMS"

The purpose of this paper is to analyze whether the legal commitment to 'equality of arms' is possible in practice, are real opportunities given to the defense, or the prosecution is well ahead of the defense? The principle of equality of arms is an excellent starting point to determine whether the trial was really fair. There is no doubt that the principle of "equality of arms" is one of the basic elements of the right to a "fair trial" guaranteed by Article 6 of the European Convention on Human Rights and Freedoms (Merrilis, J.G. 1993, p.193, Wasek – Wiaderek, 2000: p.23).

According to this provision (Guide on article 6 right to a fair trial, [criminal limb], ECHR):

1. In the determination 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defense;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The provision of Article 6 (Publication, Council of Europe F-67075) doesn't regulate the connection between the defense and the public prosecutor because the provision is in general terms and it is shaped so it could be applied to both criminal and civil cases (J Summers, 2007): p.98). Being a constituent element of the right to a fair trial, the principle of equality of arms is "a lens through which the requisite procedural fairness in any criminal proceedings can be ascertained." (Federova, 2012) In addition, it has been recognized that equality of arms is a relevant consideration both in the pre-trial and trial phase of proceedings. As, essentially, equality of arms constitutes a balance of fairness reasonably adjusted to the roles and responsibilities of the participants in a criminal process, these roles and responsibilities represent the position against which the discussion will proceed.

Thus, two related but distinct equality considerations interact within the concept of equality of arms: (1) Formal equality: ensuring equality between two equally situated parties; this corresponds to 'a level playing field' where the advantage of one party would lead to an unfair outcome; and (2) Material equality: the idea that a state should ensure some level of equality between the stronger and a weaker party (Federova, 2012:12).

But we have to underline that the concept of equality of arms does mean guarantying a mathematical equality between the parties. It is an expression of the larger concept of equality and the equines depends of the individual case.

2. THE PRINCIPLE OF EQUALITY OF ARMS IN THE PROCEDURAL LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Equality of arms is defined in a very extensive and neutral way because it is a starting point for determining the balance of rights and responsibilities between the two opposing sides in a criminal case. Precisely, this balance / imbalance is the issue of many judgments before the European Court of Human rights (hereafter ECHR). It is notable that the Court frequently stresses that equality of arms is just one element of the 'wider concept of a fair trial'. This is not incidental, but has a methodological significance. Establishing a lack of balance is just the first part of the Court's approach; once this has been determined the Court will examine the effect that this has had on the fairness of the proceedings as a whole. (J Summers, 2007:104).

The ECHR, in his decisions, has repeatedly underlined that the principle of "equality of arms" can be injured with various actions.

As we stated earlier, the Article 6 from the ECHR contains general provision so it could be applied bought in civil and criminal cases. The jurisprudence of the Court, at the beginning, showed many violation of the right of equality of arms in civil cases, long before the violation in criminal cases. The first civil case was *X. v Sweden*. The first cases that contained violation of the article in criminal cases were *Pataki and Dunshirn v Austria* and *Opfer and Hopfinger v Austria*. In the first case, the prosecutor was able to attend the hearing before the appellate court and to take actions. In this manner, the prosecutor asked the court to increase the sentences for the defendants. On the other hand, the participation and presence of the accused and their lawyers before the appellate court was not allowed. As a result of this, the prosecutor was in an advantage position opposite of the defense. The appellate court increased the sentence in second instance verdict. The ECHR found that this was violation of the right to equality of arms, since the prosecution had a right to presence before the appellate court and the defense had no such right. The Court find that the real impact of the prosecutor presence of the verdict was irrelevant, as long as he had the right to be present the defense should have that right as well. It is enough that the defense was not allowed the right which was allowed to the prosecutor - the presence in the second instance proceedings that ultimately put the prosecutor in a more favorable position than the defense, which in turn, finally, is incompatible with the right to a fair trial.

Even on the assumption [...] that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had an opportunity of influencing the members of the court, without the accused or his counsel having any similar opportunity or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which, in the opinion of the Commission, is incompatible with the notion of a fair trial (Oakes, 2012). In Ofner and Hopfinger, the Commission and Committee considered the role of the Generalprokurator of the Supreme Court of Austria and specifically whether the latter's practice of advising the Court's Rapporteur on a plea of nullity, where that advice was given and the decision reached in the absence of the defendant's counsel, contravened the principle of "equality of arms", said to be "an inherent element of a 'fair trial'" protected by Article 6 (Oakes, 2012).

Although the cases concerned different procedures, the unifying point was that they all revolved around the determination of an appeal in a non-public setting, in which the accused had not had an opportunity to be heard, even though the opposing side had been given this chance. The Commission determined that the issues ought not to be addressed under the specific guarantees of Article 6 paragraph 3, but rather that they all concerned the 'procedural equality of the accused with the public prosecutor'. This was later referred to by the Court as the principle of equality of arms, and was determined to be an 'inherent element of a "fair trial"' (J Summers, 2007:104).

From the analyzed case law of the Court as the most common reason for a violation of the principle of equality of arms is considered violation of the following right "anyone who is party to criminal proceedings will have equal opportunity to present its arguments under conditions that do not place him in disadvantage vis-à-vis opposed party. In this sense, the case *Struppat v Federal Republic of Germany*, in which the prosecutor had greater period of time to obtain evidence or propose them until the end to the main hearing. The deadlines for providing evidence from the defense, on the other hand, were impossible. The narrow timeframe to obtain the evidence led to the result, the trial court to reject these evidence as overdyed. Also, as a violation of the right to equality of arms is considered such actions that cause unequal right of access to evidence, documents and so on. In this regard are the cases *Foucher v France*, *Bendenoun v France*, *Mialhe v France*, *McMicheal v United Kingdom*, *Vermeulen v Belgium*, in which the ECHR found that the right to equality of arms was violated because the access to certain evidence by the defense was denied without any legal basis, and therefore the defense was put in an unequal position with the prosecution. Second, inequality in the right to submit evidence and expert opinions. In this regard are the cases *Borgers v Belgium*, *Ruiz-Mateos v Spain*, *Nideröst-Huber v Switzerland*, *Van de Hurk v Netherlands*, *FR v Switzerland*, *Bulut v Austria*, *Apeh Üldözötneik Szövetsége and Others v Hungary*, *Werner v Austria*. Also in many cases the ECHR confirmed the

unequal status of technical experts such as *Boenisch v Austria*, *Brandstetter v Austria*, *Dombo Beeher BV v Netherlands*. This is a very big issue in our proceedings as well, since the implementation of expert witness in our law is only a “cosmetic change” of expertise, and opens a lot of questions to the real equal access (Mickovski, 2014: 17).

3. THE PRINCIPLE OF "EQUALITY OF ARMS" IN ACCORDANCE WITH OUR LAW

The right to a fair trial is implemented in our criminal procedure and is one of the core values of our criminal justice system. This right is absolute and can't be limited on any legal base. Its essence is fair and public hearing by an independent and impartial court with guaranteeing of all the minimum rights of the defendant. One of those minimum rights is the right of equity of arms between the parties, the prosecutor and the defense. In our Law on Criminal Procedure, it is provided that the defense has the same rights and duties as the prosecutor except those rights that belong to the prosecutor as a state authority. Therefore, the purpose of this article is elaborating the right of 'equity of arms' and its misunderstanding in practice. Also, we intend to elaborate the real position of the experts and expert witnesses in the criminal proceedings in the context of equality of arms and furthermore to show the inconsistencies in the application of the provisions of these types of evidences in practice. We'll make an effort to show that, generally in practice, the application of these provisions is either misused or their application has not been approved by the competent authorities. Also we'll try to indicate that expert witnesses are not reserved only for the defense, but they can be equally used by the prosecution as well. Hence, we intend to show some case studies in which some evidence are not considered by the court just because they are not proposed by the prosecutor and they are crucial for the verdict.

The right to a fair trial is explicitly guaranteed in Article 5 in the Code for Criminal Procedure (Official Gazette no.150/2010, hereafter CPC) together with the principle of "equality of arms" as its integral part. In this regard, in accordance with the provision of Article 5 of the Code, *a person accused of a crime is entitled to a fair and public hearing by an independent and impartial court, in an adversarial procedure, in which one may challenge the accusations and can propose and present evidence in his defense*. Hence, we can undoubtedly conclude that the principle of 'equality of arms' is guaranteed. But the practice is not always in correspondence with the letter of the law. Can we talk about real equality in the current criminal justice system that is not yet abandoned the attitude of "obedience" between the police and prosecutors, on one hand, and the prosecution and the court, on the other? According to the CPC, the defense has the same rights as the prosecution, with exception of those who belong to the prosecutor as a public authority. The previous legislative was very much in favor of the prosecutions, and gave so little opportunities to defense to prepare its arguments that lead to the impression that the defense has no chance in preparing a “winning case”. The first "inequality" that was problematic in the previous legislation was in the unequal human and professional resources of defense vs. prosecution in the sense that the prosecution has the entire state mechanism as its ally (criminal experts, police, forensic experts, etc.) and defense was put alone.

The legislator made an effort to correct this, but the new provisions are not appropriate solution. According to the new CPC, the defense can hire private detectives, technical experts and so on, to complete the evidence procedure in favor of the defense. And all of this stands nicely on paper but the practice is something else. Justice is expensive. The question is whether each defendant can afford such an expensive defense, which necessarily implies other costs other than the hiring of a defense lawyer? Or the right to 'all-inclusive' defense is reserved only for those who financially can afford it. And what about those who can't afford a lawyer and the state has provided them an ex officio lawyer? The provisions for hiring a technical expert or a private detective are dead letter for them. Hence, that 'equal' access to justice depends on how much the defendant can financially afford to be represented.

The ECHR has accepted a two-step approach for establishing a violation of equality of arms. Starting point is to establish actual lack of procedural or institutional balance and then to assess the consequences of the inequality toward the fairness of the whole proceedings. (Buzarovska et al., 2015). As stated in the ECHR's case-law, it is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his/her report that in fact prompted the bringing of a prosecution. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified. There is a violation of equality of arms principle when appearances suggest that the opinion submitted by the expert was more akin to evidence against the applicant used by the prosecuting authorities rather than a "neutral" and "independent" expert opinion.

The application of the new Law on Criminal Procedure created a dilemma regarding the question of whether the defense can use expertise as evidence in the criminal proceedings and whether there are procedural opportunities to challenge the report. The arguments that are presented in the thesis that the defense cannot use expertise in preparing and presenting its own theory of the case is based on the restrictive interpretation of the provision of the LCP which regulates that the expertise can only be ordered by a written order and since the defense can't issue orders, the list of defense evidence cannot offer expertise (Buzarovska, et al. 2015). Inability to use the expertise as evidence by the defense is a result of the absence of a formal requirement for an expert's report. Contrary to this interpretation, noting that there is no provision in the LCP that is limiting the defense to obtain evidence to challenge the professional and technical issues relating to relevant facts, and also the rights of the accused that regulates that the defendant must have sufficient time and opportunities to prepare his defense, and especially to have access to files and be familiar with the evidence against him and on his behalf.

This means that he can also challenge the expertise of the public prosecutor and to reduce its probative value. In this sense, the court acted quite properly when he accepted expert's report by the defense in order to challenge the prosecution's expert. On the other hand, in some courts, expert's reports proposed by the defense were rejected as illegal evidence on the grounds that the report wasn't made on the basis of an order from a competent authority. This is totally wrong. Our opinion is that the Court cannot allow violation of the European Convention on Human Rights regarding the principle of equality of arms with restrictive interpretation of the provisions of the LPC.

4. CASE – STUDY OF VIOLATION OF 'EQUALITY OF ARMS' IN MACEDONIA

One of the most cited cases in Macedonia that has obvious violation of the right of equality of arms was the case *Stoimenov v. Macedonia* (*Stoimenov v. "the former Yugoslav Republic of Macedonia"* no. 17995/02). The application concerned Mr Stoimenov's conviction on drug related offences in March 2000 for which he was sentenced to four years' imprisonment. Relying, in particular, on Article 6 ph. 1, the applicant complained that the principle of equality of arms had been breached as the national courts had convicted him on the basis of expert reports produced by the same ministry which had brought criminal charges against him. Both expert opinions were given by the same expert at the Bureau, were almost identically worded and provided succinct information about the technique used to determine the composition of the poppy-tar and the conclusion that it was opium. The applicant's representative lodged a request for an alternative expert opinion to be obtained from a scientific institution concerning the quality of the poppy-tar for the following reasons: the Bureau operated within the Ministry, which had lodged the criminal complaint against him. The poppy-tar was old and had been buried for many years and an authorised organisation had refused to buy it as it was of poor quality. The ECHR held unanimously that there had been a violation of Article 6 ph. 1 concerning the principle of equality of arms and declared the remainder of the application inadmissible.

The ECHR notes that the expert opinion provided by the Bureau was the only report that existed on the quality of the poppy-tar. In particular, the applicant had no possibility himself to submit a private expert opinion, since the cakes of poppy-tar had been confiscated by the authorities and he had no possibility of access to them. The Court further observes that it was not a court which appointed the Bureau to carry out the analysis of the poppy-tar in accordance with section 234 of the LCP. It was the Ministry which had firstly drawn the expert report on its own motion to substantiate the criminal complaint it had lodged with the public prosecutor. The Bureau cannot, therefore, be considered as a court-appointed expert. Having regard to the particular circumstances of the case, appearances suggest that the opinion submitted by the Bureau was more akin to evidence against the applicant used by the prosecuting authorities rather than a “neutral” and “independent” expert opinion. The ECHR awarded Mr Stoimenov EUR 1,000 in respect of non-pecuniary damage and EUR 500 for costs and expenses.

CONCLUSION

Each party must be afforded a reasonable opportunity to present its case under conditions that do not place him at a disadvantage vis-à-vis his opponent or opponents and every arguments or observations intended to advise or influence a court, should be communicated to both parties. As a violation of the principle of equality of arms is considered violation of the following right "anyone who is party to criminal proceedings will have equal opportunity to present its arguments under conditions that do not place him in disadvantage vis-à-vis opposed party. The principle of equality of arms is considered to be an inherent element of the principle of fair procedure stipulated as such in the procedural law of the European Court of Human Rights. The right to a fair trial is implemented in our criminal procedure and is one of the core values of our criminal justice system.

This right is absolute and can't be limited on any legal base. Its essence is fair and public hearing by an independent and impartial court with guaranteeing of all the minimum rights of the defendant. The right of equality of arms is a part of the right of the fair trial in our legislative as well. The purpose of this article was to show that this right is not only essential but it is also a milestone to fair procedures. In this sense, every interpretation of the LCP that deprives the defendant of his right to equality of arms, is a wrong interpretation and should be avoided. The jurisprudence of the ECHR in its practice has shown many variations of violation of this right. Therefore the courts must be careful when applying the law and to have in mind that *justice must not only be done: it must also be seen to be done*. (Delcourt v. Belgium, Judgment, 17 January 1970).

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