Equality of Arms as a Standard of Fair Trials

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Seminar on Human Rights and Access to Justice in the EU
European Judicial Training Network
Vilnius, Lithuania
15th May 2015
Summary

1. Fair Trial Principle in Europe
2. Content of the Fair Trial Principle
3. Equality of Arms and Adversarial Rights
4. Content of the Principle of Equality of Arms
1. Fair Trial Principle in Europe

Fair Trial Principle is accepted as a standard by European legal frameworks:

- European Convention of Human Rights: article 6-1
- European Union Charter of Fundamental Rights: article 47
- European Constitutions:
  - Lithuania: articles 30 and 31 of the Constitution
  - Portugal: articles 20, 32 and 268-4 and 5 of the Constitution
  - France: Declaration des droits de l’Homme et du Citoyen de 1789, the Universal Declaration of Human Rights and the European Convention on Human Rights
  - Germany: articles 19-4 and 103-1 of the Constitution
  - Italy: articles 24, 111 and 113 of the Constitution
  - Spain: article 24 of the Constitution
The Fair Trial Principle is accepted by European legal frameworks under different terms:

- Procès équitable (ECHR, FR);
- Fair trial (ECHR);
- Tutela efectiva de los derechos (ES);
- Giusto processo (IT);
- Due process (UK);
- Tutela jurisdicional efetiva (PT).
Right to a Fair Trial includes:

1. Right to present a claim before a court and have the case decided (access to court);

2. Right to have the procedural rules applied in a way which favours a decision based on substantive law/on the merits (not in procedural technicalities);

3. Right to have the claim decided by an impartial and independent court;

4. Principle of Equality of Arms;
2. Content of the Fair Trial Principle

Right to a Fair Trial includes:

5. Right to an adversarial procedure;

6. Right to a transparent procedure (public hearing, a reasoned court decision, access to the documents and status of the judicial procedure, an adequate level of clarity of the legal framework);

7. Right to a speedy trial;

8. Right to be assisted by a lawyer.
3. Equality of Arms and Adversarial Rights

- **Principle of Equality of Arms**
  - There should be a “fair balance” between the parties;
  - Each party must be afforded a reasonable opportunity to present his case (including evidence);
  - Without any substantial disadvantage of a party vis-à-vis the other party.

(ECHR cases Bulut v. Austria of 22nd February 1996; Foucher v. France of 18th March 1997; Platakou v. Greece of 11th January 2001; Bobek v. Poland of 17th July 2007)
3. Equality of Arms and Adversarial Rights

• **Right to an adversarial trial/Principle of Contradictory**
  - Any element which can influence the solution of the cause should be subject to discussion between the parties;
  - Each party should have:
    - The possibility to make known the elements on which his claim is based; and
    - The possibility to know and discuss any claim, evidence or document presented to the judge.
3. Equality of Arms and Adversarial Rights

- Principle of Equality of Arms and the Right to an Adversarial Trial are very close:
  
  - ECHR commonly looks at the two principles together (ECHR case Borgers v. Belgium of 30th October 1991; Makhfi v. France of 19th October 2004)

- Both principles are referred:
  
  - To the way arguments, documents, elements and evidence are presented before the court;
  
  - To the characteristics of the procedures before the court.

- The main difference:
  
  - Equality of Arms is referred to the status of the parties/to the balance of procedural rights granted to the parties;
  
  - Adversarial Trial concerns to the way the procedure is ruled/is referred to a method of decision.
3. Equality of Arms and Adversarial Rights

- Very close situations may present a breach to the Principle of Equality of Arms or to the Right to an Adversarial Trial:
  - Submission of observations by an Attorney-General/Avocat Général/Public Prosecutor without communication to the defence; and
  - Its participation in the court’s decisions may be:
    - Not acceptable under the Principle of Equality of Arms in a criminal case where the public prosecutor acts as a party (ECHR case Borgers v. Belgium of 30th October 1991); or
    - Not acceptable under the Principle of Contradictory in a retirement pension case where the Ministério Público/Public Prosecutor is not a party (ECHR case Lobo Machado v. Portugal of 20th February 1996).
4. Content of the Principle of Equality of Arms

Basic content

• Each party must be afforded a **reasonable opportunity to present his case**
  - Includes all the facts, arguments and claims presented before the court.

• **Without placing him in a substantial disadvantage vis-à-vis the other party**
4. Content of the Principle of Equality of Arms

1st rule: It is not possible to ensure a perfect equality

- The plaintiff usually has more time to prepare his claim than the opponent to respond;

- Rules allowing for an extension of the time for the rebuttal should be considered to preserve the Principle of the Equality of Arms (e.g. in very complex cases).

2nd rule: Not all inequalities breach the Principle of the Equality of Arms

- A difference of treatment concerning the parties’ witnesses (evidence given under oath for one party and not for the other) does not necessarily breach the Principle of Equality of Arms (ECHR case Ankerl v. Switzerland of 23rd October 2006).
4. Content of the Principle of Equality of Arms

3rd rule: Substantive procedural advantages should not be accepted

- The submission of observations by an Attorney-General/Avocat Général without communication to the defence and to which the defence could not respond arm the Principle of the Equality of Arms (ECHR cases Borgers v. Belgium of 30th October 1991; Bulut v. Austria of 22nd February 1996).
  - It is a matter for the defence to assess whether a submission deserves a reaction (ECHR case Bulut v. Austria of 22nd February 1996)

- Participation of the Avocat Général in the court’s decision is not acceptable (ECHR case Borgers v. Belgium of 30th October 1991).

- Limited access to documents classified as confidential when access is granted to public officers is not acceptable in lustration procedures (ECHR cases Matyjek v. Poland of 24th April 2007; Bobek v. Poland of 17th July 2007)
4. Content of the Principle of Equality of Arms

3rd rule: Substantive procedural advantages should not be accepted

- It is not acceptable under the Principle of Equality of Arms to deny the possibility to present a witness when:
  - Only two persons had been present at a meeting at which an agreement had allegedly been reached; and
  - Only one of these two key persons was heard (ECHR case Dombo Beheer B.V v. The Netherlands of 27th October 1993).

- Witnesses for the prosecution and the defence must be treated equally: someone who has presented reports giving place to a criminal procedure may not really be an independent expert but a witness (ECHR case Bonisch v. Austria of 6th May 1985).
4th rule: Different procedural rules considering the nature of the party may be accepted

- Different conditions and time-limits for lodging an appeal for the public prosecutor (shorter time-limit for the private party; longer for the Public Prosecutor) do not breach the Principle of Equality of Arms (ECHR case Guigue and SGEN-CFDT v. France of 6th January 2004).

- The following procedural advantages for the public prosecutor/attorney general/public entities should not be accepted:
  
  - Waivers regarding the payment of procedural penalties (Portuguese Constitutional Court/Tribunal Constitucional has a different view: cases 59/91 and 355/01);
  
  - A waiver to present a response contesting all the facts alleged by the plaintiff in a case presented against the Portuguese State (Portuguese Constitutional Court/Tribunal Constitucional has a different view: case 529/94)
4. Content of the Principle of Equality of Arms

5th rule: A breach of the Principle of Equality of Arms may result of a global assessment of procedural rules

- The following legal framework on expropriation procedures breaches the Principle of Equality of Arms (ECHR case Yvon v. France of 24th April 2003):
  ▪ The Government Commissioner (GC) and the expropriating authority enjoy advantages: access to the land charges register when expropriated parties have only limited access to this register;
  ▪ Unlike the other parties, the GC is not obliged to give notice of his pleadings; he is not obliged to inform the other parties that this has been done; he is the last to present its claim;
  ▪ Under the law GC’s submissions assume particular influence on courts’ decisions.
4. Content of the Principle of Equality of Arms

6th rule: Different rules regarding terms

- It is not acceptable under the Principle of the Equality of Arms if time ceases to run for the State in court procedures but not for the other parties (ECHR case Platakou v. Greece of 11th January 2001)

- Different time limits for the applicant to present pleadings in support of oral presentations when the responded does not have any time limit should not be accepted (ECHR case Wynen v. Belgium of 5th November 2002)

7th rule: Public parties should not be exempted from paying court fees

- The Principle of the Equality of Arms is better satisfied if public entities are obliged to pay court fees.

- However, ECHR has decided that a different legal framework regarding payment of court fees in favour of the public prosecutor does not arm the Principle of the Equality of Arms (ECHR case Stankiewicz v. Poland, of 6th April 2006)
4. Content of the Principle of Equality of Arms

8th rule: Parties/defendants should be allowed to access their case file and reports in order to prepare their defence (ECHR cases Foucher v. France of 18th March 1997; Kuopila v. Finland of 27th April 2000).

9th rule: Pre-trial procedures may cause a breach on the Principle of the Equality of Arms

- This is the case when the reasons given by an administrative authority in an administrative decision are too summary and general to enable the claimant to present a reasoned challenge (ECHR case Hentrich v. France of 22nd September 1994).
10th rule: It is important to assess the factual particularities of the case; not only the legal framework

- It breaches Equality of Arms if a defence lawyer is made to wait for fifteen hours before being given a chance to plead in the early hours of the morning.

- Thus, tiredness may arm the Principle of Equality of Arms… (ECHR case Makhfi v. France of 19th October 2004)
Thank you!

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