

## ПРОЦЕССУАЛЬНОЕ ПРАВО. ПРОКУРОРСКИЙ НАДЗОР

## PROCEDURAL LAW. PROSECUTOR SUPERVISION

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Research Article

### “Equality of arms” in criminal procedure in the context of the right to a fair trial

Fardin Y. Khalilov  

The Justice Academy of the Ministry of Justice of the Azerbaijan Republic,  
*Baku, Azerbaijan Republic*  
 [ph\\_d@mail.ru](mailto:ph_d@mail.ru)

**Abstract.** The level of realization of the right to a fair trial is one of the crucial indicators of democracy in any state. In order to ensure this right, all the minimum standards deriving from it must be clearly understood by law enforcement agencies and their practice must meet these standards. As ‘equality of arms’, the right to a fair trial, is not directly enshrined in the text of Article 6 of the European Convention on Human Rights (hereafter — the Convention) and is of implicit character; the issues like its essence, content and the way it should manifest in practice are open for discussion. For this reason, the focus on those issues is highly relevant. The aim of this article is, with reference to the case law of the European Court of Human Rights (hereafter — ECHR) and the modern doctrine based on this right, to explain the role of this principle and the essence of its mutual relations with the other elements of the right to a fair trial. Selected case law of ECHR bears great interest compared with other decisions and is discussed in the form of empirical materials of the study. From the doctrinal materials, interpretation of Article 6 of the Convention and theoretical sources related to the European standards in the criminal procedure are also analyzed. The article exercises methods of dialectical comprehension; they are determinism, induction, deduction, case studies and methods of law interpretation. As a result of the study, a unique doctrinal commentary has been obtained in the context of adversariality and impartial and independent court principles of the concept of ‘equality of arms’, as well as, interaction of the minimum rights of persons subject to criminal prosecution, guaranteed by the Convention.

**Key words:** criminal process, fairness, adversarial, equality of the parties, minimum rights, correlation, European Court of Human Rights, case law, interpretation

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Научная статья

## **«Равенство оружия» в уголовном процессе в контексте права на справедливое судебное разбирательство**

**Ф.Я. Халилов**  

Академия Юстиции Министерства Юстиции Азербайджанской Республики,  
г. Баку, *Азербайджанская Республика*

ph\_d@mail.ru

**Аннотация.** Уровень реализации права на справедливый суд является одним из основных показателей демократизма в любой стране мира. Для обеспечения данного права все вытекающие минимальные стандарты из него должны быть четко осознаны правоприменительными органами, а правоприменительная практика должна строго отвечать этим стандартам. Так как принцип «равенства оружия» не закреплен в прямом тексте ст. 6 Европейской Конвенции по правам человека и имеет имплицитный характер, вопросы о сущности, содержании и проявлениях рассматриваемого принципа остаются дискуссионными в теории в связи с чем, актуализируется научное исследование данной проблематики. Целью статьи является разъяснение концепции принципа «равенство оружия», его роли в обеспечении справедливости всего уголовного судопроизводства и коррелятивных связей с иными элементами права на справедливый суд, ссылаясь на прецедентное право Европейского Суда и на современную доктрину. В качестве эмпирических материалов исследования выступили наиболее интересные с точки зрения освещения тематики прецеденты Европейского Суда. Теоретические материалы преимущественно связаны с научно-практическим толкованием ст. 6 Европейской Конвенции и европейскими стандартами уголовного судопроизводства. В статье применены методы диалектического познания: детерминизм, индукция, дедукция, в том числе методы казуистики и толкования права. Результатом исследования является уникальный доктринальный комментарий к принципу «равенство оружия», подготовленный в контексте его корреляции с принципами состязательности, беспристрастности и независимости суда, а также с минимальными правами уголовно преследуемых лиц.

**Ключевые слова:** уголовный процесс, справедливость, состязательность, равенство сторон, минимальные права, корреляция, Европейский Суд по правам человека, прецедентное право, толкование

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## **Introduction**

The principle of a fair trial was unheard before the Convention; the concept existed in European procedural systems in the form of the right to a hearing, the *audiatur et altera pars*<sup>1</sup> of Romano-Canonical proceedings. The two equally vague terms naturally had different connotations, but the principle was the same (Matscher, 2000:10).

The Convention is the initial comprehensive international treaty in the area of human rights and the first to have established an International Court to safeguard those rights. ECHR decides on contraventions of the rights guaranteed by the Convention and allegedly committed by the Contracting States. It has developed an extensive jurisprudence, which has played a critical role in shaping the concept of human rights not only in Europe, but also on the other continents on earth (Golubovic, 2013:759).

The right to a fair trial provided by the Convention is important in and of itself. Nevertheless, it is also central to the enforcement and vindication of other fundamental rights. The “rule of law”, showed in the Preamble to the Convention and central to its vision, cannot exist if there is no fair trial (Schabas, 2015:265).

Article 6 is influenced by the principle of “due process of law” in Anglo-American law; thus the guarantee of Article 6 is worded in more detail and gives rise to a greater number of cases before the ECHR than the classical civil rights and liberties. The so-called judicial and procedural rights under Article 6 encompass various legal positions. Their common denominator is the principle of effective legal protection, which reflects the European constitutional principle of the rule of law (Grabenwarter, 2014:100).

Article 6 requires a “fair hearing”. The notion of “hearing” may be equated with that of “trial” or “trial proceedings”. It follows, firstly, from the French wording of the provision<sup>2</sup>. Secondly, the right to be heard within a right time, reflected in the first paragraph, refers to the proceedings as a whole. Thirdly, the second statement in the first paragraph allows the exclusion of the public and the press from all or part of the trial (Dijk, Hoof, Rijn & Zwaak, 2006:578).

Any person in a democratic community is guaranteed to be provided with the right to a fair court regardless of his or her being accused of a serious crime, even of one leading to serious consequences such as terrorism. In fact, the more severe actions are intended for a person accused of committing a crime in a democratic society, the more rights he or she has to a fair trial.

It is difficult to determine the right to a fair trial using a generally accepted concept because it involves a number of parameters of legal proceedings, but it can be understood as a set of rules to be followed in order to have a fair hearing (Çayan,

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<sup>1</sup> Translation: It is necessary to listen also to adverse party.

<sup>2</sup> In French: Toute personne a droit à ce que sa cause soit entendue.

2016:19; Turan, 2016:77—78). In this respect, “equality of arms” is one of the rules demanding to act accordingly in order to have a fair trial.

### **Materials and methods**

The methods of the analysis and synthesis of the empirical basis were the most commonly used in the present article. The case law of the ECHR has provided the empirical basis.

A retrospective investigation of issues (the historical approach) was occasionally used in addition to the above-mentioned methods. The formal and dogmatic research method was equally experienced in the article because the goal of the study was not to give a critical investigation of the ECHR’s legal views; on the contrary, the main objective was to clarify issues under investigation precisely within the context of the ECHR case law precedents.

The analysis method was adopted to choose the most significant and informative atypical legal situations of the ECHR case law precedents. The synthesis method helped to define the most frequent ECHR’s positions on the subject under study by generalizing the provisions of a number of the ECHR’s decisions in one thesis.

The study of doctrinal sources provided a useful insight into the extent to which other researchers had previously focused on certain issues that are part of the present study. Based on this information, an attempt was made to present the issue under investigation from a new stylistical perspective.

### **“Equality of Arms” as an element of fairness of trial**

“Equality of arms” is not directly reflected in the text of Article 6. It is considered to be an implied right (Morshakova, 2012:272, 360; Goss, 2014:90). Glancing at the ECHR case law shows relatively few references to Arts. 31—33 in the Vienna Convention on the Law of Treaties (hereafter — VCLT). Close as its strategies are to the common rule of the purposive interpretation under Art. 31 VCLT, ECHR has created its own labels for interpretative techniques such as “living-instrument”, “practical and effective rights”, “autonomous concepts” etc. (Voskobitova, 2005:47; Letsas, 2009:59). Identification of implicit rights is also a technique for interpreting the Convention. The quintessence of a fair trial can be formulated as *everyone is equal before the law and has the right to equal legal protection without any discrimination* (Vasyaev & Knyaz’kin, 2015:6). In circumstances without “equality of arms” fairness will never be achieved (McBride, 2018:14).

Therefore, the idea of equality of opposing parties in a trial is based on an intentional interpretation of Article 6.

Accordingly, the ECHR case law provides the principle that “equality of arms” is a part of the wider concept of a fair trial<sup>3</sup>. This principle acts as a procedural guarantee of the equality of proceedings. As A.I. Kovler noticed, the defense of human rights comprises 80 % in the procedure, the rest is establishing justice; this was the idea of

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<sup>3</sup> *Ekbatani v. Sweden*, 26.05.1988, A/134.

the founding fathers of the Convention, judging by *Travaux préparatoires* (Kovler, 2019:127—128).

Some authors attribute this principle to functional guarantees, dividing the fundamental guarantees provided for in the Convention into organic ones (the establishment of a court by law, neutrality, the publicity of the trial, that is, which entrust the State with many obligations whose goal is to make such a trial possible) and functional ones aimed at ensuring equality, which must be observed at all stages of the process (Tumanov & Entin, 2002:88).

“Equality of arms” was first noted in 1968, in *Neumeister v. Austria*<sup>4</sup>. Later, in 1993, in *Dombo Beheer v. The Netherlands*, ECHR indicated that although the phrase is absent from the Convention, fairness in this regard has been preserved to require “equality of arms”. Each party has to be provided with a right set of circumstances to present their case — including their evidence — under conditions that do not put them at a substantial disadvantage *vis-à-vis* their opponent<sup>5</sup>.

For criminal cases, where the very character of the proceedings involves a fundamental inequality of the parties, the concept of the “equality of arms” assumes an added importance, and the same applies, though to a lesser degree, to administrative procedures<sup>6</sup>.

The “equality of arms” cannot be defined as the equality of the power of the parties in either sides. It is important here that each party has equal opportunities for claims and protection, and that one party can no larger exercise rights in the proceedings than the other (Taner, 2019:97). In criminal cases, it requires the defense to be in a similar situation with the prosecution (Matscher, 2000:13).

### **“Equality of Arms” & adversarial criminal procedure**

Closely related to the right to adversarial proceedings, the “equality of arms” implies that the parties should have the same access to records and other documents pertaining to the case, at least insofar as these may play a part in the formation of the court’s opinion<sup>7</sup>.

The hearing should take place on equal terms between the two parties. There being some overlap between the requirements of the adversarial principle and those of equality of arms (Matscher, 2000:16).

A core element of adversarial proceedings is the presumed capacity of each side to challenge the probative force of evidence produced by the other. In order for the trial to comply with Article 6 (1), the prosecution authorities must disclose to the defense all material evidence against the accused. Failure to comply with this requirement negatively affects the fairness of the trial<sup>8</sup>. The right to an adversarial trial implies the parties’ ability to receive information and comment on all evidence or observations presented in court by other party. It may be deduced from extensive case law that it is

<sup>4</sup> *Neumeister v. Austria*, 27.06.1968, 1 E.H.R.R. 91.

<sup>5</sup> *Dombo Beheer v. Netherlands*, 27.10.1993, 18 E.H.R.R. 213.

<sup>6</sup> *Feldbrugge v. Netherlands*, 29.05.1986, 8 E.H.H.R. 425.

<sup>7</sup> *Ernst and others v. Belgium*, 15.06.2003, 39 E.H.H.R. 35.

<sup>8</sup> *Edwards v. United Kingdom*, 25.11.1992, 15 E.H.R.R. 417.

immaterial whether a person has chosen not to be legally represented, whether the documents or observations in issue are important for the consequence of the proceedings, whether the omission to communicate the document in issue has caused any prejudice, or whether the observations give any fact or argument which already appeared in the disputable decision. It is for the parties to evaluate whether a submission deserves a reaction (Dijk, Hoof, Rijn & Zwaak, 2006:584—585).

In cases when an adversarial trial is not conducted, it becomes very difficult to provide a fair balance arising from the “equality of arms” because breaking the principle of the adversarial trial could disrupt the balance between the parties in terms of defending their positions (İnceoğlu, 2013:221, 249).

### ***The impartial and independent court as a part of adversarial proceedings and its influence on equality of arms***

The decision maker’s impartiality and independence is one of the underlying requirements for the existence of the adversarial principle. In its broadest sense, impartiality can be viewed as prone neither to the prosecution nor to the defense, and independence can be understood as the court’s independence from the prosecution and the defense.

Article 6 (1) guarantees the right to a fair trial before ‘an independent and impartial tribunal established by law’. There cannot be a fair criminal or civil trial before a court, which is, or appears to be, biased against the defendant or litigant, and the fair trial guarantees are meaningless if the tribunal’s decision is liable to be overturned by some other authority, which does not offer such guarantees<sup>9</sup>.

The ECHR is concerned both with the subjective and objective elements of independence and impartiality. The subjective element involves an enquiry into whether the personal conviction of a judge in a particular case produces doubts about his or her independence or impartiality. The judge's lack of bias is presumed unless there is evidence to the contrary, and there are exceedingly few cases where subjective bias has been established since in practice such evidence can be very hard to come by. The objective element involves the determination of whether, from the point of structure or appearance, a party’s doubts about the tribunal’s independence and impartiality may be legitimate (White & Ovey, 2010:266).

When considering ‘equality of arms’ in the context of the rule of the independent and impartial tribunal, it matters whether the judge who is to decide the case fulfilled procedural duties in the previous proceedings. For example, in *Piersack v. Belgium*, the judge who heard the applicant’s case previously acted as a member of the public prosecutor’s department. It was considered as a violation of Article 6. In *Wettstein v. Switzerland*, the petitioner’s case was heard by the court board that consisted of five judges. The point was that two of them who were part-time judges acted as legal representatives of the opposite party in other proceedings against the applicant. Regardless of the fact that there were no substantive legal relations between the applicant’s case and other cases in which part-time judges acted as legal

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<sup>9</sup> *Van de Hurk v. Netherlands*, 19.04.1994, 18 E.H.R.R. 481.

representatives, the cases' overlapping in terms of time led the ECHR to the conclusion that the applicant had his purposes to consider that the judges could see him as an opposing party. The ECHR supposed that Article 6 was breached in this case<sup>10</sup>.

The personal interest of a judge conducting the criminal proceedings in a case makes him a party and seriously breaks the essence of 'equality of arms'. Personal partiality (having a personal interest in a case) leading to the violation of the principle of *Nemo debet esse iudex in propria causa* (Latin for 'No one can be a judge in his case') can be couched in the existence of a direct or indirect interest in the result of the case. Personal partiality can lead to either accusation or inclination to justification. As personal partiality is closely linked with the category of personal interest, it can arise during the court proceeding as well. An official who accepted jurisdiction does not pursue personal interest at that time, whereas the personal interest of the individual in charge of the case may arise in the following course of the case due to being illegally influenced through bribes, etc. The prosecuting officer's or the decision maker's acting for the sake of his or her personal interests impairs the interests of people having different procedural status in the case, as well as those of justice in general, worsens the public aspect of the court proceedings and its opportunities as a means of defending the public interest.

The scope of subjects permitted to have a personal interest in criminal proceedings is limited. They can be either victims of a crime (victim and civil claimant) or persons who are involved in criminal or civil liability (a suspected person, an accused person and a civil defendant). Being personally interested in the specific results of criminal proceedings, other subjects of criminal proceedings, especially decision makers, can not be an essential part of the procedural status. In fact, this element excludes the participation of a particular person as a subject with the decision-making status in the due case.

### ***'Equality of Arms' & 'Favor defensionis'***

As noted, the Convention requires that the prosecution party and the defense party must have equal legal capacity in order to be fair in the criminal proceedings. But is it realistic in fact to ensure this equality in practice? Some authors believe that as long as the state acts as a prosecution party in the criminal proceedings, a prosecution party and a defense party can never be equal in reality. The arguments of the supporters of this idea are in fact persuasive. They note that as opportunities such as application of coercive procedural measures and restriction of an individual's rights will always belong exclusively to the state, and as these opportunities can never be granted to ordinary people, the state will always have greater legal capacity than human. Therefore, the principle of 'equality of arms' is a fiction and cannot exist in real practice (Golovko, 2020:113).

Although this argument seems reasonable at first glance, we do not think it is necessary to rush to abandon the principle of 'equality of arms'. It is true that the state and the individual do not possess the same power, but there is also an issue that the

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<sup>10</sup> *Piersack v. Belgium*, 01.10.1982, 5 E.H.R.R. 169; *Wettstein v. Switzerland*, 21.12.2000, Application no. 33958/96.

Convention does not deal with the ‘identity of arms’ between the state and the individual, but with the ‘equality of arms’.

In other words, for a criminal trial to be fair, it is not necessary to equate the capabilities of the state from the prosecution party with the capabilities of the defense party, it is sufficient to equalize these possibilities as much as possible. We believe that, in fact, it is impossible to equate the person and the state in practice. Because we must either completely deprive the state of the powers or give the person the powers peculiar to the state for that reason. On the contrary, we believe that in practice it is possible to equalize the capabilities of the person and the state. Because this does not require depriving the state of its power, nor it requires giving the person powers that are not characteristic of a person.

Unlike ‘identity of arms’, ‘equality of arms’ can also be provided through making a balance. In order to make a balance, it is not necessary to give the parties the same rights and responsibilities; it is enough to provide supplemental obligations for the ‘strong side’ and additional privileges (concessions) for the ‘weak side’. Additional privileges for the defense in criminal proceedings comprise the phenomenon of *favor defensionis*, and some authors assert that only through such rules the capacities of the defense party, that is weaker, become equal in comparison with the prosecution party in the criminal proceedings. In other words, ‘equality of arms’ can also be achieved through *favor defensionis* (Solov'ev, 2021:34—36). We also think that this approach is more correct.

The rules of *favor defensionis* can be reflected in different forms in the national criminal-procedural legislation. For example, specific time limits may be set for a person to remain in the status of a suspect, the period to claim about the acquittal may be shorter than the period to raise a claim about the conviction, unlike the others, the accused may be given the right to have the last word in court, and so on. Article 6 also contains some *favor defensionis* rules, which provide some ‘equality of arms’ by giving additional benefits to the defense to level capacities.

Article 6 also contains some *favor defensionis* rules, which provide ‘equality of arms’ to some extent through giving additional benefits to the defense party. We regard that these rules include *onus probandi* (burden of proof) and protection against self-incrimination.

Thus, according to the presumption of innocence reflected in Article 6 (2) ‘onus probandi’ lies on the prosecution. The prosecution party must urge the court that the accused is guilty; it is not for the latter to establish evidence on his/her innocence. In general, ‘onus probandi’ rests on the prosecution and any doubt should benefit the charged. It is on the prosecution to adduce evidence convincing the guilt of the accused and not the duty of the accused to demonstrate his/her innocence<sup>11</sup>.

Evidently, the ‘onus probandi’ rule, established in Article 6 (2), improves the condition of the defense party. Despite the principle of equality of arms reflected in the Convention, the defense party does not bear the same burden of proof as the prosecution party. However, in this case, the fact that the prosecution party has a heavier obligation

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<sup>11</sup> *Agapov v. Russia*, 06.01.2021, Application no. 52464/15; *Pasquini v. San Marino (No. 2)*, 08.03.2021, Application no. 23349/17; *Ilias Papageorgiou v. Greece*, 10.03.2021, Application no. 44101/13.

than the defense party does not violate the equality of the parties, but rather balances the inequality of power between the state and the person.

Similarly, the rule of protection against self-incrimination also sets additional concessions for the defense party. Thus, one facet of Article 6 (2) is the privilege against self-accusation. It is closely related to the notion of ‘onus probandi’ and the idea that the charged person should not contribute to or take part in meeting the evidentiary threshold (Schabas, 2015:300). Obviously, while the defense party has the right to be passive from beginning to end, the prosecution party is not able to fulfil his/her function being passive. Although this rule also gives the defense party an advantage, in fact it aims to balance the legal possibilities between the parties.

### **‘Equality of Arms’ & the minimum rights established in Article 6 (3)**

It is important to consider what ‘fairness’ requires in the circumstances of each case. Fairness in the civil context requires consideration of factors different from those that apply in determining whether ‘substantial injustice’ will result in the criminal context. These factors can be gleaned from case law (Brickhill, 2005:298).

Rights established in Article 6 (3) are part of the guarantees under Article 6 (1). Each safeguard is borne by the concept of effective defense; this happens by providing for a time limit, by avoiding disadvantages due to the language barrier, ensuring contact between the accused and the legal counsel, compensating for economic drawbacks or ensuring effectiveness and ‘equality of arms’ in the hearing (Grabenwarter, 2014:153).

All the rights of a charged person are viewed as the manifestation of the ‘equality of arms’ in Article 6 (3) of Doctrine (Ambos, 2004:27).

An interesting interaction can be observed between the minimum rights of accused individuals and a fair trial and ‘equality of arms’ as its part (Rabceovich, 2005:131—132; Karakehya, 2008:38). Thus, according to the legal position of the ECHR, the minimum rights list of persons charged with committing a crime provided in the Convention, Article 6 (3) (a), (b), (c), (d) and (e) can not be understood as *numerus clausus* (closed number). Importantly having guaranteed the minimum rights noted in the Convention, Article 6 (3) (a), (b), (c), (d) and (e), is not enough for the court proceeding to be regarded as compatible with a fair trial, as the ECHR considers the relations between paragraphs 1 and 3 of Article 6 in the Convention as those of general to particular; therefore, even if there is no violation of minimum rights set forth in paragraph 3 of Article 6 in the Convention, proceedings do not meet the demands of principles of a fair trial and ‘equality of arms’<sup>12</sup>. The ECHR’s examination of the absence/presence of ‘equality of arms’ is not to be directed at a particular feature of procedure in isolation<sup>13</sup>.

### **Article 6 (3) (a)**

Anyone charged with a criminal offence has a right to be informed promptly, in the language he/she understands (and in detail) of the nature and cause of the accusation against them.

<sup>12</sup> *Artico v. Italy*, 13.05.1980, 3 E.H.R.R. 1.

<sup>13</sup> *Edwards v. United Kingdom*, 25.11.1992, 15 E.H.R.R. 417.

Two main points pertaining to the mentioned right deserve special attention. First, a person should be informed of the nature and causes of the accusation against him or her immediately and thoroughly. Second, the information should be provided in the language the very person understands.

The first of the above-mentioned aspects is the most important one, as the accused should be aware of further changes in the accusation. It is also highly important for the accused to be able to comprehend the information in the language he or she speaks fluently<sup>14</sup>.

The importance of this right in terms of ‘equality of arms’ ensuring bears upon the fact that the defendant is aware of the accusation against him/her and evidence underlying it early enough to be able to decide on appropriate defense tactics against the charges set forth, as well as on evidence to be obtained, and so on. In this way, the accused is able to balance his/her argumentation opportunities with the prosecution.

### *Article 6 (3) (b)*

The ‘equality of arms’ also applies to the ‘time and facilities’ available to a party to prepare his or her case before the hearing. (Janis, Kay & Bradley, 2008:798; Trubnikova, 2011:175).

According to the ECHR, the judge’s primary role in ensuring the mentioned right is to provide a balance between the trial and the reasonable period of time it is to be conducted. A number of factors should be taken into consideration in ensuring the charged person’s right to have enough time to organise their defense: factual aspects of the case, difficulties of the case, the proceedings and others. The most considerable factor is the period of time for the accused person to be provided with a defense counsel. The time for an accused to take advice from the defense counsel is fundamental to preparation of the defense. In this light, in case a person charged with a criminal offence is kept in detention, his/her defense counsel shall meet with them confidentially, anytime without restriction to discuss relevant issues. In the ECHR case law, the right of the accused to see his/her defense counsel is considered as the right of the accused to communicate with their advocate.

In the ECHR case law, the accused person’s right to get familiarized with the evidence is considered as an integral element of the right to have adequate opportunity to organise his/her defense. The ECHR considers that it is a crucial point in terms of Article 6 of the Convention for defense counsel of the charged person to have adequate time and opportunities to get ready for the defense<sup>15</sup>.

Taking into account the right to have adequate time and opportunities to write a statement of defense in the context of the principle of ‘equality of arms’, we can

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<sup>14</sup> *Brozicek v. Italy*, 19.12.1989, 12 E.H.R.R. 371; *Kamasinski v. Austria*, 19.12.1989, 19 E.H.R.R. 36; *Pelissier and Sassi v. France*, 25.03.1999, 30 E.H.R.R. 715 *Salvador Torres v. Spain*, 24.10.1996, Application no. 21525/93.

<sup>15</sup> *Albert and Le Compte v. Belgium*, 10.02.1983, 5 E.H.R.R. 533; *Campbell and Fell v. United Kingdom*, 28.06.1984, 7 E.H.R.R. 165; *Domenichini v. Italy*, 15.11.1996, Application no. 15943/90; *Goddi v. Italy*, 09.04.1984, 6 E.H.R.R. 457.

conclude that the defense party should have enough time and opportunities to organize and effectively carry out the defense. This right must be recognized by the opposite party.

In *Bönisch v. Austria*, both prosecutions against the applicant who was prosecuted twice had been initiated by the same body<sup>16</sup> on its own tests. In both cases the director of the body who initiated the prosecutions was appointed as an expert by the national court. In his first case an applicant was permitted to present alternative expert as his own witness, but in his second case such permission was not granted. The ECHR noticed impermissible inequality in both cases of the applicant. In spite of the fact that the applicant had been permitted to invite his own expert witness, in his first case the appointment of the Director as the court's expert formally invested him with the function of the neutral auxiliary of the court. As a result, the Director had been able to participate throughout the proceedings and question the witnesses, while the expert invited by the applicant had no such powers. Given the fact that it was the Director's report that prompted the case in the first place, he played the role of a witness against the defendant<sup>17</sup>.

In *Brandsteller v. Austria*, the ECHR had to define the extent to which counter-expertise is mandated by the Convention. The court expert was employed by the same institute as the expert who filed the report that led to the prosecution. After the expert had submitted his report, Brandsteller raised an objection against the perceived bias of the expert. The ECHR held that the Austrian court had not breached 'equality of arms' in refusing the defendant's request to appoint his own expert. The right to an adversarial trial stands for the fact that both parties should be given the opportunity to have information of and comment on the observations filed and the evidence adduced by the other party. However, this does not imply that the expert should necessarily be present at court or give oral evidence. An additional factor that is essential in establishing the right to counter-expertise is the importance of the expert evidence in determining issues. In *Mantovanelli v. France*, the ECHR considered whether there had been any other supporting evidence besides that of the disputed expert, or whether the accused had been convicted solely on the facts of the expert's evidence (Meintjes-van der Walt, 2001:304).

At the same time in cases when the applicant may have been to some extent disadvantaged in preparing defense, but the allowed time and/or granted facilities were adequate to satisfy Article 6 (3) (b), the ECHR is not inclined to detect violation of the 'equality of arms'. For example, no violations of 6. Article and in particular of 'equality or arms' principle were found in *Kremzow v. Austria* in spite of the fact that the accused received a copy of the Attorney General's position paper three weeks before the Supreme Court's hearing on the case even though the Court had received it much earlier and had, indeed, prepared a draft judgment based largely on Attorney General's position paper. In this case the time allowed to the applicant to prepare his defense was held adequate to satisfy Article 6 (3) (b) by the ECHR<sup>18</sup>.

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<sup>16</sup> Federal Food Control Institute.

<sup>17</sup> *Bönisch v. Austria*, 06.05.1985, 19 E.H.R.R. 191.

<sup>18</sup> *Kremzow v. Austria*, 21.09.1993, 17 E.H.R.R. 322.

### *Article 6 (3) (c)*

In the absence of the right of the charged person to defend himself, it is impossible to talk either about adversarial or adequate opportunities of the opposing parties.

A charged person's being defended is of great importance to ensure a fair balance via procedural functions carried out by parties to a legal dispute. In other words, in order to ensure that criminal proceedings are fair, in addition to the prosecution function throughout the course of the proceedings, the defense function must also be implemented. It is true that the defense function may not be realised as actively as the accusation function during all stages of the proceedings. For instance, the defense party may prefer passive tactics in pre-trial proceedings, get acquainted with accusation evidence and expose its primary evidence during the trial. Nonetheless, regardless of the preferred tactics, the defense party is to possess an opportunity to realize adequate defense function against the accusation function not only in terms of idea (for example, only determining the lawyer, granting specific rights to the lawyer defined by law, etc.), but also in that of reality (lawyer's participation in all the procedural actions accompanying the defendant with legal advice, presence of the mechanisms guaranteeing the rights granted to the lawyer defined by law).

If a person exposed to criminal prosecution defends himself in person, it does not mean that he refuses the assistance of a lawyer or any other counsel or that he does not need them. However, the right of a person subject to criminal prosecution to protect himself in person is not regarded as an absolute right<sup>19</sup>. There are cases when national legislation does not accept the rejection of a defense counsel or when the lawyer's participation is mandatory, or when the appointment of a defense counsel is to be mandatory, etc. and does not conflict with Article 6 (3) (c).

A person exposed to criminal prosecution is entitled to the right of choosing a legal counsel for himself if he owns enough money for lawyer's services. An accused person who takes advantage of a free legal aid because of financial grounds does not have the right to choose any specific legal counsel or word out his own opinion on the issue<sup>20</sup>.

However, when an accused person is affluent, his right to choose a legal counsel for himself is not of the absolute right in nature<sup>21</sup>. It means that national legislation considering the rules regulating participation of lawyers in criminal proceedings, cases excluding the lawyers' access to the case or lawyers' being removed from the case, etc. does not contradict Article 6 (3) (c) and ensures the 'equality of arms'.

Sometimes these rules derive from the interests of justice. In such cases, if the accused is not able to afford their own lawyer, they should be provided with free legal assistance.

Various cases explain the interaction between interests of justice and free legal services. For example, rendering free legal assistance is of great importance in the light

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<sup>19</sup> *Croissant v. Germany*, 25.09.1992, 16 E.H.H.R. 135.

<sup>20</sup> *M v. United Kingdom*, (1984) 36 D.R. 155.

<sup>21</sup> *X v. United Kingdom*, (1978) 15 D.R. 242.

of interests of justice in cases when the accused is expecting serious sanctions, especially imprisonment<sup>22</sup>, when the law to be applied in solving the case is complex<sup>23</sup>, when legal awareness of the person accused in complex cases is insufficient and only an experienced lawyer is needed to carry out the defense in such cases<sup>24</sup>.

If a person subject to criminal prosecution defends himself via free legal aid provided to him, such legal assistance should be practical and effective in terms of ensuring 'equality of arms'. Although state agencies are not responsible for every shortcoming on the part of a defender when providing free legal aid, they should either replace the lawyer or force him/her to carry out the duties; certain decision is made if they are aware of non-practical and non-effective legal aid because of the objective or subjective reasons, for example, illness or shirking, among others<sup>25</sup>. In general, any measures limiting the right of defense should be based on necessity and, if less restrictive measures are enough, such measures should be applied in that case<sup>26</sup>.

### *Article 6 (3) (d)*

In fact, it is not uncommon for evidence to be offered in such a form as to eliminate or limit the effectiveness of such examination. Such evidence may, as in the principal case, actually be presented to the decision-maker. Alternatively, undisclosed facts never produced at trial might have helped to the other side in preparing its case and in securing evidence that it did use in the trial (Janis, Kay & Bradley, 2008:808).

The right enshrined in Article 6 (3) (d) requires that the accused person should be entitled to the following: to summon and examine any person whom he believes can give testimony on the issues crucial to his case; to examine the witness against him; and to summon and question a witness in case the accusation party refers to the testimony of that witness.

But as shown in *Rowe and Davis v. the United Kingdom*, the entitlement to the disclosure of relevant evidence is not an absolute right. Sometimes competition of different interests in criminal proceedings is inevitable. For example, the security of witnesses, or national security and the rights of the accused may compete. Therefore, in cases where there are sufficient grounds, the restriction of certain rights of the accused may be considered permissible in the context of Article 6. But, in order for justice not to suffer, all difficulties arising from permissible restrictions on the rights of the accused must be balanced by appropriate procedures<sup>27</sup>.

The right to summon witnesses and interrogate them is not absolute in that case. Domestic laws can determine the scope of persons who are allowed or not to be summoned as witnesses. The restrictions and prohibitions enshrined in the law regarding interrogation of persons who have diplomatic immunity, close relatives of a

<sup>22</sup> *Benham v. United Kingdom*, 10.06.1996, 22 E.H.R.R. 293.

<sup>23</sup> *Perks and others v. United Kingdom*, 12.10.1999 (Application nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95, 28456/95).

<sup>24</sup> *Pham Hoang v. France*, 29.08.1992, 16 E.H.R.R. 53.

<sup>25</sup> *Artico v. Italy*, 13.05.1980, 3 E.H.R.R. 1; *Kamasinski v. Austria*, 19.12.1989, 19 E.H.R.R. 36.

<sup>26</sup> *Van Mechelen and others v. Netherlands*, 18.03.1997, 25 E.H.R.R. 647.

<sup>27</sup> *Rowe and Davis v. United Kingdom*, 16.02.2000, 30 E.H.R.R. 1.

person whose interests were affected during the criminal proceeding as a witness are not reviewed as violations of Article 6. For example, in *Unterpertinger v. Austria*, the ECHR points out that some states that are party to the Convention have adopted provisions exempting family members to testify. Such provisions do not clearly contradict with the provisions of Article 6 (1) and 6 (3)<sup>28</sup>.

As the right defined in Article 6 (3) (d) is not absolute, competent authorities allow rejecting summoning (do not allow convening) some witnesses. However, in this case, competent authorities should substantiate the evidence of those whose convening was rejected to be not relevant to the case.

Sometimes summoning and examining the witness who testifies against the charged person may not be possible for certain objective reasons. For example, if the witness is sick or has died, it will objectively be impossible to summon and question him/her. In such cases, the ECHR considers it permissible to refer to the testimony of a witness who does not participate in the court under certain conditions. Then a fruitful environment for setting forth the counterargument should have been provided, as well as alternative options should have to be reviewed. In this case, ‘equality of arms’ can be ensured.

In some cases, the charged person is aware of the contents of statements against him, nevertheless, he does not know the person who made the statements. It is called anonymous testimony. In case law, witnesses whose identity remains undisclosed to the defendant and/or their counsel in order to guarantee their safety are called anonymous witnesses. However, anonymity is of relative character and identity of those who testified, as a rule, remains secret to defense party whereas the body deciding the case has information about their real identity.

With regard to this issue, the ECHR is in the position of providing the balance of interests. Provision of a fair trial requires, in some cases, a balance between the witnesses called to testify in the interests of the defense or the victim’s interests. The anonymity of witnesses should be compensated through application of procedures enabling to challenge credibility of their testimony (immediately, for example through asking questions to witnesses testifying via a distorted video channel or later, for example, in cases when the defendant does not attend the hearing when getting acquainted with protocols after the testimony took place)<sup>29</sup>.

A major challenge concerning anonymous testimony is that the defendant and his lawyer find it difficult to challenge statements of witnesses. For example, in *Kostovski v. Netherlands*, the ECHR stated that if the defense is not aware of the identity of the person it wants to interrogate, it can be deprived of key details which are able to prove that the witness’s position is partial, hostile and impossible to rely on. Witness evidence or other information exposing the defendant can be deliberately false or wrong and defense, having insufficient information enabling it to verify the validity of a witness, can hardly clarify the issue. There is no doubt that such situations cause threats<sup>30</sup>.

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<sup>28</sup> *Unterpertinger v. Austria*, 24.11.1986, 13 E.H.R.R. 175.

<sup>29</sup> *Doorson v. Netherlands*, 20.02.1996, 22 E.H.R.R. 330.

<sup>30</sup> *Kostovski v. Netherlands*, 20.11.1989, 12 E.H.R.R. 434.

The established case law of the ECHR defined the system of conditions of permissibility of ‘anonymous testimony’ in court (the admissibility of witness anonymity only in cases of a real threat to their security; a procedure ensuring participation of the defense, at least defense counsel, in the examination of the witness; inadmissibility of conviction based only on the testimony of anonymous witnesses). Within these conditions, the application of ‘anonymous testimony’ is compatible with the ‘equality of arms’.

Also, it must be noted that there is the right to find, challenge and interrogate witnesses who can testify in favour of the defendant. The defendant is not obliged to call and interrogate witnesses to prove his/her innocence. *Ei incumbit probatio qui dicit, non-qui negat*<sup>31</sup>. In criminal trial, an *onus probandi* (burden of proof) is imposed upon the prosecution<sup>32</sup>. The employment of a presumption of liability from the proof of certain facts does not by itself violate Article 6 although it obviously confers a comparative advantage on one party<sup>33</sup>. The ECHR has also stated, however, that in criminal cases where a defendant is entitled to the presumption of innocence, the ECHR does not suppose presumptions of fact or law with indifference<sup>34</sup>.

### *Article 6 (3) (e)*

Under Article 6 (3) (e) any person accused of committing a crime has the right to free assistance of an interpreter if he does not understand or speak the language used in court.

There is no doubt that a person who does not comprehend the language of the proceedings or cannot express himself in this language is deprived of the opportunities to defend himself effectively. Likewise, some people who cannot understand the thoughts uttered against him during the proceedings or respond to these thoughts adequately, as well as those who are not able to get acquainted with written documents as they are speech-, hearing- or visually-impaired find themselves at a disadvantage. Therefore, in the broadest sense, the right to a fair trial and the relevant principle of ‘equality of arms’ requires that such person’s opportunity to respond to the accusation adequately should be provided via involvement of an interpreter who can communicate the language of the proceedings to the defendant including sign language.

In the mentioned cases an interpreter’s free assistance is of great importance in terms of ensuring the right to fair trial.

The ECHR understands that ‘the free aid of an interpreter’ does not mean to demand interpreter costs from the charged person. According to the ECHR, the law on ‘the free assistance of an interpreter’ does not imply conditional or temporary exemption from interpreter costs, or cancellation of the payment of such costs. In addition, it should be taken into account that in the light of proving Article 6 (3) (e) of the Convention the law on ‘the free aid of an interpreter’ should concern all necessary

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<sup>31</sup> Translation: The burden of the proof lies upon him who affirms, not him who denies.

<sup>32</sup> *Telfner v. Austria*, 20.03.2001, Application no. 33501/96.

<sup>33</sup> *Salabiaku v. France*, 07.10.1988, 13 E.H.R.R. 379.

<sup>34</sup> *Salabiaku v. France*, 07.10.1988, 13 E.H.R.R. 379.

written and oral materials, i.e. both documents and statements for a person to be able to exercise the right of fair trial<sup>35</sup>.

In terms of providing ‘equality of arms’ as free legal assistance, free interpreter services should not be formal, but practical and effective as well.

## Results

‘Equality of arms’ is closely linked to the right to adversarial proceedings. The interaction between the principles of ‘equality of arms’ and adversariality is so close that it sometimes becomes difficult to draw a clear line between them. Even the minimal rights provided in Article 6 (3) constitute additional guarantees for both the principle of ‘equality of arms’ and that of adversariality. The main reason for this is the fact that both principles are not directly identified in the text of Article 6 and that they are products of intentional interpretation. However, the most common way to distinguish between these two principles is as follows. ‘Equality of arms’ requires that both sides of the judiciary (defense and prosecution) be subject to the same consideration, while the principle of contention requires that both parties access all the materials of proceedings. When an adversarial trial is absent, it becomes extremely challenging to maintain a fair balance derived from the concept of ‘equality of arms’, however, the breach of the principle of adversariality may not breach ‘equality of arms’.

One of the main requirements for the principle of adversariality realization is the decision-maker’s impartiality and independence. In that sense, if the prosecutor that is in charge of the criminal proceedings is personally interested in the case, it seriously breaks ‘equality of arms’.

In practice the prosecution and defense parties do not always have equal opportunities, because when the state acts on behalf of the prosecution party, it is unrealistic for an ordinary person acting on behalf of the defense party to have equal opportunities with the state. Thus, it is necessary to take into account that the Convention deals not with ‘identity of arms’ but with ‘equality of arms’ between the two parties. Unlike ‘identity of arms’, ‘equality of arms’ may be provided with the help of a balance of interests between the two parties. That is why, whereas the rules of *onus probandi* and protection against self-incrimination set up in Article 6 (2), involve supplemental rights, concessions and privileges, it does not violate equality of the parties, *vice versa*, it balances equality of powers between the state and the person to some content.

The concept of ‘equality of arms’ is in a mutual relationship with the minimum rights of a person accused of a criminal offence. The list of the rights noted in Article 6 (3) can not be regarded as *numerus clausus*. Each of the rights being provided is inadequate to account for the compatibility of a criminal prosecution with the right to a fair trial. Even when the rights defined in Article 6 (3) are fully observed, the proceedings on a case may be considered as not meeting the requirements of a fair trial, including ‘equality of arms’.

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<sup>35</sup> *Luedicke, Belkacem and Koc v. Germany*, 28.11.1978, 2 E.H.R.R. 149; *Ozturk v. Germany* 21.02.1984, Application no. 8544/79.

In terms of ‘equality of arms’, the importance of the right set out in Article 6 (3) (a) is that it is due to this right that the defense party is specially aware of accusation and against which evidence the accusation is based on, what defense tactics should be chosen against the prosecution, what evidence should be obtained, and so on. It can thus balance the argument with its accusation.

When the right in Article 6 (3) (b) is viewed from the perspective of the ‘equality of arms’, it is reasonable to conclude that the time and facilities available to the defense party are reasonable enough for preparation and effective realisation of defense. Moreover, they should be adequate to the time and facilities available to the opposing side.

The right provided in Article 6 (3) (c) is crucial in terms of ensuring the ‘equality of arms’: if the person subjected to criminal proceedings has no right to defend himself, neither adversity nor equality of the parties involved will be possible. Defending a person charged with a crime is essential for the establishment of a fair balance through the procedural aspects of the legal dispute between parties. In other words, in order to justify criminal proceedings, the defense function should be implemented in the response to the prosecution function throughout the entire course of the proceedings. Regardless of the selected defense tactics, the defense is not always merely an idea (for example, simply defining a lawyer, granting certain rights to a lawyer, etc.), but also reality (e.g, attorney’s involvement in certain procedural actions and providing his/her clients with advice, availability of real guarantees of the rights granted to the lawyer, and so on) allowing to carry out a defense function that can adequately respond to the prosecution function.

The right set out in Article 6 (3) (d) requires the accused to have the following capabilities: the accused should be able to summon and interrogate any witness if he/she supposes that the witness may testify to the details of his claim; the accused should be able to get information from witnesses about who testify against him/her in court; the accused should be able to convene and question any witness if the prosecution cites the testimony of that witness.

The ECHR case law presupposes the system of permissible conditions for ‘anonymous testimony’ in the court. Under these conditions, application of ‘anonymous testimony’ is in line with the ‘equality of arms’. Such conditions are as follows: the expression ‘anonymous witness’ can only be applied where there is a real threat to the security of the protected person; the defense must, in each case, participate in questioning witnesses who testify under the pseudonym and/or with the help of technical means (an opportunity to interrogate those who give testimony should be provided); the verdict of the court may not be based solely on the information given by ‘anonymous witnesses’.

Also, it should be noted that finding, convening and examining witnesses who can give testimony is a right. The accused is not obliged to call witnesses to testify for his innocence.

The right defined in Article 6 (3) (e) is of great importance in terms of the principle of ‘equality of arms’, since a person who does not understand the language of proceedings or is not able to express himself is deprived of the opportunity to defend himself effectively and, thus, is facing unequal conditions. Likewise, persons who do

not understand the language of the proceedings, as well as those who can not give adequate answers to court, including those who are unable to get acquainted with the written documents, are also disadvantaged.

For this reason, the ‘equality of arms’ as a substantive right to a fair trial, and its integral part require that adequate response to the actions of the prosecution (for example, to propose its own version of the case, to protest, to give cue, etc.) are provided through persons who understand both the language of the proceedings and the language of the accused, including the situation when the accused is hearing- and speech-impaired. As is the case with free legal assistance in terms of ‘equality of arms’, free translation services should be sufficient and effective rather than imaginary and formal.

### Discussion

The results mostly correlate with those of other research studies on the ECHR case law in terms of analysis and synthesis in relation to the interpretation of the essence and content of the right to a fair trial. The reason for this is the fact that the ECHR’s sustainable cases act as the most reliable sources for such research.

One of the main issues left out of the present study is the complete list of the so-called ‘minimum rights’ of prosecuted individuals, set forth in the Convention. More specifically, we examined how ‘equality of arms’ correlates with minimum rights defined in Article 6 of the Convention. However, we are of the opinion that, the Convention contains a longer list of minimum rights of prosecuted individuals. As an example, there can be no doubt that the minimum rights, set forth in the Convention, in relation to persons who were detained (arrested) and imprisoned on suspicion of committing crime are also the minimum rights of prosecuted individuals. In this regard, further research is of interest on the correlation between the ‘equality of arms’ and other minimum rights of prosecuted individuals, which are enshrined in other articles of the Convention.

The obtained results could be used in both further theoretical research and law enforcement. The outcomes of this research study could be useful in practical activities of national courts and criminal investigation courts with a view to enhancing assurance over the right to a fair trial and hindering typical violations of the right under study.

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**About the author:**

**Fardin Y. Khalilov** — PhD in Law, Chief Researcher of the Department of Scientific Research and Doctoral Studies, The Justice Academy of the Ministry of Justice of the Azerbaijan Republic; 158 Vidadi srt., Baku, AZ 1000, Azerbaijan Republic

**ORCID ID: 0000-0001-9260-2997**

*e-mail:* ph\_d@mail.ru

**Об авторе:**

**Халилов Фардин Яшар оглы** — доктор философии по праву, главный научный сотрудник отдела научного исследования и докторантуры, Академия Юстиции Министерства Юстиции Азербайджанской Республики; AZ 1000, Азербайджанская Республика, г. Баку, ул. Видади, д. 158

**ORCID ID: 0000-0001-9260-2997**

*e-mail:* ph\_d@mail.ru