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*Annet E. Gácsi**

Study of the principle of equality of arms in particular in Hungarian criminal proceedings**

1. Introduction

"The theory of criminal proceeding law […] has seen a tremendous improvement recently […] and this improvement has so far been interpreted by academic and practicing professionals from a perspective focusing on the essence, objective and system of criminal proceedings. However, taking an insight into the *workshop of science* (and into the works of criminal procedural law authors), we can learn that, even today, the largest debates and theoretical fights are the ones addressing *basic and essential matters*."[1] Not only are the aforementioned thoughts that are quoted from a Hungarian legal scholar and professor Ferenc Finkey who lived throughout the turn of the 19th century and the 20th century and date back more than a hundred years, still actual nowadays, they get even more emphasis as the new Hungarian Criminal Proceeding Act is being codified.

The current Hungarian Criminal Proceeding Act (Act XIX of 1998) as adopted in 1998 and enacted in Summer 2003, has been amended at around 2,000 points by nearly 90 acts and several constitutional court resolutions, rendering this Act non-coherent. Recognising this non-coherence, the Hungarian Government affirmed the proposal concerning the regulation principles of the new Criminal Proceeding Act on February 11th, 2015 (this proposal is hereinafter referred to as the "Concept").[2] At

* Senior Lecturer, University of Szeged, Faculty of Law and Political Sciences, 6720 Szeged, Tisza L. krt. 54, Hungary, e-mail: gacsi.anett@juris.u-szeged.hu.

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[1] F. Finkey, *A felek fogalma és köre a büntetőjogi per mai elméletében. Különlenyomat „Büntetőjogi dolgozatok" című műből*, Pécs 1914, p. 1.

[2] The Concept is available in Hungarian language on the following website: http://www.kormany.hu/download/d/12/40000/20150224%20IM%20el%C5%91terjeszt%C3%A9s%20az%20%C3%BAj%20b%C3%BCntet%C5%91elj%C3%A1r%C3%A1si%20t%C3%B6rv%C3%A9ny%20szab%C3%A1lyoz%C3%A1si%20elveir%C5%91l.pdf, 30.12.2016.

the time of the preparation of this study, the new draft law (hereinafter referred to as the "Draft") has already been drawn and is expected to take effect on July 1st, 2018.[3]

In creating the new Criminal Proceeding Act, the legislator had to take its position in numerous *basic and essential matters* that are debated in both literature and legal practices. These matters included the field of criminal proceeding *principles*, paying particular attention to the principle of shared functions (or functional allocation) and a more consistent enforcement thereof (and, as part of that, of the matter of "Who is to obtain evidence that corroborates the charge?"), to the right to effective defence, and to the principles of evidence. These basic and essential matters also included the establishment of the effective collaboration system relating to the defendant, as one of the *subjects to the criminal proceeding*, and of the legal enforcement steps for the aggrieved party and any other persons requiring special treatment; the establishment of categories for such subjects to the criminal proceedings who are either new or have been previously known under a different collective name (party with monetary interest, and representative); and the inclusion, in the Criminal Proceeding Act, of the definition of criminal proceeding-related capacity and the rules associated therewith. For a long time, there has been a requirement that criminal proceedings be *effective* and *fast*. Bearing in mind the foregoing, the Criminal Proceeding Act contains numerous essential novelties including but not limited to the development of the *new – shared – investigation model* (i.e. splitting of the investigatory phase into two parts, namely the exploration part and the inspection part), the establishment of the rules for *disguised tools* relating thereto, and the re-consideration of *coercive measures*; *the simplification of the judicial proceeding* (e.g. establishment of the rules for worthwhile and concentrated trial preparation); and *reforming the legal remedy system*. Broadening the scope of use of telecommunication equipment and modernising the rules for procedural actions in criminal proceedings are more of *technical novelties* rather than essential dogmatic matters. Finally, another essential novelty is the establishment of the

[3] The Draft is available in Hungarian language on the following website: http://www.parlament.hu/irom40/13972/13972.pdf, 5.03.2017.

partially new system and the rules for *separate and special proceedings* that are taxonomically isolated from ordinary procedures.

The legislator has heavily relied on the dogmatic requirements established by academic criminal lawyers.

2. The right to a fair procedure (*fair trial*)

In criminal proceedings subject to rule of law, another *basic and essential matter* is setting the rule of *right to a fair procedure*.

This right (the essence of which is to ensure that a framework for fair procedures is established within which government bodies bring decisions in individual cases affecting the rights of citizens[4]) is a right originating from Anglo-Saxon law, the essential aspects of which were first declared *at international levels* in Section 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4th, 1950, Rome, Italy (hereinafter referred to as the "Convention").[5]

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

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[4] E. Róth, *Az eljárási jogok* [in:] G. Halmai, G.A. Tóth (ed.), *Emberi Jogok*, Budapest 2003, p. 703.

[5] J. Bénédict, *Le sort des preuves illegales dans le procés pénal*, Lausanne 1994, p. 301; M. Hollán, A. Osztovics, *A tisztességes eljáráshoz való jog – az (1) bekezdés magyarázata* [in:] A. Jakab (ed.), *Az Alkotmány kommentárja*, Budapest 2009, p. 2059. A provision similar to that of the Convention can be found in Section 14 of the International Covenant on Civil and Political 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 defence;
(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.

However, taking a closer look at it, one can notice that the language of the Convention refers to *fair trial*.[6] The issue here is that, from a structural and procedural point of view, the trial is only a part of the criminal proceeding (this being said, not to degrade the significance of trials) but the requirement of fairness shall be satisfied throughout the entire proceeding, not just the trial phase. Unless the elements of fair procedures are applied at least on a minimal level throughout the preparatory phase (i.e. investigatory phase and prosecutor's phase), the trial will likely become objectionable.[7] Therefore, the requirement of *fairness* shall apply to the *entire procedure*. Consequently, it is more appropriate to use the phrase *right to a fair procedure*. At this point, it is to be noted that the right to a fair procedure *is not exclusive for criminal proceedings* but is also present in other type of proceedings. On the other hand, I agree with Tamás Bán in saying that "a person charged with committing a crime is already ‹inherently› in handicap to the investigating authority and the prosecuting

[6] The Hungarian language seems to be a bit more sensitive in terms of terminology. The term *fair trial* as used in English language can be literally translated into Hungarian as *tisztességes tárgyalás*. The issue with this term is that it implies that the parties to a legal proceeding have the right to a fair trial, and the term *trial* refers to the trial phase and only the trial phase of the proceeding. On the other hand, the commonly used Hungarian term *tisztességes eljárás* (it can be literally translated into English as *fair procedure* or *fair proceeding*) has a broader meaning, also covering other phases of the proceeding such as the investigation phase and the judicial phase.

[7] Á. Erdei, *Tanok és tévtanok a büntető eljárásjog tudományában*, Budapest 2011, p. 234.

authority in many aspects in the proceeding due to the structure and nature of the criminal proceeding. Consequently, obeying the principle of fair procedure is particularly significant in the criminal proceeding."[8]

With regards to *Hungarian (internal) law*, this principle and its sub-elements are set forth in Section XXVIII of the Fundamental Law.[9] Although the current Criminal Proceeding Act does not literally contain the term "fair procedure", certain rights associated with the principle of fair procedure appear in the Criminal Proceeding Act either as operating principles (right to defence, presumption of innocence) or in some part-specific static and dynamic rules. One of the requirements set for the codification of the new Criminal Proceeding Act was that "the procedural actions of the parties shall be guided by the principle of fair procedure". At the beginning of the codification process, it was considered that the right to a fair procedure be declared in the future Code as a fundamental principle. This consideration was dismissed and the right to a fair procedure was included *expressis verbis* in the preamble section of the draft law. According to the Ministerial Commissioner in charge of the codification process, Barna Miskolczi, the new Act contains the cause and aim of the regulation along with a preamble that includes such principal theses that cannot or need not be provided for in the Act itself due to the lack of normative content.[10] Maybe the right to a fair procedure in relation to this Act is more of a case of including a so-called guiding principle (which covers the entire proceeding) in the preamble so as to highlight this guiding principle from other principles and express that this guiding principle shall be applied throughout the entire proceeding. In my opinion, there is no lack of normative content as both the individual operating principles

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[8] T. Bán, *A tisztességes eljárás és annak egyik fontos vonása: az ártatlanság vélelme* [in:] M. Tóth (ed.), *Büntető eljárásjogi olvasókönyv*, Budapest 2003, p. 59.

[9] For the sake of completeness, it is to be highlighted that Section XXVIII of the Fundamental Law includes the right to a fair procedure as well as other basic norms for constitutional (more broadly construed) criminal law. See: M. Lévay, *Büntetőhatalom és Alkotmány, különös tekintettel a bűncselekménnyé nyilvánításra és a büntetésekre* [in:] T. Drinóczi, A. Jakab (ed.), *Alkotmányozás Magyarországon*, Budapest–Pécs 2013, p. 213.

[10] B. Miskolczi, *Az új büntetőeljárásjogi kódex fontosabb újításai röviden*, https://jogaszvilag.hu/rovatok/szakma/az-uj-buntetoeljarasi-kodex-fontosabb-ujitasai-roviden, 30.12.2016.

and the part-specific static and dynamic rules are great examples of how the principle's detailed rules are filled with normative content.

In summary, whether based on international or Hungarian legal sources, it can be stated that the requirements unfolding the context of a fair procedure are the classic and generally recognised criminal proceeding principles and, as the case may be, essential rules. Therefore, the principle of fair procedure can be considered as a *guiding principle*[11] and such a "universal principle" or "collection of principles" that demonstrates the European standard (more precisely, the minimum level) for holding a person accountable within the context of criminal law.[12]

3. The principle of equality of arms

3.1. General definition

The principle of equality of arms is a generally and undoubtedly accepted "*essential part*"[13] of the principle of fair procedures (treated as a guiding principle) and has the purpose of ensuring that, in criminal proceedings, the prosecution and the defence have equal chances and opportunities to express their opinions and take their positions with regards to factual and legal matters.[14] However, it is to be noted that even though the application of the principle of equality of arms does not always mean that the prosecution and the defence have completely identical scope of legitimation (i.e. this principle does not necessarily ensure completely identical

[11] The term *guiding principle* first appeared in the first books and commentaries written for the Code of Criminal Procedure. See: J. Balogh, *Magyar bűnvádi eljárási jog,* Budapest 1901, p. 139; F. Finkey, *A magyar büntető eljárás tankönyve*, Budapest 1899, p. 173. Later, in Hungary, this term was adapted to the right to a fair procedure by Flórián Tremmel.

[12] C. Herke, C. Fenyvesi, F. Tremmel, *A büntető eljárásjog elmélete*, Budapest–Pécs 2012, p. 51; M. Sulyok, „*In All Fair-ness" avagy igazság szerint*… [in:] A. Badó (ed.), *A bírói függetlenség, a tisztességes eljárás és a politika*, Budapest 2011, p. 93.

[13] F. Sudre, *Droit européen et international des droits de l'homme*, Paris, p. 338; E. Toma, *The Principle of Equality of Arms – Part of the Right to a Fair Trial*, "Union of Jursits of Romania" 2011, no. 8, p. 1–3.

[14] 6/1998. (III. 11.) AB hat., ABH 1998, 91, 93; P. Paczolay, *A fegyverek egyenlőségének elve az Alkotmánybíróság gyakorlatában* [in:] Z. Juhász, F. Nagy, Z. Fantoly (ed.), *Sapienti Sat. Ünnepi kötet Dr. Cséka Ervin Professzor 90. Születésnapjára*, Acta Jur. et Pol. Szeged, Tomus LXXIV (2012), p. 391.

rights[15]), this principle does require that the defence be provided with such scope of legitimation that is comparable with that of the prosecution.[16]

3.2. Dilemma about naming: the principle of equality of arms vs. (?) the principle of equal parties?

As mentioned above, Section 6 of the Convention has been drafted under the influence of common law. This fact is significant for the principle of equality of arms (in particular, its *title*) as derived from the right to a fair procedure. The Anglo-Saxon – adversarial proceedings[17] – (more specifically, only the *British*) approach is to *interpret the criminal proceeding strictly as a private law proceeding* where the lawsuit is a fight between two opposing but equal parties.[18] Tom Bingham did a great job demonstrating this aspect in his work by jointly mentioning the public prosecutor with the plaintiff and the accused party (defendant party) with the respondent, and stating, based on the principle of equality of arms, that "the proceeding shall be fair for both sides".[19] Bingham stated that, from a general perspective, this is manifested in criminal proceedings in the form of ensuring that both the public prosecutor and the accused party shall be given fair opportunities to prove or negate the existence of the criminal claim.[20]

According to Árpád Erdei, the term "equality of arms", referring to judicial duels in old times (note: it was a strict rule for judicial duels that spears be of the same length), expresses the requirement that the procedural tools available for the prosecution and the defence *(if not identical) shall at least be matched in terms of their power*.[21] Stefan Trechsel has similar views by comparing the criminal proceeding to gladiator fights that

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15 Róth, 2003, p. 729; Paczolay, 2012, p. 392.

16 6/1998. (III. 11.) AB hat., ABH 1998, 91, 93.

17 T. Király, *Büntetőeljárási jog*, Budapest 2003, p. 30.

18 On the other hand, U.S. criminal proceedings are of public law nature (resulting in, amongst other consequences, the demand and right of fairness being vindicated only for the defendant). K. Bárd, *A sértettek eljárási jogai a nemzetközi bíróságok gyakorlatában* [in:] P. Hack, G. Horváth, E. Király (ed.), *Kodifikációs kölcsönhatások. Tanulmányok Király Tibor tiszteletére*, Budapest 2016, p. 113–114.

19 T. Bingham, *The Rule of Law*, London 2011, p. 90.

20 Bingham, 2011, p. 90.

21 Erdei, 2011, p. 235.

were popular in ancient Rome, and the parties to the criminal proceeding (prosecution and defence) to the gladiators themselves. He stated that even though the weapons available for the two combatant gladiators were not identical (one of them was equipped with a sword and a shield and the other one with a net and a trident), they were equal (matched each other) in the fight.[22]

The title "principle of equality of arms" is debated in *French literature*. In France, it seems to be more appropriate to use the term "*equality of parties*" due to the balance in rights to which the parties to the proceeding are entitled (*équilibre des droits des parties*).[23] Moreover, the French Criminal Proceeding Act contains the following language as early as in its "preamble" (*Article préliminaire*): "The criminal proceeding shall be equitable (*équitable*), contradictory (*contradictoire*) and shall ensure that the rights to which the parties to the proceeding are entitled are in balance (*préserver l'équilibre des droits des parties*)". The term "equality of parties" as used in French criminal proceeding law (French Doctrine[24]) better reflects the characteristics of continental criminal proceeding systems (or, at least, the characteristics of their judicial phase), including a more active judicial engagement and relatively passive contribution from the parties as opposed to the term "equality of arms" which may be more relevant for Anglo-Saxon trial systems that tend to depict the criminal proceeding as a "battle" between the parties.[25]

The matter of *equality of parties* also appeared in earlier Hungarian criminal proceeding law literature (as an essential matter). The baseline to elaborate on this matter was the acknowledgment or the very denial of the so-called *legal relationship theory*.[26] While Jenő Balogh denied the legal relationship theory (thus also denying the existence of "parties" in a criminal proceeding, obviously leading to the denial of "equality of parties" as

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[22] S. Trechsel, S.J. Summers, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 96.

[23] J.-P. Dintilhac, *L'égalité des armes dans les enceinte judiciares*. Rapport de la Cour de Cassation. 2003, 129–150, https://www.courdecassation.fr/IMG/pdf/Rapport_2003_optimise.pdf, 20.10.2016.

[24] Toma, 2011, p. 3.

[25] Toma, 2011, p. 3.

[26] Király, 2003, p. 19–20.

well),[27] Ferenc Vargha[28] and Ferenc Finkey acknowledged the existence of the legal relationship theory. I agree with Ferenc Finkey in that the definition and scope of parties form an inseparable bond with the essence and purpose of criminal proceedings. However, there is a question here: while, at the time of the first Code of Criminal Procedure (Act XXXIII of 1896), Hungarian procedural lawyers who supported the legal relationship theory stated that "since the main part of the criminal proceeding is the lawsuit (the trial) itself, there have to be parties involved in the proceeding",[29] it is questionable if criminal proceedings nowadays have "parties" involved in it as criminal proceedings nowadays can be divided into two (equal) main phases being the preparatory phase and the judicial phase with the preparatory phase further divided into an investigatory phase and the prosecutor's phase. I shall now take a little detour here. Making a comparison with civil and administration proceedings, Finkey considered criminal proceedings to be *dual-sided legal protection tools*. While, on one side, the state holds the tool in their hand to maintain legal order, the individual (defendant), on the other side, has the tool in their hand against that very state (more specifically, the state-controlled authorities).[30] Consequently, *from a substantive law perspective, he considered the criminal lawsuit to be a special public law relationship* between the state and the defendant in which *the defendant shall participate as a party* and not only shall they comply with their procedural obligations but they shall also be entitled to certain procedural rights as prescribed by law.[31] However, he did not stop at the substantive law perspective and went further (also beyond the legal relationship theory) to define *the criminal proceeding from a procedural law perspective* as well. From this perspective, he thought that the parties to a criminal proceeding were not the state and the defendant. He thought that, based on the principle of shared function or functional allocation (i.e. the prosecution, defence and judgement functions separated), the parties were the prosecution and the defence (within the defence side,

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27 J. Balogh, *Magyar bűnvádi eljárási jog*, Budapest 1901, p. 13–15.

28 J. Balogh, K. Edvi Illés, F. Vargha, *A Bűnvádi Perrendtartás magyarázata*. Budapest 1909, p. 585.

29 Finkey, 1914, p. 2.

30 Finkey, 1914, p. 3–4.

31 Finkey, 1914, p. 4, 20–22, 28, 34.

primarily the defendant). Therefore, from this perspective, he considered the public prosecutor and the defendant to be the parties: "the battle, the legal dispute is between them, and the court only acts as an impartial outsider decision-making authority to ensure that the external order of the lawsuit is maintained, to require parties to comply with their rights and obligations specified under the particular lawsuit and, where applicable, recover from any omissions of such rights and obligations in relation to the clarification of the real facts and of any other significant circumstances that are relevant for the decision to be made in the case, and to adopt the necessary resolutions in each phase of the lawsuit".[32] However, he considered the prosecution (public prosecutor) and the aggrieved party (private prosecutor, substitute public prosecutor) to be *parties only from a procedural law perspective* (they are the ones who fulfil the state's criminal prosecution tasks: while the public prosecutor acts on the basis of the principle of legality, the private prosecutor and the substitute public prosecutor may only represent the prosecution side if strict statutory conditions are met). On the other hand, he considered the defendant to be a "full" party (i.e. a party from both a substantive law and a procedural law perspective) who is personally interested in the lawsuit and is "free to exercise their rights specified under the particular lawsuit".[33] Therefore, it can be ascertained that Finkey acknowledged the existence of parties in criminal lawsuits, but clarified that the accuser shall be considered as a party only during the lawsuit (i.e. the judicial phase), not before or after that. He also noted that the public prosecutor also has public authority capacity and judicial tasks (for example, the public prosecutor may submit legal remedy in favour of the defendant) without it degrading the "party" nature of the public prosecutor.[34] He also acknowledged the definition of equality of parties.

Below is another example extracted from earlier Hungarian literature: In 1943, Ervin Hacker published a work (*A magyar büntetőeljárásjog rövid vázlata*; unofficial English translation of the title: *Short draft of the Hungarian criminal proceeding law*, Miskolc 1943) in which he wrote about the

[32] Finkey, 1914, p. 5, 23–24, 30, 35.

[33] Finkey, 1914, p. 5–6.

[34] Finkey, 1914, p. 37–38.

requirement of *equality of parties*. He thought that in order for substantive justice to be realised, it would be desirable to grant equal rights to both the accuser and the accused party (due to their positions in the lawsuit) so that "the principle of equality of parties shall be realised".[35]

With regards to the definition of *equality of parties*, some people in Hungary nowadays support the *idea of etatism*.[36] Therefore, Viktor László Bérces studied the terms "equality of parties" and "equality of arms" in depth (with such a limitation that he fully excluded the French Doctrine from the scope of his sources). He concluded that "using the term ‹equality of parties› in criminal proceeding is not correct […] neither the defendant, nor the defence counsel is party to the acting bodies […] the term ‹party› is a category within civil law and, as such, refers to the coordinative relationship between the parties […]".[37] Another significant person in this matter is a doyen of the criminal proceeding law school in Pécs, Hungary, Flórián Tremmel who pointed out that the definition of party is deliberately excluded from the procedural law act.[38]

Despite of the aforementioned "critique" about the terminology, the European Court of Human Rights (ECtHR) recognise and consistently use the term "*equality of arms*".[39] (With consideration of the practices of the ECtHR, I also referred to this term as "the principle of equality of arms" in this study.) Moreover, it can be stated that if it was not for the practices of the ECtHR, this principle would probably not have become such an important principle in continental legal systems, too.[40] On the other hand, I deem the view of "*in the judicial phase of criminal proceedings, the involved (opposing) entities* (accuser and defendant) *shall be considered as parties*" as a representable (moreover, justified) view.

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35 E. Hacker, *Alapelvek* [in:] M. Tóth (ed.), *Büntető eljárásjogi olvasókönyv*, Budapest 2003, p. 48–49.

36 Erdei, 2011, p. 176.

37 V.L. Bérces, *A védői szerepkör értelmezésének kérdései – különös tekintettel a büntetőbíróság előtti eljárásokra*, Budapest 2014, p. 38–39.

38 F. Tremmel (ed.), *Új magyar büntetőeljárás*. Budapest–Pécs 2004, p. 91; In contrast: Király, 2003, p. 163–164.

39 *Delcourt v. Belgium* (Application no. 2689/65), Judgment of 17 January 1970.

40 Paczolay, 2012, p. 391.

3.3. The principle of equality of arms in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the legal practices of the European Court of Human Rights

The principle of equality of arms can be found in the Convention for the Protection of Human Rights and Fundamental Freedoms, more specifically in Section 6 on fair procedures (fair trial). However, the Convention declares only the most fundamental legal principles, and it is the task of the *European Court of Human Rights* (hereinafter referred to as the "Court" or "ECtHR") to fill such legal principles with content. As it is well known, Strasbourg Law, in overall, can be considered as classic Anglo-Saxon type case law, where the knowledge of the rule (the Convention) alone is useless without gaining knowledge of the legal materials of the Court. However, these legal materials, by their nature, are not constant and are changing over time (evolutionist change) but sometimes in the very opposite direction of where former legal practices were heading to (revolutionist change).[41] With regards to the principle of equality of arms, the change seems to have been rather evolutionist than revolutionist. Based on the practices of the Court, the principle of equality of arms can be studied both in narrower and broader sense.[42]

In a narrower sense, the principle of equality of arms comprises *Section 6 (3) (d) of the Convention*, addressing the matter of witness hearing. Just to make it clear before we proceed with this study, *no subject to the criminal proceeding other than the defendant (defence side) may refer to the violation of the Convention* with regards to the aforementioned subsection (the private party, for example, may not refer to the violation of the Convention with regards to the aforementioned subsection).[43] However, according to established legal practices, not even the accused party may refer to the violation of the Convention with regards to the aforementioned subsection (e.g. inability for the defendant to hear the witnesses) if this situation had been caused by the act or omission of the defendant themselves.[44]

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41 A. Grád, M. Weller, *A strasbourgi emberi jogi bíráskodás kézikönyve*, Budapest 2011, p. 15, 26–27.

42 Grád, Weller, 2011, p. 360.

43 Grád, Weller, 2011, p. 413.

44 *Balliu v. Albania* (Application no. 74727/01), Judgment of 16 June 2005.

The rights of the defendant relating to the hearing of witnesses are not absolute rights – according to the established legal practices of the Court, one case where violation of the Convention may occur is the "failure to call witnesses who are essential in exploring the truth".[45] However, for this (failure to call a witness who is essential in exploring the truth) to cause a violation of the Convention, the defendant shall be obliged to submit proof or presumptive proof indicating that the violation of the Convention could have been avoided by calling such witness – it is not sufficient from the defendant's side to only make reference to it.[46]

At first, it might seem that this interpretation only allows the principle of equality of arms to be applied in a narrow scope as such principle applies only to witnesses and their testimonies. But the Court *interprets the definition of witness in an extended manner*.[47] Therefore, with regards to the applicability of Subsection d), the practices of the Court extend the definition of witness to include persons who may not have been qualified as witness under the national law as well as the co-defendant (in relation to the defendant), whether their cases are heard before the Court in the same proceeding or in separate proceedings.[48] Similarly, the Court applies an *extended approach* to the *definition of testimony*, too. Therefore, essentially, any and all verbal statements that are used by national courts in judging the case, shall qualify as testimonies. With regards to this matter, nor do the legal practices of the ECtHR require the witness to be present before the national court in person (for them to be qualified as witness).[49] Therefore, reading out what the witness had testified during the investigation shall qualify as a testimony provided that such testimony will be used for the judgement as a mean of

[45] *Sadak and Others v. Turkey* (Application nos. 29900/96; 29901/96; 29903/96), Judgment of 17 July 2001. With regards to the non-granted right to ask questions from the prosecution's witnesses: *Hulki Günes v. Turkey* (Application no. 28490/95), Judgment of 19 June 2003.

[46] *Perna v. Italy* (Application no. 48898/99), Judgment of 25 July 2001.

[47] Grád, Weller, 2011, p. 412.

[48] *Lucá v. Italy* (Application no. 33354/96), Judgment of 27 February 2001; *Mild and Virtanen v. Finland* (Application nos. 39481/98, 40227/98), Judgment of 26 July 2005; *Balsán v. the Czech Republic* (Application no. 1993/02), Judgment of 18 July 2006; *Kaste and Mathisen v. Norway* (Application nos. 18885/04, 21166/04), Judgment of 9 November 2006.

[49] However, as a contradiction: *Rudnichenko v. Ukraine* (Application no. 2775/07), Judgment of 11 July 2013.

evidence.[50] [Even though it would not fit in the boundaries of this study, it is to be noted for the sake of completeness that the matter of anonymous witnesses has earned its own special legal practice within the context of Section 6 (3) (d).[51] As a general rule, "no judgement shall be based exclusively or decisively on anonymous testimonies".[52]]

At this point (definition of the witness and of the testimony), it is to be briefly noted that a question arises whether or not *the expert and the expert's opinion can be subsumed to Section 6 (3) (d)*. According to its consistent practices, the Court consider experts to fall under the scope of Subsection d) only if the role that the expert effectively plays in the proceeding "very much resembles" that of the witness. Also, in some cases, the Court tends to consider experts to fall under the scope of Subsection d) "based on all circumstances of the case".[53] In other cases (for example, the national court decides not to include the expert designated by the accused party in the proceeding or to hear them in the proceeding "only" as a witness and not as an expert[54]), the Court judges the matter related to the expert under Section 6 (1) (fair procedure).[55] However, at this point it is also important to note that the defendant (defence side) does not get to hear out "any expert-witness in any matter" by subjective right.[56]

In a broader sense, the principle of equality of arms means that the rights of the prosecution shall be equal to the rights of the defence

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[50] *Kostovski v. Netherlands*, Judgment of 20 November 1989, Series A no. 166. Most recently, the Court has developed a so-called *three-step test* to address this matter: *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECtHR 2011; *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

[51] *Kostovski v. the Netherlands*, Judgment of 20 November 1989., Series A no. 166; *Lüdi v. Switzerland*, Judgment of 15 June 1992, Series A no. 238; *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, Reports 1997-II, p. 691; *A.M. v. Italy* (Application no. 37019/97), Judgment of 14 December 1999; *P.S. v. Germany* (Application no. 33900/96), Judgment of 20 December 2001; *Bocos-Cuesta v. the Netherlands* (Application no. 54789/00), Judgment of 10 November 2005; *Bonev v. Bulgaria* (Application no. 60018/0), Judgment of 8 June 2006.

[52] Grád, Weller, 2011, p. 421.

[53] *Bönisch v. Austria*, Judgment of 6 May 1985, Series A no. 92.

[54] *Brandstetter v. Austria*, Judgment of 28 August 1991, Series A no. 211.

[55] *Balsyté-Lideikiené v. Lithuania* (Application no. 72596/01), Judgment of 4 November 2008.

[56] *Doorson v. the Netherlands*, Judgment of 26 March 1996, Reports 1996-II, p. 446.

side with regards to the knowledge of the case, the presence and the evidence process. That is, the Court applies *Section 6 (1) of the Convention* to deal with such requests that refer to "inequality of arms" and that are not related to the narrow sense of the Convention's terminology usage (Section 6 (3) (d)).[57] Based on case law, violation of the Convention occurs and thus the principle of equality of arms is disobeyed when, for example, the requestor is given short notice to submit any appeal against a decision at first instance but, on the other side, the public prosecutor is not bound by any time limit[58], or the prosecution side is informed of the composition of the acting court in advance but the defence side is not.[59] Another example of the inequality of arms as established under the broader sense is when the defence side is refused to gain insight into certain documents in the prosecution side's materials or to receive copies of significant instruments or documents.[60] It might seem to be absurd but it did happen in the Court's case law practices in a criminal proceeding that the public prosecutor general (the representative of the prosecution) and the executive jury of the Supreme Court exchanged secret correspondences with regards to the particular case;[61] or when the representative of the prosecution secretly submitted materials to the court (in this sense, the term "secretly" refers to the defence side not being given official notice or the chance to respond).[62]

In my opinion, the matter of equality of arms as viewed in a broader sense (Section 6 (1)) can be divided into two sub-groups. The first one is the sub-group that satisfies Section 6 (1) of the Convention,

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[57] Grád, Weller, 2011, p. 360.

[58] A more indirect view on this topic is available here: *Ben Naceur v. France* (Application no. 63879/00), Judgment of 3 October 2006.

[59] *Kremzow v. Austria*, Judgment of 21 September 1993, Series A no. 268-B.

[60] *Öcalan v. Turkey* (Application no. 46221/99), Judgment of 12 March 2003.

[61] *Josef Fischer v. Austria* (Application no. 33382/96), Judgment of 17 January 2002; *Lanz v. Austria* (Application no. 24430/94), Judgment of 31 January 2002.

[62] *Bulut v. Austria*, Judgment of 22 February 1996, Reports 1996-II, p. 346; *Meftah and Others v. France* (Application nos. 32911/96, 35237/97, 34595/97), Judgment of 26 July 2002; *Kabasakal and Atar v. Turkey* (Application nos. 70084/01, 70085/1), Judgment of 19 September 2006.

by reason of Section 6 (1) being a clause of subsidiary nature, that is, when there is no specific circumstance as designated in Section 6 (3) (d) based on which the case could be examined. Majority of the cases referenced above can be classified into this sub-group. The second one is the sub-group that satisfies Section 6 (1) of the Convention, by reason of the case being complex and affecting Section 6 (2) and Section 6 (3) [and possibly multiple sub-sections in Section 6 (3)], too. With the latter sub-group, an additional requirement is that the individual subsections themselves would not be suitable for establishing the violation of Section 6. In my opinion, a great example of this sub-group is the case of *Barbera, Messegué and Jabardo v. Spain* in which the requestors incriminated with act of terrorism were transported to Barcelona from Madrid in a 600 km trip as late as during the night before the "decisive" trial. This transportation resulted in the requestors being both physically and mentally exhausted in the morning when the trial took place. Another concern in the case was that 2 out of the 3 members of the judicial council were changed in the morning of the trial's day which left the defence side with no chance to raise objection against such change should they wish to. In the trial held after this history, the court did not inspect (or did inspect but only partially) the vast majority of the evidence materials, the trial lasted for an extraordinarily short period of time before the defendants were declared to be guilty. The defence side felt aggrieved by these circumstances, too. These procedural violations fall under the scope of Section 6 (2) and Section 6 (3) of the Convention, respectively. However, the Court took the position that, under Section 6 (1) as a whole unit, the aforementioned violations had such a unified (consolidated) effect which resulted in the Convention being violated.[63] The Court eventually declared that the right to a fair procedure had been impaired and added that the principle of equality of arms had been disobeyed.[64]

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[63] *Barbera, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, Series A no. 146.

[64] The Court made the same decision in the case of *Gencer and Others vs. Turkey* on the grounds of procedural violations similar to those mentioned above. *Gencer and Others v. Turkey* (Application no. 6291/02), Judgment of 21 December 2006.

3.4. The principle of equality of arms in the practice of the Hungarian Constitutional Court

The Hungarian Constitutional Court is of the view that the principle of equality of arms has two requirements set for it. First, all parties shall be present in person in the procedural actions. Second, the prosecution and the defence side shall be given the opportunity to gain insight into case-relevant data in the same depth and to the same extent.[65]

The Hungarian Constitutional Court also addressed this principle (which might be derived from the right to a fair procedure) in many of its resolutions. Below is a non-exhaustive list of resolutions in which the Hungarian Constitutional Court examined the principle of equality of arms with regards to criminal proceedings: in relation to the *right to defence*:

- resolution No 6 of 1998 (III. 11.) – appropriate time limit and opportunity for the defence side to make preparation;
- resolution No 8 of 2013 (III. 1.) – informing the defence counsel (in due course and in verifiable/traceable manner) of the first hearing of the suspect;
- resolution No 61 of 2009 (VI. 11.) – accessing documents after the date the decision acquired the force of res judicata;
- resolution No 104 of 2010 (VI. 10.) – protected witness and their situation and protection in the criminal proceeding.[66]

It can be noticed that the Constitutional Court examined the principle of equality of arms in criminal proceedings mainly through the interpretation of the *right to defence* (and other provisions alongside the right to defence). Although the right to defence is "such a principle in constitutional criminal proceeding law that is present in countless different detail rules *throughout all phases of the criminal proceeding*"[67], it does not constitutionally require that the fundamental right be enforced in the individual procedural phases with identical content and unified detail rules. It allows the legislator to define the detail rules for the right to defence differently for the investigation and for the judicial process. While the investigatory phase is

[65] 6/1998. (III. 11.) AB hat., ABH 1998, 91, 93.

[66] Some of the resolutions were processed by: Paczolay, 2012, p. 392–395.

[67] 25/1991. (V. 18.) AB hat., ABH 1991, 414, 415.

aimed at exploring the story from the suspect of committing a crime to the point of reaching the degree of certainty required for formal accusation, the criminal judicial phase has the purpose of passing a judgement on the action specified in the formal accusation. Therefore, to ensure the executability of tasks involved in the investigatory phase, the constitutional principle of the *equality of arms may only be enforced within certain boundaries during the investigatory phase of the criminal proceeding*.[68] The foregoing allows us to learn that, in principle, the absence of defence counsel is one of the obstacles to hold a court trial (provided, certainly, that the defence counsel's mandatory participation at the trial had been prescribed). On the other hand, when it comes to the investigatory phase, the presence of the defence counsel is regulated for the individual procedural actions as merely an option but not a requirement (even in the cases where defence counsel shall be mandatorily appointed – the law requires the appointment of the defence counsel but not its presence). Accordingly, in the investigatory phase, the absence of the defence counsel, alone, will not prevent the founded suspicion from being disclosed and the first and continued hearings of the defendant from being conducted. Therefore, as the Constitutional Court had already pointed out in one of its former resolutions, it is constitutionally justifiable (thus not causing the right to defence to be unnecessarily and disproportionately restricted) that, in accordance with the rules of the current act, the absence of the defence counsel will not prevent the hearing(s) of the defendant from being conducted even in the cases where the defence counsel shall be mandatorily appointed. Otherwise, setting such requirements could endanger the timely execution of the tasks involved in the investigatory phase.[69] As a mean of compensation for setting out that the presence of defence counsel in the investigatory phase is merely optional and not required, the Criminal Proceeding Act contains numerous essential provisions that are aimed at strengthening the rights of the defence side. Such provisions state, amongst others, that the hearing of the defendant shall be scheduled by the investigatory authority in a way as to ensure that the defendant is given appropriate time and opportunity to make preparation

[68] 8/2013. (III. 1.) AB hat., ABH 2013, 391, 397.

[69] 209/B/2003. AB hat., ABH 2008, 1926, 1942; 8/2013. (III. 1.) AB hat., ABH 2013, 391, 397–398.

for the defence (refer to Section 43 (2) (c) of the Criminal Proceeding Act and Section 179 (4) of the Criminal Proceeding Act), and that, with regards to any defendant being held in custody, the defence counsel shall be appointed for such defendant in custody no later than until the date/time of the first hearing of such defendant in custody and the defence counsel shall be informed, in the appointing resolution, of the place where such defendant is held in custody and of the schedule (including the place and date/time) of the hearing of such defendant (refer to Section 179 (2) of the Criminal Proceeding Act and Sections 48 (1) and 48 (2) of the Criminal Proceeding Act).[70] The question arises that if such notice is not delivered or delivered with delay, does this failure constitute a violation of the right to defence and disobedience to the principle of equality of arms with such principle already restricted in the investigatory phase? The Constitutional Court partially examined this matter with regards to the right to defence in its resolution No 8 of 2013 (III. 1.).[71]

In summary, it is ascertainable that the Constitutional Court, in its resolutions designated above, strived to create balance between the interests of the prosecution and the defence side and between the functions fulfilled in criminal proceedings. That is, the Constitutional Court pointed out that the equality of arms is not a mathematical equality but rather a tool to emphasize the right to access information (documentation) and thus to effectively participate in the procedural actions, and the importance of effective preparation by the defendant and the defence counsel.[72]

3.5. The principle of equality of arms in the codification of the new Criminal Proceeding Act

Given the baseline of being linked to each other by the Concept itself, the Concept treats the principle of equality of arms and the right to a fair procedure in a whole-part relation by stating that "[…] the right to a fair

[70] 8/2013. (III. 1.) AB hat., ABH 2013, 391, 398.

[71] The resolution was processed by: A.E. Gácsi, *A fegyverek egyenlősége elv összetett vizsgálata a (hatékony) védelemhez való jog és a bizonyítékok értékelése mátrixában* [in:] A. Gál, K. Karsai (ed.), *Ad Valorem. Ünnepi tanulmányok Vida Mihály 80. születésnapjára. Iurisperitus Kiadó*, Szeged 2016, p. 75–90.

[72] Hollán, Lőrik, 2009, p. 2054; Paczolay, 2012, p. 397.

procedure […] itself relies on the enforcement of other principles in criminal proceedings including […] the principle of equality of arms."[73] The requirement of equality of arms (equality of parties) also appears in the Concept in relation to the requirement of intended practice of law (i.e. prohibition to misuse the law). Based on the language of the Concept, the legislator shall pay particular attention, in the codification process, to the fact that the procedural rights and obligations vary by the phases of the procedure. There is no pure authority-party relationship or purely coordinative party-party relationship (where parties are given the right of disposal for the particular proceeding) in criminal proceedings. An example is that while the public prosecutor acts in an authority capacity during the investigatory phase, the public prosecutor turns into a party positioned similar to the defendant when standing before the court. With consideration of the foregoing, the norm material shall take into consideration the changes to legal relationships throughout the proceeding, the subjects positioned completely differently, and the procedural phases having distinct features.[74]

The Code refers to the requirement of equality of arms implicitly in several points (and in some points the Code even strengthens it). Such points include but are not limited to the *more consistent enforcement of shared functions (or functional allocation)* leading to the consequence that, even though decisions shall be based on true facts, the court cannot be obligated to reveal the facts ex officio; it can only be obligated to clarify the facts within the framework established by the motions of the parties (i.e. the prosecution and the defence). Consequently, failure of the court to obtain means of evidence due to the lack of motion by the prosecution shall not render the court's decision unfounded. The way the principle of equality of arms is strengthened here is that, during the judicial stage, not only the defence but also the prosecution has interests in making evidence motions that support the defence or the prosecution, respectively. At the same time, it relieves the court of the obligation to obtain incriminating evidence without motion. Another such point is the declaration of *the right to effective defence*. The right to defence will continue to be a core (basic) principle provided for in the

[73] Concept, p. 5.

[74] Concept, p. 22.

new Criminal Proceeding Act currently under development. However, the legislator has added the attribute word "effective" to the word "defence" ("The defendant shall have the right to effective defence across all stages of the criminal proceeding."). However, the right to effective defence is essentially an expectation set for attorney-at-laws who fulfil defence tasks as the appointed defence counsel system currently in place in Hungary cannot be honestly considered to be effective. Therefore, the principle of equality of arms imposes additional tasks on the defence. Even though it might look like an unusual solution (since, in legal practice, the principle of equality of arms is normally required to broaden the scope of legitimation of the defence side), it is closely related to fair trials.

4. Closing thoughts

The principle of equality of arms is an essential part and the accomplishment and manifestation of a fair procedure.[75] Although this principle traditionally relates to Anglo-Saxon law, the ECtHR, in its legal practices, have made this principle an important part of continental law systems.[76] A positive aspect of this is that it draws attention to the importance of *favor defensionis* which means that "the defence side (the defendant, in particular) is accumulatively handicapped; therefore, it would be desirable to provide the defence side with many favourable legal solutions (i.e. with the ‹favour›)".[77] I fully agree with the criminal proceeding law school in Pécs, Hungary in saying that the real contents of the principle of equality or arms could, besides the positive aspect, be unfolded even more clearly as a negative requirement, that is, in the form of a prohibition that would "prohibit the acting authorities from increasing the defendant's disadvantage".[78] This negative requirement is reflected in multiple resolutions of the ECtHR and of the Constitutional Court.

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[75] Paczolay, 2012, p. 391.

[76] Paczolay, 2012, p. 391.

[77] K.J. Heller, *(In)equality of Arms at the International Criminal Tribunals*, *Opinio Juris*, February 7, 2006, http://lawofnations.blogspot.hu/2006/02/inequality-of-arms-at-international.html, 15.12.2016; Herke, Fenyvesi, Tremmel, 2012, p. 53.

[78] Herke, Fenyvesi, Tremmel, 2012, p. 53.

In summary, it is ascertainable, based on the majority of positions taken in literature, that the essence of the "party" capacity of the subjects fulfilling the prosecution and defence functions is that the equality of parties can be translated as the equality of such subjects' rights associated with the trial. However, the legal situation of the parties is not equal in general but is equal only in terms of their rights provided for by the Criminal Proceeding Act. In accordance with the current act, the legal literature divide such rights into two groups: the rights serving the learning of the case, and the rights serving the advancement (resolution) of the case. While the first group consists of the rights to attend the procedural actions, to gain insight into documents, to ask questions and to ask for clarification, the latter group consists of the rights to make comments and motions.

A question might arise: why is it necessary to examine the matter of equality of arms (and in relation to that, the right to a fair procedure and the definitions of "parties" and "equality of parties") at the dawn of a new legislation? The answer can be extracted from the thoughts of Ferenc Finkey as presented in the introductory section of this study. These are essential matter(s) where, as the ECtHR explained in its case of *Delcourt v. Belgium*, "…justice must not only be done: it must also be seen to be done".[79]

[79] *Delcourt v. Belgium* (Application no. 2689/65), Judgment of 17 January 1970.

Summary

One of the commonly known and recognized essential elements of the right to fair trial is the principle of equality of arms. This principle, fabricated through legal theory and legal practice over time, has the purpose of ensuring that, in criminal proceedings, the prosecution and the defence have equal chances and opportunities to express their opinions and take their positions with regards to factual and legal matters. Even though the application of the principle of equality of arms does not always mean that the prosecution and the defence have completely identical rights, this principle does require that the defence be provided with such rights that is comparable with that of the prosecution.

Keywords: criminal procedure, right to fair trial, principle of equality of arms, principle of equal parties, defendant's right