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THE PRINCIPLE OF „EQUALITY OF ARMS" THROUGH THE PRISM OF ECtHR CASE *MURTAZALIYEV v. RUSSIA* (2018) – AN ERROSSING EXPANSION OF THE TEST OF OVERALL FAIRNESS?

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Summary: This article critically examines the application and implications of the principle of „equality of arms" in the context of the European Court of Human Rights (ECtHR) decision in Murtazaliyev v. Russia (2018). The principle of „equality of arms" is a cornerstone of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR), ensuring that neither party in a legal proceeding is at a substantial disadvantage. The Murtazaliyev case represents a significant judicial foray into the nuances of this principle, particularly concerning the procedural equities between the defense and prosecution. This article argues that the Court's reasoning in Murtazaliyev v. Russia potentially marks an erroneous expansion of the test of overall fairness, with far-reaching implications for the adjudication of future cases. The analysis focuses on the Court's interpretation of evidentiary fairness, the balance of adversarial opportunities, and the procedural safeguards necessary to uphold the integrity of the judicial process. The decision is scrutinized for its adherence to established precedents and its impact on the jurisprudential landscape of the ECtHR. By dissecting the legal reasoning and the standards applied, this article highlights the challenges and potential pitfalls inherent in the evolving scope of

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„equality of arms“. The findings suggest that while the Court aims to enhance procedural justice, its approach in this case may inadvertently undermine the legal equilibrium it seeks to protect. This critical assessment calls for a re-evaluation of the criteria for determining overall fairness to ensure that the principle of „equality of arms“ is consistently and coherently applied, thereby safeguarding the fundamental rights enshrined in the ECHR.

Keywords: equality of arms, ECtHR, Murtazaliyev v. Russia, Article 6 ECHR, fair trial, procedural justice, judicial fairness.

1. INTRODUCTION

The principle of equality of parties is a cornerstone of procedural justice, ensuring fairness and impartiality in legal proceedings, particularly in the field of criminal law. At the heart of this principle lies the idea that both the prosecution and the defence must be afforded equal opportunities, resources, and procedural guarantees for the effective presentation of evidence. The concept of "equality of arms" is deeply rooted in the fundamental principles of due process and the right to a fair trial, as enshrined in various international human rights instruments and national legal systems throughout the world.

One significant judicial milestone that underscores the importance of the principle of equality of parties is the case of *Murtazaliyeva v. Russia*. This case, decided by the European Court of Human Rights (ECtHR), exemplifies the critical role of this principle in protecting the rights of individuals within the criminal justice system, particularly in contexts in which imbalances of power and asymmetries may undermine the integrity of legal proceedings.

This paper undertakes a comprehensive examination of the case of *Murtazaliyeva v. Russia*, delving into its factual background, legal complexities, and broader implications for the protection of procedural rights. Our analysis seeks to clarify the application and interpretation of the principle of equality of parties in the specific context of this landmark judgment, shedding light on its significance in upholding the rule of law and ensuring procedural fairness.

The case of *Murtazaliyeva v. Russia* revolves around allegations of violations of the European Convention on Human Rights (ECHR), particularly Article 6, which guarantees the right to a fair trial, in the criminal proceedings brought against Ms Zare Khasanovna Murtazaliyeva

before the Russian courts. Central to the ECtHR's examination was whether the principle of equality of parties had been respected during the judicial proceedings, taking into account factors such as access to legal representation, the possibility of presenting evidence and examining witnesses, and equality of procedural rights between the prosecution and the defence. Through a careful analysis of this ECtHR judgment and its implications, this paper aims to elucidate key doctrinal principles and case law concerning the principle of equality of parties. Furthermore, it seeks to explore the broader implications of the *Murtazaliyeva* case for the protection of procedural rights within the framework of international human rights law and domestic legal systems.

In doing so, the paper engages with the doctrinal discourse on the principle of equality of parties, drawing on legal scholarship, comparative jurisprudence, and human rights theory in order to provide a nuanced understanding of its normative significance and practical application. Moreover, it seeks to encourage critical reflection on the challenges and complexities inherent in ensuring procedural fairness and equality before the law, especially in contexts marked by systemic deficiencies and structural inequalities.

In conclusion, this paper aims to contribute to the ongoing academic dialogue on the principle of equality of parties and its role in protecting the right to a fair trial. By examining the case of *Murtazaliyeva v. Russia* through a multidisciplinary lens, our objective is to advance our collective understanding of the fundamental principles of procedural justice and their implications for the protection of human rights in differrent legal contexts.

2. THE CONVENTION CONCEPT OF FAIR PROCEEDINGS

The principle of „equality of arms", or more precisely the principle of equality of parties in proceedings, is not *explicite* proclaimed by the European Convention, but rather emerged in the jurisprudence of the European Court of Human Rights. This speaks both to the beauty of the Convention as a living instrument that is constantly developing and to the elasticity of the right to a fair trial. Since its „introduction" into Convention life, the principle of „equality of arms" has become an integral part of fair

proceedings. But what does it actually refer to, and how did the expansion of Article 6 of the Convention come about?

Fair proceedings, or due process and fair trial, represent, one may freely and rightly say, a very old concept. Its first appearance, at least in traces, can be found in the famous legal monument of medieval England – *Magna Charta Libertatum*, or the Great Charter of Liberties. Although the concept of a fair trial is not explicitly mentioned in the text of *Magna Charta Libertatum* of 1215, this document, among other things, contained in Clause 29 a demand addressed to the King that he should deny no one the right or justice due to him, as well as a guarantee that no one would be deprived of liberty except by the lawful judgment of his peers or by the law of the land (Ivičević-Karas, 2007: 765; Raosavljević & Novaković, 2024: 14–15). This document was of very great importance because it introduced the concept of the rule of law into English law. Namely, the rule of law as a concept required „procedural equality" between individuals and the state, that is, public or state authority, which in essence represents a demand for „equality of arms" between the parties to proceedings. Furthermore, the principle of personal liberty was affirmed through the Petition of Right of 1628 and the Habeas Corpus Act of 1679, which guaranteed judicial control over every act of the executive authority in the process of depriving an individual of personal liberty (Krapac, 1995: 93). By guaranteeing personal liberty, the Habeas Corpus Act also provided a guarantee that liberty would not be taken away without due process, since the procedure itself was conceived as a guarantee of individual rights and freedoms.

Over time, the right to procedure evolved in English law, and more generally in legal systems based on the Anglo-Saxon legal tradition, becoming an integral part of the concept of the rule of law, the notion of a fair trial, understood in a broader sense in English law, and the concept of due process in Anglo-American law.[3] By recognising the right of the accused to a fair trial, more precisely to fair proceedings, the aim is to protect certain procedural rights that are evident in the English and American legal traditions. Nevertheless, due to the complex and specific nature of English and American case law, it becomes practically impossible to distinguish and articulate the components of the right to a fair trial or fair proceedings exclusively through abstract legal provisions or the

[3] Due process in the United States of America is today guaranteed by two amendments to the U.S. Constitution – the Fifth Amendment and the Fourteenth Amendment.

jurisprudence of English and American courts. In addition, the right to certain procedural guarantees concerns strictly „procedural protection", in the sense that an individual must be able, during the course of proceedings, to influence their outcome (Focarelli, 2001: 170). It would prove that this conception of fair proceedings had a major influence on the jurisprudence of the ECtHR.

If we look at the legacy of the Anglo-Saxon, or Anglo-American, legal tradition, it can be observed that the drafters of the European Convention were inspired by it when formulating the specific guarantees of Article 6 of the Convention. Why was this so? One possible answer may lie in the fact that, in the legal orders of the Euro-continental legal tradition, since the constitutionalisation of human and civil rights and freedoms, the principle of legality, or lawfulness, has been emphasised more strongly than fairness or equity, which is more characteristic of the Anglo-Saxon legal tradition.[4] Although fairness can be discerned in the French Declaration of the Rights of Man and of the Citizen – proclaiming that „all men are born equal" and that „every man is presumed innocent until declared guilty" – we must nevertheless conclude that the legal standard of fair proceedings from Anglo-Saxon law inspired the authors of the European Convention, and very likely also the judges of the European Court of Human Rights when deciding cases.

The following two arguments support the above:

(1) When discussing the concept of fairness as used in the case law of the European Court of Human Rights, it is important to note that there is no strictly defined legal demarcation of it. Fairness, in this context, represents an elusive legal standard that is not neatly aligned with the specific content of defined legal norms. Consequently, the interpretation of fairness remains fluid and requires determination on a case-by-case basis. This gives the judge a creative role in the application of such legal standards. Similarly, there is no „abstract and general definition of the right to a fair trial"; rather, it consists of a set of preconditions from which it has been extrapolated and articulated (Ruiz Fabri, 1999: 58). The operational framework of the European Commission of Human Rights and the case law of the European Court of Human Rights play a key role in delineating and interpreting the Convention concept of fairness. It is evident that this

[4] On the application of fairness in judicial and other proceedings, see: Marković, 1996: 100–106.

system bears a striking resemblance to the system of precedent law rooted in English law and, more generally, in legal systems grounded in the Anglo-Saxon legal tradition. Nevertheless, it is essential to recognise that the system of judicial precedent differs from the fundamental principles of national legal orders associated with the Romano-Germanic legal tradition; and

(2) It is appropriate to emphasise that the fundamental principles underpinning the right to a fair trial, as embedded in the case law of the European Court of Human Rights, include concepts such as the adversarial principle – *audiatur et altera pars* or *audi alteram partem* – and the principle of equality of parties (Rzepka, 2000: 283–284; Đurđić, 2015: 82). These principles, initially institutionalised in English law and later adopted into the legal framework of the United States of America, constitute integral components of the guarantees of a fair trial. Consequently, it logically follows that the drafters of the European Convention, in drafting the provisions relating to fair trial guarantees, drew inspiration from the model of English law, which in fact became a „source of law". Moreover, the substantive conception of defining judicial bodies, as affirmed in the case law of the European Court of Human Rights, also finds its origins in English law. Similarly, the assessment of the independence and impartiality of the judiciary, according to the well-known maxim that „justice must not only be done, it must also be seen to be done", can be traced back to the English legal tradition (Ivičević-Karas, 2007: 769).

Regardless of the fact that the basic inspiration for the concept of fair proceedings in the European Convention – and also in the later jurisprudence of the ECtHR – was English law, it should be emphasised that the Convention concept of fair proceedings also draws inspiration from other sources (Galligan, 1996: 218–221). Otherwise, the ECtHR would not be able, in its practice, to apply concepts found in the national legislation of European states. Thus, the ECtHR applies the method of autonomous interpretation of legal concepts and standards primarily in order to enable the development of individual rights by limiting state prerogatives, but also in order to ensure the uniform application of these legal concepts and standards in sometimes very different national legal orders (Ivičević-Karas, 2007: 770). Through the application of autonomous interpretation, the ECtHR may, depending on social reality as well as all the circumstances of the particular case, expand or restrict the guarantees

provided by the European Convention. However, the application of autonomous interpretation, which enables precisely this elasticity of Convention rights and freedoms, is not without challenges. These challenges relate to the sometimes very significant differences existing among the national legal frameworks of the members of the European family of law. For this reason, the ECtHR seeks to achieve the universalisation of certain elements of fair proceedings and thereby establish standards that are acceptable and applicable to all national legal systems. One such universal standard is precisely the equality of procedural parties, that is, the principle of „equality of arms".

3. THE PRINCIPLE OF EQUALITY OF PROCEDURAL PARTIES IN THE ECHR

Within the jurisprudence of the European Court of Human Rights, the principle of equality of parties, designated as an essential component of fair procedural standards, has its roots in the Anglo-Saxon legal tradition (Silver, 1990: 1010). This principle, reflecting the broader framework of fair and just proceedings, is in its essence characteristic of the „sporting theory of justice" contained in the accusatorial procedural model (Ivičević-Karas, 2007: 771). This model presupposes that disputes are resolved by ensuring strict equality between opposing parties. Central to this conception is the idea that the search for truth within criminal proceedings is best facilitated through an adversarial dispute between the parties involved (Corker & Young, 2000: 119). Such an approach stands in sharp contrast to the procedural norms prevailing in Romano-Germanic legal traditions, where the adversarial model is generally not applied.

Before addressing the meaning of the principle of equality of parties as clarified in the case law of the ECtHR, it is necessary to acknowledge the fundamental differences between the procedural frameworks of legal systems belonging to the Anglo-Saxon and Romano-Germanic, or Euro-continental, traditions. Namely, the key difference lies in the interpretation of the notion of „proceedings" or „process" within these legal paradigms. In Romano-Germanic legal systems, such as French law, the term „process" (*procès*) denotes a dispute brought before a court or an unresolved conflict presented to a judicial body. By contrast, in the Anglo-Saxon legal tradition, „process" or „trial" encompasses the examination

and adjudication of legal or factual issues by a court. Here, the trial represents only one aspect of the procedural continuum, with many disputes being resolved before its initiation, often through settlement agreements (Girard, 2003: 53–54).

Furthermore, contemporary criminal proceedings continue to bear the imprint of historical forms of criminal procedure, particularly the accusatorial and inquisitorial models. Rooted in the Anglo-Saxon legal tradition, the accusatorial model envisages a public, oral, and adversarial exchange between the parties before an impartial court whose task is solely to adjudicate and resolve the conflict. Implicit in this framework is the principle of the rule of law, which requires procedural equality between individuals and state authorities (Danet, 2004: 35; Zupančić, 1995: 272). Consequently, the parties participate in adversarial criminal proceedings on an equal footing, similarly to civil proceedings, thereby reflecting a distinctive feature of the Anglo-Saxon legal heritage (Stefani, Levasseur & Bouloc, 2004: 47). By contrast, the criminal procedural framework prevailing in continental legal systems, particularly within the Romano-Germanic legal tradition, is grounded in the imperative of respecting the rule of law, primarily through adherence to the principle of legality (Zupančić, 1995: 272). These systems of criminal procedure inherit certain elements from the inquisitorial model while also integrating features of the accusatorial model, resulting in what is referred to as a mixed type of procedure. This hybrid approach is essentially adversarial, especially during the main hearing. However, prior to the main hearing, the possibility remains of invoking procedural secrecy, thereby limiting the accused's access to case materials and participation in the proceedings (Krapac, 2003: 17–19). Moreover, the prosecutor in such procedural models, representing the coercive authority of the state, possesses a range of powers that are not extended to the accused. Consequently, criminal proceedings significantly differ from civil proceedings, since they do not ensure a true parity of arms between the opposing parties (Damaška, 1997: 383).

Despite initial appearances suggesting irreconcilable differences between legal systems of the Anglo-Saxon and Euro-continental legal traditions, such assumptions are not, in themselves, accurate. Historical forms of criminal procedure no longer survive in their original and unchanged states, since the boundaries between legal traditions are gradually diminishing. Consequently, criminal proceedings in different

jurisdictions increasingly exhibit similarities, indicating a convergence of practices. Within the framework or concept of fair proceedings, emphasis is placed on the principle of equality of parties, a fundamental aspect of adversarial criminal justice, strengthened by the rights of the accused to defence. This convergence underscores the validity of the claim that the European Court of Human Rights draws inspiration from the Anglo-Saxon legal tradition in its elaboration of the right to fair proceedings and the principle of equality of parties (Ivičević-Karas, 2007: 773–776).

The principle of equality of parties has been established and affirmed within the jurisprudence of the ECtHR as a fundamental element of the right to fair proceedings. Although it is not explicitly articulated in the text of the European Convention, it is regarded as one of the implicit principles derived from Article 6 of the Convention (Pavišić, 2006: 101). At present, its precise definition remains elusive, since it primarily relates to the notion of qualification or legal representation (Ivičević-Karas, 2007: 776). However, its emergence as a means of ensuring fairness – initially evident in the opinions of the European Commission of Human Rights in civil and criminal cases from 1959 (*Szwabowicz v. Sweden*) and 1962 (*Ofner and Hopfinger v. Austria*), and later in key ECtHR decisions in cases such as *Neumeister v. Austria* (1963) and *Delcourt v. Belgium* (1970) – consolidated its status as an autonomous expression of fair proceedings within the Court's case law (Ivičević-Karas, 2007: 777; Ergec, 2004: 190). Since then, it has been indisputably established that procedural fairness entails respect for the principle of equality of parties, together with the adversarial principle. According to settled case law, this principle requires that each party be afforded a reasonable opportunity to present its case before the court under conditions that do not place it at an unjustified disadvantage in comparison with the opposing party (Đurđić, 2015: 83). This definition has been consistently upheld in numerous decisions of the ECtHR, in both civil and criminal matters (Ivičević-Karas, 2007: 778). In criminal proceedings in particular, fairness is compromised if the accused is placed at an unjustified disadvantage in relation to the prosecutor (Surrel, 2003: 300).

The principle of equality of parties essentially entails the absence of differential treatment between the parties, thereby ensuring that neither party is placed at an unjustified disadvantage in the exercise of its fundamental procedural rights. It encompasses not only the specific rights

of the parties, but also their freedom from any restrictions on procedural rights that may unfairly disturb the balance of the proceedings (Rzepka, 2000: 111). Although its interpretation develops over time, particularly through the application of the method of evolutionary interpretation of legal concepts and standards, the principle of equality of parties remains a constant and arguably the most significant criterion of „fair proceedings" (Đurđić, 2014: 444–445). National courts frequently invoke this principle in combination with the principles of fair procedure (Favreau, 2001: 10).

4. THE ECtHR CASE OF *MURTAZALIYEVA v. RUSSIA* (2018)

On 18 December 2018, the Grand Chamber of the ECtHR delivered its judgment in the case of *Murtazaliyeva v. Russia*. By this judgment, which concerned the conviction of a Chechen woman on charges relating to terrorist activities, the Court concluded that there had been no violation of the right to a fair trial. The key aspect of this judgment revolves around the applicant's claim that the refusal of the domestic judiciary to summon two defence witnesses was contrary to Article 6(1) and Article 6(3)(d) of the ECHR. Given the initial state of the relevant case law originating from Strasbourg, this case represented a favourable opportunity for the ECtHR to clarify the standards embedded in the European Convention. Unfortunately, in its clarification, the Grand Chamber further expanded the scope of the assessment of the „overall fairness of the proceedings" referred to in Article 6(1) of the Convention. Consequently, this metric now represents the ultimate standard in this area.

In January 2005, the applicant was sentenced to nine years' imprisonment on charges connected with terrorist activities. The Supreme Court of the Russian Federation upheld the conviction in March 2005, although it reduced the sentence to eight and a half years. The applicant, however, brought her case before Strasbourg, alleging multiple violations of her right to a fair trial, with particular emphasis on the failure to summon two witnesses who had been present during the police search of her bag. This search led to the discovery of two packages identified as containing explosives, which the applicant claimed had been secretly placed in her possession before the search.

The ECtHR considered it imperative to set out its standards concerning the right to examine witnesses on behalf of the defence, an aspect of the case law that had undergone limited evolution since the precedent established in *Perna v. Italy* in 2003. After examining subsequent cases based on *Perna*, the ECtHR formulated a tripartite assessment framework, as set out in § 158:

(1) Was the request to examine a witness sufficiently reasoned and relevant to the subject matter of the accusation?

(2) Did the domestic courts consider the relevance of that testimony and provide sufficient reasons for their decision not to admit it?

(3) Did the domestic courts' refusal to admit the testimony undermine the overall fairness of the proceedings?

As regards the first criterion, in *Perna* the ECtHR placed on the applicant the burden of justifying the necessity of the witness's testimony for establishing the truth (§ 29). However, in the context of *Murtazaliyeva*, the ECtHR broadened the scope of the defence's prerogatives, extending them not only to witnesses who directly affect the outcome of the trial, but also to those whose testimony may reasonably be expected to strengthen the defence's position (§ 160).

As for the second element, the ECtHR required domestic courts to consider the relevance of the requested testimony and to provide convincing reasons for their decisions (§ 162). While acknowledging the primary role of national law in regulating the admissibility of evidence, the ECtHR emphasised the need for domestic courts to scrutinise the submissions of the defence carefully, aligning their reasoning with the strength of the defence arguments (§§ 163–166). Finally, the ECtHR endorsed the use of the „overall fairness of the proceedings" as the final criterion for assessing the propriety of the trial. This measure was intended to prevent unjustified rigidity in the application of the tripartite test, recognising exceptional circumstances in which considerations of fairness may differ from standard assessments (§ 168).

Applying these principles to the case at hand, the ECtHR found that the defence's justification for summoning the witnesses had not been sufficiently concrete or developed. Moreover, the reasoning of the Supreme Court of the Russian Federation for not summoning the witnesses was considered acceptable, given the applicant's own claim concerning the origin of the explosives. Ultimately, the ECtHR held that the refusal to

summon the witnesses had not jeopardised the overall fairness of the proceedings, referring to the applicant's effective defence, her opportunity to challenge the prosecution evidence, and the substantial body of evidence supporting the conviction. Accordingly, the ECtHR concluded that there had been no violation of the applicant's rights under Article 6(1) and Article 6(3)(d) of the European Convention on Human Rights.

The judgment in *Murtazaliyeva* has been the target of numerous criticisms. The primary contentious aspect of the judgment concerns the continued imposition of a substantial burden on the accused to justify the necessity of witness testimony, which constitutes the first limb of the tripartite test. Although the ECtHR appears, at first sight, to have reduced this burden in comparison with the precedent set out in *Perna*, the practical implementation of the new standard reveals a very heavy burden, particularly in relation to the requirement to explain how the witness's testimony „could reasonably be expected to strengthen the defence's case".

In his dissenting opinion, Judge Pinto de Albuquerque characterised this adjustment as one that initially appeared milder and more lenient, but lamented the illiberal application adopted by the majority. Furthermore, Judge Bošnjak, in his partly dissenting opinion, expressed concern regarding the potential dangers arising from an excessively restrictive application of the first element. He warned against anticipatory speculation concerning the potential impact of witness testimony on the judicial assessment of relevant facts, emphasising the inherent unpredictability of witness testimony and its ramifications. Moreover, Judge Bošnjak expressed concern regarding the discrepancy between the burden placed on the accused and the principle that grants the defence significant autonomy in determining its strategies, including the selection and presentation of factual arguments. He advocated a more liberal interpretation of the first limb, granting the defence greater freedom in fulfilling its procedural obligations. In essence, the criticism advanced by Judges Pinto de Albuquerque and Bošnjak highlights the discrepancy between the alleged easing of the burden on the accused and its strict practical implementation, thereby advocating a more lenient application of the first element in order to align it better with the principles of procedural fairness and defence autonomy.

What is even more concerning within the broader case law under Article 6 of the Convention is the ECtHR's continued reliance on the

„overall fairness of the proceedings“ test as the final standard for assessing the adequacy of a trial. The ECtHR increasingly avoids setting „bright-line“ rules regarding the rights of the defence, opting instead for the adaptable nature of the „overall fairness“ assessment. Illustratively, in *Al-Khawaja and Tahery v. the United Kingdom* (2011), the ECtHR departed from the rigid delineations of the „sole or decisive rule“ concerning the admissibility of hearsay evidence. Instead of categorically prohibiting convictions based solely or decisively on statements of absent witnesses, the ECtHR introduced the concept of „sufficient counterbalancing factors“ capable of ensuring the overall fairness of the proceedings.

Similarly, in *Ibrahim and Others v. the United Kingdom* (2016), the ECtHR extended this approach to the rule from *Salduz v. Turkey*. Initially established in *Salduz v. Turkey* (2008), this rule provides that access to legal assistance should generally begin from the initial police questioning, unless compelling reasons justify a restriction. However, in *Ibrahim and Others*, the ECtHR departed from the requirement of „compelling reasons“ for restricting access to legal advice, holding that their absence does not automatically entail a violation of Article 6 of the European Convention. Instead, the ECtHR required an assessment of the impact of the restriction on the overall fairness of the proceedings, emphasising the need for a holistic assessment.

Further expanding this framework, in *Beuze v. Belgium* (2018), the ECtHR extended its application to encompass not only cases similar to *Ibrahim and Others*, concerning individualised decisions to restrict access to legal representation, but also cases involving systemic restrictions arising from legislative provisions. In essence, these developments underscore the ECtHR’s evolving approach to preserving procedural fairness, characterised by a departure from rigid standards towards a more contextualised assessment of the adequacy of the trial based on the comprehensive criterion of „overall fairness“.

The „overall fairness“ test is problematic for several reasons. First, as Judge Pinto de Albuquerque argued in his dissenting opinion, it is „inherently subjective and therefore extremely malleable“. In the absence of a benchmark by which to determine whether proceedings were „overall fair“, the determination of this issue risks collapsing into an „I know it when I see it“ standard. Respect for fundamental procedural rights should not be assessed by judicial intuition. A related risk, identified by Judge

Bošnjak in his partly dissenting opinion, lies in the fact that the determination of the fairness of proceedings may be tainted by the manner in which judges assess the fairness of the outcome. In this regard, Judge Bošnjak considered it inappropriate for the majority to take into account whether the available evidence was sufficient to convict the applicant. According to Judge Pinto de Albuquerque, „proceedings are not fair because the guilty are convicted or the innocent acquitted". This is not simple, as Pinto de Albuquerque argues, because „there is no way of legally establishing whether the guilty were guilty except through the proceedings themselves". Proper procedure should instead be regarded as a value in itself – not only for the innocent but also for the guilty – and should be treated accordingly, regardless of the extent to which it contributes to a more accurate determination of legal truth in a particular case.

Furthermore, the „overall fairness" test creates ambiguity, resulting in a lack of guidance for domestic courts. Although the ECtHR set out certain criteria in *Ibrahim and Others v. the United Kingdom* in order to delineate the application of this test, those criteria are so broad that, as Judge Pinto de Albuquerque observed, they resemble „a map the size of the territory: seemingly accurate, but in reality useless in terms of providing any guidance". Consequently, the retrospective assessment of cases by the ECtHR becomes complex, since determining whether a reduction of safeguards at one stage of the proceedings may be compensated by the proper conduct of subsequent stages essentially entails a comparison of different elements. This difficulty is further compounded for domestic authorities and courts, as Judge Pinto de Albuquerque explained. Given the sequential nature of legal proceedings, domestic actors lack foresight concerning the progress of a case, since different bodies have different responsibilities in different situations. As such, the uncertainty inherent in the „overall fairness" test exacerbates the challenges faced by domestic bodies in addressing procedural complexities.

Thirdly, the „overall fairness" test does not provide meaningful safeguards. A procedural guarantee, such as the right to examine witnesses, is not effective if its necessity can be recognised only retroactively. Even if procedural deficiencies could hypothetically be compensated by the proper conduct of other aspects of the proceedings, relying exclusively on hindsight in determining compliance undermines the effectiveness of such safeguards. Entrusting domestic bodies with the task of assessing

procedural fairness on a case-by-case basis entails inherent risks, since there is no guarantee of consistent or accurate assessments.

Instead of adopting an ad hoc approach to assessing the value of procedural guarantees, it is imperative to recognise their inherent function: to provide structural protection against procedural inequalities. The use of these safeguards as „a blunt and indiscriminate instrument", as articulated in *Al-Khawaja and Tahery v. the United Kingdom* (§ 146), serves as a strong incentive for domestic bodies to devote due attention to procedural integrity. By emphasising the structural importance of these safeguards, their consistent application serves as a means of deterring unjust criminal convictions, thereby strengthening the structural integrity of legal systems.

Is it excessively formalistic to expect domestic courts consistently to adhere to the practice of examining witnesses at trial unless compelling reasons are provided for refusing a sufficiently reasoned and relevant request in that regard? This question deserves reflection, particularly in light of the warning expressed in the dissenting opinion of Judges Sajó and Karakaş in *Al-Khawaja and Tahery*.

In their dissent, Judges Sajó and Karakaş emphasised the pervasive influence of populism, law-enforcement agencies, and prosecutorial authorities, which often exert pressure on courts around the world to disregard fundamental safeguards of criminal procedure. While some demands may arise from legitimate practical constraints, such necessities should not justify the erosion of the rights of accused individuals, which are indispensable for ensuring a fair trial and the fair administration of justice. Unfortunately, seven years after the judgment in *Al-Khawaja and Tahery*, the Grand Chamber judgment in *Murtazaliyeva* represents yet another example of what Judge Pinto de Albuquerque now condemns as „the corrosive expansion of the overall fairness test". Under the guise of examining the overall fairness of the proceedings, the ECtHR risks diluting the essence of the defence rights expressly set out in Article 6(3) of the European Convention on Human Rights.

5. CONCLUSION

The case of *Murtazaliyeva v. Russia* serves as an appropriate lens through which to examine the principle of equality of parties in the field of human rights law. The analysis of the judgment of the European Court of

Human Rights in this case reveals the nuanced complexities surrounding procedural fairness and the protection of the rights of the accused. The principle of equality of parties, as embedded in Article 6 of the European Convention on Human Rights, emphasises the imperative of ensuring a balanced and fair legal process in which both the prosecution and the defence possess appropriate resources and opportunities to present their cases.

However, the application of the „overall fairness“ test, as demonstrated in *Murtazaliyeva*, raises significant concerns regarding the effectiveness of procedural safeguards and the potential erosion of the rights of the accused. While the ECtHR's adoption of a flexible approach may ostensibly aim to accommodate different legal contexts and ensure holistic assessments of the adequacy of trials, it also introduces ambiguity and subjectivity into the evaluation of procedural fairness. Moreover, the burden placed on accused persons to justify the necessity of procedural safeguards, together with the lack of concrete guidance for domestic courts, risks undermining the structural integrity of judicial proceedings. Furthermore, the reluctance to establish clear boundaries with regard to the rights of the defence, as evidenced by the increasing application of the „overall fairness“ test, presents challenges to maintaining the principle of equality of parties. Excessive reliance on subjective assessments and retrospective evaluations undermines the effectiveness of procedural safeguards and may exacerbate disparities in legal outcomes.

LITERATURA

1. Corker, D. & Young, D. (2000). Abuse of Process and Fairness in Criminal Proceedings. London – Edinburgh – Dublin: Butterworths.
2. Damaška, M. (1997). „O miješanju inkvizitornih i akuzatornih procesnih formi“. Hrvatski ljetopis za kazneno pravo i praksu, 4(2)/1997: 381-394.
3. Danet, J. (2004). Défendre Pour une défense pénale critique. Dalloz: Paris.
4. Đurđić, V. (2014). Novi krivični postupak Srbije – novi razlozi za usklađivanje sa evropskim pravnim standardima. Zbornik radova Pravnog fakulteta u Nišu, 68/2014: 443-458.

5. Đurđić, V. (2015). Perspektiva novog modela krivičnog postupka Srbije. NBP. Nauka, bezbednost, policija, 20(2)/2015: 71-95.
6. Ergec, R. (2004). Protection européenne et internationale des droits de l'homme. Bruxelles: Bruylant.
7. Favreau, B. (2001). Aux sources du procès équitable une certaine idée de la qualité de la justice, u: Le procès équitable et la protection juridictionnelle du citoyen, Actes du Colloque organisé à Bordeaux les 29 et 30 septembre 2000 par l'Institut des droits de l'homme des avocats européens et l'Institut des droits de l'homme du Barreau de Bordeaux. Bruxelles: Bruylant.
8. Focarelli, C. (2001). Equo processo e Convenzione europea dei diritti dell'uomo: contributo alla determinazione dell'ambito di applicazione dell'art. 6 della Convenzione. Padova: Casa editrice dott. Antonio Milani.
9. Galligan, D. J. (1996). Due Process and Fair Procedures, A Study of Administrative Procedures. Oxford: Clarendon Press.
10. Girard, C. (2003). Le procès équitable dans l'espace normatif anglo-saxon: l'éclairage du droit public anglais, u: Procès équitable et enchevêtrement des espaces normatifs, Travaux de l'atelier de droit international de l'UMR de droit comparé de Paris (sous la direction de Ruiz Fabri, H.). Paris: Société de législation comparée.
11. Ivičević-Karas, E. (2007). „Načelo jednakosti oružja kao konstitutivni element prava na pravični kazneni postupak iz članka 6. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda", Zbornik Pravnog fakulteta u Zagrebu, 57(4-5)/2007: 761-788.
12. Krapac, D. (1995). Engleski kazneni postupak. Zagreb: Pravni fakultet u Zagrebu.
13. Krapac, D. (2003). Kazneno procesno pravo, Prva knjiga, Institucije. Zagreb: Narodne novine.
14. Marković, B. S. (1996). Suđenje po pravičnosti u opštem i u arbitražnom pravu. Anali Pravnog fakulteta u Beogradu, 44(2-3)/1996: 100-106.
15. Pavišić, B. (2006). Kazneno pravo Vijeća Europe, Izvori, komentari, praksa. Zagreb: Golden marketing – Tehnička knjiga.

16. Raosavljević, P. & Novaković, F. (2024). Evropski sistem zaštite ljudskih prava. Banja Luka: Univerzitet za poslovni inženjering i menadžment Banja Luka.
17. Ruiz Fabri, H. (1999). Égalité des armes et procès équitable dans la jurisprudence de la Cour européenne des droits de l'homme, u: Égalité et équité: Antagonisme ou complémentarité. Paris: Economica.
18. Rzepka, D. (2000). Zur Fairness im deutschen Strafverfahren. Frankfurt am Main: Vittorio Klostermann.
19. Silver, J. S. (1990). Equality of Arms and the Adversarial Process: A New Constitutional Right. Wisconsin Law Review, 4/1990: 1007-1042.
20. Stefani, G., Levasseur, G. & Bouloc, B. (2004). Procédure pénale. Dalloz: Paris.
21. Surrel, H. (2003). L'égalité des armes, u: Sudre, F. & Picheral, C. (ur.) La diffusion du modèle européen du procès équitable. Paris: Institut de droit européen des droits de l'homme.
22. Zupančić, B. M. (1995). „Kazneni postupak i njegove funkcije u državi izvornog liberalizma". Hrvatski ljetopis za kazneno pravo i praksu, 2(2)/1995: 253-277.
23. Al-Khawaja and Tahery v. the United Kingdom, nos. 26766/05 and 22228/06, ECtHR 2011.
24. Beuze v. Belgium [GC], no. 71409/10, ECtHR 2018.
25. Delcour v. Belgium, no. 2689/65, ECtHr 1970.
26. Ibrahim and Others v. the United Kingdom, nos. 50541/08, 50571/08, 50573/08 and 40351/09, ECtHR 2016.
27. Murtazaliyeva v. Russia [GC], no. 36658/05, ECtHR 2018.
28. Neumeister v. Austria, no. 1936/63, ECtHR 1966.
29. Ofner and Hopfinger v. Austria, no. 524/59 617/59, ECtHR 1963.
30. Perna v. Italy [GC], no. 48898/99, ECtHR 2003.
31. Salduz v. Turkey, no. 36391/02, ECtHR 2008.
32. Szwabowicz v. Sweden, no. 434/58, EComHR 1959.

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