

## Equality of Arms, Albanian Case and the European Court of Human Rights

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### Abstract

*One of the main principles of a fair judicial process is the equality of arms, an elaborated principle from the Albanian Constitutional Court Jurisprudence in full harmony with the definitions made in the European Court of Human Rights. This principle implies that anyone that is a party in the judicial process must have equal possibility to introduce its issues, and that no party must satisfy any considerable advantage against the opponent, establishing therefore a fair equilibrium between these parties. This principle finds regulation from a series of judicial norms, which are sanctioned in the Albanian Constitution as well as in the way the Penal Procedure Code sounds like. In this code, we find the sanctions of the principle for an accusing process, based on the contradiction of the penal law, providing procedural means which are equal for both parties in the trial.*

**Keywords:** equality process, fair trial, penal procedure, constitutional principle.

The equality of arms process includes the notion that both parties in the process have the right to have the information about the facts and arguments of the opponent party, and that each of the parties must have a fair possibility to answer the other.

In this article is expound the fact of how this principle "equality of arms" finds regulation from a series of judicial norms, which are sanctioned in the Albanian Constitution as well as in Penal Procedure Code and in European legislation. In this article it is found the sanctions of the principle during an accusing process, in both Albanian and European jurisprudence, based on the contradiction of the penal law, providing however procedural means which are equal for both parties in the trial.

The Penal Procedure Code of the Albanian Republic (2011) has foreseen that when there are full proofs on the guiltiness of the accused, the general prosecutor introduces the request for judging the case and that the request is informed to the accused and the one who suffered it (*article 331*).

In the same way, this The Penal Procedure Code of the Albanian Republic (2011) clearly has also foreseen that when the accused is free or detained he does not come to the trial even though he is notified and does not have any legal reason to come, the court hears the parties and declares in his absence. In this case he is represented by the defendant (*article 351*).

Since the Albanian legislation recognizes the trial on the accused in his absence, the lawmaker has foreseen the right that the process must be held in the presence of a lawyer defending the accused, mainly by setting against this procedural subject to the represented prosecution and consequently ensuring the needed judicial debate of the fact or law circumstances. Based on Decision of the Constitutional Court (*No. 5/03; 2003*), which has undertaken the claim of citizen H.P, who claims that, there was a breach of the principle of a fair legal process, this Court noticed a breach upon the arm equality, expressing itself that... not assuring the participation in the trial of the accused, in every case but even then, when the latter is hidden from justice, it may not make legal the development of a process against it, without the participation and hearing the defendant. The principle of contradiction and equality of arms under a penal trial, asks that the defensive arguments may be equally introduced like those of the prosecutor. This principle presupposes that each party must offer the reasonable possibilities to introduce the pretensions on the case, in such conditions that it does not put the other party in an unfavorable position. On the contrary, the court, hearing only the prosecutor's arguments raised before and foreseen in the trial and not hearing the pretensions of the one asking for it, has given to the judicial process a biased development.

Respecting the equality of arms principle as well as that defensive one through a lawyer, are important aspects of

a fair legal process in the Albanian constitutional sense. As a consequence, under the functioning of respecting these principles, a special role is played even by notifying the party and his/her defense lawyer about the copy of the claim and its past, as well as about the date of the trial for the case. In this way, the Joined Colleges of the Supreme Court in the Republic of Albania (*No.1; 2001*), have unanimously decided that Ordering to call and notify the accused to take part in the appeal trial, is a legal and optional obligation for the court.

Such a categorical end, comes from the analysis that is given to the respective dispositions that regulate the right to defend the accused in a penal process as well as the right for a fair legal process, foreseen in the Constitution, in the Convention for the Protection of Human Rights and Fundamental Freedoms (2010), as well as in the Penal Procedure Code.

Anyhow, according to the requests of the Constitution of the Albanian Republic, during a penal process anyone has the right to... defend him/herself or... (*Article 31, letter "c"*).

The formulation made in the above Albanian Constitutional disposition is the same with the formulation of the Article 6, point 3, letter "c" of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "...Anyone accused has the right, among others and mainly to defend him/herself or...".

Furthermore, Article 33 point 1 of the Albanian Republic Constitution has foreseen that anyone has the right to be heard before going to the trial.

On the other hand, lawmaker in the Penal Procedure Code of the Albanian Republic foresees that the actions before the trial in the Appeal Court, have foreseen that the Head of the Appeal Court College orders calling the accused...(*Article 426, 2011*)

Assuring the right of participation and hearing the accused in an appeal trial, is an indispensable action, not only in the legal constitutional aspect of it, but also for the mere fact that the Appeal Court different from the Supreme Court in Albania, judges it even as a fact court. Therefore, referring to the requests foreseen under the Penal Procedure Code of the Albanian Republic, it is stated that when a party asks to regain access of the evidence from administration in a supreme level trial or gains new evidence, the court if they deem as indispensable, decides repeating it fully or partially the trial.....Repeating the trial is decided even mainly when the court deems it as indispensable. The court decides repeating the trial when it is noticed that the accused has not participated in the first instance....

Whereas the hearing in the Supreme Court, in compliance with the requests foreseen under Article 432 of the Penal Procedure Code of the Albanian Republic, is done only because of defined reasons that deal with..not respecting or wrong application of the penal law or other judicial norms...not respecting procedural norms that are foreseen as an invalid consequence, denial or loss of legal right... loss of reasoning or openly non-logical character....

Seeing all the above-mentioned dispositions united, we may come to the conclusion that participation of the accused whether he is free or arrested during the trial (and even in appeal), hearing and defending him, if for him (the accused) it is a constitutional and legal right, for the court it is an obligation and even legal that does not allow for equivocal.

Joint Colleges of the Supreme Court in Republic of Albania, emphasize that not respecting this legal obligation, to call and notify the accused, who is free or arrested in the appeal trial, is an offense even of the constitutional right for a fair legal process under the meaning of the Albanian Republic Constitution (*article 42*), according to which Freedom, property and recognized rights by Constitution and law may not be breached without a fair legal process.

Another special moment that must undergo the analysis is the difference that must be made between the "*notification of the accused*" and the "*notification of the defendant*", a moment which is confused often in practice. As it was already mentioned, not rarely courts equalize the position of the defendant with that of the accused, by "equalizing" the rights and obligations of these two subjects in the penal process.

It is true that the defendant in general has the rights that the law recognizes for the accused. But the procedural law has defined even the respective limits under these rights. Therefore, in the Penal Procedure Code of the Albanian Republic (*Article 50*), it is stated that the defendant has the rights that the law recognizes to the accused, despite those that are personally reserved for the latter.

It is exactly the accused, who foresees, always within the legal rights framework, the limits of the rights of his defendant. Even under the viewpoint of the requests foreseen under of the Penal Procedure Code of the Albanian Republic (*article 426 point 1*), we cannot in any way be "based" on the call of notification of the accused with his defendant. In this disposition it is exactly and expressively defined the division of one subject from the other, states that The Head of the Appeal Court College orders the accused, civil accuser and the civil accused, as well as to the defendants and their representatives....

As it was mentioned above, in the cited dispositions of the Penal Procedure Code, it is foreseen the ordering of

calling the accused in the trial of the appeal court. On the first hand, eventually it may be created the wrong impression that we are dealing simply with a *call order* and only that. But, if we see it in its complexity and unity with the other dispositions of the Penal Procedure Code of the Albanian Republic, it is concluded that the "*call order*" for the accused whether he is free or arrested in the appeal trial, may not be comprehended or divided from *his notification* and procedural rules that must be applied for this notification.

Also in this case we may ask the question, if there are differences between "*call order*" and "*notification*" of the accused, in the sense of the requests of point 1 of Article 426 of the Penal Procedure Code of the Albanian Republic and beyond, in the other procedure dispositions. Joined Colleges of the Albanian Republic value the fact that effectively and potentially there exist differences.

At first, in principle the penal procedural law in special dispositions, foresees and defines what the court "orders" and in other dispositions, it foresees and regulates the "Notifications".

Secondly, "the order" regards the essence in defining an action that must be committed and who should make it and the mean how it should be done.

On the other side, "notifications" regard the "technical" side of how it must be realized the awareness about a certain act which may be a call, decision, etc.

Still, remaining along the same line of the analysis of the concrete problem, of the unity between the "*call order*" and "*notification*" of the accuser, in the sense of the requests of the Penal Procedure Code of the Albanian Republic (*Article 426 point 1*), there are some conclusions to be drawn.

The appeal court has misunderstood this disposition quite not rarely. Only the attitudes, from time to time different from them, underlined at the beginning of this reasoning, confirmed something like this. In not less cases, those in the initial phase of the actions, formulate in writing the order for calling the accused whether he is arrested or free, not the police or the relevant guests, and they just remain with that. For such courts, it is sufficient to identify this order in their judicial files and according to them everything is done in compliance with the legal requests.

But effectively in this case, "it is forgotten" another legal obligation, that this order may not be understood without realizing the notification of the accused. In order to illustrate the connectivity between the "*call order*" and "*notification*" of the accused, it is sufficient to foresee the definitions that the Penal Procedure Code of Albanian Republic (*article 349 and 350*) make.

Therefore the Penal Procedure Code of Albanian Republic (*article 349*) states that The court orders to repeat the call for the trial when it turns out that the accused or the person against whom it has been made a request for a trial from the one who accused him, has not received the notification or that the notification is suspicious.

Whereas in Penal Procedure Code of Albanian Republic (*Article 350*) states that when the accused, if even detained or the person against which it has been done a request for trial from the one accusing, is not present in the trial... the court postpones or suspends the trial, defines the date of the new trial and orders to repeat the call... When the notifications is out that it was fair, the court decides to postpone the trial and orders repeating the notification....

From the above analysis, it may be concluded that it is not understandable an artificial division between the call order from the notification of the accused, as if it is wrongly perceived from the special courts. Within this framework, the appeal court must apply and respect the legal requests that concern the accused whether he is free or arrested. Concretely, these requests are foreseen in the Penal Procedure Code of Albanian Republic (*articles 139 and 140*).

As a consequence in a trial case, the Appeal Court of Shkoder against citizens Q.L and Z. L (*No.56, 2000*), the Court must order calling the accused arrested, by calling them according to the legal requests foreseen under the Penal Procedure Code of the Albanian Republic (*article 139*). According to this disposition it is stated that: Notification for the accused detained is done where they are detained by following this act. When the accused refuses to receive a copy of the act or when he is absent for justified causes, the act is given to the responsibility of the institution, which for the last case notifies the interested party with the fastest means.

The above dispositions are applied even when the accused is in detention for another accusation or is actually serving a sentence....

By not applying or respecting the foreseen requests in article 31, letter "ç" of 33 point 1 of the Albanian Republic Constitution, and article 6, point 3, letter "c" of the Convention for the Protection of Human Rights and Fundamental Freedoms, we are dealing with an offence within the constitutional rights and as a consequence with a unfair legal process. On the other side, by not applying and respecting the foreseen requests from articles 426/1 of the 139 of the Penal Procedure Code of Albanian Republic, all the realized acts on behalf of the court of appeal in this trial, are absolutely invalid. Such a conclusion is arrived at, by checking the requests of article 128 letter "c" of the Penal Procedure Code of Albanian Republic. In this disposition, which regards the absolute invalidity of the acts, it stated that

the procedural acts are absolutely invalid when the disposition related to are not respected...The call of the accused or the presence of the defendant when it is obligatory.

As a consequence the Joined Colleges of the Supreme Court decided on the denial of the Decision of the Court of Shkoder (No.56;2000)

Such a breach has been claimed by the request directed to the Constitutional Court of the Albanian Republic, by citizen Gj. B, who claimed as he did also in the past in the Supreme court, that the trial of the case in the Appeal Court of Shkoder, is done without the participation of the defendant, be it defined mainly from the court, a fact that according to the claimer makes an offence in the fair legal process, because of not respecting the principle of equality of arms. Constitutional Court of the Albanian Republic (No.19; 2003) evaluated it right with the pretention that that: Equality of arms and the contradiction principle are essential elements of a fair process in the constitutional sense. Based on this, there are many tasks that appear to the court among which it is of special importance the creation of equal rights for the participation of the parties or their representatives in the process, as well as the possibility of their declaration for facts, evidence and legal evaluation that are tightly linked with the case that is evaluated in the court. In every phase of the trial, none of the parties must feel themselves in the open unequal positions, against their opponents.

For their own nature, equality of arms and opportunities, as a consequence the principle itself of the contradiction, plays a very important role in the penal process, because in every case, in front of the accused person for committing penal acts, normally is the state itself. Under these circumstances, the above requests are practically in the service of the defense of the accused person, who during all the process until the last decision given from the court, is presupposed to be not guilty.....

In this decision, the Constitutional Court of the Albanian Republic (No.19; 2003) is accepting the established standards from the jurisprudence of the Strasbourg Court, according to which guaranteeing the participation in the process of the accused or his defendant, is of course valid not only the first instance, but also during the trial of the case and even in the other instances of the trial, especially in cases when these judgments are foreseen and even developed through oral debate (*Alimena vs. Italy, 1991*).

Also the Joint Colleges of the Supreme Court of the Albanian Republic (No.371, 2000) have unanimously decided that the defined mainly from the court defendant or he who is chosen from the relatives of the accused, to participate in the trial that is done in the absence of the accused to defend his interests, is not the legitimate person from the norms of the penal procedural law in power, in order to complain against a decision given in the absence of the accused. He is legitimate only if he is equipped with the special procurement issued by the accused him/herself to verify fairly in front of the law.

In order to argument on the above-mentioned attitude, the Joint Colleges of the Albanian Republic refer and analyze the respective constitutional dispositions that regulate the right to defend the accused in the penal process, the right to complain on the decision in a higher court, as well as the right for a fair legal process closely linked to them.

According to Albanian Republic Constitution (*Article 31, letter c*) states that during the penal process anyone has the right to... protect him/herself or with the help of a legal defendant chosen by him/her, and communicate freely and privately with him/her...

Formulation of the above constitutional disposition is the same with the formulation of the Convention for the Protection of Human Rights and Fundamental Freedoms (*article 6/3, point "c"*) which states that every accused person has the right to, among other and mainly:...to defend him/herself or with the help of a defendant of his/her choice...

On the other side the Penal Procedure Code of the Albanian Republic (Article 6) states that the accused has the right to defend him/herself or with the help of a defendant. When there are no sufficient means the defense is provided free of cost with a lawyer. Also that the defendant helps the accused so that he is guaranteed his procedural rights, and his legal interests are preserved.

Let us continue further with the constitutional right of the accused in order to complain against the judicial decision given against him. According to Albanian Republic Constitution (Article 43) that states that anyone who has the right to complain against the judicial decision in a Supreme Court, apart from when it is foreseen differently in the Constitution. We must emphasize since the start that the case under discussion, is not one that is foreseen differently in the Constitution. So, it is obligatory that the accused are not denied the right to appeal against the decision of the first instance court. The Constitution of the Republic of Albania (*Article 43*) of is in harmony with the Additional Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Article 2*), according to which every person declared guilty from a court for a penal offence has the right to introduce to check in detail everything in front of the highest jurisdiction of guilt or sentence. Exercising this right, including the causes for which it may be exercised, are defined by law.

Referring to the relevant disposition of the Penal Procedure Code of the Albanian Republic, we may see that by law the accused are recognized and guaranteed the right to complain, which is a right that is closely personal. According to the Penal Procedure Code of the Albanian Republic (*Article 410*) states that the accused may complain him/herself or through his defendant. Against the given decision in absence, the defendant may make a sole complain when he is equipped with a representative act issued in the forms foreseen by law.

According to the evaluation of the Joint Colleges of the Supreme Court of the Albanian Republic, the limitation of the right of the accused to defend him/herself or to choose him/herself the defendant, because of his trial in absence, is not anti-constitutional. This limitation which is consequence of the application of the law, does not overcome the defined limits of the Albanian Republic Constitution (*Article 17*). As long as these dispositions are in power, it is presupposed their constitutionality. As a consequence, it is thought that there is no room for suspending the judgment and ask the Constitutional Court of the Albanian Republic to express itself about the non-constitutionality of the legal dispositions mentioned above that foresee the judgment in absence of the accused who is hiding the justice.

In this case when the trial is done in the absence of the accused, because he is not present in the court or is trying to hide to the judgment, the defense lawyer assigned mainly from the court, or chosen from the relatives of the accused, does not represent the will of the accused because it is not represented by him. He only performs a public function that is assigned from the court for the interest of the justice, to help for the protection of the procedural rights of the accused in the court and to guarantee a minimum standard for a fair legal process.

In essence, not allowing the right to complain on behalf of the assigned defendant from the court mainly or assigned from the relatives of the accused, in the cases of the trial in his absence, when the act of representation is missing or when he/she is unavailable, does not harm his/her interests. Such a protection, by not having the possibility of contacting the accused to receive information from him, is very much limited in providing the evidence to make him/her not guilty or facilitate his position.

Not exercising the constitutional right of the accused against the decision of the court given in his absence, when he/she hides justice, may come as a consequence of a decision taken on his free will, which is not at disposal of others, but it may be even because of an objective impossibility, for which in order to prove the burden it rests upon the accused him/herself, during exercising later other defensive means that the law recognizes (Penal Procedure Code of the Albanian Republic).

On the contrary, the accused who is judged on his absence, as soon as he knows about the decision given against him, has the right that at any time, he may ask to reestablish on time his complain, maintaining the burden of proof that he did not know about this decision.

According to the Penal Procedure Code of the Albanian Republic (*Article 147/2*) states that if the decision is given in his absence, the accused may ask for reestablishment of the decision within the limits to make a complain when he may prove that he did not know about this decision.

Regarding the cases when the case in Appeal is sent by the prosecutor or other accused people, who have not been absent or who are represented regularly by defense lawyers assigned by them, they will be treated the same, as in the case when an accused is aware of the decision given against him and has not judged convincible to make a complain. In these cases, the law has rightly solved the limits of the case in the highest court and the effects of judgment for the parties in process.

We must emphasize that this cases the court is obliged that during a certain case he must define again a defendant lawyer for the accused who continues to be judged in his absence. This will guarantee an indispensable minimum for the defense of the procedural rights of the accused in absence and a fair legal process.

Also, the accused in absence has objectively the biggest possibilities to ask for re-judging the decision given against him (*The Penal Procedure Code of the Albanian Republic, articles 449 – 450*), because he has not consumed the proofs he might have, with which he has the right to prove his innocence or prove circumstances that facilitate his position.

The Decision No. 5, date 17.02.2003 of the Constitutional Court of the Albanian Republic is very important, because it defines the participation of the party in process as not only a physical participation but the creation of possibilities to know with the claims of the other party, in order that the opponent party may be able to foresee its claims.

Thus, it is indisputable that these standards establish tax obligations against every court, of whatever instance they are. It must said be that in order to have a fair legal process, the court has to guarantee each of the parties under the process the use of the same arms, in order for them to introduce their claims in the same conditions with the other party (*Foucher v. France, 1997*).

The right of defense is an essential principle to have a fair hearing, but even in the most decisions of European Court of Human Rights has been depicted that such right was sometimes limited to one party such as in the case *Borgers v. Belgium* (1991, Series A no. 214-B) in which the facts brought by the opponent party in front of the Court of Cassation were not submitted to the other party in advance and as such the defense was unable to reply and make the relevant objection in the case. Furthermore, the opponent party took part even as an advisor in court's discussion to the case. Even in the case *Kuopila v. Finland* (2000, no. 27752/95) where the defense was not able to submit his claims on a supplementary police report.

Even in the case *Makhfi v. France* (2004, no. 38184/03), the court concluded that in this case there's a violation of Article 6 § 1 together with Article 6 § 3 since a defense lawyer waited for 15 hours to present his case in the early hours of the morning.

In many cases the court found a violation of the principle of equality of arms i.e *Zhuk v. Ukraine* (2010, no. 45783/05) in which the accused party was excluded from the preliminary hearing held in camera despite his request to be present even though was convicted on appeal court.; or in the case *Bonisch v. Austria* (1985, Series A no. 92), and, conversely, *Brandstetter v. Austria* (1991, Series A no. 211) in which witnesses of the defense party and that of the prosecution party were not equally treated making in this way one of the witnesses to benefit a privileged role; or in the case *Matyjek v. Poland* (200, no. 38184/03) in which the defense party was not able to access fully his file on the case.

## 6. Conclusions

Under the current power of the European Union harmonization, it is more than certain that we should expect a broad extension of EU measures, within the criminal procedural law and independent. Furthermore, the Court of Justice of the European Union will decide on the validity and interpretation of the measures and also adapt to ensure all legal restrictions and protections. Additionally, as also already mentioned, it is re-established a new era of human rights. Human rights, with the general principles of law of the EU, should ensure that the Court wisely enough, provides a reasonable balance between effectiveness of policy EU on one hand and not over-regulation excess, as well as the protection of basic elements of the penal system of the Member States on the other.

However, I reckon, that the Council should continue in some way - focusing and protect common interests, areas of exclusive competence and shared, and where will be necessary to underpin the policies of the European Union - the reliability impose criminal penalties as well as criminal law. The European Union should not try to present uniform concepts of criminal law, but should focus on key issues of the EU and their protection.

An essential criteria of a fair hearing and court case is the principle of "equality of arms" between the parties in both Albanian and European Legislation. Equity means, which must be respected throughout the trial process, meaning that both parties are treated in a way that ensures they have equal procedural capacity of the trial course, and be on an equal stance to present their case.

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