Theme II "Ensuring Justice" – Action 5: Regional dimension for 6 EaP

Project for Regional Dialogue on Judicial Reform in the EaP Countries

Working Group on Regional Dialogue on Judicial Reforms
in the Eastern Partnership Countries

Expert Report on the outcomes of the Working Group's meeting on:

EQUALITY OF ARMS

With focus on rules of disclosure of evidence by both parties; criteria for treating evidence and the need for giving reasoned decision by the judge for accepting or refusing evidence

Chisinau, Republic of Moldova, 28 June 2016

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BACKGROUND

The meeting of the Working Group (WG), on which this report is based, has been organized in implementation of the project for regional dialogue on judicial reforms, within the framework of the joint Council of Europe and European Union Eastern Partnership (EaP) Programmatic Co-operation Framework (PCF). The project aims at fostering dialogue, professional networking and exchanges of experiences among legal professionals in view of addressing outstanding common challenges and consolidating national processes of judicial reform. In this framework, representatives from judiciaries, ministries of justice and bar associations of the EaP countries selected a number of areas of shared interest perceived as most challenging for the respective national reform processes and established three Working Groups that were tasked to examine, with the support of international experts, one of the selected issues in a dedicated meeting.

Topics selected by participants for further analysis included: judicial ethics and disciplinary liability of judges, with a focus on their distinctions and interrelations; e-justice, in particular aspects of electronic case management; legal aid schemes, with special attention to ways to ensure independence of legal aid financed lawyers; independence of judges; selection, evaluation and promotion of judges; the role of Courts of Cassation/Supreme Courts; ways to ensure inclusive and transparent judicial reforms; alternative dispute resolution mechanisms, with a focus on criminal restorative justice and mediation in civil cases; equality of arms between lawyers and prosecutors.

The second round of meetings of the three WGs was hosted in Chisinau, Republic of Moldova, in June 2016 and focused on the following topics: judges' career (WG A), high courts (WG B) equality of arms (WG C). Discussions were facilitated by international experts, also tasked to produce a report on the outcomes of each meeting.

This paper provides an overview of the discussions held during the meeting of the WG C, focusing on equality of arms. It is based exclusively on the information provided by the participants by filling in a questionnaire prepared by the experts and the discussions held during the meeting, supplemented with the comments and inputs by the independent expert. It does not in any way aim at providing an exhaustive presentation or a thorough assessment of the situation in the countries considered, but rather at reporting about the issues presented and discussed by the participants with the purpose of exchanging experiences and possibly identifying areas of common interest for further examination or co-operation.

Executive summary

The Council of Europe has requested Mr. Rytis Jokubauskas with support of Mr. Mark Jobert to facilitate the discussion in the working group on the topic of equality of arms. The working group is established under Project for Regional Dialogue on Judicial Reforms in EaP Countries and participants of the working group represent six Eastern Partnership (EaP) countries – Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine.

This report presents European and international standards on equality of arms, an overview of the situation in participating countries and recommendations. It is based on analysis of European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR), analysis of jurisprudence of European Court of Human Rights (ECoHR) and information provided by participants of the working group.

The report has four parts. It starts with an introduction, which provides background information about the meeting of the working group and the gathering of information.

European and international standards are presented in the second part. It includes analysis of the ECHR, jurisprudence of the ECoHR and other international court institutions, overview of the evolution of jurisprudence in France with parallels to EaP countries and a list of the standards on the equality of arms.

The third part presents an overview of the situation in participating countries regarding equality of arms[1]. Analysis is presented according to thematic subtopics, complimented by examples from participating countries.

Conclusions and Recommendations close the report, drafted by the experts based on the information provided by participants of the working group.

The report is part of the Project for Regional Dialogue on Judicial Reforms in EaP Countries, funded by the EU and implemented by the Council of Europe within the Programmatic Co-operation framework (PCF) 2015-2017.

[1] The paragraphs in third part in italic are based on the answers to questionnaire provided by members of the working group.

1. Introduction

On 28 June 2016, the working group C, established under the Project for Regional Dialogue on Judicial Reforms in EaP Countries, funded by the EU and implemented by the Council of Europe within the Programmatic Co-operation framework (PCF) 2015-2017, met in Chisinau, republic of Moldova, tasked to discuss the equality of arms in participating countries, namely Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine.

Participants of the working group included judges, lawyers, prosecutors, civil society representatives and other stakeholders.

In order to prepare for the meeting a questionnaire has been drafted. Participants from all countries provided answers to the questionnaire in advance of the meeting, providing useful information for the discussion. An additional expert from France was involved. The meeting offered opportunities to share experiences, track common developments in each of the participating countries, and identify common challenges. It must be noted, however, that the results of the questionnaires cannot provide an official or comprehensive overview of the situation in each country.

European and international standards were presented to participants of the working group, including presentation on related cases of European Court of Human Rights and comparison of ECHR cases against France and against countries of the region represented in the working group.

Answers to the questionnaire complemented by discussions in the working group were the basis for the overview of the situation in participating countries as well as the conclusions and recommendations made in this report.

2. European and international standards on equality of arms

2.1. Equality of arms – part of the right to fair trial

International documents:

- European Convention for Protection of Human Rights and Fundamental Freedoms;
- Universal Declaration of Human Rights;
- International Covenant on Civil and Political Rights;

and jurisprudence of international court institutions:

- European Court of Human Rights;
- The International Criminal Tribunal for the former Yugoslavia;
- International Criminal Court

set forth the right to a fair trial. The main purpose of fair trial is to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms.

Article 6 of ECHR sets forth:
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:
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 defense;
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.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have provisions that are very similar of not identical to Article 6 of ECHR.

Equality of arms is part of fair trial principle. **Equality of arms** means that all parties to the proceedings have a *reasonable opportunity* to present their case to the court under conditions which do not place them at a *substantial disadvantage* in comparison with their opponents.

The rights of the defense often overlap with the equality of arms. The ECHR concentrates on due process and ensuring that procedural rights are being respected in practice.

Equality of arms might be described as the requirement to strike a fair balance between the parties. When determining what would be a "fair balance" in concrete cases, the nature of the case and what is at stake should be considered. Elements of equality of arms include:

a) Timely access to case files;
b) Being able to gather and assess evidence;
c) Having enough time for the preparations necessary for presenting a case;
d) Being present at public trial and having a chance to be heard;
e) Not facing unreasonable practical obstacles to presenting a case;
f) Procedural equality with respect to timelines for presenting cases;
g) The right to present arguments;
h) The right to be present in court during arguments by opposing parties;
i) The right to present evidence;
j) The right to challenge the evidence of other parties;
k) The equal treatment of witnesses for each side;
l) The right to present contrary expertise.

Equality of arms principle is applicable only to the proceedings in court regardless of the type of cases, i.e. in criminal as well as in civil and administrative proceedings. The only exception is the applicability of equality of arms also in pre-trial investigation, but extending only to procedural activities that might lead to breach of equality of arms later in court proceedings.

2.2. Jurisprudence about equality of arms

Equality of arms is revealed through jurisprudence of international court institutions. The European Court of Human Rights has developed the content of equality of arms in numerous cases when it decided that there was a violation of equality of arms:

Jespers v. Belgium:
The ECoHR held that the principle of equality of arms obliges prosecuting and investigating authorities to disclose to the defense any material, which they have or could gain access to, which may help acquitting the accused or lead to a lesser sentence.

Foucher v. France:
The ECoHR was of the opinion that by limiting the defendant's access to the case file prevented him from preparing an adequate defense and violated the principle of equality of arms.

Schenk v. Switzerland, Unterpertinger v. Austria:
The ECoHR always took the position that it is the competence of national courts to decide on the admissibility of evidence. Having said this, the ECoHR stated that the way evidence is treated might be in breach of equality of arms.

Albert and Le Compte v. Belgium, Öcalan v. Turkey:

Level of complexity and the stage of the proceedings, volume and quantity of materials influence the perception of adequate time for preparation of the defense and therefore equality of arms.

Mayzit v. Russia:
Ability to read and write with concentration are important when ensuring adequate facilities for preparation of the defense and therefore equality of arms.

Miminoshvili v. Russia, Bäckström and Andersson v. Sweden:
Under certain conditions additional time to prepare its position should be given to the defense in order to ensure equality of arms. But it is up to defense to request it.

Bonisch v. Austria, X v. Switzerland:
Giving some witnesses a privileged role or failure to admit testimony is in breach of equality of arms.

Ramanauskas v. Lithuania, Teixeiro de Castro v. Portugal:
Entrapment by agent provocateurs or other aggressive techniques used by investigative bodies might lead to the breach of equality of arms.

The jurisprudence of International Criminal Court is not as rich as that of ECoHR. Nevertheless ICC already formulates its own concept of equality of arms and fair trial. Lubanga case was the first one tried by the ICC and was an opportunity to evaluate the concept of equality of arms in international criminal justice. The ICC Appeals Chamber explained that where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by the Prosecution, it would be a contradiction in terms to put the person on trial. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.

The International Criminal Tribunal for the former Yugoslavia also has developed international standards of equality of arms through its judgements:

Prosecutor v. Tadic:
As the status of ICTFY and specific relations of ICTFY with the states involved the failure to obtain the evidence, this is considered to be outside of the scope of equality of arms.

Prosecutor v Brdanin & Talic:
Under the ECHR the court is obliged to ensure equality of arms, but according to the ICTFY the prosecution should take care of equality of arms, which indicates the powerless of the ICTFY in comparing with the dominance of the prosecution.

Prosecutor v. Oric:
ICTFY held that this is not to say that an accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's

case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.

2.3. Overview of the evolution of jurisprudence in France with parallels to EaP countries

Avocat Général and Commissaire du gouvernement

The equality of arms principle has brought many profound changes to administrative and criminal procedural rules in France. The French institution of the "Avocat Général" and the "Commissaire du gouvernment" which had existed in one form or another for centuries and was "exported" to several other European countries had to undergo a comprehensive reform as a result of the application of the Equality of Arms principle.

Traditionally this independent judge was able to give his opinion on the case and deliberate, in camera, with the court. The parties were simply expected to listen politely to this judge's opinion and to take notes. Progressively this was challenged as parties complained that this "neutral judge" appeared to them to be a party that should not enjoy the privilege of sitting and discussing the case with the other judges. The ECoHR clearly stated that this judge cannot be regarded as neutral because subjectively speaking he is an ally or opponent.

The Avocat Général is discussed in cases:
Borgers v. Belgium
Kress v. France
Slimane Kaid v. France (No.2)
Martinii v. France
Marc Antoine v. France

The evolution from Martini, 2006 to Marc Antoine, 2013 is worthy of notice. France modified its legislation taking away the right of the commissaire du gouvernement to vote with the other judges but still allowing him to sit with them during the deliberation process. This was judged by the ECoHR to be contrary to Equality of Arms. France modified its legislation again taking away the right to sit with the other judges and the new legislation was accepted by the ECoHR in 2013.
An interesting application of the conflict of interest principle was made by the French Supreme Court[2] to the French Stock Exchange Regulator (COB) condemning the confusion between rapporteur and member of the disciplinary board.

Communication between judges

The issue of privileged communication between rapporteur and Avocat Général has been scrutinized several times by the ECoHR: Silmane Kaid v. France(No.1) and Quesne v. France.

2 5 Feb. 1999 bull.1

The issue of a confusion between the role of rapporteur, avocat général and judge and the resulting jurisprudence has been instrumental in changing not only administrative and criminal procedural rules but has also had an effect on disciplinary proceedings. For example, disciplinary proceedings against lawyers, in France, used to include a certain degree of confusion between prosecution and judgement. This has changed under the influence of ECoHR jurisprudence and now prosecution, reporting and judgement are handled by different persons.

Substantive procedural advantage
The unfair procedural advantage is usually linked to the right to appeal but it can also involve access to information not available to the defendant. For example, in Yvon v. France, in expropriation proceedings, the commissaire du gouvernement had access to land register data which was denied to the owner of the property.

The imbalance between the parties may result for one of the parties being denied the right to appeal or suffering a restriction of that right. For example, in Precup v. Roumania, only the prosecutor could appeal. French Supreme Court decisions are also interesting. In 1997, the Cour de Cassation[3],found fault in the accused person not being allowed the right to appeal when the prosecutor could. In Berger case (2010) the Constitutional Court went a step further and condemned the right of the prosecutor to appeal a decision by an investigative judge when the same right was denied to the victim.

Different Procedural Rules
The typical cases regarding procedural rules usually involve time limits. For example, in Gascon v. France the prosecutor had 2 months to appeal whereas the defendant had only 10 days. Subsequently the law was changed to give the defendant 20 days. Other examples can be found in the unsuccessful attempts by defendants to invoke violations of Equality of Arms when confronted by time constraints. The French Supreme Court found no fault in that a bank had to turn over records more 28 years old[4] or in that the Avocat Général was permitted to file his observations only 24 hours before the hearing[5].

Access to file
The main violation regarding access to files concern the denial of access by law or by purely practical circumstances such as lack of time. The typical cases are Foucher v. France and Frangy v. France. In Frangy v. France the ECoHR found there was no violation because although the defendant had no access his lawyer did.

In Turcan & Turcan v. Republic of Moldova a partial access to the file was deemed insufficient as Moldovan administrative practice was to give access to only a few pages of the file.

3 6 May 1997 bull.170

4 29 Oct 2003 Bull. 155

5 1 July 1997 Bull. 260

Pre-trial procedures
In Henrich v. France, a violation was found in the insufficient reasoning of an administrative decision.

In Zhuk v. Ukraine, a hearing was held in camera on whether an appeal should be heard. This was deemed possibly acceptable. But for the fact that the prosecutor was present at the hearing, the appearance of fair justice was found therefore to be lacking.

In 2010, the French Supreme Court found fault with the examination of the results of a handwriting expertise because only the prosecutor could ask questions to the handwriting expert[6].

Factual particularities
These are situations where the relevant legislation is in conformity with the equality of Arms principle but its application by the Courts or police is faulty. This may concern the treatment of evidence.

In Harutyunyan v. Armenia, the local court recognized that evidence had been obtained by torture but failed to find that such evidence was tainted. In Dima v. Romania, the Supreme court failed to answer a request from the plaintiff to void an expert report.

Factual particularities may also have to do with rules of civil procedure. In Nikoghossain v. Armenia, the local court failed to verify if a summons had reached the defendant.

Another typical situation is that of the defendant not having the necessary time to prepare his defence. In Huseynli v. Azerbaijan), the accused person was rushed to trial (about three hours from arrest to trial) without having time to consult the file. ECoHR stated that the issue of whether the time and facilities afforded to an accused person must be assessed in the circumstances of each particular case. It was also the case in Galstyan v. Armenia where the defendant was either in transit or in a holding cell with no contact to the outside world. A similar situation address by ECoHR in Iglin v. Ukraine.

In Makhfi v. France the violation of equality of arms was due the length of the hearing (17 hours non stop), as adequate defense was not possible as the defendant and his counsel did not have sufficient rest.

2.4. European and international standards on equality of arms

International document and practice of international court institutions sets the following standards on equality of arms:

1. Equality of arms involves giving each party the **reasonable possibility to present its cause** and ensuring conditions that will **not put one party in a disadvantaged position** against its opponent. This includes ensuring equal opportunities to both parties to participate in a court hearing and have the same rights during the process.

6 11 Mar. 2010 N° 10-80,953

2. Each party must be given a possibility to **present in an equal manner all evidences** that they hold. The witnesses for the prosecution and the defence must be treated equally, meaning that the court must allow both parties to adduce relevant documents and evidence. However, this right is not an absolute right and some exemptions may be made in case of protecting fundamental rights of another individual or to safeguard an important public interest.

3. The **accused must be fully informed on the evidence and other information against him/her** in order to be able to prepare a defence. Defence must have an access to the documents and information that the opposing party has and must be given an opportunity to comment on the arguments provided by the opposing party. Therefore the prosecution authorities must disclose to the defence all material evidence in their possession for or against the accused.

4. **Rights of the defendant must be laid down in the criminal procedure legislation.** The accused as well as their council should be able to follow the proceedings, answer questions and make their submissions without suffering extensive tiredness or facing other obstacles that may put them in a clearly disadvantaged position against its opponent.

5. The court must treat each party of the trial **equally when communicating** to them. Submitting documents to one of the party without informing another one may put that party in a more disadvantaged position in the process.
However, if observations submitted to the court are not communicated to either of the parties there will be no infringement of equality of arms as such, but rather of the broader fairness of the proceedings.

6. Each party must be treated **equally in terms of the appeals** (time limit to submit the appeals, conditions to respond, etc.). The administrative authority must provide clear reasons in administrative proceedings providing the appellant a possibility to mount a reasoned challenge to their assessment and allow applicant to submit arguments in support of his case.

3. Situation on equality of arms in EaP countries

The situation in relation to equality of arms is nearly the same in all EaP countries and only small details differ. Therefore, equality of arms can be analyzed from a regional perspective.

The paragraphs below in italic are based on the answers to questionnaire provided by members of the working group.

3.1. Court communication:

In court all parties are treated equally when it comes to court communication with the parties (sending documents, such as police reports to both parties) in all participating countries. This is the case for criminal, as well as civil and administrative cases.

> *In **Belarus** the court will inform both the defence side, and the prosecution of the place and time of the hearing in advance. Thus, in accordance with Art. 281 Criminal Procedure Code the parties not later than five days should be informed about the place and time of commencement of the trial. In case of failure to observe this period, the criminal case is delayed. The defense and the prosecution in accordance with the applicable procedural law have equal rights in the study of the materials of the criminal case. In civil and administrative proceedings the parties have equal rights to timely notice of the proceedings and to study the case materials. Parties shall be notified about the time and place of the hearing (Art. 267 Code of Civil Procedure).*

3.2. Witnesses

Defense and prosecution have equal rights to examine witnesses in criminal proceedings in all participating countries. Witnesses in administrative and civil cases have equal rights as well. No witnesses enjoy privileged role, but in some cases persons do not have the obligation to testify.

> *In **Azerbaijan** both sides are allowed to question or cross-examine the opposing side's witnesses. Witnesses summoned to the hearing at the request of one of the parties to the proceedings shall be questioned in the following order:*
> *- by the person who made the request;*
> *- by other persons belonging to that party;*
> *- by persons belonging to the opposite party;*
> *- by the court.*
> *Witnesses summoned on the initiative of the court shall be questioned first by the prosecution, then by the defence, and after that by the court. Based on the equality principle it is not allowed to treat the witnesses of prosecution and defence differently.*
>
> *In **Georgia**, witnesses do not enjoy privileged role in criminal procedure. However, article 50 of Criminal Procedure Code defines the circle of persons not obliged to be a witness. In particular, the following persons shall be free from obligation to testify as a witness and to submit objects, documents, substances or other items containing information significant to the case:*
> *a) a defence counsel – regarding the facts that have become known to him/her in connection with carrying out the duties of a defence counsel on the case;*

b) a lawyer rendering legal assistance to a person prior to formally receiving defence – regarding the facts that have become known to him/her in connection with providing legal assistance;

c) a clergyman – regarding the facts that have become known to him in the course of a confession or otherwise revealed in confidence;

d) a close relative of a defendant;

e) a Public Defender or a person authorized by him/her – regarding the facts that have been entrusted to him/her as to the Public Defender;

f) member of the Parliament of Georgia – regarding the facts that have been entrusted to him/her as to the member of representative body;

g) a judge – regarding the facts contained in the confidential deliberation of judges;

h) a journalist – regarding information obtained through professional activities;

i) a victim of trafficking in person – during the term given for reflection (deliberation);

j) members of the Special Prevention Group set up at Public Defender's Office in relation to a fact that became known to them while fulfilling the functions of a National Prevention Mechanism, if they refuse to testify;

k) member of High Council of Autonomous Republic – regarding the facts that have been entrusted to him/her as to the member of representative body.

Additionally in cases foreseen by the law the court can release from the duty of a witness: medical worker, notary, public servant, a serviceman and a person enjoying equal status with a serviceman, a participant of a counter-terrorist or a special operation.

But during the discussion participants, mainly lawyers, admitted that although from the legislative point of view all witnesses are equal, courts tend to trust witnesses of prosecution more.

3.3. Experts (specialists)

In civil and administrative proceedings the parties have equal rights regarding experts (specialists): this may apply for the appointment of the necessary expertise, the acquired findings and participation in the questioning of experts in court.

*In **Georgia**, the party is free to choose a public or private expert, to ask questions to the expert and to formulate certain questions. The expertise under the party's decision is submitted to the court. When expertise results are included into the case files, the opposite party is authorized to get access to them and conduct expertise itself.*

In criminal proceedings defense and prosecution have equal rights in requesting expert analysis, appointment of expert or specialist, formulating questions for them and questioning in criminal proceedings in all participating countries. But this is not the case for pre-trial investigation. Although equality of arms is applicable to court proceedings, some expertise can be done only at pre-trial investigation stage and cannot be done/repeated in court proceedings due to objective circumstances. Therefore results of expertise done at pre-trial stage might make it impossible to have the fair balance between the defence and prosecution rights.

*In **Azerbaijan**, within the preliminary investigation proceedings the investigator (or prosecutor) can request for a report by appointment of the expertise. The lawyer does not have such rights. Under the provisions of the Law of the Republic of Azerbaijan "On Lawyers and Advocacy" the lawyers are granted with the competence to receive the expert opinion. However, the relevant authorities do not respond to such inquiries of the lawyers for the expert opinion.*

*In the Republic of **Moldova**, the problem is that the request by the defence for expertise is decided by the investigative body. When approving the request the investigative body often appoints state institutions as experts. Such state expert institutions are under the authority of the same ministry as the investigative body and judges tend to trust more state experts rather than private experts.*

3.4. Presentation of evidence

The defence and the prosecution have equal rights to collect and submit documents and other evidence to the court. But most of the evidence is gathered during pre-trial investigation and defence has fewer possibilities than prosecution to gather evidence at this stage.

*In **Georgia**, under article 83 of Criminal Procedure Code, prior to the first appearance of a defendant before the court, the parties shall be obliged to give each other an opportunity to become familiar with the information and evidence they plan to present to the court and to provide with the copies of written evidence as well. After the request for exchange of information is filed, failure to provide the other party with all materials available at that moment shall lead to finding the material to be inadmissible evidence. No later than five days prior to the pre-trial hearing the parties shall provide each other and the court with all the information available at their hand at that moment regarding the evidence they intend to use in the trial.*

*In **Ukraine**, all documents and materials are submitted to the court during the preliminary hearings. At the same time, parties have several different opportunities to collect evidence. It is too difficult to collect evidence for the defence, because of the restrictions foreseen in different laws of Ukraine to obtain information with limited access. At the same time, law enforcement authorities (police, prosecutors) have access to such information. In addition,the investigation (search) actions at the initiative of the defence (except for examination) depend on investigator, prosecutor and investigating judge – they can satisfy or reject such requests by the defence.*

All participating countries have the same general rule on the admissibility of evidence in criminal cases – courts accept all evidence submitted by defence and prosecution. But representatives of Azerbaijan, Georgia and Republic of Moldova referred to the exceptions, usually related to the legality of obtaining the evidence.

*In **Azerbaijan**, if there is no doubt as to the accuracy and source of the information, documents and other items and as to the circumstances in which they were obtained, they may be accepted as evidence in criminal case. The court shall have the right to*

dismiss requests connected with the submission of evidence only if it is not relevant to the case or is considered inadmissible (illegally obtained).

*In **Georgia**, the court can consider evidence inadmissible in cases foreseen by the law. In particular, under article 72 of Criminal Procedure Code, evidence obtained through substantive violation of the rules established by the Code, as well as the evidence that has been collected lawfully, but on the basis of the illegally obtained evidence, if such evidence worsens the legal status of the defendant, shall be considered inadmissible. Evidence shall be also inadmissible if it is obtained through the observance of the rules established by the Code, but the reasonable doubt that it might have been altered, its characteristics and qualities might have substantially changed, or that the trace on it might have been substantially extinguished is not refuted.*

The parties have equal rights to present their evidence in civil and administrative cases. The court has to accept the evidence of the parties in the administrative and civil proceedings, unless the evidence is obtained in breaking the law or if it is not related to the dispute.

*In **Armenia**, the court cannot refuse to accept evidence from a party. The court can reject a request for summoning certain persons for questioning, demanding certain documents, if such a request is groundless.*

3.5. Access to evidence

Submissions to a court by one party without the knowledge of the other, especially when the latter has no opportunity to comment in criminal/civil/administrative cases, is not possible in all participating countries.

*In **Armenia**, in criminal cases, parties are obliged to disclose all materials to each other before submitting them to the court. In civil and administrative cases, it is not possible for one party to make submissions to a court without the knowledge of the other, especially when the latter has no opportunity to comment in civil or administrative cases.*

The court cannot deny access to evidence to one of the parties in all types of cases. Any limitations can be only on the grounds of state secret.

*In **Ukraine**, the court cannot deny access to evidence to one of the parties. Each party is entitled to have access to the materials of proceedings, and the judge is obliged to provide access to materials of a case to each party. During such acquaintance with evidence, each party has a right to make extracts or copies. There are some restrictions in respect of defenders and legal representatives of a suspect or victim in criminal cases: they relate to materials with the information about State security, if such persons have no access to such information to be obtained in accordance with the law (Art. 517 of the Criminal Procedure Code of Ukraine).*

In court the rights of defence and prosecution are the same when it comes to access to documents and/or information related to the case. But in pre-trial investigation in most of the countries prosecution enjoys more rights than the defence.

*In **Ukraine,** according to Article 22 of the Criminal Procedure Code of Ukraine, parties to the criminal proceedings have equal rights in collecting and submitting to the court all objects, documents and other evidence. But there are certain benefits of the prosecution in obtaining necessary materials. The defence is not entitled to independent investigative (detective) actions, except for the examination. The defence only has the right to initiate their conduct by lodging a relevant request to the prosecutor and by challenging the prosecutor's refusal to conduct them.*

*In **Belarus** the defence and the prosecution parties have equal rights in obtaining information relevant to the case. If evidence relevant to the case cannot be collected by the party, it may apply to the court for the recovery of such evidence.*

*In **Georgia,** according to Article 120(10) of the Criminal Procedure Code of Georgia, the prosecution shall have the right to primary examination of an object, item, substance, or document containing information, seized on the basis of the motion of the defence. The mentioned rule stipulates that both parties have access to the evidence obtained upon the motion of the defence, however initially it will be the prosecutor to have a right to examine such evidence. This reservation means that in spite of this, if the collection was implemented by the defence party, the prosecution party is still the first one to examine it. This raises concerns about the equality of arms.*

Usually prosecution is required to disclose to the defence all material evidence in their possession for or against the accused.

*In **Ukraine,** according to Article 290 of Criminal Procedure Code of Ukraine, a prosecutor or an investigator on his or her behalf have to provide access to materials of the pre-trial investigation which are in their possession, including any evidence which they can use to prove innocence or lesser degree of guilt of an accused, or help mitigate the punishment. If the prosecution did not provide access to the materials of pre-trial investigation, the court has no right to admit as evidence the information contained in them. Refusal to disclose a publicly open document, the original of which remains in the pre-trial investigation materials, is not allowed (Art. 221 of the Criminal Procedure Code of Ukraine).*

Regretfully some answers from participants did not allow concluding whether prosecution is required to disclose to the defence all material evidence in their possession for or against the accused in concrete state. Defence is provided access to all documents of the case in all participating countries. But this does not necessarily mean that the defence is given access to evidence in favour of the accused as such evidence might not be included in the documents of the case. Whether it is possible for the prosecution not to include some documents in the criminal case that is sent to the court is a subject to be clarified in the future.

In civil cases parties have the right to fully familiarize themselves with the case materials in all participating countries.

3.6. Presentation of the case

Legal frameworks in all participating countries do not allow for cases of one party being put in disadvantage against it's opponent when presenting the case. But breaches of equality of arms still might happen when applying the law in practice.

> *In **Azerbaijan**, in some cases violations of certain procedural requirements during pre-trial or court proceedings are possible, for example, motions of the defence may be groundlessly denied.*

It is not possible for the defence to be not allowed to reply to the submissions made by the prosecution. Defence and prosecution have the same rights to appear before the court, including appeal and cassation.

Participants in the working group have different opinions on whether the rules of criminal procedure (especially the provisions protecting the rights of the defendant) laid down in national legislation are clear enough, detailed enough and whether there are provisions that might be interpreted in various ways. Representatives from Azerbaijan and Belarus are of the opinion that rules of criminal procedure are quite clear and exclude their ambiguous interpretation. While representatives from Armenia, Georgia, Republic of Moldova and Ukraine think that some provisions of criminal procedure should be developed.

> *In **Armenia**, there are certain provisions that are not clear or there is a contradiction between some articles. For example, the time limit for considering the submissions by the investigator during the investigation takes five days according to Article 199 of Criminal Procedure Code of Armenia, at the same time the investigator can prolong the consideration until the certain circumstances can be clearly ascertained. This time can be indefinite.*

> *In **Georgia**, there are listed rights and obligations of the accused in the 38th clause of the Criminal Code of Georgia. The provision is not completely faultless, because it does not contain some important rights, such as right to demand the video or audio record of the interrogation and to demand video or audio recordings of certain investigation operations.*

3.7. Appeal

All parties have equal rights to submit the appeal in criminal and civil cases in all participating countries, with two small exceptions, in Azerbaijan and Ukraine, where there are some specificities when the prosecutor, the state or a local authority participates in civil proceedings.

> *In **Azerbaijan**, according to the Article 357 of the Civil Procedural Code, the prosecutor shall have a right to file a protest against court acts in the event it is a claimant or petitioner in court hearing in circumstances provided by law. The prosecutor's protest shall be a complaint filed by him/her to a court of appellate instance in respect of a case where he/she participates, and shall be equivalent of appellate complaint by its legal nature and legal consequences.*

*In **Ukraine**, the Civil Procedure Code provides for a restriction for a prosecutor acting in public interest, state authority or local authority to submit an appeal. Article 297 sets a one-year time limit for the renewal of a period of lodging an appeal. Regardless of the validity of the reasons for the missed time limit for lodging an appeal, the court of appeal refuses to open the appeal proceedings if the appeal of the prosecutor acting in the public interest, state authority or local authority was submitted after the expiry of one year from the moment of announcement of the impugned judgment.*

3.8. Legal aid

All participating countries have legal aid systems that enable provision of legal aid in criminal cases as well as in some civil cases. Legal aid is regulated by special Law on Legal Aid in all countries except for Azerbaijan, where some aspects of qualified legal aid funded from state budget are regulated by different laws.

3.9. Continuing professional qualification

Judges, prosecutors and lawyers undergo continuing professional training in all participating countries. Although training regimes differ, all participating countries have trainings on equality of arms, usually not as a separate topic, but as part of the right to fair trial.

4. Conclusions and recommendations

3.1. Equality of arms is fairly well implemented in the legislation regulating court proceedings of all participating countries. This inter alia includes presenting the case, hearing witnesses, access to evidence and case file, communicating with the court, right to appeal and other.

3.2. Despite quite good regulation of court proceedings, equality of arms is breached in practice through decisions in concrete cases, for example by denying requests of defense or trusting some witnesses more just because they are witnesses of prosecution. This is very latent and difficult to observe or point out. Two main approaches to deal with such breaches of equality of arms should be considered. First, the courts should be proactive in seeking not to be in the breach of equality of arms themselves. Therefore the courts should be self-critical with regard to the approaches they take and should regularly raise their professional qualification in the field of equality of arms. Second, lawyers and especially bar associations should be more proactive in drawing attention to systematic breaches of equality of arms and finding proper solutions. This requires a systematic approach and professionalism. Academia would make a perfect ally in this field.

3.3. Although equality of arms is applicable to court proceedings, some actions (e.g. expertises, gathering evidence) can be done only at pre-trial investigation stage and cannot be done/repeated in court proceedings due to objective circumstances. Unfortunately defense rights at pre-trial investigation are not sufficient and prevent from fair balance between the defence and prosecution in the court proceedings. Therefore, the rights of the defense, especially in dealing with expertize and gathering of the evidence, should be improved in the legal framework of participating countries.

3.4. If the prosecution has the possibility not to include some documents in the criminal case that is sent to the court, it should be treated with caution as this might allow the prosecution not to disclose to the defence all material evidence in their possession that is in favour of the accused.

3.5. Rules of criminal procedure (especially the provisions protecting the rights of the defendant) laid down in national legislation of Armenia, Georgia, Republic of Moldova and Ukraine, are not clear enough and not sufficiently detailed. Some provisions might be be interpreted in various ways. Therefore the legislation of the abovementioned countries should be developed accordingly.

3.6. There are no systemic flaws regarding equality of arms in civil and administrative proceedings in participating countries.

Annexes

Programme

Second round of meetings of the three Working Groups for Regional Dialogue on Judicial Reform in EaP Countries

Chisinau, Republic of Moldova – 28 June 2016

WORKING GROUP C

Equality of arms

with focus on rules of disclosure of evidence by both parties; criteria for treating evidence and the need for giving reasoned decision by the judge for accepting or refusing evidence

PROGRAMME

Strasbourg, 21 June 2015

09.00 – 09.30	Opening and Introduction By Rytis Jokubauskas, the international Consultant
09.30 – 10.30	Presentation of relevant European and other international standards By the international Consultant, followed by Q&A and discussions
10.30 – 10.45	Coffee Break
10.45 – 12.30	Presentation of case-studies, best practices or lessons learned in relation to the identified challenges from experiences of countries both within the region and in other Council of Europe member states Introduced by the international Consultant with possible contributions by additional experts and inputs by participants
12.30 – 14.00	Lunch Break
14.00 – 15.30	Presentation on ECHR cases - examples of violations of equality of arms in participating countries By Marc Jobert, Attorney at Law, International Expert Overview and analysis of the most challenging issues faced by participating countries By the international Consultant, with comments and inputs by participants
15.30 – 15.45	Coffee Break
15.45 – 17.30	Proposals and discussions of possible regional approaches or cooperation initiatives that could be undertaken in response to the identified challenges Lead by the international Consultant, with inputs from participants

Working Group C

Equality of arms

28 June 2016
Jazz hotel, Chisinau, Republic of Moldova

List of Participants

Strasbourg, 21 June 2016

International Experts

1.	Mr Rytis Jokubauskas	Advocate, Lecturer at Law Department of Mykolas Romeris University in Vilnius
2.	Mr Marc Jobert	Attorney of Paris Bar

RSG Members

3.	Mr Artur Hovhannisyan	First Deputy Chairman of the Chamber of Advocates of Armenia
4.	Ms Gulnar Gurbanova	Member of the Board of the Azerbaijan Bar Association
5.	Mr Zaza Khatiashvili	Chairman of Georgian Bar Association
6.	Mr Alexandre Tsuladze	Head of the Department of International Co-operation and Quality Management of the High Council of Justice of Georgia
7.	Ms Ketino Vekua	Prosecutor at the Department of Supervision over Prosecutorial Activities and Strategic Development
8.	Mr Dorin Popescu	Member of the Bar Association of Chisinau
9.	Mr Valentyn Gvozdiy	Deputy Head of the Ukrainian National Bar Association and the Bar Council of Ukraine
10.	Mr Irakli Kandashvili	Executive Board Member of the Georgian Bar Association (Back in Jan 2016)
11.	Ms Sviatlana Bandarenka	Judge of the Court of Moskovskij District of Minsk, Deputy Chairman of the Judicial Division for Criminal Cases

Civil Society Representatives

12.	Ms Sima Yagubova	Member of the Azerbaijan Lawyers Confederation
13.	Mr Roman Aharonyan	Deputy Director of the School of Advocates of Armenia
14.	Mr Davit Khachaturyan	Associate Professor at Law Department of Yerevan State University

15.	Mr Irakli Gvaramadze	Article 42 NGO Georgia
16.	Mr Azer Kasumov	Senior Legal Adviser at Law and Development Public Association
17.	Ms Zoia Iarosh	Vice-President of the NGO "Association of Advocates of Ukraine"
18.	Mr Ion Guzun	Legal Officer at Legal Resources Centre NGO Moldova

Institutional Experts

19.	Mr Emanoil Plosnita	Dean of Chisinau Bar Association, member of the Council of the Moldovan Bar Association
20.	Mr Mukhtar Mustafayev	Member of the Presidium of the Bar Association of Azerbaijan
21.	Mr Ilgar Garalov	Judge, President of Khazar District Court
22.	Mr Abbas Abbasli	Prosecutor at Public Prosecution Department of the General Prosecutor's Office of Azerbaijan
23.	Mr Karen Bisharyan	Prosecutor at General Prosecutor's Office of Armenia
24.	Ms Volha Savich	Member of the Bar Association of Minsk
25.	Ms Nora Karapetyan	Judge in Yerevan Malatia Sebastia district court
26.	Mr Sergiu Vasiliu	Deputy Head of the Judicial Department on criminal matters at General Prosecutor’s Office of the Republic of Moldova
27.	Mr Eduard Bulat	Head of department for fighting against trafficking of human beings at General Prosecutor’s Office of the Republic of Moldova
28.	Mr Stanislav Kravchenko	Deputy President and Judge at High Specialized Court of Ukraine for Civil and Criminal Cases

CoE Secretariat

Ms Sophio Gelashvili	Head of Unit
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