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**THE CONCEPT OF "FAIR TRIAL": THE RATIO OF RUSSIAN  
AND INTERNATIONAL STANDARDS**

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***Abstract***

One of the key rights of citizens provided for and guaranteed by the European Convention for the Protection of Human Rights is the right to a fair trial. The Constitution of Russia contains a law close in legal essence, namely: the right of every citizen to judicial protection. By virtue of the generally recognized priority of norms and principles of international law, the constitutional right to judicial protection must comply with requirements and provisions developed by European practice in the light of the realization of the right to a fair trial, including in the field of criminal proceedings. The presented scientific paper examines the concept of the “right to a fair trial” from the standpoint of its relationship with principles of equality of the parties (equality of arms) and adversarial (adversarial). The attention is focused on the unequal concepts of equality and equality of the parties in the Russian criminal procedure doctrine. The author studies the legal positions of the European Court of Human Rights and the Constitutional Court of the Russian Federation regarding the definition of the nature and content of this law, analyzes the practice of its implementation in criminal proceedings. The conclusion is made about the need to rethink the existing concept of adversarial Russian criminal proceedings, in favor of the need to develop in the doctrine and criminal procedural legislation the concept of balance between accusation and defense, which can be based on the idea of equality of parties and adversarial human rights courts..

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## 1. Introduction

The right to a fair trial, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is important in international practice and is aimed at ensuring the real possibility of realizing the specific rights and legitimate interests of citizens in legal proceedings.

Due to the fairly extensive case law developed by the European Court of Human Rights, there is no uniform legal interpretation of this notion under current conditions.

An analysis of article 6, paragraph 3, of the European Convention for the Protection of Human Rights and Fundamental Freedoms shows that the conclusion that judicial proceedings comply with the standard of justice set out in paragraph 1 should be based on a review of the trial as a whole, rather than a separate review of one specific aspect of a trial or one specific incident.

Thus, in the case of Barbera, Messegué, and Jabardo (1988) v. Spain, the European Court found that the national proceedings were unfair because of the cumulative effect of various procedural shortcomings. Every single flaw would not convince the Court that the trial was “unfair”, but their combination was a factor that led to the conclusion of a violation of Article 6 (Barbera, Messegué, & Jabardo, 1988).

The European Court of Human Rights applies the concept of “fair trial” in cases where the trial meets the requirements set out in paragraph 3 of Article 6 but cannot nevertheless be defined as fair. Such a dynamic interpretation of the notion of “fair trial”, depending on the circumstances of a particular case, allows for the continuous development of this definition and its adaptation to the real needs of criminal justice in general.

## 2. Problem Statement

Russian law enforcement practice does not always adhere to those interpretations of the content of the analyzed law, which contain European standards.

In particular, the Constitutional Court of the Russian Federation understands the right to judicial protection as a right that is essentially broader than the right to a fair trial.

Thus, in the Decree No. 27-P of December 10, 1998, the Constitutional Court of the Russian Federation indicated that the right to judicial protection is realized through a combination of various procedural means ensuring fair justice and the effective restoration of violated rights of citizens. Thus, according to this legal position, he, firstly, included in the content of the right to judicial protection both guarantees of fair justice, and in general guarantees of effective restoration of rights (which is an independent right enshrined in Article 13 of the European Convention on Human Rights and fundamental freedoms).

Secondly, this indicates that the realization of such a right is not limited to the implementation of a fair judicial procedure, but also implies the achievement of a certain result (restoring the violated right), i.e. The Constitutional Court of the Russian Federation included the right to a favorable judicial decision in the content of the right to judicial protection. A similar position directly follows from the text of the Decree of the Constitutional Court of the Russian Federation of March 17, 2010 No. 6-P, according to paragraph 2 of which the right to a fair trial implies “making a lawful and reasoned judicial decision”.

Finally, it should be noted that the Constitutional Court of the Russian Federation made an invaluable contribution to upholding the need for real enforcement of the right to judicial protection (rather than formally proclaiming it), which also corresponds to the approach of the European Court of Human Rights. At the same time, the Constitutional Court of the Russian Federation is far from always strictly adhering to this approach, which can create obstacles for the Russian citizens to effectively protect their right to a fair trial (Trubnikova, 2011).

This necessitates a study in the Russian criminal procedure doctrine of the content and legal essence of the right to a fair trial guaranteed by the citizens of the European Convention for the Protection of Human Rights, the main forms and conditions for its implementation.

### **3. Research Questions**

The European Court of Human Rights, in resolving complaints in criminal cases, considers the totality of such principles as equality of parties and adversary as constituent elements of the notion of “fair trial”. These principles are interrelated, interdependent, and together, as such, “fill in” the right to a fair trial through the minimum rights of the accused (Fedorova, 2012)

Undoubtedly, in terms of the observance of human rights, these principles are fundamental aspects of the right to a fair trial. They have the autonomous and independent meaning of fair trial principles, which should be treated equally as sub-principles of the right to a fair trial (Summers, 2007).

A special, inalienable connection between the above legal provisions, emphasize the Russian processualists. Equality of the parties, according to Vishnevskaya (2004), is the most important condition for the implementation of the principle of competition. Consequently, the process can be recognized as contentious only when “when the parties can actively and on equal prove their case ...” (Vishnevskaya, 2004, p. 7).

Foreign researchers, noting the importance and significance of this principle to ensure the fairness of the trial, emphasize, in particular, that in the conditions of criminal proceedings, where the nature of the process already implies significant inequality between the parties, the principle of equality of the parties takes on great significance, since state, and where the prosecution enjoys enormous resources and advantages, only the principle of equality helps the accused person to justify his Lo (Van Dijk & Van Hoof, 2006). It cannot be said that justice was committed if the accused is punished proportionately and correctly, but not “justly”, i.e. in the absence of adequate opportunities to present his case, protect himself and receive enough information and legal assistance (Wasek-Wiaderek, 2000).

At the same time, it should be noted that equality of the parties as a principle of international law has a slightly different legal content, different from its understanding in the Russian criminal procedure doctrine (Chebotareva, 2018).

At the national level, the relevant rules that create favorable conditions for finding the truth and issuing a fair court decision, enshrines the Constitution of the Russian Federation (Part 3, Article 123).

As the Constitutional Court of the Russian Federation has repeatedly pointed out, a necessary guarantee of judicial protection and a fair trial of the case is the equal opportunity given to the parties to bring their position on all aspects of the case to the court’s attention, because only on this condition does

the right to judicial protection be exercised at a court hearing fair, complete and effective (definition of the Constitutional Court of the Russian Federation of 04.11.2004 N 430-O).

The principle of “effective and practical rights” has long been developed and used by the European Court of Human Rights. It is important not only to have rights, but also to be able to realize them.

At the heart of the concept of the Russian criminal process is the idea of equality as one of the components of equality of the parties. In the indicated semantic interpretation, the Russian concept is already that which is implied by international law.

In the Russian legal doctrine, equality is an expression of formal equality based on the principle of equality of all before the law and the court and consists in providing the state to the participants in criminal procedure legal relations of the same rights to defend their interests. But this is possible only in relation to equal subjects. In criminal proceedings in Russia there are inherent inequalities and it is meaningless to talk about creating absolute equality between the parties to the prosecution and the defense. The prosecution has the power of the state and all its instruments (legal, organizational, technical, financial, etc.) to expose and indict a person. The defense does not have such an arsenal of means.

The European Court of Human Rights, disclosing the legal essence of this principle as “one of the elements of the broader notion of fair trial”, in the sense of Article 6 § 1 of the Convention, implies that “each party should be given a reasonable opportunity to present its version under the conditions in which neither side has a clear advantage over its opponents” (Bulut, 1996, p. 31); in this context, importance is attached to both external manifestations and the inclusion of hypersensitivity to the fair administration of justice (Moiseyev, 2009). “The trial will not be fair if it takes place in conditions that could unreasonably put the accused in a less favorable position” (Delcourt, 1970, p. 23).

In the case of *Jespers (1981) v. Belgium*, the Commission on Human Rights considered the principle of equality primarily as a balance between the defense representing the accused and the charge supported by the state, demanding that the authorities ensure that the defense, which is necessarily in a weaker position, is put possibly on par with the prosecution. In this case, it was also noted that

*... in any criminal case initiated by a government body, the prosecutor has to support the prosecution of the possibilities arising from its investigative powers, which are based on the judicial and police apparatus, which has significant technical resources and means of coercion. It is with a view to establishing, as far as possible, equality between the prosecution and the defense by the national legislation of most countries, the responsibility for conducting a preliminary investigation is assigned to a judicial official or, if the authority to conduct an investigation is assigned to the public prosecutor's office, the latter is charged with collecting evidence both against and in the benefit of the accused.* (Jespers, 1981, p. 55)

Such an approach broadens the scope of equality of the parties with regard to a more in-depth understanding of the equality of the parties as a mechanism for balancing the existing inequality in the criminal process between the individual and the state.

The principle of “equality of the parties” does not guarantee both parties any specific procedural rights; rather, it only guarantees that when the procedural right is granted to one party, the other must also

be granted it. Thus, if the court decides to deprive both parties of substantive procedural law, the equality of the parties will not be violated, since the appeal is equal (Trechsel, 2005).

The European Court of Human Rights also notes that the defense decides for itself whether that other argument deserves its reaction, therefore, when the prosecution submits its comments to the court without the knowledge of the defense, this is unfair, even if they do not give any advantage to any of the parties on the matter which is decided by the court. The court believes that this principle does not lose its significance even when the arguments in question benefit the defense (Sharomov, 2009).

The case-law practice of applying the Convention, defining the sphere of equality of procedural possibilities of the parties, is very diverse.

The European Court of Human Rights, in particular, refers to the elements of equality of the parties: a) timely access to the case file; b) the ability to collect and evaluate evidence; c) sufficient time to prepare for the submission of explanations on the case; d) being present at a public trial and being heard; e) the absence of groundless practical obstacles to the presentation of explanations in the case; f) procedural equality in the timing of the presentation of the case; g) the right to present arguments; h) the right to be present in the courtroom during the submission of arguments by the opposing party to the dispute; i) the right to present evidence; j) the right to challenge the evidence of the other party; k) equal treatment of witnesses of each party; l) the right to present the results of the examination, reflecting the opposite opinion (Iokubauskas, 2016; De Salvia, 2004).

Summing up, one should agree with the position of Trubnikova (2011), emphasizing that the European Court of Human Rights sees the meaning of the principle of equality in ensuring not formal equality - equality of rights of the parties (which is typical of the Russian model of justice - author). real equality - equality of their ability to defend their positions, "equality of means" (Dragon, 2005) (the means available to the prosecution and defense should be equal (Edwards and Lewis, 2004). To this end, the position of the parties in the process must be equitably justified, a "fair balance" must be created between the parties (Stadukhin, 2007).

#### **4. Purpose of the Study**

The purpose of this study is a conceptual analysis and synthesis of the legal positions of the European Court of Human Rights in the aspect of implementing the principles of equality of the parties and the adversarial process as determining principles of the right to a fair trial, determining the content, legal guarantees and limits of the implementation of this right in the Russian criminal procedural law.

#### **5. Research Methods**

The basis of this study is the dialectical method of cognition, as well as general scientific and private-scientific methods, namely: comparative legal, system-structural, logical-legal.

#### **6. Findings**

In the course of the study, the main directions of improvement of the Russian criminal procedure science, in terms of regulating the fair trial procedure, were identified, which can contribute to the

development of a uniform application of the criminal procedure law, effective use of legal opportunities by the law enforcer and act as an additional guarantee of compliance and proper enforcement of rights and the legitimate interests of citizens in the field of criminal proceedings.

## 7. Conclusion

Thus, the principle of competition and constituent equality of the parties in its legislative consolidation, as well as the science of the criminal process of Russia are not identical to the principle of equality of the parties, formulated and developed in the case-law of the European Court of Human Rights. In contrast to the formal equality of rights, which characterizes the Russian principle of equality of the parties, the equality of arms principle is focused on the ability of the parties to exercise their rights. Such opportunities should be equal; in a court proceeding, neither party should have clear advantages over the other.

In the practice of the European Court of Human Rights, the principle of equality of the parties is a guarantee of a fair trial.

Equality of the parties, in contrast to formal equality (equality before the law and its *lex specialis* equality before the courts and tribunals), as non-discrimination, is a procedural aspect of equality of the parties in a trial.

The European Court focuses on due process and the enforcement of procedural rights in practice. Equality of the parties can be described as a requirement to achieve a fair balance between the interests of the parties. It is the balance between the two sides of the process that is the central aspect of the equality of the parties.

It is solely from these legal positions that the European Court considers complaints of Russian citizens about the violation of their convention rights, noting the presence in Russian practice, first, of the inequality between the parties to the prosecution and the defense in the process of obtaining and evaluating evidence; secondly, the violation of the equality of the parties in terms of the absence or deficiencies of legal representation, the lack of sufficient opportunities for their own defense.

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