WHEN IS THE EQUALITY OF ARMS PRINCIPLE VIOLATED IN CRIMINAL PROCEEDINGS?

Proposal for a better understanding and application of the "disadvantage" concept in Colombian Criminal Proceedings on the basis of international experiences

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I. PROBLEM STATEMENT

How can the concept of "disadvantage" be understood and applied in Colombian criminal proceedings on the basis of the German and the European Court of Human Rights' case law?

II. RESEARCH QUESTIONS

1. What factors and reasons have been considered by the Colombia's highest courts to determine whether a violation of Equality of Arms (EA) takes place in Criminal Proceedings?

2. How have the Germany's Highest Courts -Federal Constitutional Court and Federal Court of Justice- and the European Court of Human Rights (ECtHR) interpreted and applied the concept of "disadvantage" in criminal proceedings?

3. What can Colombia learn, change, maintain, and develop, on the basis of the German and the ECtHR's case law, regarding the understanding and application of the "disadvantage" concept in criminal proceedings?

III. JUSTIFICATION

Colombia adopted a Criminal Procedure with accusatory tendency trough the Legislative Act (LA) 03 of 2002, which treats the defendant as an active party to the proceedings by giving him/her a series of substantive and procedural rights to resist the prosecution.

One of the most significant prerogatives within this mixed criminal procedure system is the principle of EA, which is not explicitly mentioned in the LA 03/2002, but was derived from it[1] and has been recognized and developed by the Constitutional Court and the Supreme Court of Justice.

Despite the widely known and evident importance of procedural equality, it has not had a completely clear, steady, and coherent development within the Colombian case law. In fact, the jurisprudence has been ambiguous and, even, contradictory in terms of EA's basis, definition, elements, and scope. For instance, there are decisions in which it has been argued that EA means that the parties must have the *same* burdens and tools[2], and, in others, it has been said that the conception of procedural balance cannot match the idea of exact equality[3].

That situation undermines the quality of the administration of justice since it brings, as can easily be inferred, serious problems, especially, but not limited to, legal uncertainty, inequality, and unfairness. These issues cannot be allowed in a State governed by the Rule of Law and, therefore, they need to be fixed. The question now is, how to do it? Or, at least, how to contribute to do it? There are numerous ways to achieve that goal, but it is important to highlight that in the Colombian case law it is possible to find, as mentioned, divergent decisions with opposing theses related to the essence or the core of EA. This means that the concept of EA itself needs some kind of clarification, for example, regarding its basis, definition, elements, and scope.

However, trying to make clear all these topics will go beyond the limits of a doctoral research. In fact, even trying to clarify only one of them in its entirety will require more than one deep research. Just to give a quick and small example, concerning the scope of EA one of the things that need to be clarified is who can claim a right to EA: only the defence? The prosecutor and the defence? How about the victims? can they ask for protection of "its" EA? What about the Public Ministry, which represents the interests of

[1] Constitutional Court of Colombia. *Judgment C-118 of 2008.* Judge Marco Gerardo Monroy Cabra
[2] Constitutional Court of Colombia. *Judgment C-396 of 2007*. Judge Rodrigo Escobar Gil. Confirmed by *Judgement C-616 of 2014*. Judge Jorge Ignacio Pretelt Chaljub
[3] Constitutional Court of Colombia. *Judgment C-186 of 2008*. Judge Nilson Pinilla Pinilla; and *Judgment C-067 of 2021*. Judge Gloria Stella Ortiz Delgado

the Colombian society in criminal proceedings? can it also invoke this right for its benefit?

Based on that consideration, this research will focus only on one of those topics and exclusively on one aspect within the chosen topic. The selected field is the "elements" of EA and the concrete component that this research will deal with is the one called by the ECtHR as "disadvantage", which answers the question of when it can be understood that EA has been infringed.

The reason why of choosing "disadvantage" as the focus of this study is as simple as powerful: it is the core of EA; it goes to its heart. The concept of "disadvantage" is probably the most important concept of EA having in mind that it assesses and determines the respect or compliance with the procedural equality guarantee and establishes the bottom line that cannot be trespassed by anyone. In other words, "disadvantage" is the key concept to determine whether there is EA in criminal proceedings[4].

This concept is of such a great importance that, as it goes to the procedural equality's core, it contributes to reveal the essence and dynamics of EA, which, in turn, allows to discern and clarify other of its elements, such as the concept of "arms". Even more, it can help to make clear other huge topics, like EA's scope. Nevertheless, as anticipated, this would go beyond the limits of this dissertation, which could only serve as a starting point for future research projects on these matters.

Given its relevance, it is possible to say that clearly knowing when EA is violated and making clear the bottom line of EA compliance will allow to have, to some extent, clearer, steadier, predictable, egalitarian and, even, fairer decisions on this regard.

Now, the question is, how to shed a light on the core concept of "disadvantage"? There are several paths to reach that goal and, once again, the art of choosing becomes relevant and leads us to the methodology section.

[4] Regarding "disadvantage" as the most important element of EA, see Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. Cambridge, Intersentia ltd, 2011. P. 4

IV. METHODOLOGY

General considerations on the research methods

Firstly, this work can be characterized as a philosophical-legal research due to the fact that it inquires into a foundational principle that helps to organize the Colombian criminal procedure and to give sense to its rules and values.

Secondly, as anticipated, this research will study only one element of the whole right to EA, therefore, an analytical and abstract method will be used since it is going to break down the study object and to isolate its essential qualities and elements in order to separately study one of them and to rebuild its relationships with the whole category, which, in turn, permits to reconstruct the object of study trough a synthetic process.

Thirdly, considering that the question that will be answered with this research is how the concept of disadvantage can be understood and applied, the methodology that will be used is also normative.

Fourthly, given that there are not many general and explicit rules to determine a breach of EA within the Colombian criminal proceedings, an inductive method will be used in order to get two objectives: reaching a better understanding of the concept of "disadvantage" by identifying key factors and reasons that decide EA compliance and from them, guidelines that explain how to apply the concept of "disadvantage" will be drawn.

Finally, it should be noted that as the reference to establish the proposal of understanding and application of "disadvantage" in Colombian criminal proceedings is the German and the ECtHR's case law, the use of a functional comparative method becomes mandatory.

Concrete methodology

To begin with, given that the Colombian jurisprudence has not been completely clear and steady, it is necessary to establish its state of the art, that is to say, the Constitutional and Supreme Court of Justice's current understanding and application of "disadvantage" in

criminal proceedings. In this regard, it is crucial to highlight that despite the influence of the ECtHR on the Colombian case law, the latter has *explicitly* used the concept of "disadvantage" only a couple of times, notwithstanding it will be utilized as a reference due to the fact that it answers the question of when it is understood that EA is broken.

Considering that there is no single judgment, nor scholar research, that responses that question in depth, the case law will be presented in an organized way and after that it will be analyzed by studying the factors and reasons that have led both Courts to determine whether an EA breach has taken place. This examination will reveal the key and essential features that constitutes an EA violation for the Colombian Courts. Those crucial aspects, in turn, will allow to draw guidelines to establish an EA violation in future cases and will constitute the basis for evaluation from the perspective of the ECtHR.

So far, this study will already be useful given that, for the first time within the context of Colombian criminal proceedings, this topic will be exposed and deeply studied, therefore, reaching more clarity and certainty on this matter.

Notwithstanding, organizing, exposing, and analyzing the current state of the art of "disadvantage" in Colombian criminal proceedings is not enough to shed a light as useful as possible. Hence, it needs to be complemented. How to do it?

Before answering that question, it is necessary to point out that since the Colombian jurisprudence has been unclear and contradictory in some fundamental elements of EA, it is compulsory to clarify the concept of "disadvantage" from the beginning, from the bottom line. Only by having robust foundations, a further, coherent, and stable development would be possible.

Taking into consideration the foregoing statement, one way to complement the Colombian development is by "standing on the shoulders of giants" and looking at others' experiences and traveled paths. Concretely, in this research we will stand on the shoulders of the ECtHR and the German Highest Courts due to the following reasons.

Firstly, it is important to notice that the ECtHR is widely known for having established the most developed and effective international legal regime for the protection of human

rights[5]. Particularly, from the HR perspective, the ECtHR has the most sophisticated and detailed case law on EA[6], therefore, its reference is not only strategic, but mandatory. In this regard, it is essential to point out that the Strasbourg case law has had a long tradition on this matter since the concept of EA in this context was introduced for the first time in 1962[7]. This tradition, naturally, has allowed this Court to deal with a wide range of cases and, therefore, to create, to some extent, a structured doctrine.

Besides that, something that deserves to be underscored is the strength of the ECtHR's theory on EA. It has influenced not only European and Latin-American domestic jurisdictions, but also international[8] and other regional Courts[9]. Particularly, it should be noted that, regarding EA, the Colombian case law has been clearly and directly influenced by the Strasbourg Court, more than by any other judicial body.

Moreover, the ECtHR is an appropriate reference for the main objective of this study since it sets minimum human rights compliance standards. The Human Rights case law is an authoritative indication of the bottom line, which marks the borderline between permissible and impermissible[10] and from which a coherent doctrine can subsequently be elaborated.

Now, it should not be forgotten that this Court has carried out that task while being sensitive to procedural diversity and without being guided by a particular model of criminal procedure[11]. The Court does not approach to procedural guarantees presuming that the common law understanding of fair trial is better than the civil law one. Both can comply with those guarantees[12].

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[5] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 61, FN 417.
[6] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 6
[7] European Commission of Human Rights. Ofner and Hopfinger v. Austria. Application Nº. 524/59 and 617/59. Report of 23 November 1962. P. 680
[8] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 6
[9] Masha Fedorova. *The Principle of Equality of Arms in International Criminal Proceedings*. Cambridge, Intersentia, 2012. P. 38
[10] Masha Fedorova. *The Principle of Equality of Arms in International Criminal Proceedings*. Cambridge, Intersentia, 2012. P. 29
[11] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 3
[12] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 66

In this way, the interpretation of EA in Human Rights context does not depend on the domestic criminal procedure models, however, the application of this principle can only be understood having regard to the contextual features of one particular model. Also, it should be born in mind that by providing a general minimum understanding of the values and norms involved, the HR perspective can only guide the "disadvantage" concept application *in concreto*[13]. Because of that, the Court offers an open and evolutionary interpretation, which will depend on the national criminal procedure systems[14], hence, allowing for subsequent developments in any kind of domestic jurisdiction, as could be the Colombian one.

Having the bottom line regarding EA compliance will allow to assess the current state of the Colombian jurisprudence and to establish the starting point from which it can build a stronger and more coherent and stable development of "disadvantage". This benefits, in turn, will permit the Colombian jurisprudence to understand, clarify, amend, and develop its own concept of "disadvantage".

Now, it is important to highlight the reasons why of including the German experience as a reference for this study.

To begin with, it is significant to notice that the development of "disadvantage" from the Human Rights perspective needs to be complemented with the Criminal Process angle in order to get a panorama as complete as possible on this matter. Since the EA development within the ECtHR only shows minimum compliance standards, a concrete and richer experience can be found in a domestic jurisdiction, like the German one.

Besides that, choosing Germany as a case of study will allow to reach the main objective of this research in a more coherent way due to the fact that it is directly influenced by the Strasbourg Court's doctrine.

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[13] Masha Fedorova. *The Principle of Equality of Arms in International Criminal Proceedings*. Cambridge, Intersentia, 2012. P. 18

[14] Omkar Sidhu. *The concept of equality of arms in criminal proceedings under article 6 of the European Convention of Human Rights*. P. 84

Additionally, it should be noted that the concept of *Waffengleichheit* in Germany turned up for the first time in the mid 19th century during the discussions around the fundamental German criminal process reform[15]. This long tradition has made it possible to this country to deal with the principle under study in a great number of cases, which could have allowed a higher level of development on this regard, making its experience relevant and enriching.

Another crucial reason for choosing the German jurisdiction for this study is the common grounds between the German and the Colombian Criminal Procedure. Naturally, both systems differ in several aspects, but they also share major topics that permit a useful and functional comparative study. For example, they belong to the so-called civil law family; they both have inquisitorial roots and are governed by the accusatory principle; and their criminal proceedings are mixed and do not correspond to the traditional ideal types, namely, inquisitorial or adversarial. Even, and being more specific, it is possible to notice that both Criminal Procedures share important areas where EA plays a relevant role, for instance, the active Victim Participation[16], which gives room for the tension between the aggrieved and the accused rights.

Last but not least, there is also an important practical reason that justify choosing Germany as a case of study, that is, the fact that this research is being carried out in this country. This circumstance is particularly relevant since it allows to get an immersive experience and to know the social, legal, economic, and cultural context where the development of EA has taken place. In this way, the comparison will be much more fruitful since it will be viable to understand, in a deeper way, the concept of "disadvantage" in action and not only on black letter.

Considering what has been said, the current German and ECtHR's state of the art regarding "disadvantage" will be presented. The factors and reasons taken into account to declare an EA breach will be exposed and deeply analyzed. In this manner, this study

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[15] Julius Glaser. *Handbuch des Strafprozesses. Part I*. Leipzig, Duncker & Humblot. 1883. Cited in Almut Sandermann. *Waffengleichheit im Strafprozeß, Zu den Rechtlichen Grundlagen dieses Rechtsinstituts* (Aku-Fotodruck Agentur 5). Inaugural Dissertation, University of Cologne. 1975

[16] A topic that has taken a huge place within the Colombian jurisprudence on EA, as will be seen in this research.

will lead to answer the question of how the concept of disadvantage has been understood within the ECtHR and the German highest courts.

After that, the already known guidelines to determine an EA violation will be studied, which will answer the question of how the concept of disadvantage has been applied within the Courts under examination. Additionally, if it is possible to establish parameters that have not been exposed by these tribunals, it will be done with the aim of offering more tools that can guide the Colombian highest courts when dealing with the concept of "disadvantage".

Finally, a comparison between the three developments of "disadvantage" will be carried out and its similarities and differences will be exposed and analyzed. From that study, it will be determined what the Colombian case law needs to learn, change, maintain and develop in relation to the understanding and application of the *sub examine* concept.

V. OBJECTIVES

GENERAL OBJECTIVE

To propose an understanding and application of the "disadvantage" concept in Colombian criminal proceedings on the basis of the German and the ECtHR's case law.

SPECIFIC OBJECTIVES

1. To establish the state of the art regarding the concept of equality of arms, especially "disadvantage", in the case law of the Colombian Constitutional Court and Supreme Court of Justice in order to identify and analyze the key factors and reasons that have led these Courts to determine whether there is an EA breach within the cases presented to them. Based on the previous exercise, the current understanding of "disadvantage" in the Constitutional and Supreme Court of Justice of Colombia and the already known guidelines that can lead to determine an EA violation according to

them will be presented. Additionally, and where possible, other guidelines that can lead to determine an EA violation in these Courts will be inducted.

2. To establish the state of the art regarding the concept of "disadvantage" in the ECtHR and the Germany's highest courts in order to identify and analyze the key factors and reasons that have led these Courts to determine whether there is an EA breach within the cases presented to them. Based on the previous exercise, the current understanding of "disadvantage" and the already known guidelines that can lead to determine an EA violation according to the ECtHR, the Federal Constitutional Court and Federal Court of Justice of Germany will be presented. Additionally, and where possible, other guidelines that can lead to determine an EA violation in these Courts will be inducted.

3. To functionally compare the Colombian, the German and the ECtHR's current understanding and application of "disadvantage" in order to propose what Colombia can learn, change, maintain, and develop regarding the understanding and application of this concept.

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