

The principle of equality of arms in civil proceedings

[Das Gebot der zivilprozessualen Waffengleichheit – grundrechtsgleiches Recht, Prozessmaxime, Allzweckwaffe?]

– Abstract –

In German law, the concept of ‘equality of arms’ in civil proceedings is widely accepted. Yet, more than 60 years after it was first explicitly mentioned by the dean of Hamburg University, *Eduard Boetticher*, its scope of application is still vague and in need of further clarification. While the basic idea that both parties to a civil proceeding should be able to fight each other with equal means and that every party should have the opportunity to present their case to the court in circumstances which do not place them at a substantial disadvantage vis-à-vis the opposing party seems to be common sense, the general definition offers a broad spectrum of possible interpretations with regard to various details. The European Court of Human Rights views the principle of equality of arms as a part of the guarantee to a fair trial according to Article 6 of the European Convention on Human Rights, while a conceptual delineation of the guarantees provided by the German Basic Law has not been reached yet. Consequently, the German Federal Constitutional Court has been hesitant to name the principle of equality of arms as the decisive standard of review. To this day, only four cases have been decided in which the concept played a relevant role. However, it is frequently used by courts and lawyers as a judicial auxiliary argument to emphasize the relevant standpoint although its persuasiveness highly depends on whether the judgement is overall found to be correct.

The paper discusses the meaning of the equality of arms principle in Germany. It is composed of seven parts: Closer analysis begins in the second part, starting with a look at the evolution of the German Code of Civil Procedure in which the discourse on equality of arms is embedded. In the third part, the efforts of courts and law reviews to provide an abstract description of the principle and its derivation are presented, before the concrete manifestations attributed to it are examined in detail. The extensive casuistry includes

questions of equality of access to the courts on the one hand, and concerns issues of intra-procedural equality of participation on the other. The fourth section shows why, despite various attempts, it has not yet been possible to define the content of equality of arms and to distinguish it from other constitutional rights: when seen as a fundamental right, it has no original scope of application. From the perspective of constitutional law, it is a vague generic term, which is redundant in the light of the differentiated catalog of German Basic Law. Since it has no properties and functions typically assigned to procedural maxims, it is also hard to qualify as a procedural maxim. The author decisively contradicts its frequent use as a ‘universal weapon’ in the sense of a procedural general clause. The fifth part of this paper is devoted to a detailed analysis of issues associated with the principle of equality of arms in selected areas of law. Here, the procedural and evidentiary peculiarities in medical malpractice proceedings are presented and compared with several procedural aspects in construction, tenancy and traffic law in order to reveal differences and similarities with regard to their central patterns of justification. This confirms that equality of arms as a term is hardly meaningful, but that more relevant patterns of reasoning are regularly available to achieve the results based upon it, which are then presented in the sixth part. Chapter seven summarizes the main findings of this paper.