THE PRINCIPAL OF ADVERSARIAL PROCEDURE IN CRIMINAL PROCEEDINGS IN THE LIGHT OF EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW*

Avrupa İnsan Hakları Mahkemesi İçtihatları Işığında Ceza Muhakemesinde Çelişmeli Muhakeme İlkesi

Assoc. Prof. Dr. Hakan KARAKEHYA**

ABSTRACT

Modern criminal procedure adopts the realization of an adversarial procedure between the equally armed parties as the most effective method in finding the material fact. Therefore, the predominant method in modern criminal procedure is the adversarial procedure method. The appropriate way to realize the adversarial procedure can be possible as a result of evenly armament of claimant and defendant.

In this study, the principal of adversarial procedure, predominant in modern criminal trial, will be examined in details in light of the arrangements of European Convention on Human Rights (ECHR) and European Court of Human Rights (ECtHR) decisions. The basic method to be employed when discussing the subject is to get use of differing opinions on doctrine and ECtHR case-law.

Keywords: Criminal Procedure, Adversarial Procedure, Equality of Arms, Right to a Fair Trial, European Convention on Human Rights

ÖZET

Modern ceza muhakemesi, maddi gerçeği en yalın haliyle ortaya koyabilmek bakımından, eşit olarak silahlandırılmış taraflar arasında çelişmeli bir muhakeme gerçekleştirilmesi esasını kabul etmiştir. Bu bağlamda modern ceza muhakemesine hakim olan yöntem çelişmeli muhakeme yöntemidir. Çelişmeli bir muhakeme gerçekleştirebilmek bakımından en önemli gereklerden birisi ise iddia ve savunma makamlarının eşit olarak silahlandırılmış olmasıdır.

Bu çalışmada, modern ceza muhakemesine hakim olan çelişmeli muhakeme ilkesi Avrupa İnsan Hakları Sözleşmesindeki (AİHS'deki) düzenlemeler ve Avrupa İnsan Hakları Mahkemesi (AİHM) kararları ışığında incelenecektir. Doktrindeki farklı görüşlerden ve AİHM içtihatlarından faydalanmak suretiyle görüşlerimizin ortaya konulması ise çalışmada kullanılan temel yöntemi oluşturmaktadır.

Anahtar Kelimeler: Ceza Muhakemesi, Çelişmeli Muhakeme, Silahların Eşitliği, Adil Yargılanma Hakkı, Avrupa İnsan Hakları Sözleşmesi

I. INTRODUCTION

One of the most fundamental problems in the criminal procedure is to clarify how the event in dispute realized. Indeed, the criminal dispute will be resolved and law will be established by this means only.[1] In this context, finding in which manner the events took place emerges as one of the main goals of

* This study was supported by Anadolu University Scientific Research Projects Commission under the grant no: 1505E441

** Anadolu University Faculty of Law, Department of Criminal Law and Criminal Procedures Law, 26470 Eskişehir / Turkey, Email: hkarakehya@anadolu.edu.tr

1 N. Centel and H. Zafer, *Ceza Muhakemesi Hukuku,* Beta Yayınevi, İstanbul 2014, p.3

the criminal proceedings.[2] Since the commencement of the litigation activities carried out in history, many different methods have been used in order to clarify in which manner the events in dispute realized. However, today's modern criminal procedure, bearing civilization accumulation and experience of history in mind, accepts the best method as the realisation of an adversarial procedural trial between the equally armed (authorized) parties.[3]

At the end of criminal disputes, there is an important benefit for the society in the punishment of the criminals, as well as the release of the innocents and excessive punishment over the retribution of the criminals. If the judgment is performed among equally armed parties in an adversarial procedural way, each side will submit their own arguments and evidence to justify their legitimacy and as a result of the adversarial arguments the conflict, the material fact will be revealed in the most appropriate form possible.

With the thought that tackling adversarial procedure which is very important with respect to criminal procedure as explained above, in light of the European Court of Human Rights (ECtHR) would be beneficial in terms of contributing to the literature, we decided to carry out this study. Presenting our views in a cause-effect relationship by benefiting from ECtHR decisions and different views in doctrine constitute our main working method.

II. CONCEPT OF "ADVERSARIAL PROCEDURE"

Criminal procedure starts with a suspicion and this suspicion is tried to be overcome in concurrence until the end of the trial. The characteristic of judgment in procedural law is its adjudication collectively. The method for making collective adjudication is adversarial method, which enables expressing opposing thoughts of those participating in the proceedings, thus allowing them to learn each other's thoughts and think together. Contrary to popular belief, adversary is not a dissention, a struggle or a contradiction, it is an idea exchange. In other words, it is demonstration of opposite opinions by two or more persons.[4]

In this respect, adversary in criminal procedures arises between powers occupying claimant, defendant and judicial seats. The prosecution, in criminal cases, presents imputation which constitutes thesis, the defence forms the antithesis by pleading, and the judicial authorities attain the syntheses, or in other words the truth and the verdict, with the collision of that thesis and antithesis.[5]

---

2 Y. Ünver and H. Hakeri, *Ceza Muhakemesi Hukuku*, Adalet Yayınevi, Ankara 2014, p.8

3 H. Karakehya, *Ceza Muhakemesi Hukuku*, Savaş Yayınevi, Ankara 2015, p.12

4 N. Kunter, F. Yenisey and A. Nuhoğlu, *Ceza Muhakemesi Hukuku,* Arıkan Yayınevi, İstanbul 2006, p.39

5 N. Toroslu and M. Feyzioğlu, *Ceza Muhakemesi Hukuku,* Savaş Yayınevi, Ankara 2015, p.21

Adversarial procedure is based on the following principle: *The most complete form of truth often comes to light as a result of the tension generated by those equally armed parties bringing forward their most powerful positions aggressively.* As stated by Lord Chancellor Eldon, the truth will be best discovered as a result of effective and harsh statements of both sides. A judgment where adversarial procedure is used in finding the truth is one of the most important requirement for a fair trial. In Polk Country & Dodson case, in U.S.A., the court in its verdict emphasized that public interest in criminal justice system could only be achieved by the correct implementation of the principal of adversarial procedure.[6] Indeed, reaching the truth with one-sided thinking will not be possible.[7] In addition, acceptance of the verdict provided at the end of a trial can only be possible as a result of expression of opposing thoughts.[8]

Many rights related to a judgment are closely associated with the adversarial procedure method. For instance, the principle of impunity of the relation between the accused and the counsel arised as a requirement of the right to access to counsel, serves for an efficient defence through guaranteeing the relation between the accused and the counsel based on reliability. Presence of a well-established defence against a well-established claimant serves for the adversarial procedure.[9]

III. HISTORICAL ROOTS OF ADVERSARIAL PROCEDURE PRINCIPAL

Fundamentals of adversarial procedure are based on the judgment of the duel conducted in ancient times. Indeed, the method of physical duel, from a formal point of view, is a kind of an adversarial procedure system just as the presidential elections, as in football matches and as in many other similar incidents. In all these events a competition which have affect to its outcome is in question. Although all these activities are basically based on the same logic, they may be classified by the structural form of competition.[10] During the duel period starting with both sides' sayings, "You judges, just hear that; I have not eaten or drunk anything today, I don't carry any bone, stone, grass, nor any magic, sorcery or incantation... ", accuser and accused used to wear their armour, ride the best horses, attack each other by holding their spears

6 J. S. Silver, Equality of Arms and the Adversarial Process: A New Constitutional Right, *Wisconsin Law Review* 1990, p.1035

7 Toroslu and Feyzioğlu, p.20

8 S. Keyman, *Ceza Muhakemesinde Savcılık,* Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1970, p.24

9 Silver, p.1036

10 G. Goodpaster, On the Theory of American Adversary Criminal Trial, *The Journal of Criminal Law & Criminology*, Vol. 78, No:1, 1987, p.119

high and fight for their lives. The duel used to start at dawn and usually lasted until one of the parties died. While the verdict was announced by the judges present at the arena, the loser was called as the horrible word of *craven* (a word of disgrace and obloquy).

In dueling, it was believed that divine justice would guarantee the punishment of the lying party. In addition, being subject to harsh rules also prevented either of the parties to gain advantage in terms of any of the armour or weapon. Each of those dueling used to wear a coat of mail, put only a pair of sandals, their legs below the knees, heads and arms up to the elbow would be bare open. The weapons used were only a spear or a 1.5 cubits long piercing and a square shield made of leather.[11]

The procedures applied as dueling during ancient time common law system is similar to today's adversarial procedure where search for the truth is sought. In this regard, it can be said that today's morally enlightened criminal procedures eventually have replaced the duel. The current criminal justice system (especially in the Anglo-Saxon system), is based on the assumption that the truth will arise as a result of fierce struggle between the parties.[12] The concept of contradiction does not have a concrete meaning. There isn't any type of general procedure related to adversarial procedure system. Various forms of adversarial procedure have been used by various societies. Adversarial procedure system was used in Ancient Greece and Rome; however these are quite different from the systems being used today.[13]

IV. THE PRINCIPAL OF ADVERSARIAL PROCEDURE IN EUROPEAN CONVENTION ON HUMAN RIGHTS

Adversarial procedure system has many determinant features. The most obvious ones of these features can be listed as the roles of judges and other decision-making bodies in the proceedings, parties or their representatives' role in controlling the presentations, reaching style in reaching the material fact and the parties' responsibilities against each other.[14]

As consistently revealed by the Court's case law, having adversarial procedure and equality of arms between the parties are the two most important requirements for a fair trial. Although these two principles express different concepts from one another, they are closely related.[15] While an exact

11 Silver, p.1007
12 Silver, p.1009
13 Goodpaster, p.119
14 Goodpaster, p.119
15 K. Ambos, Avrupa İnsan Hakları Sözleşmesi ve Yargılama Hakları - Silahların Eşitliği, Çelişmeli Önsoruşturma ve AİHS m.6, (Translated by Y. Ünver), *Adil Yargılanma Hakkı ve Ceza Hukuku*, Seçkin Yayınevi, Ankara 2004, p.27

adversarial procedure cannot be realised without equal weapons, at the same time having equal weapons without adversarial procedure has no meaning. A trial where one of the parties has become more advantageous to the other party, an adversary has not been possible. This situation is similar to giving weapons only to one side and inviting both to a duelling. As such a struggle between those two persons cannot constitute a duel, similarly an adversary situation will not be realised in a trial where one of the parties is granted an advantageous position. However, the requirements of an adversarial trial may not be fully achieved in every situation where equality between the parties is ensured. Indeed, equality exists between persons who are not given necessary defence and claim opportunities. But an adversarial situation between the parties cannot be expected.[16] Therefore, a contrariety adversarial procedure principal may be possible in some cases where the equality of arms is not violated.

In this regard, in a study related to adversarial procedure, it is essential to discuss the equality of arms to certain extent. Hence the principle of equality of arms will be discussed further below under Article 4. Due to the close relationship between these two terms, ECtHR also discuss the principles of equality of arms and adversarial procedure together and sometimes use the terms interchangeably.

ECtHR has derived the right to equality of arms and adversarial procedure from the general rule of paragraph 1 of Article 6, "right to a fair trial". A general and clear statement relating to these two rights are not included in Article 6. However, the right "*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*" as openly defined in Article 6 paragraph 3 (d) is a basic reflection of the principle of equality of arms.[17] But equality of arms is not only consisted of present the witnesses at the hearing and ask questions to other party's witnesses, but it rather contains much broader aspects. According to one view, the principles relating to equality of arms and adversarial procedure are the most important rights put forward from the general principles by bodies of Treaty.[18]

In legal doctrine, generally, adversarial procedure is considered as if it were a requirement of equality of arms and in such statements can also be found in ECtHR jurisprudence.[19] However, in our opinion, this assumption is

16 Silver, p.1007

17 C. J. M. Safferling, Audiatur et altera pars - die prozessuale Waffengleichheit als Prozessprinzip?, *NStZ* Heft 4, 2004, p.182

18 R. Esser, *Auf dem Weg zu einem europäischen Strafverfahrenrecht*, De Gruyter Rechtswissenschaften Verlags, Berlin 2002, p.401

19 See S. İnceoğlu, İnsan *Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı,* Beta Yayınevi, İstanbul 2002, p.201; Esser, p.400

not true. If there is a need to admit one of these two terms in broader terms, this shall be adversarial procedure. Because equality of arms is a principle accepted for a fair and necessary adversary.[20] None the less, assuming that the adversarial procedure is accepted in order to ensure the equality of arms is contrary both to the rules of logic and historical development, unveiling the two terms, mentioned above briefly.

The principle of adversarial procedure serves the parties the recognition of the right to be informed about the evidence and opinions presented during the trial in order to influence the decision of the court and the right to mutually comment on them (Ruiz-Mateos v. Spain).[21] As stated above, in some cases where equality of arms is granted, violation of principle of adversary may be possible. In its Niderost-Huber v. Switzerland ruling, ECtHR did not find, the absence of informing both parties of dispute about the writing which includes its opinions and sent by the first instance court to the Federal Court, contrary to the principle of equality of arms. Indeed, both of the parties were not informed of the document in question. Although the Court did not find a violation in terms of equality of arms, it ruled that the principle of adversarial procedure was violated. Because, in order to provide a complete adversarial procedure, presenting important instruments to the parties that are important for the judgment is a necessity (Niderost-Huber v. Switzerland).

In order to ensure a complete adversary, inquiring each other's witnesses is very important. In this respect, the defendant's right to ask questions to prosecution witnesses, as guaranteed by Article 6.3.d., is an important reflection of adversarial procedure. However, this shall not mean that only being able to ask questions to witnesses is sufficient for adversarial procedure. Contrarily, all the evidence other than the witnesses should be discussed at the courtroom and the parties should be able to state their views on the evidence freely. If the defendant's or his lawyer's right to make statements on any evidence is not respected, since this will cause the breach of principle of adversarial procedure and the restriction of the defence rights, it will constitute a violation of the right to a fair trial.

In this context, an important issue that should be addressed is related to the testimony of the witnesses who do not speak the language spoken at the trial. In such cases, in order to enable the court and the parties to understand what the witness says, to ask him questions, to test the accuracy of what he says, and thus to adverse to each other, the assistance of an interpreter should be sought. In order to consider the statements of the witness as evidence, his statements should be understandable. Otherwise, it is obvious that the

[20] Silver, p.1037
[21] İnceoğlu, p.241

principle of adversarial procedure would be violated. Although some authors suggest that such cases should be considered in the context of the right to have an interpreter, in our opinion, assigning an interpreter shall be considered in the context of adversarial procedure. Hereby, the content of an evidence is tried to be understood, accused person's benefitting from an interpreter is not aimed. In this context, it is proper to consider the understanding the content of a statement within the principle of adversarial procedure.[22]

ECtHR considers the States reasonable in adopting various methods to fulfil the requirement of adversarial procedure. Accordingly, while adversarial procedure system can be based on Anglo-Saxon law, which constitutes its main source, it can also be based on ex officio investigation accepted by Continental European law.[23] However, whichever method is adopted, the other party shall be able to learn the opinions in the file and to comment on them (Brandstetter v. Austria).[24]

In the case of Göç v. Turkey, ECtHR has discussed the role of Principal Public Prosecutor at the Court of Cassation with regard to principle of adversarial procedure. In this regard, the role of the Principal Public Prosecutor is to advise on the merits of the appeals and in this way try to influence the decision. When considering the nature of the comments, that the accused was not given an opportunity to make written observations was considered a violation of adversarial procedure (Göç / Türkiye).

Although the treaty bodies, in their earlier decisions, did not consider the content of the opinions of which the defence was not aware of, recently began to decide to the contrary. Accordingly, at a hearing, alleging thoughts of which the defence is not aware and whether the court has considered these thoughts or not while making the decision, has no importance. Evaluating if something presented to the court is worth to react or not is the work of defence. In this context, presenting something to the court without the knowledge of the defence will in any case undermine the principle of adversarial procedure.[25]

V. THE PRINCIPAL OF EQUALITY OF WEAPONS AS A RESULT OF ADVERSARIAL PROCEDURE

V.1. General

Effective realization of adversarial procedure can only be possible with the implementation of equality of arms principle. In this regard, both sides should

22 D. Tezcan, Tercümandan Faydalanma Hakkı, *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Mecmuası,* No.1-4. 1997, p.198
23 C. Roxin, *Strafverfahrensrecht,* C.H. Beck, München 1998, p.116
24 İnceoğlu, p.243
25 İnceoğlu, p.243

somehow be in an equal position and at the court they should have the opportunity to take forward the aspects which are advantageous for them. This principle of equality, which is as important as other guarantees included within the principle of a fair trial, a general and therefore to some extent indefinite term, should be protected.[26]

In German teaching, both in court decisions and in doctrine, the principle of equality of arms is respected pursuant to right to a fair trial. There have been some criticisms towards this principle. The rationale for this critique is basically as follows: In Continental European legal system including German system, there is no adversarial system; but rather judgment is carried out by judges and prosecutors who are state bodies. In this respect, this so-called principle which is of different nature in terms of Continental European legal system is a kind of self-deception that has nothing to do with the real criminal procedure.[27] However, despite these minor criticisms, the majority considers the principle of equality of arms as one of the indispensable requirement for a fair trial.

What does the principle of equality of arms require? In other words, what is supposed to be equal? First of all, this principle does not mean that persons in both sides, especially the defendant and the prosecutor, should have the equal ability and experience for the judgment process. Besides, this principle does not point out that the prosecutor and the defendant shall exercise a standard performance and equal effect beyond the minimum level required by law. According to this principle, there should be equality between those dueling at the court; in other words, both parties should be given equal rights allowing them to prepare and submit their thesis. In a criminal disputes settled by a duel, supplying one side with a spear and a shield and the other side with a small knife would not be fair. In this respect, the principle of equality of arms, in terms of the investigation of truth and realization of justice is of vital importance.[28]

It should also be noted that, the understanding of adversarial procedure system in Continental Europe and the Anglo-Saxon law system (kontradiktorisches modell) is different. While there is a conformity in issues related to the realization of adversary, such as easily asserting their evidence at the judgment, being informed on issues related to them, having the right to ask questions to other party's witnesses, unlike the understanding in Continental Europe, the American system, the position of the judge (and the jury in the jury trial) more like a referee and not interfering to the adversarial

[26] Silver, p.1036
[27] V. Krey, *Strafverfahrensrecht,* Verlag W. Kohlhammer, Stuttgart, Berlin, Köln 1990, p.93
[28] Silver, p.1036

trial between the parties, each of the parties questioning their own witnesses is considered as the most important requirement for an adversarial procedure.[29] In this regard, while in the Anglo-Saxon criminal judgement the method of contradiction emerges as an adversarial procedure, the European legal system, though it allows an adversary between the parties, does not convert the judgment to "adversary" procedure.[30]

The principle of equality of arms in the context of the ECHR has first been applied in Neumeister v. Austria case and has been recognized as one of the most important requirements of a fair trial since then.[31] The principle of equality of arms, especially in criminal cases, assures that the defence have the reasonable opportunity to prepare and submit its thesis equally with the prosecution.[32]

Every procedure in the context of the judgment, subject to the characteristic of the case, is handled in terms of the principle of equality of arms by ECHR bodies. In other words, by considering its properties, equality of arms is inspected in every single case and the inequality that caused the application is evaluated whether it resulted an unfair trial or not.[33] The earlier understanding of formal procedural equality between the accused and the prosecutor has been further developed in the mid-80s. As emphasized in the decision Borgers v. Belgium, in line with the modern understanding, this principal represents one being able to express events to the other side without putting himself under conditions unfavourable for him (Borgers v. Belgium).[34]

The disagreement of the Parties with each other on equal terms, reflects the part of the Anglo-Saxon adversarial judgment. Therefore, it is a fact that in some cases it is difficult to match these principles with Continental European law. Actually, due to historical reasons, in a judgment, the prosecutor always has greater powers in Continental European law when compared to the defence.[35] In this respect, in Continental European law, the principle of equality of arms C is interpreted narrowly. Within the context of this principle, during the investigation phase, variations between the prosecutor powers and suspect's rights resulting from their judgment roles cannot be constituted against the principle. However, except as required by the judgment roles, putting the suspect into a negative position against the prosecution will constitute a

29 K. Volk, *Grundkurs StPO,* C.H. Beck Verlag, München 2005, p.95; Roxin, p.114
30 Roxin, p.116
31 İnceoğlu, p.212
32 Safferling, p.182
33 İnceoğlu, p.213
34 Ambos, p.24
35 F. C. Schroeder, Ceza Muhakemesinde Fair Trial İlkesi, *Ceza Muhakemesi Hukukunda Fair Trial,* İstanbul 1999, p.96

breach of the principle of equality of arms. During the trial, it is necessary to ensure a proper balance between the rights granted to the prosecution and the defence. Because, beginning with this period, the prosecutor replaces his managing position to an assertor position which clearly shows his role being a party to the legal proceedings. For example, if with the opening of a criminal case a restriction was brought to the defence on the examination of a file, all these limitations will be removed automatically.[36]

ECtHR also approaches to such situations pragmatically and contemplates if the procedural inequalities cause an unfair judgment or not. If the inequality in question does not cause the defence side into an injustice situation by no means, the Court rules that the right to a fair trial has not been violated (Kremzov v. Austria).[37]

In order to have a fair equality between the parties of the dispute, the parties should have the equal opportunities (powers) to access the documents and information relating to the proceedings of the case. However, it should not be forgotten that, from the equality of arms perspective, it is important that one of the parties does not hold an advantage against the other. If both sides are in an equal position in terms of reaching a document, this case does not constitute a violation of the equality of arms. However, it may violate the sub equitable rights under right to a fair trial. The Court, at its Feldbrugg v. Netherlands decision, has not seen any irregularities to the principle of equality of arms, where the applicant could not reach the decision of the official expert in a dispute. Because the other side of the case was in the same situation. If expert opinion were against the other party, the other party would not have the opportunity to see and comment on the report as well. However, although the Court had not seen a violation in terms of equality of arms in the dispute, it ruled that the right related to the general rule was violated since full participation of the parties in the case had not been provided (Feldbrugge v. Holland).

Although not clearly stated in Article 6, another important right arising in the context of principal of equality of arms is right to present an evidence being able to express opinion about the opposing party's evidence. This right, in relation to the witnesses, has been expressly guaranteed in paragraph, 6.3.(d) and this subparagraph, although not exactly, is the most explicit arrangement that reveals the principal of equality of arms defined in Article 6. However, evidence is not made of witnesses only. Apart from this, there are also documental and indication evidence which are important in terms of

[36] Centel and Zafer, p.186
[37] İnceoğlu, p.227

proof and the powers of the accused to test the reliability of all these evidence is a result of the general principal, the right to a fair trial defined in Article 6.[38] Although, by analogy, the applicability of subparagraph (d) of paragraph 3 of Article 6 could be asserted for the other evidence, we have found studying it appropriate under the issues of adversarial procedure and equality of arms in terms of other evidence since the said article mentions about prosecution witnesses only. Indeed, the court refers to paragraph 1in terms of evidence other than the witnesses; but when dealing with the subject, it links up with paragraph 3 (d) (Bönish v. Austria).

The Convention bodies accept the authority of national courts in issues related to the assessment of the evidence and on decisions whether the evidence is relevant or not that, but considers this issue in cases when the rejection of the evidence have clearly resulted the judgment to an unfair situation (Barbera, Messeque and Jabordo v. Spain).

The right to substitute the evidence is of great importance in terms of the accused having equal opportunities against prosecution. Indeed, bringing different limitations to the accused while the prosecution has many easy possibilities in order to prove the guilt will prevent the duel conducted with equal weapons in the courtroom. Although the deterioration of this equation can exceptionally be seen reasonable in favour of the accused who is weaker before the government bodies, in no circumstances, the deterioration of this equation in his contrary could be accepted.

ECtHR has examined the issue in Bönish vs. Austria case in terms of designation of experts and accused's expert having equal rights with other experts at the hearing. In this case, while the expert designated by the court and expressed his opinion in favour of the indictment was permitted to be present in the hearing, the expert appointed by the accused party (technical advisor) was treated as a witness. ECtHR, after having examined the issue, ruled out that this practice was a violation of the right to a fair trial in the context of the damage to the principal of equality of arms (Bönish v. Austria).[39]

For submitting an evidence it should be noted that this right is not without any exceptions. Indeed, this right, legitimized so that the accused could make his defence as necessary and easily present the issues in his favour, can be abused such as presenting unnecessary evidence in order to prolong the trial. In this respect, ECtHR did not accept this as an absolute right. Every single evidence presented by the accused does not to be accepted; but improper restriction of this right constitutes a violation of a fair trial.

38 Ambos, p.37
39 Schroeder, p.100

Apart from presenting evidence, the accused should be given the opportunity to comment on the evidence brought by the other party and to reveal those which are in his favour. Because an evidence brought by the prosecution, when handled at different angles might lead to results in favour of the accused. The same is also true in terms of the evidence requested ex officio by the court.

Another point to be noted in this regard is that the main objective for the principal of equality of arms is to protect the accused and that sometimes having the equal arms might not be fair for him. Hence, in the duel conducted in judgment hall, sometimes exceptions may be made to the principal of equality of arms in favour of the accused. Indeed, while on one side there is a prosecutor who has received legal training, undergone a specific time during the internship and often with years of judgment experience, on the other side is the accused who has nothing to do with these qualifications. In this regard, equally arming these two people with different positions and expertise and not intervening in the duel may result negative consequences for the accused. Therefore, although his powers are not reminded to the prosecutor, reminding defendant's rights by the court is accepted as necessary for a fair judgment. In addition, the obligation of notification to remind his rights to the accused by prosecution and law enforcement officers during the investigation phase is included in the laws often.[40]

CONCLUSION

In procedural law a verdict is given collectively. The method of making collective provision is adversarial procedure method, which enables parties participating the judgment to mutually express their opinions, thus learn each other's thoughts and think together. Thus, the modern criminal judgment is realized by the mutual adversarial opinions between the equally armed parties. In this way, both the prosecution and the defence will contradict to each other by putting forward the evidence supporting their thesis and thus the occurrence of the event that caused the dispute will be revealed in the most accurate way.

Many rights related to judgment are closely associated with the principle of adversarial procedure. For instance, the right to access to counsel serves for the efficiency of the defence and thus, guarantees a well-established defence against the claimant and ensures that adversarial procedure is realized between equally armed parties.

Fundamentals of adversarial procedure are based on the judgment of the duel conducted in ancient times. In dueling, it was believed that divine

[40] Schroeder, p.104

justice would guarantee the punishment of the lying party. The procedures applied as dueling during ancient time common law system is similar to today's adversarial procedure where search for the truth is sought. In this regard, it wouldn't be wrong to say that today's morally enlightened criminal procedures eventually have replaced the duel.

As consistently revealed by the Court's case law, having adversarial procedure and equality of arms between the parties are the two most important requirements for a fair trial. According to some authors, the principles relating to equality of arms and adversarial procedure are the most important rights put forward from the general principles by bodies of the Treaty and recently is one of the most important contributions to the European law. Although these two principles express different concepts from one another, they are closely related. While an exact adversarial procedure cannot be realized without equal weapons, having equal weapons without adversarial procedure has no meaning. Due to the close relationship between these two terms, ECtHR also discuss the principles of equality of arms and adversarial procedure together and sometimes use the terms interchangeably.

REFERENCES

Ambos, Kai. (2004) Avrupa İnsan Hakları Sözleşmesi ve Yargılama Hakları - Silahların Eşitliği, Çelişmeli Önsoruşturma ve AİHS m.6, (Translated by Y. Ünver), *Adil Yargılanma Hakkı ve Ceza Hukuku*, Seçkin Yayınevi, Ankara.

Centel N. and Zafer, H. (2014) *Ceza Muhakemesi Hukuku,* Beta Yayınevi, İstanbul.

Esser, R. (2002) *Auf dem Weg zu einem europäischen Strafverfahrenrecht*, De Gruyter Rechtswissenschaften Verlags, Berlin.

Goodpaster, G. (1987) On the Theory of American Adversary Criminal Trial, *The Journal of Criminal Law & Criminology*, Vol. 78, No:1.

İnceoğlu, S. (2002) İnsan *Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı,* Beta Yayınevi, İstanbul.

Karakehya, H. (2015) *Ceza Muhakemesi Hukuku*, Savaş Yayınevi, Ankara.

Keyman, S. (1970) *Ceza Muhakemesinde Savcılık,* Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara.

Krey, V. *Strafverfahrensrecht,* Verlag W. Kohlhammer, Stuttgart, Berlin, Köln

Kunter, N., Yenisey, F. and Nuhoğlu, A. (2006) *Ceza Muhakemesi Hukuku,* Arıkan Yayınevi, İstanbul

Roxin, C. (1998) *Strafverfahrensrecht,* C.H. Beck, München.

Safferling, C. J. M. (2004) Audiatur et altera pars - die prozessuale Waffengleichheit als Prozessprinzip?, *NStZ* Heft 4.

Schroeder, F. C. (1999) Ceza Muhakemesinde Fair Trial İlkesi, *Ceza Muhakemesi Hukukunda Fair Trial,* İstanbul.

Silver, J. S. (1990) Equality of Arms and the Adversarial Process: A New Constitutional Right, *Wisconsin Law Review*.

Tezcan, D. (1997) Tercümandan Faydalanma Hakkı, *Ankara* Üniversitesi *Siyasal Bilgiler Fakültesi Mecmuası,* S.1-4.

Toroslu, N. and Feyzioğlu, M. (2015) *Ceza Muhakemesi Hukuku,* Savaş Yayınevi, Ankara.

Ünver, Y and Hakeri, H. (2014) *Ceza Muhakemesi Hukuku*, Adalet Yayınevi, Ankara

Volk, K. (2005) *Grundkurs StPO,* C.H. Beck Verlag, München.