PEER REVIEWED ARTICLE

An Evaluation Of Evidence Obtained Through Electronic Surveillance In Criminal Procedure And Its Status Within Disciplinary Law*

Assoc. Prof. Dr. Çetin ARSLAN**

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** Hacettepe University, Faculty of Law.

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ABSTRACT

Act(s) which constitute the basis of criminal procedure, may also result in a disciplinary obligation, due to the legal status of the Actor. When this occurs, then the question is: whether the evidence that is obtained through communication surveillance during criminal procedure, may it be admissable during disciplinary procedure, or not. If the answer is 'yes', then the next question is: under which conditions would it be possible to admit this evidence in? This is a subject of ongoing discussion. The reform that is made, regarding the illegal/inadmissible evidence within the criminal procedure law, is not completely reflected upon administrative law. For this reason, within disciplinary law, the evidence obtained through communication surveillance is admitted in without any restrictions. Scholars have not conducted much research on this subject. In this article we have examined this subject under the light of the Council of State and Court of Cassation's decisions; and we also have made some suggestions on this subject.

Keywords: *Communication Surveillance, illegality, crime, punishment, offense, disciplinary, evidence*

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I. Prologue

An act which would be the subject of investigation and/or prosecution, because it is claimed to be potential a crime, may concurrently be evaluated from the perspective of disciplinary law *(See: 657 numbered law, article 131)*. The act that is presumed to have been committed by the accused, due to his/her legal status in the social group he/she belongs to, may constitute a crime, both within the meaning of criminal law, and also within the meaning of disciplinary law. In this case, it may need to be established from the perspectives of both legal disciplines, whether the act has been committed or not. If it is established that the act has been committed, then it needs to be established what type of enforcement it would require. In principle, even though they are independent of each other, especially on the subjects of whether the crime has been committed or not; if it has been committed the manner that it has been committed; the time it has been committed, and such elements; the incidents established during the course of criminal trial, and evidence regarding this, might be the determining factors regarding a disciplinary investigation. As it is often seen in practice, the evidence admitted in criminal trial, may subject not only the suspects but also third parties to an disciplinary investigation. In this regard, this evidence would constitute the basis of a disciplinary investigation, and furthermore, during the stage of judicial scrutiny, they would form the basis of the Court's decision.

Parallel to legal developments, and advances on the subject of illegally obtained evidence during criminal procedure, there has been noticably positive theoretical, and practical improvements. Even so, this subject is quite novel in terms of different legal disciplines are concerned; especially in terms of private, and disciplinary law[1]. Even so, as far as we can tell both from the news, and

[1] E.g. SEE: Tanrıver, Süha, "*Türk Medeni Usul Hukuku Bağlamında Hukuka Aykırı Yollardan Elde Edilen Delillerin Durumunun İrdelenmesi*", TBB Dergisi, Sa. 65, Temmuz-Ağustos 2006, p. 119–128; Ateş, Mustafa, "*Hukuk Yargılamasında ve Özellikle Boşanma Davalarında Hukuka Aykırı Deliller*", Terazi Aylık Hukuk Dergisi, Yıl 3, Sa.18, Şubat 2008, p. 89–114; The Court of Cassation examines whether the evidence is obtained through illegal means or not: After the conclusion of the above dated trial, appealing party asked the decision that is rendered by the local Court, to be examined through legal enforcement. On 10.14.2008, the appealing party A.I.D and his/her Council Attorney G.T. went before the Court. The other did not show up even though they have been process served. The Court decided to render its decision to a later date, after hearing the present party before the Court. Today, after reading all the documents the following decision is rendered: In the incident, the CD containing the sound recordings that the Defendant-the Plaintiff's husband has submitted as evidence to the Court, has been obtained illegally through Plaintiff's invasion of privacy. The Plaintiff argued that for this reason, it cannot be asdmitted in as evidence. The Court stated that 'this information that is submitted in as evidence by the Defendant-husband, has been obtained, through illlegal means, through invasion of privacy, without the Plaintiff's knowledge, for that matter it may not be taken account'. The Court further stated that there was no other evidence to

also from the judicial decisions, the disciplinary, as well as the administrative authorities, use evidence obtained through communication surveillance as a basis for their decisions, without investigating and evaluating its legitimacy. Let us emphasize that, it is not advisable to utilize all the communication records, and/or documents that are in the criminal investigation and/or criminal prosecution files, as a basis for a disciplinary investigation; without making a legally

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indicate that the Plaintiff did violate the obligation of fidelity. For the foregoing reasons, the Court dismissed the counter claim in the divorce case that the Defendant –husband initiated against his wife. The submitted evidence was obtained without the Plaintiff's knowledge, within the mutual home of the spouses, through a system prepared by the husband without the Plaintiff's knowledge. Following an expert witness investigation, it was found that the the sound recordings in the CD were original; there were no additions, substractions, clippings, and duplications on the CD. Respondent Plaintif did not claim that the recorded conversations were not hers, she objected to this evidence stating that it is obtained through invasion of privacy. If the means a piece of evidence is obtained is through violation of personal rights guaranteed under the Constitution, there is no hesitance that this evidence is obtained through illegal means. If there are legal means that the evidence is obtained, then the illegality does no longer exist.

There is no doubt that under the Constitution, every individual has a right to ask for respect in his/her private, and family life. Secrecy of private life, and family life may not be invaded *(Constitution art. 20/1)*. However, within a family union, the spouses are required to remain true to one another by law *(TCiv.C. art. 185/3)*. The private life of one of the spouses, interests the other spouse as if it were his/her own. For this reason, in a marriage, the area of legal obligations regarding a marriage union, is not an area of one of the spouse's private life, it is a mutual area of family life. Regarding this area, not the privacy of the individual lives of the spouses, but the privacy, and sanctity of the family union is important, and takes precedence. Therefore, legal obligations of the marriage union, is not privileged from the perspective of the other spouse. For this reason, the Respondent-Plaintiff who is suspicious of his spouse's infidelity, who placed a recording device in the mutual home of the couple, and recorded the secret conversations of his spouse, and who established the infidelity of his spouse, could not have invaded the privacy of his spouse, and this act would not have been deemded to be illegal. To the contrary, when the Respondent in the counter claim, invited people to the mutual home of the couple for an illegal purpose, she has invaded the privacy of the marriage union. For this matter, it is not possible to allege that the afore mentioned evidence is obtained illegally. Therefore, the investigation conducted, and the evidence gathered, established that the Plaintiff-Respondent in counterclaim, has invited her friends including, friends from the opposite sex, to the mutual home, and she has acted contrary to the obligation of fidelity. Thus, it is established that between the couple there is irreconciliable differences, which would shake the marriage union fundamentally, and which would prevent the continuance of the marriage union. Under the circumstances, the Plaintiff has a right to initiate the counterclaim. Since there is no legal reason to force the couple to live together; the husband, the Defendant's-the Plaintiff in the counterclaim must be sustained, and the petition of the wife is dismissed. "*RESULT: The Plaintiff in the counterclaim-the Defendant husband's objections to appeal must be sustained, and the rendered decision MUST BE VACATED for the reason explained above...*"

(2nd. Office of the Court of Cassation, 10.20.2008, decision 2004/635 E, 2007/387). In the same way, the Court of Cassation HGK *(General Civil Board)* previously decided that for a piece of evidence to form the basis of a judgment, it must not be illegal. *(SEE: 02.26.2002, 2002/2–617, 648)*

sound differentiation on the subject; just based upon the tenet that they were obtained through a Court order.

No doubt, this happened as a result of wide-spread use of evidence obtained through communication surveillance, which is a by-product of light speed advances in technology. This type of evidence is admitted in, not only in the area of criminal law, but also in other areas of law, without investigating, and evaluating its legibility. As far as we can tell from the news, and from the judicial decisions that we were able to analyse, both the disciplinary authorities, and the administrative judicial authorities use this evidence obtained through communication surveillance, as a basis for their decisions. They base their decisions, upon this kind of evidence, without investigating, and evaluating the legitimacy of this evidence.

Let us emphasize that, in a disciplinary action, it is not advisable to rest one's opinion on all the records of communication in the criminal investigation and/or criminal prosecution file, without making a sound distinction on the subject; and just based upon the reasoning that they were obtained by a Court order.

Here we are going to refer to the main points on the subject, based upon the decisions of the Council of State, and we shall try to initiate a discussion on this subject.

II. Decisions Of The Council Of State On This Subject

A. DECISION I

"...The lawsuit was initiated by the Plaintiff, who worked as a customs officer for the Office of the General Director of the Customs and Guard, in Gaziantep. He was punished by dismissal from his duties as a civil servant on 02.15.2007, by process number 2007/8, under article 125/E-g of the 657 numbered Law. Later, this decision was vacated, and the Plaintiff initiated a lawsuit in order to receive backpay, and other additional wages, plus its legal interests which accrued as a result of this process.

12.25.2007 dated, and E:2007/199, K:2007/1307 file numbered decision of the Gaziantep 2. Administrative Court stated that: even though the Plaintiff had telephone conversations with an individual who was claimed to have been involved in smuggling, the expressions he used did not rise to the level, and severity to call for the penalty of dismissal from the position of civil servant. Other than the expressions he used during the telephone conversations, and claims on the indictment, there was no clear finding that he had committed the crime of moral turpitude, that would rise to the level of being in conflict with a civil servant's position. On the other hand, it is clear that the actions

of the Plaintiff, might fall under other provisions of the 657 numbered law, regarding disiplinary penalties. Following this reasoning, it is decided that: the process which was based upon the legal suit must be vacated; and his salary, and other employee benefits must be calculated by the Administrative Office, and paid to the Plaintiff.

The Respondent on appeal- the Administrative Office, argued that the decision of the Administrative Court is against the law, and the procedure. The Administrative Office requested that the decision should be reviewed, and vacated on appeal.

Under article 125/E-g of the 657 numbered Law, to behave in disgraceful, and dishonorable ways and measures that would conflict with the title of civil servant, is designed as a disciplinary regulation which would result with the disciplinary penalty of dismissal from civil service.

After reviewing the file: During the investigations conducted by the Gaziantep Police Department Unit for Combatting with Smuggling and Organized Crimes, the police received some information regarding some suspects, who were residing in the city of Gaziantep, at Etiler ditrict, on Türkmenler Street. These individuals owned some businesses in Küsget Industrial Site. According to this information, the suspects brought large amounts of petroleum, and other items from Syria, and Iran, into Gaziantep, without paying their customs; and they sold them in the market. After receiving this information, a systematic operation under the code name the 'Black Mine' was conducted, for nearly 6 months. After legal wire tapping, and physical pursuits, it is established that an operation was conducted. Suspects, including the Plaintiff among them, have been apprehended, and taken into custody. They have been prosecuted for organized smuggling, and organized aiding in smuggling. A separate prosecution for bribery was initiated against the Plaintiff, and four other people. According to the disciplinary investigation conducted, when various communication records recorded between the dates of 02.23.2006-05.13.2006 were examined, it is established that a person named Ö.G has been involved in organized smuggling for a number of times. Ö.G, accepted to help the trucks which were carrying fuel oil, and accepted to take money in the amount of 300-400 *(the currency is not indicated)*, per truck.

Through the telephone conversations, it is established that Ö.G, helped to direct foreign truck, and trailer drivers who brought him smuggled fuel oil, to the Plaintiff. Also, when the Plaintiff said: "*give 150 million in expenses*", Ö.G accepted this offer. It is established that, Ö.G talked to the driver named Hüseyin over the phone, and directed the driver to the Plaintiff to help him smuggle 40-45 galons of fuel oil, and he even gave instructions to the driver such as: "*give 300-400 per truck*". The phone conversations the Plaintiff had with Ö.G, and the expressions he used during these conversations, established

that the Plaintiff had an illegal association with Ö.G, and the Plaintiff helped this individiual in order to fulfill his act. None of these conducts, and acts are compatible with the office of a civil servant. For the stated reasons, it is decided that the Plaintiff must be punished by removal from the duties of a civil servant, under Article 125/E-g of the 657 numbered law. As far as the criminal charges, it is decided for the Plaintiff to be acquitted for lack of evidence.

Under the file numbers of 2005/988 and 2006/460 of Gaziantep 1. Magistrate's Court, file number 2006/9 of the 3.Magistrate's Court, file number 2006/766 of the 4. Magistrate's Court's joint decisions, when the cellular telephone conversations of the individuals who have been accused of being involved in organized smuggling were intercepted, and when the communication records were analysed, it was discovered that the Plaintiff held telephone conversations with Ö.G., an individual who is a known smuggler, on more than 10 occasions. From the content of these phone conversations, it is established that he is in an illegal association with this individual, and he has helped this individual during the commission of his activities.

In this case, under article 125/E-g of the 657 numbered Law, it is understood that the penalty of removal from civil service is not contrary to law. Therefore, the decision of the Administrative Court vacating the process, that is the subject matter of the lawsuit, is not legally correct.

For the reasons explained above, the Defendant Administrative Office's request for appeal has been sustained. 25.12.2007 dated, and E:2007/199, K:2007/1307 numbered decision of the Gaziantep 2. Administrative Court is vacated, based on article 49, section 1/b of the 2577 numbered Administrative Adjudication Procedure Law. based on the same article, Section 3 of the 3622 numbered law, and for the reasons stated above on 12.24.2008, it is decided by unanimous votes, for the file to be remanded to the aforementioned Court, for the Court to reach a new decison *(Danıştay 12. Dairesi, Esas No: 2008/2568, Karar No: 2008/7255)*[2].

As far as it can be understood from the decision:

1. The measure of surveillance of communication is not for the civil servant who received disciplinary penalty.
2. The civil servant was acquitted both, of the crimes of bribery, and smuggling.
3. The authority that enforced the disciplinary penalty, the Local Administrative Court, and also the Council of State admitted in evidence, which was

[2] For a much recent decision on the same subject SEE: Council of State12. D, 04.02.2011 T, 2010/64 E, 2011/474 K *(http://dhb.aile.gov.tr, 07.10.13)*. This decision was the subject of domestic news due its importance: "*…Council of State 12th Office, 'it is decided that the evidence obtained through technical surveillance, and wire tapping which is not used in criminal prosecution, may be used for disciplinary investigaions …" (http://www.hurriyet.com.tr/gundem/18401157.asp, 07.10.13)*.

obtained through communication surveillance. Without questioning whether the measure of communication surveillance of the other defendant*(s)* would conform to article 135 of the CCP or not, the evidence that was obtained through communication surveillance was admitted in, to define the disciplinary penalty and/or to form the basis of the judicial review.

The local administrative Court- the authority which carried out the disciplinary penalty, and also the Council of State, used the evidence obtained through communication surveillance to assess the disciplinary penalty, and/or for the stage of judicial review, without investigating whether the measure for communication surveillance conformed to article 135 of the CPC.

B. DECISION II

"...The Plaintiff, who worked as a customs inspection officer at the Gaziantep Office of the General Director of Customs and Protection, petitioned to have the process dated 02.15.2007, and numbered 2007/8 vacated, which resulted his removal from the position of civil servant.

Gaziantep 2nd. Administrative Court's 12.25.2007 dated, E:2007/194, K:2007/1306 numbered decision stated that no further prosecution is necessary after reviewing the file. The Court stated that the Plaintiff who worked as a customs inspector at the Gaziantep, Customs, and Protection Office, was not found guilty of the crime of receiving bribes, following the operation code named 'the Black Mine'. For this reason the Court found that there was no ground to prosecute him for this crime. His prosecution for the crime of aiding in smuggling was still pending at the Gaziantep 1st Magistrate Court. In the investigation report number 31, prepared on the date of 10.18.2006, among the allegations in the indictmens; and also 11.17.2005 dated, and 2005/988 numbered decision of the Gaziantep 1st Magistrate Court to allow wire tapping revealed that on numerous occasions the Plaintiff *(on appeal)* has had various conversations, with an individual named Ö.G. After evaluating these phone conversations it is decided that his demeanour, behaviour, and actions were not compatible with the identity of a civil servant. He was found to have committed the offense of exhibiting disgraceful, and dishonorable behaviour incompatible with his identity as a civil servant. For this reason, under article125/E-g of the 657 numbered Law, the authorities moved to remove him from his duties as a civil servant. As a result of this, Prime Ministry Undersecretary of Customs, Office of High Disciplinary Council with its 2.15.2007 dated, and 2007/8 numbered decision penalized him by removing him from his position of civil servant. A law suit was initiated to vacate this decision. It is decided that in the incident that is the subject matter of the dispute, even though, it has it has been established that, the Plaintiff had telephone conversations with the individual who is accused of being engaged in smuggling. However, the expressions that are on the records of communication, do not rise to the level, and

gravity of his removal from his duties. Other than the expressions used during the telephone conversations, and the allegations within the indictment there is no other material evidence that would indicate that the Plaintiff engaged in alleged activities. For this reason, the procedure implemented is not agains the law; and it is decided to vacate the procedure, which was the subject matter of the legal dispute.

Defendant- the Administrative Offce, claimed that the procedure against the Plaintiff was not against the law, and begged for the decision to be vacated on appeal.

Disciplinary penalties are administrative enforcements, that have been imposed on civil servants, who act unruly; without paying attention to the work order, and who would perform acts that would conflict with the nature of the civil service. Disciplinary penalties, have a wide range of severe penalties including permanent suspension from civil service. Due to their gravity, and their importance, disciplinary penalties, are treated under Article 38 of the Constitution, regarding crimes, and penalties.

In many of its decisions, the Constitutonal Court has evaluated the disciplinary penalties, under Article 38 of the Constituton, that is within general principles regarding crimes and penalties. In its 4.19.1988 dated, and E:1987/16,K:1988/8 numbered decision, the Constituonal Court stated that: Administrative sanctions are among the mandatory decisions, and procedures, and the crimes and penalties are going to be imposed based on their compatibility with the Constitution. In a state ruled by laws, under the principle 'no crime, and no penalty without law', the necessity for every act which would fall under the definition of crime to be defined, and to be set forth, is emphasized.

When a civil servant commits a public offense, and his/her offense is established by a duly conducted investigation; the offense he/she has committed must be established clearly. He/she must be penalized under the relevant law, which would penalize the stated offense. If the offense that the civil servant is accused of committing does not fit any of the descriptions stated in the law, then the disciplinary penalty would be illegal, and it must be dismissed.

On the other hand, article 125/C-1, of the 657 numbered law, states that the offense of a civil servant who behaves in a dishonourable, and untrustworthy manner, during the commission of his/her duties, will be penalized by garnishing his/her salary.

As it has been established by the Administrative Court, the Plaintiff had telephone conversations with the individual who is accused of being engaged in smuggling. However, the expressions that are on the records of communication, do not rise to the level, and gravity of his removal from his duties. Since there is no other material evidence on this matter, the process regarding the penalty by his removal from civil service is not against the law.

However, when the transcripts of the telephone conversations are examined, it is clear that the Defendant behaved in a conflicting way that would disredit the reputation and trustworthiness of a civil servant; thus, it is clear that he has committed the disciplinary offense under 657 numbered law, which is described above.

For this reason, since the Defendant's act fell under article 125/C-1 of the 657 numbered law, the decision of the Administrative Court has been correct.

For the reasons stated above, on 12.31.2008 with majority of votes, it is decided to dismiss the Defendant-the Administrative Office's request for appeal. It is also decided that Gaziantep 2. Administrative Court's 12.25.2007 dated, and E:2007/194, K:2007/1306 numbered decision must be sustained as to its final decision. The expenses for appeal must be on the appealing party, the Defendant- Administrative Office *(Council of State 12th. Office, Decision No.: 2008/2516, Decision No: 2008/7455)*[3].

As far as we can tell from this decision:

1. The measure of communication surveillance is not regarding the civil servant who received the disciplinary penalty.
2. Regarding the civil servant's case for the crime of receiving bribes, an additional decision of dismissal was rendered. The prosecution for the crime of 'aiding an organized smuggling' case is still pending.
3. The authority implementing the disciplinary penalty, the local Administrative Court, and the Council of State took this type of evidence as a basis for the designation of the disciplinary penalty, and judiciary review.

They reached their decisions without investigating whether the conditions of communication surveillance implemented on the other Defendant*(s)* during criminal procedure complied with the provisions under article 135 of the CPL, or not.[4]

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[3] The dissent in this decision is as follows: "*Through the evaluation of the data, and the documents obtained both during the disciplinary, and criminal investigations, it is established that the Plaintiff has not abided by the obligations set forth under Law Number 5607, Article 19 of the Combating with Smuggling Law. Not only that, but also he was in contact, in association with people who are in the business of smuggling, he even helped those individuals. These acts are so disgraceful that, it is clear that they are not compatible with the identity of a civil servant. For this reason, the procedure that was decided earlier was legally correct. We do not agree with the decision of the majority regarding affirmation of the judgment. Member A.Ç.Z) Member (M.Ç).*"

[4] Court of Cassation's approach is also in this manner, even though it may be in a circumstantial. Indeed, in some of its decisions even if the Court of Cassation has decided that evidence obtained by chance may not be used for criminal prosecution, from the perspective of disciplinary punishment the Court has rendered some decisions that would conflict with this decision.
Thus: in one of the decisions it rendered the Court of Cassation *(5th Criminal Office 06.14.2006 dated, 06/6–4 numbered decision of the Court of Cassation)*: ..."A prosecutor of the Republic who is acquitted becase of inadmissable evidence... it is decided that his/

III. EVALUATION

A. 1.- Criminal Procedure investigates to find out whether an incident that has claimed to have happened in the past, has actually happened; if it has happened, whether it was perpetrated by the suspect/Defendant, or not; and to define the ramifications of this act with regards to criminal law[5]. When this is done, the same tools are used in order to represent and, to re-play the disputed incident, during the prosecution phase. These tools are called "evidence *(proof/means of evidence)*[6]. Even though, in theory, there are different classifications, representing different perspectives; according to a classification prepared by Kunter there are three kinds of evidence. These are: "*declarations*", "*documents*", and "*manifestations*". "*Declaration*", and "*document*" evidence refer to the present case, which help to prove it directly. "*Declarations*" are divided into three among themselves: "*Defendant's/accused's declaration*", "*declaration of the witness*", and "*declaration of the parties other than the Defendant*" *(e.g. involved, financially responsible, etc.)*. "*Documents*"[7] are also divided into three among themselves: "*Written Documents*", "*Documents identifying shapes*", and "*Documents identifying sounds*". The third kind of evidence, "*manifestations*"[8] is divided into two: "*natural manifestations*" *(e.g. blood, sperm)*, and "*artificial manifestations*" *(e.g. uniform that is donned, monograms indicating the owner of the property)*[9].

2.- During criminal procedure material facts are investigated, therefore as a rule everything can be used as evidence. There is no requirement for certain facts to be proven, with only certain type of evidence *(principle of freedom of*

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her actions must be evaluated from the perspective of disciplinary offense under article 87th of the Act No. 2802, and therefore it must be submitted to the discretion of the High Commision of the Judges, and the Prosecutors...." With this decision *(in my opinion, wrongfully so)* the Court imputed a value to the inadmissable evidence in the file, from the perspective of the disciplinary offense.
(SEE: Öztunç, Özgün, "Ceza Muhakemesi Açısından Yasak Deliller ve Disiplin Soruşturması Açısından Yasak Deliller ile Tesadüfen Elde Edilen Delillerin Değerlendirilmesi Sorunu", http:// www. ozgunlaw. com/ articles/ Makale22072011 _DrOzgun Oztunc.pdf, 07.10.13, p. 6). Let us emphasize that Court of Cassation's 07.03.2007 dated, and 2007/5 MD-23 E. and 2007/167K numbered decisions follow the same practice.
(www.kazanci.com).

[5] Centel, Nur/ Zafer, Hamide, Ceza Muhakemesi Hukuku, 6. Bası, Beta Basın Yayın Dağıtım A.Ş, İstanbul 2008, p.197.

[6] Centel/ Zafer, Ceza Muhakemesi Hukuku, p.197; In the dictionary 'evidence' is defined as: "*a clue, an indication that leads a person to the truth he is seeking*"
(http://www.tdk.gov.tr/, 24.05.09)

[7] "*A Document*", a man-made proof, that represents the material case. It can be divided into two: "*formal*" it is valid until its contrary is proven, and valid until it is proven that it is fraudulent; or it may be of a "*private*" nature.

[8] "*Indication*", is any kind of clue, or trace that is the residue of the incident.

[9] Kunter, Nurullah/ Yenisey, Feridun/ Nuhoğlu, Ayşe, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 15. Baskı, Beta Basın Yayın Dağıtım A.Ş, İstanbul 2006, p. 612 et seq.; Turhan, Faruk, Ceza Muhakemesi Hukuku, Asil Yayın Dağıtım, Ankara 2006, p. 156 et seq.

evidence). We must emphasize that in criminal procedure in order to prove that the Act has been committed by the accused/the Defendant, the adjudicator must reach a totally discretionary decision through the aid of instruments, which are within acceptable within legal norms. If not, if the doubt cannot be completely overcome, the under the principle of "*Defendant benefits from doubt*", a decision must be reached for the Defendant.

3.- Even though, everything can be used as evidence during criminal procedure, it is still mandatory that this evidence would have certain properties. In this regard, the evidence: must be real, wise, representing the incident, unanimously approved[10], and also it must be admissable[11]. If the evidence is obtained illegally, this would be "*inadmissable evidence*", and it would be impossible to take this evidence as a basis for the discretionary decision to prove the alleged crime. Under our Constitution's article 38/6, which has been amended on the date of 10.03.2001, by article 15th of the 4709 numbered Law states that: "*Evidence that is obtained illegally, may not be admitted in as evidence*"; this is quite wide. Article 217/2 of the CPL states that: "*Alleged crime, may be proven by any kind of legally obtained evidence*"[12]. Let us indicate that, according to the Constitutional Court, and the Court of Cassation the term "*contrary to law*", has a much wider context than the term "*illegality*". Texts on positive law, and regarding contrary behaviour against fundamental human rights and freedoms, we can mention "*contrary to law*". In this regard, contrary practices to the Constitution; to the international treaties ratified under the law; to the regulations; to the by-laws; to the decisions to join case laws; to the law of precedents; and to the general principles of law, they all would be within the concept of "*contrary to law*"[13].

B. An act, committed by a Clerk/ Civil servant, a lawyer, a notary public, a student, and even an individual who works as a labourer under the labour laws, may constitute a crime under criminal law, and also may be the subject of an investigation under disciplinary law. In this situation, criminal law, and disciplinary penalty law would be in conflict. Independent of one another, while the criminal prosecution is pending, disciplinary process is also pending at the same time. In this respect, an acquittal, a decision of 'no reason for punishment',

[10] Not only the Judge, but also the Parties must know/learn content of the evidence.

[11] Kunter/ Yenisey/ Nuhoğlu, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, p. 575–579; Turhan, Ceza Muhakemesi Hukuku, p. 155–156.

[12] The subject is governed under article 254/2 of the CPL: "*(Addendum clause 11.18.1992-art.3842/24) Illegally obtained evidence by the Investigation, and Prosecution Authorities, may not be admitted in as evidence to form the basis of the decision.*" For the detailed comparison of the mentioned regulations SEE:. Öztürk, Bahri/ Erdem, Mustafa Ruhan, Uygulamalı Ceza Muhakemesi Hukuku, 12.Baskı, Seçkin Yayınevi, Ankara 2008, p. 487–500.

[13] Constitutional Court, 06.22.2001, RG, 01.05. 2002/24631 *(repeated)*; Court of Cassation, General Penal Board *(CGK)*, 29.11.2005/7–144/150 *(zkr. Centel/ Zafer, Ceza Muhakemesi Hukuku, p. 653 ve dn.39)*.

a conviction, a decision for an injunction, dismissal or abatement of an action in the criminal case *(CPL, article 223)* is not going to be conclusive regarding the disciplinary investigation. As a rule the Administrative Office would not be bound by the decision of the criminal Court on the subjects of whether a disciplinary investigation should, or should not begin, and/or whether a penalty is due in a pending disciplinary investigation. In fact, the fundamental principle regarding the civil servants is regulated under article 131 titled: "*Conducting Criminal Prosecution, and Disciplinary Investigation Concurrently*", of 657 numbered Law. Under this article[14]: "*The fact that a criminal prosecution has been initiated against a civil servant on a given subject, cannot delay the disciplinary investigation on the same subject./Whether a civil servant is convicted, or acquitted under the criminal law provisions, could not have any bearing on the implementation of any disciplinary penalty against him./ (Addendum: 10.06.1983 – 2910/1 article). Under 160 numbered law regarding Establishing a State Staff Office, under article 4 Under the 4th article of the 160 numbered law, regarding the establishment of State Employee Office, in case that the employees who work in the referenced offices commit any offenses within the scope of their work, or if they commit any offenses within the course of their employment, and if they commit any other crimes outside the scope of their work, they will be investigated by Constitutional Prosecutors; Military Prosecutors; or investigator Magistrates. After the duly conducted investigation regarding the civil servant, any copies of decisions of dismissal, a judicial bar, indictment, a written motion, or a true bill, or copies of final judgments rendered by the related courts, will be sent to the ministry, establishment, or institute that this employee works for*"[15]. Let us immediately emphasize, that even so, the disciplinary investigation is not totally independent of the criminal investigation and/or prosecution. For a decision of acquittal when it is established that the Defendant did not commit the crime, or a decision of conviction *(CPL art. 223)* when it is established that the Defendant committed the crime that he/she is being accused of, is going to bind the disciplinary authorities, regarding its content, and its nature *(Constitution art.138/4)*. At the same time, the evidence obtained during criminal procedure, is going to form the basis of decisions rendered at the end of disciplinary investigations, and the judicial review thereof. This situation lays out the importance of the evidence obtained during criminal investigation, and its legitimacy; and the fact that this evidence's importance not only from the perspective of criminal law, but also from the perspective of disciplinary law.

[14] For similar regulations SEE: article 72, 96 of the 2802 numbered Law.

[15] Under the 11.29.1984 dated, and article 55 of the 243 numbered Executive Order *(KHK)* referrals to the 12.13.1960 dated, article 4 of Act No., is considered to be referring to 6.8.1984 dated, 160, and 217 numbered of the KHK's related article. Therefore, article 4th referred under this article, must be considered as article 2 of the 217 numbered KHK *(http://mevzuat.basbakanlik.gov.tr/, 05.29.09)*.

B.1.- Regarding evidence that is contrary to law, there is no clear arrangement in disciplinary law[16]. However, this does not mean that evidence that is contrary to law could be used in this area of law; for many norms, and basic principles of law, starting with article 38 of our Constitution would be against this. Indeed, our Constitution's article 38/6 that replaced article 15th of the Law number 4709, on the date of 10.03.2001, arranges that the evidence obtained contrary to law, could not be admitted in as evidence. This provision would be binding upon both criminal adjudication, and also other areas of adjudication[17]; and it would also be binding upon administrative establishments, and authorities on the subject[18]. Indeed under article 177/e of the Constitution: "*The provisions of the Constitution which would be effective after the general vote of the people; and implementation of new laws regarding existing, and future institutions, and establishments, and if any amendments are required, processes that are related to these, provisions of Acts which do not violate the Constitution, or directly the provisions of the Constitution, under the 11th article of the Constitution...*" will be applied. As we know, under article 11 of the Constitution, "*provisions of the Constitution, are fundamental legal rules, which are binding upon the legislative, executive, and judiciary powers; administrative authorities; and other institutions, and individuals*". [19]

Let us indicate that under article 176/2 of the Constitution, article side headings are not considered to be the Consitution. For this reason, the heading "*Main points regarding Crimes and Punishments*" does not have any binding effect, and does not have a limiting function[20]. Moreover, Constitutional Court's 04.04.1991 dated, and 1990/12 E., 1991/7 K. numbered decision stated that: the essence of article 38 of the Constitution, does not only cover punishments under substantive criminal law, but it also covers administrative penalties *(disciplinary penalties)*.

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[16] On this subject there is a clear provision, under the French Act of Criminal Proeedure, article 174, final clause. Under this provision even if illegally obtained evidence is inadmissable for purposes of criminal procedure, they may be used for the purposes of disciplinary investigation of the Judges, the Prosecutors, and the lawyers. *(http:// legislationline.org/ download/ action/ download/ id/1674/ file/ 848f4569851e2ea7eabfb2ffcd70. htm/preview, 07.10.13)*.

[17] Tanrıver, Türk Medeni Usul Hukuku Bağlamında Hukuka Aykırı Yollardan Elde Edilen Delillerin Durumunun İrdelenmesi, p. 122.

[18] Öztürk/ Erdem, Uygulamalı Ceza Muhakemesi Hukuku, p. 498–502; Şen, Ersan, Türk Hukuku'nda Telefon Dinleme Gizli Soruşturmacı X Muhbir, 3. Baskı, Seçkin Yayınevi, Ankara 2009, p. 121–128; Kaymaz, Seydi, Ceza Muhakemesinde Telekomünikasyon Yoluyla Yapılan İletişimin Denetlenmesi, Seçkin Yayınevi, Ankara 2009, p. 449.

[19] Agrees with the viewpoint of Private Law: Tanrıver, Türk Medeni Usul Hukuku Bağlamında Hukuka Aykırı Yollardan Elde Edilen Delillerin Durumunun İrdelenmesi, p. 122–123.

[20] Öztürk/ Erdem, Uygulamalı Ceza Muhakemesi Hukuku, p. 502; Tanrıver, Türk Medeni Usul Hukuku Bağlamında Hukuka Aykırı Yollardan Elde Edilen Delillerin Durumunun İrdelenmesi, p. 122.

2.- An administrative adjudication authority, which reviews a disciplinary penalty that is rendered based upon an evidence contrary to law, is going to render its decision based upon article 11th of the Consitution. Under article 138/1 of the Constitution "*A conscionable judgment, bound by the Constitution, and the law...*" will be rendered. For this reason, the administrative adjudication authority will examine the legality of the instruments used to prove a disciplinary offense, which is an administrative process. In case they are illegal, it will adjudge to vacate the administrative process, in other words, to vacate the disciplinary penalty[21].

3.- Under article 36/1 of the Constitution: Either a Plaintiff, or a Defendant, everybody has a right to a fair trial before the adjudication authorities; as long as he/she uses legal means, and methods. This provision governs an individual's freedom to seek justice either as a Plaintiff, who puts forward a claim; or as a Defendant, who has a right to defend[22]. However, this freedom can only be exercised through legal instruments, and methods. An Administrative Authority's disciplinary penalty which is based upon evidence contrary to law, cannot be accepted as a legal means of defense, when an individual against whom a disciplinary penalty is rendered appeals this decision.

D.- Evidence obtained through communication surveillance during criminal procedure, may be subject of evaluation during a disciplinary investigation. Let us evaluate some of these possibilities:

1.- During the communication surveillance for the purpose of criminal investigation, or prosecution, the communication of an indivual who does not have a judicial injunction, may be identified, wire tapped, and/or recorded by mistake. In this case, if the information obtained raises doubt that a crime listed under article 135/6 of the CPL might have been committed, in such a situtation, it is going to be kept, and it will be assessed by the Prosecutor for the Republic, only within the context of a criminal investigation on the subject. It shall not be used in any other way, and it shall not constitute a basis for disciplinary penalty. Moreover, the information, or the content of wire tapping, is the kind that would form the basis of a crime other than what is listed under section 6, of article 135, and/or it is such that it would form the basis of a disciplinary offense, it cannot be used, assessed, expressed by anybody, or any institution, not even the by the Prosecutor for the Republic. It may not be shared by the third parties.

For communication surveillance, is a protective measure which limits an

[21] For similar findings, and evaluations, SEE: Gökpınar, Mahmut, Disiplin Hukukunda Yasak- Hukuka Aykırı Deliller *(Anayasa Mahkemesi- Danıştay ve Yargıtay İçtihatları ile)* Disiplin Suçu Genel Teorisi, İstanbul 2011, p. 13, etc.

[22] Tanrıver, Türk Medeni Usul Hukuku Bağlamında Hukuka Aykırı Yollardan Elde Edilen Delillerin Durumunun İrdelenmesi, p. 124.

individual's fundamental rights, and freedoms *(especially the right to communicate, and the sanctity of private life) (Constitution art. 20–21)*, and these rights can only be limited by the principle of proportionality, and by law *(Constitution art.13, 20, 22)*. For this reason, the communication surveillance which was provided by the lawmaker only for certain grave crimes, and only within the context of criminal procedure *(CPL art.135–138)*, cannot be invoked for disciplinary law, which has a different purpose, different subject matter, and different method.

2.- The Respondent in a disciplinary investigation, is also the perpetrator of the crime in criminal procedure, and a decision of conviction rendered against him *(CPL art. 223/5–6)* has been finalized. In this situation, a final judgement of conviction, would be binding upon the Administration, as far as the disciplinary investigation goes. The Administrative Office conducting the disciplinary investigation is bound by the decision of conviction rendered by the Criminal Court; therefore, it may use the evidence obtained through communication surveillance that is within the file. However, the Administrative Court may not change the outline of the committed act, by evaluating the evidence in a different way. A contrary situation, would mean that the law is contradicting itself; and also it would mean that for the purpose of a disciplinary investigation it would be possible to use communication surveillance, which would result in obtaining evidence through illegal means.

3.- In the example -*(b)*-above, a judgement of acquittal was rendered since the accused was not the perpetrator of the alleged crime, and the decision has been finalized *(CPL art. 223/2-b)*. In this case, for the reasons stated earlier, neither the decision of acquittal, nor the documents in the file regarding the communication surveillance, cannot consitute the basis for the disciplinary penalty. Because, with the decision of acquittal of the criminal Court, it is established that this individual did not commit this Act. This decision would be binding upon the Administrative Office.

4.- After the conclusion of criminal procedure, a judgment other than a judgment of conviction, or acquittal, which is mentioned above *(e.g. a decision of abatement of action, dismissal of the administrative case, no reason to render a penalty on the Defendant) (See: CPL art. 223)* may have been rendered. In this case, for the reasons stated above, the evidence obtained through communication surveillance, cannot form the basis of a disciplinary investigation; and procedures, and judgments rendered after its judicial review.

5.- Because of the importance of this subject, we briefly would like to mention, the view points of Judges, and Prosecutors on this subject. As you know, 02.24.1983 dated, and 2802 numbered "*Judges and Proseutors Act*" *(RG, 26.02.1983/17971)*, article 82nd , titled " *the Investigation*" states that: "*For an investigation, or examination to be initiated against the Judges, and Prosecutors, for the crimes that they have committed within the scope of, or within the commission*

of their duties; or due to their demeanours, and behaviours which do not comply with their identity, or duties, a permission from the Ministry of Justice is required. "The Ministry of Justice may conduct the examination, and investigation, through Justice Inspectors, or through Judges, or Prosecutors who are seniors of the accused. The Judges, and the Prosecutors who will conduct the investigation, have the same authority that the justice inspectors have under article 101." Article 101 that is referred to states that: "*Justice inspectors hear, or depose the individuals that they deem necessary to hear, or depose; and if the investigation requires it, they search. They collect the evidence to prove the Act, directly from all the offices, and establishments. Related establishments, and individuals have to submit the requested evidence.*" When we look at the above referenced provisions, the justice inspectors have the authority to conduct "*searches*" *(See: CPL art. 90–140)* under certain conditions; other than this protective measure they are not bestowed with any other protective measures, including communication surveillance. Let us emphasize that during a disciplinary investigation conducted against Judges, and Prosecutors of the Republic, protective measures such as communication surveillance; its recording; evaluation of its signal data; cannot be referred to, even with the decision of the Judge. Also the evidence obtained through communication surveillance during a criminal investigation, or prosecution, within the framework of articles 135-138 of the CPL, cannot form the basis of a disiplinary investigation, for the reasons stated above.

5271 numbered CPL, which was enacted after the 2802 numbered Law states that: The authority to search is essentially based on the decision of the Judge; when time is of the essence, this decision would be rendered by the Prosecutor for the Republic *(art. 119)*. This provision is rather an assurance as far as the fundemental rights and freedoms are concerned, and it also conforms to the Constitution. Therefore, articles 82, and 101 of the 2802 numbered Law, have been annulled by implication.

E.- When you examine these thoughts/principles that are explained in brief, and the above stated decisions of the Council of State, the first thing that catches your attention is that neither the administrative authority that implements the disciplinary penalty, nor the administrative Court that renders the decision, nor the Council of State that examines the decision on appeal, had investigated, or assessed the evidence-wire tapping, that formed the basis of the decision, from the perspective of the disciplinary law. However, as far as it is understood from the decisions, the person whose communication has been wire tapped was not the civil servant Defendant, who received the disciplinary penalty, but it was the other Defendant. In this situation, it was not possible to use this evidence against the civil servant, during criminal procedure[23]. As

[23] Thus, within the doctrine, there is accurate findings, and critics stating the illegality of the similar practices.

you know, communication surveillance-when the other conditions stated under article 135 of the CPL exist-may only be used for criminal investigation, and prosecution; and in case there is strong probability that the accused committed the crime, and there is no other way to obtain any evidence. For this reason, both during the administrative process in the form of disciplinary penalty, and its judicial review, it is not legal to base the decisions on the evidence obtained through communication surveillance[24]. Let us state that in a similar situation, the Council of State, sustained the decision of the local Court. The local Court refused to vacate the decision of the administrative Court, that penalized a police officer by removal from his/her duties. The Plaintiff, the police officer was acquitted from criminal prosecution. The removal decision was based upon the conversations of the police officer, with another individual whose conversations were wire tapped, under an order of communication surveillance. However, two Court members dissented –rightfully so. They based their dissent on a precedent decision of the Court of Cassation, General Penal Board *(CGK)* 2006/162 E, 2007/167 numbered decision, a person who does not have an order of communication surveillance agasint him, who is a party to telephone conversations that are wire tapped, cannot be removed from his job based upon this evidence.

(Öztunç, Ceza Muhakemesi Açısından Yasak Deliller ve Disiplin Soruşturması Açısından Yasak Deliller ile Tesadüfen Elde Edilen Delillerin Değerlendirilmesi Sorunu, p. 6-9).

[24] For the 12th Office of the Council of State, 24.09.2008 dated, and 1240/4858 E, K numbered decision, SEE: Meran, Necati, Adli ve Önleme Amaçlı İletişimin Denetlenmesi *(Telefon Dinleme-SMS-MMS-E-Mail İzleme)* Gizli Soruşturmacı Teknik Takip, Adalet Yayınevi, Ankara 2009, p. 263–264.

IV. CONCLUSION

"*Communication Surveillance*", has been approved by the law maker under strict scutiny, and limited to the crimes listed under articles 135/6 of the CPL. The basis for this limited approval is no doubt, the potential limitation of fundamental rights and freedoms of an individual, sanctity of the private life, and freedom to communicate. According to the lawmaker's clear declaration of intent, due to the fact that it is not stated within the script of the law, and also due to the fact that its application would be against the order of democratic society, and the principle of proportionality *(The Constitution art.13; ECHR art.8)*, a piece of evidence obtained through communication surveillance during criminal procedure, cannot be used during a disciplinary investigation. For this reason, it is important that the evidence is obtained through proper means.

In case that the communication surveillance was conducted in a manner, either partially, or wholly contrary to the stated terms under the law, it is clear that this type of evidence would be illegal both from the perspective of disciplinary law, and also from the perspective of criminal law. A provision of the Constitution-the Supreme Law of the Land, states that illegally obtained evidence would not be admitted in as evidence *(art.38/6)*, and that the provisions of the Constitution would be binding upon the powers of the judiciary; the executive; and the judiciary, and the administrative authorities, and other establishments, and individuals *(art.11)*; and the fact that the Judges would base their decisions on the Constitution, on the laws, and on their own discretions based on the law *(art.138)*; when we assess all of these provisions together, the evidence obtained through invasion of privacy, and through breach of freedom of communication, cannot be admitted in as evidence, within any branch of law including criminal law, private law, as well as disciplinary law. In this case, as far as a disciplinary investigation, and an imposition of penalty go, the administrative authorities, and the adjudicators , cannot base their decisions on any evidence obtained illegally in general; and in particular they cannot their base their decisions on documents that are obtained through communication surveillance.

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