



INTELLIGENCE IN CRIMINAL PROCEDURE LAW*

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ABSTRACT

Under the practice of Turkish Criminal law, matters that are generally assessed under the concept of “intelligence”, such as an “informant’s declaration”, “eavesdropping for intelligence”, “declaration of a secret witness”, “information gathered by the police force from various different sources”, constitute the basis for many criminal procedures such as prosecution, judgment of conviction; searches and seizures, arrest. Due to its nature, since intelligence is “one sided”, “circumstantial”, “secret”, “its truth cannot be proven”, and “data which has been processed in a certain way”, and in reality since it exists as a “police activity pertaining to the period before the perpetration of the crime”, there is a debate whether it could be used as evidence in criminal procedure, and if it would be accepted as evidence, under what conditions this could be possible. In this paper, this subject is examined with a view of the approaches in the doctrine, and of the applications of the Court of Cassation.

Keywords: *Intelligence, criminal procedure, evidence, secret witness, (x) informant.*

I. PROLOGUE

Especially during the recent years, under the Turkish Criminal Procedure, both during the investigation stage, and also during the prosecution stage, among the evidence that would constitute the basis of various procedures, the Judge's decisions or the Court's decisions, judgments, and even decrees of the Court of Cassation, there is information and/or documents that would generally be referred under the concept of "intelligence"^[1] such as "declaration of the informant", "gathered information", "intelligence", and "hearsay"^[2]. On the other hand, especially during the recent years, within the concept of crimes of terror, within the trend coined as the "enemy combatant law" in the doctrine, there is a tendency to put more emphasis on the preparation stage; and thus there is a tendency to widen the boundaries of punishment^[3]. Parallel to this tendency, in the area of criminal procedure, there is a tendency to utilize "prosecution of reactionary crimes"; to combat with crime, through crime prevention methods", and "measures of prosecution". In this juncture, starting with the subject of communication surveillance during the investigation of a crime, on the subject of "wiretapping for intelligence", and on the subject of "utilization of intelligence during criminal investigation, and prosecution, there are heated debates especially on the subject of relinquishing some procedural guarantees^[4].

In the law of criminal procedure views and applications such as "utilization of intelligence" and/or "widening the boundaries of intelligence", reveal the

- [1] We can add declarations of "the secret witness" to these.
- [2] There is no official statistics, or scholarly research on this subject. Thus, the author bases his opinion upon the decisions of the Court of Cassation, and upon the files, which he had a chance to observe during the course of his nearly 25-year career, the last 10 years of which he spent with a tenure as a Prosecutor at the Court of Cassation (Ex. See: CGK, 06.03.2012, 2011/10-387, 2012/75).
- [3] On this subject, See: Sinn, Arndt, "Modern Suç Kovuşturması- Düşman Ceza Hukuku Yolunda mı? (Çev. Yener Ünver)", in: Terör ve Düşman Ceza Hukuku (Proje Yöneticisi: Kayıhan İçel, Editör: Yener Ünver), Seçkin Yayıncılık, Ankara 2008, p. 614-615; Foster, Susanne, "Birleşik Krallıkta Terörle Mücadele- Suç Sonrası ve Önleyici Çözüm Arayışları", Risk Altındaki Global Dünya Toplumu ve Ceza Hukuku (Criminal Law in the Global Risk Society) (Eds. Ferudun Yenisey- Ulrich Sieber)", Max Planck Enstitüsü ve Bahçeşehir Üniversitesi Yayınları, İstanbul 2011, p. 433-441; Müller, Tim Nikolas, "Ceza Hukuku Vasıtasıyla Terörizmi Önleme" (Çev. Ayşe Nuhoglu), Risk Altındaki Global Dünya Toplumu ve Ceza Hukuku (Criminal Law in the Global Risk Society) (Eds. Ferudun Yenisey- Ulrich Sieber)", Max Planck Enstitüsü ve Bahçeşehir Üniversitesi Yayınları, İstanbul 2011, p. 453-462.
- [4] On these subjects, See: Jill E.B. Coster van Voorhout, "Intelligence as a Legal Evidence", Volume 2, Issue 2 (December) 2006, p. 119-144 (<http://www.utrechtlawreview.org>, 23.08.10); Albrecht, Hans-Joerg, "Almanya'daki Gizli Soruşturma Tedbirleri Hakkında" (Çev. Ferudun Yenisey), Risk Altındaki Global Dünya Toplumu ve Ceza Hukuku (Criminal Law in the Global Risk Society) (Eds. Ferudun Yenisey- Ulrich Sieber)", Max Planck Enstitüsü ve Bahçeşehir Üniversitesi Yayınları, İstanbul 2011, p. 521- 545; Özbek, Veli Özer, Ceza Muhakemesi Hukuku, Seçkin Yayınevi, Ankara 2006, p. 159 vd.

importance, and the trendiness of this subject^[5]. In our paper, we examine this subject broadly, based upon the applications of the Court of Cassation.

II. INTELLIGENCE AND RELATED CONCEPTS

In order to assess the problem, and lay out the solutions, at first, it will be useful to look up the meanings of the umbrella concept of “*intelligence*”, and some related terms.

The word “*intelligence*”^[6] means: 1. Newly obtained information, news, hearsay. 2. Gathering Information, receiving news; whereas, “*hearsay*” means: 1. Hearsay 2. News, its veracity (truth) cannot be confirmed, intelligence. “*Informant*” that is closely related with this concept means: “1. *Conveyor of News, informant*. 2. *A person informing the authorities regarding an illegal situation, informant*”^[7]

Intelligence which is technically the same thing in essence is described as: “*a product obtained through continuous processing according to the needs designated by the State, and it is composed of news, information, documents obtained from disclosed or undisclosed sources*”^[8].

Intelligence is a multi faceted concept which is divided into classifications such as: “*military intelligence*”, “*political intelligence*”, “*economic intelligence*”, “*social and cultural intelligence*”, “*technological intelligence*”, “*scientific intelligence*”, “*electronic intelligence*”, “*cyber intelligence*”, and “*biographic intelligence*”, based upon its subject^[9]. Intelligence in the context of criminal procedure can appear

[5] In Germany, it is currently discussed whether the intelligence bodies' areas of duty, should be broaden to include general crimes [See: Albrecht, Almanya'daki Gizli Soruşturma Tedbirleri Hakkında, p. 521].

[6] On the subject of intelligence, many different explanations from different perspectives have been made in the doctrine. On this subject See: Köseli, Mutlu, İstihbarat Temel Hususlar ve Güncel Konular, Ankara 2011, p. 7-12; Acar, Ünal/Urhal, Ömer, Devlet Güvenliği İstihbarat ve Terörizm, Adalet Yayınevi, Ankara 2007, p. 191-195.

[7] See: <http://tdkterim.gov.tr>, 20.11.10.

[8] <http://www.mit.gov.tr/isth-olusum.html>, 23.11.10; Same way: Bıçak, Vahit, Suç Muhakemesi Hukuku, Seçkin Yayınevi, Ankara 2010, p. 268. Thus under the 2000/284 numbered, and 02.14.2000 dated In fact, Council of Ministers regulation “*Regulation Regarding Security Investigation, and Archive Examination*” dated 02.14.2002 and numbered 2000/84 intelligence is described as follows: “*intelligence means the result of the classification of information, recording, evaluation, and interpretation, which is gathered through various sources, in various means*”.

[9] Acar/Urhal, Devlet Güvenliği İstihbarat ve Terörizm, p. 204-208. Furthermore, intelligence is divided into sub groups depending on the nature of the act: “*military intelligence*”, “*civil intelligence*”, “*counter intelligence (resisting intelligence)*”; depending on the nature of the danger posed: domestic intelligence, foreign intelligence; depending on the way it is obtained: “*positive (combatant) intelligence, negative intelligence*; depending on the time period that it is obtained: “*strategic intelligence*”, “*tactical intelligence*”, “*operational intelligence*”; according to the means that it was obtained, and its functions: “*human*

as: “*declaration of informant*”, “*information that the police gathered from various sources*”, “*wiretapping for intelligence purposes*”, “*declaration of a secret witness*”.

In our law there are various provisions regarding intelligence and related concepts, which we shall mention hereinafter, as we see fit.

III. APPLICATION OF INTELLIGENCE IN CRIMINAL PROCEDURE

As we have mentioned earlier, due to its nature, intelligence is the compilation of information that is “one sided, circumstantial, secret, its veracity cannot be confirmed, and processed in a certain way (impure/not raw)”^[10]. For this reason, intelligence data are circumstantial evidence, and on their own they form the basis of the final judgment (8. CD, 20.09.2007, 2813/7030)^[11]. However, as we have mentioned above, within the system of Turkish Criminal Procedure, it is quite common to utilize intelligence (and data that have similar attributes).

A. Utilization of Intelligence before the Perpetration of the Crime (During Pre-Crime Investigation / During Preliminary Inquiries)

As we know, “*Criminal Procedure*” consists of “*investigation*” and “*prosecution*” stages. Under the CPL, “*investigation*”, covers the period starting with the time when the authorities became aware of the suspicion of crime, and ending with the admittance of indictment (article 2/1-e); whereas “*prosecution*”, “*covers the period starting with the admittance of indictment, and ending with the final sentence*” (article 2/1-f).

In order to start the investigation there must be “*suspicion of an overt act*”, in other words, there must be substantial evidence that the crime has been committed. On the other hand, for preemptory intelligence operations to take place, it is not necessary for the crime to have been committed; and with this attribute, intelligence cannot have a place within the existing stages of criminal procedure. As a result of this situation, a new stage is being tried to append to criminal procedure, which is called: “*pre-crime investigation stage/ preliminary inquiry stage*”. Let us emphasize that the purpose for the preliminary inquiries is to prevent the perpetration of the crime, and to take precaution, for the

intelligence”, “*image intelligence*”, “*open source intelligence*”, and “*signal intelligence*” (See: Acar/Urhal, Devlet Güvenliği İstihbarat ve Terörizm, p. 208-214).

[10] Thus intelligence emerges after a certain process: Köseli, İstihbarat Temel Hususlar ve Güncel Konular, p. 65- 112.

[11] Bıçak, Suç Muhakemesi Hukuku, p. 376. Thus, a member of the Court of Cassation Ali Kınacı, makes very appropriate assessment in a dissenting opinion he has written: “...” Intelligence data, is the information that is obtained by the police force, through hearsay, rumour, opinions, and presumptions. Since its source is not based upon a certain person, or a tangible event, intelligence data is not evidence. It is a vehicle to obtain the evidence....” (10. CD, 28.06.2013, 2012/490, 2013/6666).

prosecution of the crimes that will be perpetrated in the future^[12].

Since the crime has not yet been committed during the pre-crime investigation stage, crime investigative bodies/prosecutors do not have any authority; and as a result, they cannot resort to secret investigation measures which are cited under CPC article 135 and the following. Even so, under Turkish law (2559 numbered PVSK art. amendment ; 2083 JTGYK art. numbered 5; 2937 numbered DİHMİTK art. 6) under certain circumstances, in order to prevent the perpetration of certain types of crimes, a limited number of secret investigation measures are allowed. These are: “*surveillance through telecommunication, wiretapping; evaluating, recording, and wiretapping of signal data with the aid of technical instruments*”^[13].

According to the provisions mentioned above, records obtained through the above cited activities may only be used for preemptory purposes, to take precautionary measures, and to promote security. They may not be used for other reasons, and they especially may not be used as evidence during the crime investigation, and prosecution (excluding a suspicion of an overt action) stages. This is mandatory under the clear evidence rule under these provisions^[14].

B. Utilization of Intelligence after the Perpetration of the Crime, for the Purpose of Initiating the Investigation (Suspicion of an Overt Act)

It is possible to use intelligence in order to initiate the investigation. Through the intelligence he/she obtained, or he/she received, if the prosecutor gets the impression that a crime has been committed. Under article 160/1 of the CPC titled “*The duty of the prosecutor*”, he/she must immediately start the investigation under the following provision: “*as soon as helshe learns, either through an informant’s notice, or through another way, that a crime might have been committed helshe immediately starts to investigate to find the truth*”. However, in order to start this investigation, it has to include ‘concrete data’, and it must not be based upon abstract thoughts such as guess, or criminal hypotheses.

Let us emphasize that it is the decision of the prosecutor, not the decision of the police that would make it possible to initiate the investigation stage based upon intelligence data^[15].

[12] Özbek, Ceza Muhakemesi Hukuku, p. 159.

[13] MIT is not awarded resorting to this one last measure. For extensive information on the subject, see. Özbek, Veli Özer/ Kanbur, Nihat/ Doğan, Koray/ Bacaksız, Pınar/ Tepe, İlker, Ceza Muhakemesi Hukuku, 3. Baskı, Seçkin Yayınevi, Ankara 2012, p. 179-190; Yüksel, Saadet, “*Intelligence Surveillance of Wire Communications under Turkish Law*”, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Prof. Dr. Fusun Sokullu- Akıncı’ya Armağan (2. Cilt), Cilt LXXI, Sa. 1, İstanbul 2013, p. 1313-1326.

[14] Opposite: Yüksel, Intelligence Surveillance of Wire Communications under Turkish Law, p. 1320.

[15] Due to the fact that the rule under article 156 of the CPL does not exist in the CC (Criminal Code), in essence, this situation applies to all the crimes (Özbek, Ceza Muhakemesi

C. Utilizing Intelligence for the Purpose of Taking Cautionary Measures, after the Perpetration of the Crime

Before sentencing, in order to expedite criminal procedure, and to enforce possible sentences which would follow, it is possible to utilize some legal measures that would interfere with basic rights and freedoms, which are broadly called “*protective measures*”^[16]. In order to apply a protective measure, along with other conditions for example :

- For arrest “*facts which would support strong suspicion of crime*” (CPC art. 100/1),

- In order to attach real estate, and expropriate claims and credits “*reason for strong suspicion that the subject of the crime that is under investigation, and prosecution has been committed, and (real property, claims, and credits) have been obtained through perpetration of these crimes*” (CPC art. 128/1),

- To detect, eavesdrop, and record communications (CPC art. 135/1), to employ a secret investigator (CPC art. 139/1), for surveillance with technical device (CPC art. 140/1), there must exist reasons for strong suspicion, and there must be no other means of obtaining evidence^[17].

Due to their nature, intelligence data/ intelligence are impossible to contain elements that would reveal the existence of strong presumption of guilt. In my opinion, for this reason, they lack the probative value of evidence that would constitute the basis for the application of the afore-mentioned measures.

D. Utilization of Intelligence for the Initiation of Prosecution

Under article 170/2 of CPC: “*if the evidence gathered at the end of the investigation stage raise reasonable doubt that the crime has been committed*” prosecutor, initiates the public case by preparing an indictment.

On its own, intelligence/intelligence data cannot prove that a crime has been committed, and for this reason they cannot be entered as evidence to initiate the prosecution of a public case.

E. Utilization of Intelligence for the Sentencing

Article 217 of CPC states that: “(1) *Judge can base his/her decisions only upon evidence submitted in Court, and discussed in his presence. This evidence is evaluated freely, with the breast of Court. / (2) Burden of guilt, may be proven by all kinds of evidence obtained through legal means*”.

Hukuku, p. 187).

[16] The main reasons to resort to protective measures are: “*the existence of a suspicion of guilt, the existence of the appearance of being right, conforming to the rule of proportionality, due to its being regulated by laws, and the possibility of danger in case of delay*”.

[17] For the decision of arrest: “*this measure must be mandatory regarding the investigation, and there must be indications to believe that the person has committed a crime (CPL article 91/2); for searches, there must be reasonable doubt that the person could be apprehended, or the crime evidence could be obtained*” (CPL article 116).

As a natural result of this provision, intelligence/ intelligence data which may not be brought to Court, and which may not be discussed, even if it brought to Court, cannot be entered in as evidence. For example, evidence which an informant submits to the police, but who may not be able to testify in Court either because his/her identity is unknown, or he/she would not want his/her identity to be revealed, cannot be entered in^[18]; this data can only be utilized to reach the evidence^[19].

IV. Applications of the Court of Cassation on the Subject

Court of Cassation has very important duties and responsibilities such as the promotion of the right way of understanding and application of law; promotion of homogeneity in case law; finding discrepancies of law in Court decisions, and eliminating them. Thus, it is very important to designate whether intelligence data may be used as evidence in criminal procedure or not; if it may be used, it is quite important to designate under what conditions it may be used. Following are the decisions that we were able to identify, which we pass on as systematically as possible; and subsequently, we state the results, and suggestions regarding the subject.

A. Intelligence Data

1. Decisions Stating that Intelligence Data cannot be used as Evidence

“The fact that during all the stages, the defendants admitted having used narcotics (marijuana) constantly, but they denied trading in narcotics; the fact that the blood samples taken from the defendants CK and UT contained the material THC (marijuana); the fact that net 1.2 gr. which is the amount of marijuana seized from the defendants was within the personal usage limits; the fact that

[18] Under article 14 of the 3713 numbered TCC titled: “*Disclosure of Informants’ Identities*”: “*The identities of the informants who inform about the crimes and the criminals who would fall under the provisions of this law may not be disclosed, unless they give their permission, or unless the content of the information submitted would establish a criminal activity on their part*”. Similarly, under article 19/4 of the 5607 numbered KMK; “*the identities of the individuals who report on smuggling, may not be disclosed without their permission, or unless the content of the information submitted would establish a criminal activity on their part. Provisions regarding witness protection would be applicable to these people.*” Article 18 of the 3628 numbered law, titled “*information regarding a crime*” states that: “Information regarding the above referenced crimes shall directly be submitted to the Chief Prosecutors’ Offices. With the submission of the information, an information record is immediately prepared, and a copy of this is handed to the informant. In situations when haste is required, and time is of the essence, record keeping may be left for a future date. The identities of the informants may not be disclosed without their permission. If the information is found to be without basis, the informant’s identity is disclosed upon the accused’s wish.

[19] See: Emel Özgan and Ali Kınacı’s reasons for dissent (10. CD, 19.11.2009, 2009/11363, 2009/18079).

the searches of the defendants and searches in their homes did not reveal any other narcotic-stimulant materials; the fact that the narcotics were stored in an easily accessible way, within two packages of cigarettes; when we evaluate all of these together, and could not find any evidence contrary to the defense of the defendants, other than the intelligence data, the claim that the suspects committed the crime of trade in narcotics is only a suspicion.

Under one of the most important principles of criminal adjudication, ‘in dubio pro reo’ that is ‘when in doubt, for the accused’, the only way for the defendant to be punished for the crime he/she is accused to have committed, is to prove the guilt with such clarity, so that there would be no room for doubt. Events and claims that are doubtful to have happened, and could not have been completely clarified, cannot be used against the defendant to lead to his/her conviction. This principle has quite a wide range of practice areas. It may be utilized when answering whether a crime has been committed or not, or if a crime has been committed but there is doubt about the way that it has been committed; it may also be utilized when determining the nature of the crime. Criminal conviction must not be a probable discretionary decision that is reached on the basis of allowing some evidence gathered during the trial stage, but ignoring some others. Criminal conviction must be based upon definite and clear proof. This proof must be so clear that it must leave no doubt for any other possibility....” (CGK, 18.09.2012, 2012/10-1253, 2012/1769).

“... The incident of arrest, and the record of seizures; the manner which, the subject matter of the crime, the narcotics, have been seized; the defense of the defendant; and by looking at the contents of the whole file, the defendant who did not have any narcotics on him, contrary to his defense and outside the intelligence data received, and without having enough, and definite proof which would go beyond the limits of suspicion, he would not have any connection with the narcotics found in the air ducts on the channel walls. Without paying attention to the maxim “in dubio pro reo”, a decision for the conviction of the defendant. ...” (10. CD, 04.10.2010, 2008/1301, 2010/20309).

“... Since the declarations of the complainants, which they changed subsequently, were based upon hearsay, and since these declarations could not be substantiated by other evidence; and since the reason for the start of the fire could not be determined with certainty, the claim that the incident happened due to the defendant’s fault is just a mere suspicion. A written judgment is given that there is not enough evidence to convict the defendant....” (9. CD, 25.12.2006, 2006/5789, 2006/7738).

2- Decisions Stating that Intelligence Data can be admitted in as Evidence

“... During the investigations to gather data, since information has been obtained that the defendant sold narcotics, a search has been conducted in the defendant’s house, and 29.530 gr. total weight of marijuana divided into 33 small packets, and a nylon bag containing 41 gr. of marijuana have been found. Other than

this, in the search of his person, a total weight of 5.170 gr. of marijuana divided into 5 packets have been found. Considering the nature of the intelligence received, considering the incident, and the number of small packets seized, a written decision has been reached without considering the fact whether the defendant's actions constituted the crime of trading in narcotics or not...." (10. CD, 08.10.2010, 2008/4339, 2010/20882).

"...Considering the nature of the intelligence data regarding the defendant, the way that the narcotics have been seized, and the amount of narcotics seized, without considering that the defendant's confession would not help, and aid in the revelation of his crime, the application of the provision of active repentance [sentence reduction] under article 192/3 of the 5237 numbered TCC, since there was no appeal, it is not used as reason to vacate the judgment..." (10. CD, 10.13.2010, 2008/14287, 2010/21588).

B. Secret Witness and (X) Informant

1- Decisions Stating that it is not admitted in as Evidence

"....Without considering that the declaration of a witness who is protected under the witness protection program cannot constitute the sole evidence for reaching a decision, the decision was made based upon the declaration of this witness only. This was against article 9/8 of the 5726 numbered Law of Witness Protection, and therefore called for a quash...a decision to quash as stated in the notice..." (1. CD, 03.03.2010, 2009/4015, 2010/1277).

"...During the investigation stage, the wiretapping was not carried out in the acceptable method. Even so, the declarations of the informants whom the police heard as 'secret witnesses' could not constitute the basis for the decision. Considering this, the defendant Ü.Ç's, legal position must be decided according to the other evidence presented...." (10. CD, 27.03.2008, 2007/25667, 2008/4879).

"...According to a police informant's declaration the defendant sold narcotics. Under article 58 of the CPL, the informant must have testified as a witness, and according to this testimony the nature of the defendant's crime must have been assessed. However, the decision stated that the investigation was incomplete..." (10. CD, 20.10.2010, 2010/25370, 2010/22325).

"...According to the incident, and the declaration of the informant (X) kept in the file: there were a great number of weapons in the defendant's residence and his sibling's residence. When the informant declared that they would be transporting the weapons to another location, a search was conducted in the defendant's residence. During this search, 5 ordinary guns, and 5 clips belonging to these guns were discovered. Other than the fact that the defendant kept and carried 5 ordinary guns, and 5 clips, there was no clear evidence free from doubt, and no believable evidence to prove that the defendant engaged in arms trade. A written decision of conviction under article 12/1 of the 6136 numbered was delivered, without evaluating whether this act was against article 13/2 of the same law, and with reasoning

which would be discrepant with the contents of the file...” (8. CD, 11.3.2008, 2008/980, 2008/1880).

“...Other than the subjective declarations of the informants X-1 and X2, on the record of incident, defendants’ defenses, and other information and documents that are in the file, there were no absolute, and persuasive evidence to indicate that the defendants committed the crime. Even so, instead of acquitting the defendants, a decision of conviction was given....” (10. CD, 11.10.2010, 2008/17744, 2010/21139).

“....On the record of the incident, identification, arrest and seizure; the amount of narcotics which constituted the subject matter of the crime, and the way that they were seized; and the contents of the whole file, there is no sufficient, and absolute evidence that would raise reasonable doubt that the defendant used the narcotics which were seized from his home, in another way other than his personal consumption. The only evidence against the defendant’s testimony is the subjective declaration of the informant. A written decision was given without considering the fact that the defendant’s actions constituted the crime of keeping narcotics for personal consumption....” (10. CD, 11.10.2010, 2010/30011, 2010/20947).

2. Decisions Stating to Admit it in as Evidence

“....According to the contents of the record of incident, and arrest dated 12.24.2006; and according to the documents and information in the file, the farm which belonged to defendant M.N. was used as a place for production of narcotics. The machines seized in the farm were used in the production of narcotics; the report of the Department of Forensics 5th committee of experts, stated that the production of narcotics had occurred; the number of defendants and the hierarchical structure among them; the declaration of the informant (X) stating that he carried supplies to the defendants on four, or five occasions, indicated the production of narcotics. When all of these were evaluated together, they pointed out to the fact that the defendants committed the crime within an organization which was specially formed to commit this crime. The defendants must have been convicted under articles 188/1-5, 62, and 220 of TPC; instead of a conviction, a written decision is delivered / Against the law, the objection of appeal of the defense attorneys representing the defendants M.N.Y, S.Y., B.B, and the objection of appeal of the public prosecutor have been sustained for this reason, and the convictions have been vacated against the objections....” (10. CD, 17.09.2008, 2008/6060, 2008/13283).

As you see-even though there are decisions to the contrary-the Court of Cassation adopts the view that the intelligence data may be used either on its own, and/or even though it is not direct it may be used in connection with other evidence, in criminal procedure. Therefore, it accepts the intelligence data as a legally admissible way of proof. Our view is further confirmed by the following statement of the Plenary Committee of Crimes, of the Court of Cassation:

“...The incident, that is considered to be definite by the Plenary Committee of

Crimes,....have been understood to have happened through the informant's record of registration; through the incident report; through identification records; through the decisions of technical surveillance; and through records of phone conversations, through records of arrests, through reports prepared by the Department of Forensic Medicine, and through defendants defenses, and other such legally admissible evidence which would verify, and complement one another...." (CGK, 03.04.2007, 2006/10-253, 2007/80).

V. Approach of European Court of Human Rights (ECHR) to the Same Subject

In cases where the only evidence consisted of declarations of the witnesses, European Court of Human Rights, concludes that the witness or the witnesses must testify during the trial stage, and a right to interrogate must be awarded to the defendant, or to the counsel for the defense (it states that a contrary situation would be against the right of a fair trial) (examples: Kostovski/ Holland Decision, 20.11.1989, 11454/85; Unterpetinger/ Austria, 24.11.1986; Lüdi/ Switzerland, 15.06.1992; Van Machelen vd/ Holland 23.04.1997); otherwise, in case there is other evidence, other than the declarations of the witnesses, the European Court of Human Rights concluded that this discrepancy would be important and severe (ex. Doorson/ Holland Decision, 26-03-1996; Artner/ Austria, 28.08.1992). When the decisions of the ECHR regarding secret witnesses are evaluated as a whole, the following observations can be made:

- The Court views the concept of witness, as an autonomous concept, independent of the national laws.

- According to the Court, the power to make a decision on the subject of admissibility of evidence, is a subject that would fall under the jurisdiction of the national laws; and as a rule, the conclusiveness of evidence would also fall under the jurisdiction of the national courts. Therefore, the main concern of ECHR is not whether the evidence is evaluated according to the procedure, or not; but, whether the whole adjudication conforms to article 6 of the ECHR, including the presentation of evidence.

- In reality all of the evidence, must be submitted and discussed in open court in the presence of the defendant/the counsel for the defendant. However, as long as the right to defense is not curbed, the utilization of the testimony of witnesses which were taken before the trial, would not adduce evidence to be inadmissible (illegal) on their own.

- A deprivation decision may not be given, only due to the declaration of a secret witness. Along with this, there must be other evidence that is credible, absolute, and reinforcing.

- It is possible to hide the identity of the witness, when there are enough reasons to believe that there will be possible life threatening, and property threatening dangers forthcoming from the defendant. The existence of this in

the material case, must be presented with its reasons, and basis. In this situation, the undisclosed witness must testify in another location (other than the Court), and his/her testimony must be submitted to the defendant and/or to the counsel for the defendant, through technical means, and they must be awarded the possibility of questioning the witness.

VI. Conclusion and Evaluation

As we know, the subject of criminal procedure is to decide whether a certain event that is claimed to have happened in the past, has actually happened; and if it has happened whether it has carried been out by the defendant or not. Criminal procedure has also a purpose of determining the results of the incident from the perspective of criminal law. During criminal procedure material facts are investigated. For this reason, everything is considered as evidence, and as a rule, there is no oto prove obligation to prove certain elements with certain evidence (principle of freedom of evidence).

In criminal procedure, even if everything may be used as evidence, it is still mandatory for the evidence to have certain qualities. In this regard, evidence must be realistic; wise; it must represent the incident; it must be collective; and besides, it must not be illegal.

As long as the evidence grouped under the heading of intelligence possess these qualities, as a rule, they shall be used as proof in criminal procedure. However, as we have stated earlier, since the data possessing these qualities is "one sided, circumstantial, secret, its veracity cannot be definitely confirmed, and it has been processed in a certain way (in other words: it lost its originality), on its own it would not have any meaning. It must be supported with supplementary evidence, if not; we can state that the right to a fair trial (AİHS md.6) would have been breached.

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