



## LIMITATION OF POWER OF THE COUNSEL TO REVIEW THE FILE IN THE CRIMINAL PROCEDURE: LAW NO. 6572 AND IT'S CONSEQUENCES

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### **Abstract:**

*The Article No. 153 of the Law of Criminal Procedure, which regulates the power of the counsel to examine the file, has been amended by the Law No. 6572, the Article No. 44, dated 02.12.2014. According to the amendment, if the power of the counsel to examine the content of the file or taking copies of the documents jeopardizes the purpose of the investigation, it can be limited by the judge upon request of the prosecutor. However, limiting the power of the counsel to examine the investigation file is against the European Convention on Human Rights and the Constitution. Indeed, the European Convention on Human Rights gives a ruling of violation of right in cases where it determines such a limitation of power. The power of the counsel to examine the content of the file is the sine qua non of a fair trial. It also serves the purpose of revealing the truth. In this study, we will try to examine the effect of the amendment made with the Article 44 of the Law No. 6572 about power of the counsel to examine the file on the fair trial principle.*

### **Keywords:**

Fair Trial, Equality of Arms Principle, Counsel, Examine the File

### **JEL Classification:** K14

## **1. Introduction**

The 153rd article of Code of Criminal Procedure (CCP) No: 5271 on an authority of defense counsel to review the file has been amended for twice within a year with Law no: 6526 on February 21, 2014, and article 44th of Law no: 6572 on December 02, 2014. These two regulations are worlds apart. In accordance with the amendment by Law no 6526, all obstacles and exceptions for a defense counsel to review the full content of the file on investigation phase and take a copy of the documents of his/her will without a charge have been revoked in article 153rd of CCP. However, the amendment by article 44th of law no 6572 on such amendment within less than a year has turned article 153rd of CCP into another identity. According to the regulations in force; authority of defense counsel to review full content of the file or take a copy from the documents may be limited by the order of the judge upon the public prosecutor if it jeopardizes the objective of the investigation.

The entitlement of the defense attorney to review the file is a crucial instrument for the exercise of the right of defense through the course of criminal procedure. In order for the thorough and proper exercise of the right of defense, being an universal right, the defense attorney should be able to review the file and obtain duplicate copies of the contents of the same without any restrictions at the enquiry stage, which would allow the defense attorney to gain knowledge of any and all pieces of evidence for and against the suspect and to prepare the defense statements and develop the defense position accordingly. Otherwise, the equality of arms principle cannot be suggested to have been observed as it would solely be the Public Prosecutor, who has access to the case file at the enquiry stage.

This article intends to study and discuss how and to what extent the restrictions introduced by the Code No. 6572 on the defense attorney's entitlement to review the case file impair the right to due process (fair trial) and contradict with the established criminal procedure in the light of the European Convention on Human Rights (ECHR). This study also intends to analyze the reasons why the law-maker revoked the entitlement granted to the defense party to review the case file within such a considerably short period as ten months. However, we have to provide overall information about the authority of defense counsel to review the file for this review to be more proper and for identifying the problem and solution propositions. The authority of defense counsel to review the file has no restriction in the prosecution phase; therefore, it is excluded from the study.

## 2. Authority Of Defense Counsel To Review The File

### 2.1. Right to a Fair Trial and Equality of Arms Principle

One should primarily establish the meanings of the “right to due process (fair trial)” and the “equality of arms principles” in order to be able to put forth the inconveniences and matters of drawback that the restriction by the Code No. 6572 of the entitlement of the defense attorney to review the file.

The very fundamental principle in Turkish criminal procedure is the fair trial principle, according to which a state of law should realize justice fairly and lawfully. The said principle being intended to secure the principle of rule of law as ideally as possible; it requires the human dignity to be actualized and to be observed through the course of trial (Ünver ve Hakeri, 2015: 16-17). The right to a fair trial is regulated in Article 6 of the ECHR. This article secures the right to fair and open trial if accused or define the rights and obligations of individual in private law. (Mole and Harby, 2006: 6). The right of defense counsel has been secured at subparagraph (c) of the paragraph 3rd of the Article. This paragraph applies only to criminal proceedings (Leigh, in the Turkish translation 354, Dursun, 2004).

The right to a fair trial may be violated if defense counsel may not have the right to review the investigation file or not given an enough time to review the full content of the file or not provided an opportunity to review some documents to defense to prevent arrest (Çulha et al. 2013: 61).

Right to a fair trial involves the principle of equality of arms. This principle refers to the fact that each party to a case may have the reasonable facility to present his/her allegations to the court in the conditions which she/he is not disadvantageous against the other party. (Mole ve Harby, 2006: 46).

The equality of arms principle implies the establishment of the balance between the powers and entitlements of the suspect/defendant and those of the prosecutor, the extent of which balance is limited to the framework required for the protection of the victim within the scope of the criminal law. It should be noted here that the said principle does not imply total equality. As a matter of fact, it should be put that the extent of powers of the prosecutor is always broader than that of suspect or the defendant. However; such balance should not be upset against the right of defense, the defense party should not be rendered incapable of defending itself or the right of defense should not be restricted. In other words, we can say that if defense turns into an object rather than a subject, it violates the principles of equality of arms (Özbek et al. 2015: 62).

ECHR ruled in *Dombo Bebeer v Netherlands* case that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent (Dombo Bebeer/ Netherlands Decision, No. 14448/88, 10/27/1993).

As a rule, it is proposed that the principle of equality of arms in trial and legal remedies are valid in court proceedings. It is debatable if this principle is valid throughout the investigation phase. However, the European Court of Human Rights assesses the trial as a whole under right to a fair trial at Article 6 of European Convention on Human Rights and identifies principle of equality of arms with prosecution and rules the violation of right to a fair trial (Article 6 of ECHR) for the illegality that is not met at several phases of the trial and violates the principle of equality of arms at investigation phase (Özbek et al, 2015: 63).

### 2.2. The Authority of Defense Counsel to Review the File Generally

In order for the defense attorney to be able to properly fulfill its duty of defense, s/he should have knowledge of all pieces of evidence for and against the suspect or defendant. The characteristics of orality of accusation trial provide this opportunity to the accused and defense counsel as a rule. However, defense counsel may not get information about the flow of the investigation for it is confidential and written. The most useful way to overcome the obstacle is through review of the file (Centel, 1984: 111). As a matter of fact, Section 153 of the Code of Criminal Procedure entitles the defense attorney to review the case file, providing, “*The defense attorney may review the file content, and obtain duplicate copies of any document therein without having to pay a fee through the course of the enquiry stage.*” Such entitlement imposes, on the other hand, on the defense attorney the obligation to conduct such review thoroughly, elaborately

and properly as a defense attorney, who does not do so in the absence of any legal or actual obstacle would, in our opinion, have not completely performed his/her duty. Because a defense attorney cannot possibly serve to the interests of the suspect or the defendant, to whom it provides legal assistance, without being fully familiar with the pieces of evidence, statements and documents within the file.

Perhaps the first and most important reason for enabling this exception to the secrecy of the investigation is that defense counsel may not have the opportunity to collect evidence directly through law enforcement officers just as the public prosecutor does. Defense counsel requests information in such cases. Therefore, the only source of information about the case is often the investigation file. In other words, the defense relies on the investigation file.

According to Kunter, the reason why this authority has been recognized is to prevent judge getting information from unbeknown places and eliminate the secret file system (Kunter, 2009: 418). In our opinion, the control mechanism is one of the reasons why this right has been provided to the defense counsel and the main target is to provide the right to a fair trial of the individual.

*The right to review the investigation file* secured under Article 36th of the Constitution and ECHR 5/4, 6/3 and c aims to prevent misjudgment as an integral part of the defense a principle of equality of arms, which are the sine qua non of a fair trial. In order to practically use the rights provided to the suspect or accused as the subject of the trial such as bringing forward evidence, question and the right to silence bases on *how* and *to what extent* he can get information about the content of the incrimination.

The entitlement of the defense attorney to review the enquiry file is not subject to “permission” rule. Unless there is a confidentiality order regarding to the file, the defense attorney may take the liberty of reviewing the enquiry document.

Even though there is no clear regulation in European Convention on Human Rights (ECHR), European Court of Human Rights (ECHR) bases authority of defense counsel to review the file on the right to liberty and security of the person (ECHR 5/4) during the detention, principle of equality of arms and right to a fair trial (ECHR 6/3-b). According to the 3-b subparagraph of the article 6 regulated under the right to a fair trial: Everyone charged with a criminal offense may have adequate time and facilities for the preparation of his defense. In this context, the suspect or the accused should have adequate time for preparation of his defense by considering the scope and complexity of the file and facilitate reviewing the evidence that bases the accusations before the trial regarding the public prosecution against him (Öztürk et al., 2015: 254). In addition, according to European Court of Human Rights decision the counsel to appeal effectively to the detention of his/her client, the right to review the file must be unrestricted (Ceviz/Turkey No. 8140/08, Erkan İnan/Turkey No. 13176/05, Nedim Şener /Turkey No.38270/11 Ahmet Şık/ Turkey No.53413/11, Lamy /Belgium No.10444/83, Nikolova/Bulgaria No. 31195/96, Schöps/Germany No. 25116/94, Garcia Alva/Germany No.23541/94, Lietzow/Germany No.24479/94, Mooren/Germany No. 11364/03). (<http://www.barobirlik.org.tr/Detay.aspx?ID=38340/2016>). As you can see, the authority of defense counsel to review the file has been regulated indirectly. However, ECHR has filled the gap with case laws and set the valid standards for all council members.

Save for the legal exceptions; defense counsel may have access to the document and information and be informed completely (Ünver and Hakeri, 2015: 236). The defense attorney may review any papers and documents relating to the case and the enquiry. Such papers and documents are all documents, photographs, criminal record, registration file, and verdicts, reports and rogatory minutes of previous civil and criminal suits, which are collected in favor and against from the moment when the law enforcement officer is included in the case and added to the indictment by the Prosecution office. The defense counsel may have an authority to take a copy (he can take a photograph if unable to photocopy) in a physical and technical manner and review all types of arms, cartridge, empty case and CD etc, which have been protected, seized or confiscated and which cannot be put in the file physically in the scope of the file (Centel and Zafer, 2015: 193). The defense counsel may take a copy and review all evidence under protection and investigation file according to German Criminal Procedure Code (StPO m.147 / 1) (Bozdag, 2014: 166). If the judge of the criminal court of peace does not issue a restraining order, neither public prosecutor nor law enforcement

officers provide the file to the defense counsel in part. The defense counsel may review the full content of the file without anything being hidden. Otherwise, the right of defense is restricted and "abuse of trust" is committed.

The enquiry file, being reviewed and obtained duplicate copies of, to be located at prosecutor's office, at law enforcement's office or at court does not constitute a difference. The defense attorney may use this right of his/her at all three departments mentioned. The Council of State has revoked the provision, requiring law enforcement officers to obtain the written approval of the public prosecutor to meet the request of the defense counsel and regulated in the first subparagraph of the article 22 of the Regulation on Apprehension, Detention, and Interview on the grounds that such provision is illegal (Regulation on Apprehension, Detention, and Interview article 22/1, stopped execution of by the Council of state, plenary session of the chambers for administrative cases with December 15, 2005 and 2005/762 decree has been revoked by Council of State 10th. Chamber, May 22, 2008, File No: 2005/5845 and Decision. 2008/3450) Despite such ruling, law enforcement officers continue to receive written or verbal instruction from the public prosecutor for defense counsel to review the file. The main reason why law enforcement officers act in this way is that they just want to be on the safe side and guarantee themselves. According to Dülger, defense counsel takes side with the suspect during the apprehension without having any information about the investigation and is not able to fulfill his duty (Dülger, 2012: 64). We believe that this practice of law enforcement is wrong. It lacks a legal basis. The right to defense is the sine qua non of the fair trial. Therefore, the limits of this right should be regulated by the law, not by the application of the law enforcement.

Neither Code of Criminal Procedure nor other legislations contains a clear provision regarding to how long the defense attorney can take time to review the enquiry file. There is no time limited for the defense counsel. According to Centel, the time period of defense counsel to review the file should be appreciated according to the characteristics of every case (Centel, 1984: 117). We agree with this opinion and furthers that there should be generous time for defense counsel to review the file due to the importance of the right to defense. The right to defense should not be sacrificed for the sake of a short delay in administrative activities or legal proceedings.

### **2.3. The authority of defense counsel to review the file in the event of detention**

Order of confidentiality of enquiry file constitutes a particular importance on the cases of which suspects are hold for trial as in that case, the individual would be stripped of his/her freedom although there is no verdict of conviction regarding to him/her. We are of opinion that this subject should be discussed under a different topic due to significance of its consequences. If we study the approach of European Convention on Human Rights (ECHR) regarding the said subject, we would understand that they take the subject as a matter of individual freedom and safety which is stated in ECHR article 5/4 but not in the terms of right to due process (fair trial) regulated in 6th article of ECHR.

*The supervision of arrest* set out in the ECHR 5/4 should be in compliance with the principles of equality of arms between the persons, the right to a fair trial. If the attorney of the arrested person may not be afforded to an opportunity to review the documents in the file to defense effectively against the arrest warrant, then there is no principle of equality of arms (Öztürk et al. 2015: 261). European Court of Human Rights in 1989 *Lamy / Belgium* Decision (No.10444/83, 30/03/1989) resolves the violation of ECHR 5/4 for defense counsel is not able to review the file for thirty days following the arrest and states that it is against the principle of equality of the arms and adversarial proceedings that while counsel for prosecution knows the content of the file, defense counsel does not know the content of the file.

*Sener / Turkey* case (No. 38270/11, 07/08/2014) the ECHR resolves the violation of the convention by assessing that applicant and his attorneys are not able to use the facilities to object to the reasons in a satisfactory manner against the justification of the arrest of the relevant person.

If we examine the case under Code of Criminal Procedure, every person whose liberty has been restricted has a right to benefit from the defense counsel's help (Yıldız, 2006: 196), and the right of defense counsel to review the file does not change depending on the whether his client is arrested or not. In other words, the right to review the file is

provided regardless of accused arrest. There is no distinction between arrestee or not under the right of defense counsel to review the file under CCP article 153. However, the right of accused to have an early and comprehensive information about the content of the file if he is an arrestee is important and of top priority to prevent jeopardizing the objective of the investigation. (Öztürk et al. 2015: 161). The arrest is a heavy protection measure, restricting the liberty of a person without a finalized conviction. The defense counsel should know the content of the investigation file to object to arrest. The principle of equality of arms requires so. (Yenisey Nuhoglu, 2015: 206). The defense counsel should be provided priority and ease to assist his client legally, whose liberty has been restricted. Therefore, the review of defense counsel on the file should not be prevented due to the confidentiality order. Otherwise, there is a risk of person to be deprived of his liberty for years without knowing the reason of accusations.

### 3. The Amendments And Results Of The Law No. 6572

153/2, 3 and 4th clauses of Code of Criminal Procedure, which states that if the defense attorney reviewing the file contents and obtaining duplicate copies of these documents would endanger the purpose of the enquiry, this entitlement of his/her can be restricted but this restriction would not be effective on some documents, have been repealed by the Code No.6526 dated 2.21.2014.

The amendment mentioned has removed an obstacle standing in front of the defense right; and a new system, where no restrictions are for the defense attorney to review enquiry file has been established. As a matter of fact, according to Şahin, from the very beginning, the defense attorney has had limitless access on the file on each stage of the criminal procedure with this regulation. However, this amendment did not stay so long. 153th article of Code of Criminal Procedure has been changed back into by the Code No. 6572. 2nd, 3rd and 4th clauses, which had been repealed by the Code No. 6526 and which had been restricting the right of defense of the defense attorney, have been brought into effect again by this Code.

According to the amended 153rd article of Code of Criminal Procedure no 6572:

- (1) *The defense counsel may review the full contents of the file related to the investigation phase and may take a copy of his choice of documents, and is not obliged to pay any fees for such.*
- (2) *The power of the defense counsel may be restricted, upon motion of the public prosecutor, by decision of the Justice of the Peace, if a review into the contents of the file, or copies taken, hinder the aim of the ongoing investigation.. Such decision may only be given for investigation for the following crimes:*
  - a) *Crimes in Turkish Penal Code no 5237 date October 26, 2004;*
    1. *Voluntary manslaughter (Article 81, 82, 83)*
    2. *Sexual assault (except for the first paragraph, Article 102)*
    3. *Child molestation (Article 103)*
    4. *Production and trading of addictive or relieving/exciting drugs (Article 188)*
    5. *Forming organized groups with the intention of committing crime (Article 220),*
    6. *Offenses against National Security (article 302, 303, 304, 307, and 308)*
    7. *Offenses against Constitutional Order and Operation of Constitutional Rules (Articles 309, 310, 311, 312, 313, 314, 315, 316)*
    8. *Disclosure of information relating to Public Security and political interests of the State (Article 326, 327, 328, 329, 330, 331, 333, 334, 335, 336, 337).*
  - b) *Arms trafficking defined in the Law on Firearms and Knives and other tools (Article 12).*
  - c) *Embezzlement defined in the article 160th of the Banking Law no 5411 and October 19, 2005.*
  - d) *Offenses defined in the Smuggling Law no 5607 date March 21, 2007.*
- (3) *The records of the submissions provided by the individual or by the suspect who was arrested without a warrant, as well as the written expert opinions and the records of other judicial proceedings, during which the abovementioned individuals who are entitled to be present, are exempted from provisions of the second paragraph.*
- (4) *The defense counsel may review the full contents of the court files and all secured pieces of evidence, beginning with the date of approval of the indictment by the court; he may take copies of all the records and documents without any fee.*
- (5) *The representative of the victim shall enjoy all the rights provided by this Article, also.*

As you can see, it is a step back which has been taken to strengthen the right to defense with law no 6526 in article 153rd of CCP. The authority of defense counsel to review and take a copy of the content for the offenses listed has been restricted by the judge order to the prosecution phase. It is not possible for us to explain such reverting back the article to its former shape within a short period of time with legal principles. MPs, lodging a statement of opposition to such regulation in the Justice Commission in Turkish Grand National Assembly (TGNA) (<https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss641.pdf/> 2016) have claimed that government has made amendment due to their needs and recent developments.

Those expressing their views in favor of the proposal in the TGNA Justice Commission:

*The secrecy of the investigation is one of the important tools for the presumption of innocence, one of the universal principles of the law, into practice. The secrecy of investigation is an obligation to put the presumption of innocence and the right against self-incrimination into action by realizing the criminal justice in a correct, true and real manner.*

...

*The restriction orders for the aggravated investigations for organized crimes are of vital importance. Namely, if the restriction order is not taken for the cases which may hinder the aim of the investigation, file review requests may delay the public prosecutor's duty to press charges, and protect the evidence, completion of investigation in a brief time and in full. Therefore, it may result in failure of doing the investigation in a reasonable time and thereby violating the right to a fair trial. Therefore, we have to consider that confidentiality order which may be taken during the investigation for organized offenses, and other crimes may pave the way for a more effective investigation phase and thereby establishing the justice.*

We have to say that there are some provisions in the Code of Criminal Procedures to provide confidentiality for the sake of trial in the investigation phase. The decision and proceedings as to the supervision of communication may be kept confidential during the measures. (CCP 135/7). After the measures end, the minutes related to the decision and proceedings for supervision of the communication may be reviewed and taken a copy. Similarly, decisions and other documents related to appointment of the undercover investigator are protected in public prosecution office. Even after the end of his mission, the identity of the undercover investigator shall be kept a secret (CCP 139/3). Documents related to protection measures are under confidentiality, as well. However, this confidentiality bases on the law not by the rule of the judge (Centel and Zafer, 2015: 193). While there is an opportunity under the law, giving unlimited authority to the judge for taking confidentiality decision does not comply with the right to a fair trial.

In relation to our topic, Özbek states that provisions brought with Law no 6572 are exceptions, not an essential principle for they restrict the rights and judge and prosecutors have to consider this and should not turn prohibition decision into an ordinary application (Özbek et al. 2015, 256). We agree with this opinion in terms of content and express that it just seems like a wish. There is no article related to the sanctions on the judge and prosecutors if they turn restricting the right of defense counsel to examine the file into an ordinary practice. As the author states, making do with the auto-control mechanism equals to leaving the right to defense to the mercy of the judge and prosecutor.

The time period to remove the confidentiality decision on the investigation file with this amendment has been accepted as "...beginning with the date of approval of the indictment by the court" in the article 153/4 of Code of Criminal Procedure amended with Code No. 6572. "Content of the file has been expressly stated in the article. However, when we consider the realities in our country, this period is so long and violates the right to defense. If suspect knows what he is been accused of, only then he can defend himself effectively. If suspect and defense counsel have information early about the accusation for him that has started the criminal proceedings, then they have the opportunity to start defending and benefit from the defense tools on time. (Öztürk et al. 2015: 253).

Systems, in which reviewing files and obtaining duplicate copies of these files are forbidden, remind totalitarian/authoritarian systems that implements confidential file system. However, it is required by the principle of the state of law to eliminate the confidential file system and the right of defense counsel to review every document, benefitted by the court and prosecution office refers to not violation of the right to defense under article 36th of Constitution (Kocaoglu, 2012: 174).

According to Centel and Zafer, the review of defense counsel on file shall not be hindered for any other reason than the hindering the aim of the investigation. If a defense counsel uses the information obtained from the case file other than the aim of defense and in bad faith, disciplinary measures have to be applied by applying to Bar or if his action constitutes a crime, then apply to judicial authorities. Furthermore, the right of defense counsel to review the file should not be taken away, by considering the possibility to abuse, as long as he has the power to execute his profession (Centel and Zafer, 2015: 197).

Another discussion topic is to review of evidence under protection under investigation phase. According to Kocaoglu, although we have to trust defense counsel for his proceedings and qualifications, the review of defense counsel on the evidence until the indictment has been completed and sent to the court does not make a great difference for the right to defense in consideration of the defense as a human being for criminal justice to be established (Kocaoglu, 2012: 177). We disagree with this opinion. Because it makes a great difference for the establishment of the right to defense if defense counsel could only see the protected evidence at the start of the prosecution phase as the author expresses. In fact, if defense counsel has a grasp of the file and evidence at the prosecution phase, then it is a late establishment of defense right. This idea bases on distrust. The author does not trust the defense counsel, a subject of the trial and perceives him as the criminal to interrupt the trial process. However, defense counsel is a professional and he gives guarantee by being subject to professional discipline.

The defense counsel has the duty to supervise whether a material fact is sought in accordance with the law as well as his duty to defend the suspect. The defense counsel has to know, control and direct the processes of investigation and prosecution in order to fulfill this task, (Dülger, 2012: 63). For this, first of all, he must be aware of the contents of the investigation file.

In conclusion, we will address to the way of working of the courthouse. According to the Law no 6572, the judge orders the restriction of the power of defense counsel to review the file upon the request of the public prosecutor. However, as we are all aware that public prosecutor and judge work at the same courthouse. Sharing the same physical environment paves the way for people to develop "respect" relations. According to Kocaoglu, as we can see some samples in practice, granting confidentiality order about the investigation "for the sake of prosecutor's request" contradicts with all universal values of law (Kocaoglu, 2012: 176). We too share the same opinion with the author.

#### **4. Conclusion and Assessment**

The 153rd article of CCP No. 5271 on an authority of defense counsel to review the file has been amended for twice within a year with article 44th of Law no: 6572 on December 02, 2014. According to the amendments, defense counsel's power to review the full content of the investigation file or take a copy from the documents may be restricted until the phase of prosecution with the decision of judge upon the request of the prosecutor if it hinders the aim of the investigation in the listed offenses. However, restriction of the power of defense counsel to review the investigation file is contrary to the European Human Rights Convention and the Constitution. Because the defense is also one of the subjects of criminal procedure. If the functionality of defense is disabled, it is evident that the right to a fair trial set out in the article 6th of ECHR is violated. As we have provided the examples above, ECHR resolves for violations in cases where the power of defense counsel to review the file is restricted. In such cases, it causes as an annulment for the lack of right to fair trial under CCP 289/1-h.

The regulation, brought together with Law no 6572, is problematic for the right to a fair trial and doubles the problem if the suspect is arrested as well. Because it is not possible for defense counsel to defend his client due to the confidentiality order. These people may even have the risk of being arrested for a long time without knowing the accusation about them.

By all means, in some instances, confidentiality of enquiry comes to the forefront and a regulation regarding to this field is needed. However, restriction of entitlement of the defense attorney to review the file should not be the fundamental rule due to confidentiality requirements of the enquiry. Not a very broad restriction as in the Code

No.6572 but an exceptional regulation regarding to instances indicated with “*numerus clausus*” should be made. Besides, there are already confidentiality options generated by law regarding to some measures of precautions such as communication surveillance (CCP article 135/6), where confidentiality is very important for the sake of the enquiry, and assignment of a confidential enquirer (CCP article 139/3). While there is already such an option, granting the judge an extra limitless power of discretion means weakening the right of defense.

The main reason why people find the amendment made by Law no 6572 positive is that they have concerns that defense counsel may violate the confidentiality of the investigation. In our opinion, this is irrelevant. Defense counsel is a subject of the trial. He fulfills a public duty. He is subject to strict rules to execute his profession and to be qualified in the profession. Furthermore, it is possible to start a disciplinary investigation before the bar and also judicial investigation about the defense counsel, abusing the information from the investigation document. Defense counsel has to be trusted for these qualifications, not to be distrusted.

The time period to remove the confidentiality decision on the investigation file with this amendment has been accepted as “*...beginning with the date of approval of the indictment by the court*” in the article 153/4 of Code of Criminal Procedure amended with 6572. “*Content of the file*” has been expressly stated in the article. In our opinion, such delay for defense counsel to review the investigation file disables the right to defense. If we look at the realities in our country, it takes so much time for the indictment to be accepted by the court. It is far from hard to for defense counsel to defend the suspect without knowing the accusation, it is impossible.

As a result, we suggest the amendment made with the Code No. 6572 which has such a negative effect on “right to due process (fair trial)” to be reverted and 2nd, 3rd and 4th clauses of CCP article 153 which restricts the entitlement of the defense attorney to review the file to be repealed. As a matter of fact, the Code No.6526 has had brought the said system and never got any complaints by practitioners regarding to violation of confidentiality of the enquiry.

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