Hakemli Makale

ILLEGALLY OBTAINED EVIDENCE IN AMERICAN AND TURKISH CRIMINAL PROCEDURE LAW

Gülen SOYASLAN LL.M.[*]

SUMMARY:

Throughout the world, there are two main kinds of evidence that are subject to exclusion when illegally obtained. One is gathered in violation of the right to privacy, while the other violates the privilege against self-incrimination. The purpose of this paper is two- fold: first, to provide some insight about evidence that is subject to the exclusionary rule, and second, to compare the legal systems of Turkey and the United States (the U.S.) regarding this topic.

ÖZET:

Bu çalışmanın amacı, hukuka aykırı delilleri değerlendirme yasağının temelini oluşturan "hukuka aykırı deliller" konusunda Amerikan ve Türk sistemlerini karşılaştırarak, farklılık ve benzerliklerini vurgulamaktır.

Amerikan ve Türk sistemleri arasında gözlemlediğim en temel fark, Amerikan sisteminde teknik anlamda "arama teşkil etmeyen hallerin" tartışılmasına karşın, Türk sisteminde bu konunun neredeyse hiç yer bulmamış olmasıdır. Arama teşkil etmeyen haller "toplum tarafından makul kabul edilen bir özel hayat beklentisinin" bulunmadığı ve bu sebeple polisin arama kararına gerek duymayacağı hallerdir. Bu ilke, Amerikan Yüksek Mahkemesi tarafından insan hakları bakımından anayasa ihlali değerlendirmesi yapılırken göz önünde bulundurulmaktadır. Türkiye'de ise Anayasa Mahkemesi bireysel başvuruları daha çok yeni değerlendirmeye başlamıştır. Ne yazık ki Ceza Muhakemesi Kanunu'nun aramaya ilişkin maddeleri kapsamında hukuka aykırılık değerlendirmesi yapan Yargıtay, insan haklarına ve Anayasa'ya aykırılık değerlendirmesi yapmadığından "özel hayatın gizliliği ihlal edilmiş midir?" sorusu ile karşı karşıya kalınmamaktadır. Bu sebeple, makul bir özel hayat beklentisinin bulunmadığı ve sonuç olarak arama kapsamına girmeyen haller tartışma konusu dahi olmamaktadır.

Başka bir husus ise, gizli soruşturmacı görevlendirilmesinin Türkiye'de kuvvetli şüpheye dayanan arama kararı ve başka surette delil elde etme imkanının olmaması gibi ağır şartlar gerektirmesine karşın, Amerikan hukukunda "makul bir özel hayat beklentisi" olmadığından teknik anlamda arama teşkil etmemesi ve arama kararına bile gerek olmamasıdır. Amerikan Yüksek Mahkemesi'ne göre şüpheli, kendi rızasıyla ajanla konuşarak, konuştuğu kişinin ajan olduğunu bilmese de, onun bu konuşmayı polise

---

[*] New York University School of Law – LL.M. 2014.

aktarma riskini göze almıştır. Bu nedenle Mahkeme özel hayat beklentisinin toplum tarafından makul olarak karşılanmadığına ve arama kararına gerek olmadığına karar vermiştir. Türkiye'de ise bu durum şüphelinin kandırılması olarak değerlendirilmektedir. Bu nedenle arama kararı için kuvvetli şüphe ve başka surette delil elde edilememesi gibi daha ağır şartlar getirilmiştir. Kişisel fikrime göre, bu durum kandırma teşkil eder ve bir kimsenin üçüncü kişiye anlattıklarında makul bir özel hayat beklentisi vardır. Ayrıca, Türk hukukunda kandırma polisin ifade almasında bile yasaktır. Dolayısıyla, gizli soruşturmacı yoluyla konuşmaların aktarılması teknik anlamda arama teşkil edecektir. Ancak kanımca şüphe standardını kuvvetli şüpheden makul şüpheye indirmek kuralı kendi içinde daha makul hale getirecektir.

Diğer bir farklılık, Amerikan hukukunda mahkeme kararını gerektiren ve gerektirmeyen haller olarak iki ihtimal varken, Türk hukukunda üçüncü ihtimal olarak savcı/kolluk amiri de gecikmesinde sakınca varsa arama emri verebilmektedir. Bununla bağlantılı olarak, Türk hukukunda, arama kararına gerek olan ve bu karara gerek olmadan polisin kendiliğinden arama yapabileceği haller Arama Yönetmeliğinde net değildir. Kaçmanın önlenmesi, delil karartmaya engel olunması, üçüncü kişilere zararın önlenmesi, ve suçlunun suç işledikten sonra takip edilmesi durumları ana esaslar olmakla birlikte, hangi hallerde "gecikmesinde sakınca olması" sebebiyle savcıdan arama emri gerektiği, hangi hallerin ise "acil hal" olması sebebiyle arama kararını gerektirmediği gerçekten çok açık değildir. Bu durum karışıklıklara yol açmakta ve gerek polisin, gerekse uygulayıcıların kafasında soru işaretleri uyandırmaktadır. Makalede bu konu da incelenmiştir.

Başka bir önemli sorun, Türk mevzuatında şüphe dereceleri açısından kesin ve net bir sınıflandırmanın mevcut olmamasıdır. Mevzuatta yapılan değişiklerle şüphe dereceleri hangi hukuki temele dayandığı belli olmadan değişebilmektedir. Kanun koyucunun hukukun temel ilkesi olan 'makullük ilkesi' çerçevesinde kurallar koyması gerekir. Aramalar açısından bu genel ilkenin yansıması, kanundaki şüphe derecelerinin, özel hayatın gizliliğine yapılacak olan müdahale ile devletin müdahaleyi yapmaktaki yararının karşılaştırılması suretiyle belirlenmesi gereğidir. Makullük ilkesinin diğer bir sonucu, farklı aramalar için getirilen aşamalı kriterlerin birbiriyle tutarlı olmasıdır. ABD hukukuna baktığımızda, kurumların kendi içinde tutarlı olduğu sonucuna varabiliriz. Durdurma ve üst araması için basit şüphe (İlginç bir şekilde Avrupa İnsan Hakları Sözleşmesi'nin 5.maddesinde yakalama-gözaltı için gerekli kıldığı ve Türkçe'ye makul şüphe olarak tercüme edilen "reasonable suspicion" şartı kullanılıyor.); ev araması, iletişimin dinlenmesi, yakalama-gözaltı için makul şüphe (probable cause olarak adlandırılıyor) şartı aranmaktadır. Makul şüphenin ötesinde şüphe ise vücutta mermi çekirdeğinin aranması gibi vücut bütünlüğünü ihlal eden istisnai hallerde aranmaktadır. Türk hukukunda yakalama-gözaltı için 'polisin mesleki tecrübesine, bilgisine ve olayların akışına göre duyduğu şüphe' anlamına gelen ve benim basit şüphe olarak yorumladığım 'umma derecesinde makul şüphe'; ev araması için 6526 sayılı kanunla yapılan değişiklikten önce makul şüphe, sonrasında ise kuvvetli şüphe; iletişimin denetlenmesi için bu kanun değişikliğinden önce ve sonra kuvvetli şüphe; yakalama- gözaltı için- benim kuvvetli şüphe olarak yorumladığım- kuvvetli iz ve emarelerin olması şartları aranmaktadır.

Sistemimizdeki temel sorun, hukuki yapı açısından kendi içinde tutarlı bir mevzuata sahip olmamamızdır. Kurallar çok sık değişmekte ve bu durum kanunun ruhunu ve yapısını bozmaktadır. Örnegin, iletişimin dinlenmesi için kuvvetli şüphe şartının aranmasının gerekçesi olarak, dinlemeyi gerçekleştiren polisler tarafından aslında dinlemenin hedefinde olmayan kişilerin konuşmalarının da dinleneceği ve dinlemenin hedefi olan kişi hakkında ulaşılmak istenilenden çok daha özel bilgilere ulaşılabileceği hukukçular tarafından ileri sürülmekteydi. Bu sebeple, iletişimin dinlenmesindeki şüphe şartının ev aramasından yüksek bir kriterde olması - kimi hukukçular tarafından ağır olduğu söylense de- yine de anlaşılabiliyordu. Ancak 6526 sayılı Kanunla Şubat 2014'te yapılan değişiklikle ev araması için getirilen kuvvetli şüphe şartı, bana göre, makullük ilkesi gereğince kendi içinde tutarlı olması gereken şüphe silsilesinin aşamalı yapısını bozdu. Korkarım ki, ev araması için getirilen bu şart, polisi görevlerini yapamaz hale getirir ve soruşturmanın yürütülmesine, ilerlemesine, delillerin toplanmasına ve suçluların hak ettikleri gibi cezalandırılmasına sekte vurur. Bu nedenlerle benim önerim, arama, yakalama ve diğer delil elde etme yöntemleriyle tutarlılığın sağlanması için mevzuatın- sadece ilgili kanunların değil, yönetmeliklerin de- esaslı olarak gözden geçirilmesidir.

Bu makale, 6526 sayılı kanun yürürlüğe girmeden önce yazılmış ve tamamlanmıştır. Ancak yazıdaki son düzeltmeler kanun yürürlüğe girdikten sonra yapıldığı için bu değerlendirmeyi yapma gereksinimi duyulmuştur. Makalenin kendi içindeki bütünlüğünü ve tutarlılığını bozmamak ve ruhuna sadık kalmak açısından son düzeltmelerde, makalenin yazıldığı tarihteki mevzuata bağlı kalınmıştır. Zaten makaleyi anlamak açısından önemli olan da makullük ilkesi çerçevesinde, özel hayata yapılan müdahale ile devletin müdahaledeki yararını kıyaslayarak değerlendirme yapabilmektir.

Bu yazıda hukuka aykırı kabul edilen başlıca deliller incelenmiş, ve Türk ve Amerikan sistemleri karşılaştırılmıştır. Bu bakımdan, özel bir konuya yoğunlaşıp ayrıntılı olarak tartışmaktan çok, kurumlar ve hukuka aykırı kabul edilen deliller ile ilgili bilgi verme amacına yöneliktir. Hukuka aykırı delilleri değerlendirme yasağı da bu konuyla derinden bağlantılıdır; fakat başlı başına ayrı bir makaleyi gerektirecek genişlikte olduğundan, ileride farklı bir makalede incelenecektir.

INTRODUCTION

In the 21st century, evidence obtained through illegal methods is no longer considered as evidence. The era in which evidence is gathered in any way, regardless of lawfulness, has already ended. Throughout the world, there are two main kinds of evidence being subject to exclusion when illegally obtained. One is gathered in violation of the right to privacy, while the other violates the privilege against self-incrimination. The purpose of this paper is two- fold: first, to provide some insight about evidence that is subject to the exclusionary rule, and second, to compare the legal systems of Turkey and the United States regarding this topic.

In terms of evidence rules in American case law and Turkish civil law systems, the former system has specific rules regarding the admissibility of evidence, while the latter is based upon the free evaluation of evidence. Notwithstanding this difference, one specific evidence rule is same in these two systems, which is, evidence obtained by illegal methods is subject to exclusion. This rule is an effect of the American legal system, where today's strong exclusionary rule is generated, on the Continental European system. This paper first explains the meaning of the 'illegality of evidence' and then examines two major types of illegal evidence: First, evidence obtained from unreasonable searches and seizures and second, totally involuntary or unwarned statements obtained during police interrogation. In this regard, the main aim of the paper is to provide some insight about the two systems, and that's why it is more of descriptive nature rather than argumentative.

I. ILLEGALITY OF EVIDENCE

The legal systems of Turkey and the United States have different views with regard to the illegality of evidence. In Turkey, the illegality of evidence is a more exhaustive term including violations of the global principles of law, international agreements, customary law and positive law; in the U.S., as it is created by the Supreme Court, it is mostly interpreted under the Fourth (and Fifth) Amendment concepts by federal and state courts. The result of this difference is that, in Turkey, the doctrine and courts discuss whether the evidence obtained through minor violations of law could be used as evidence. In contrast, such a question does not exist at least in federal trials in the U.S., since the exclusionary rule is considered as an element of the Fourth and Fifth Amendments and minor violations of law do not breach any constitutional rights.

According to the Turkish Constitution, findings obtained through illegal methods shall not be considered evidence (Art. 38). A charged crime may be

proven through all kinds of legally obtained evidence[1]. This means that illegally seized evidence cannot be taken into consideration as proof of guilt.

With all these in mind, we must ask what illegally obtained evidence is. There is an extensive interpretation of the term 'illegal' in Turkish law. Illegality means any violations of not only the Constitution, statutes, legislative decrees, by-laws, regulations, but also international agreements, customary law and general principles of law.[2] Therefore, violations of legal rules and breaches of law are not the same concepts. The Turkish Constitutional Court has ruled that there must be a violation of either positive law or universal legal principles on human rights to constitute illegality.[3] Further, the evidence would be illegal if the way it is obtained constitutes a crime.[4]

Whether the person obtaining evidence has an official duty to do so is not a significant factor in deciding whether that evidence is illegally seized. The person who illegally obtains evidence need not have any official status. If there is a prohibition for officials gathering evidence illegally, the same rule must be applicable for ordinary people as well. Otherwise, it would be irrational.[5]

In the United States, each state has its own constitution and criminal procedure code, yet these norms cannot contravene the U.S. Constitution. The top judicial authority in the federal system is the U.S. Supreme Court whose decisions are binding on both federal and state courts. The Supreme Court bases its decisions on the U.S. Constitution. In contrast to Turkey, there is no specific and explicit rule in the U.S. Constitution about the prohibition on the use of illegally obtained evidence at trial. The exclusionary rule is a judicially created principle. In *Weeks v. United States*[6], which is the touchstone of the exclusionary rule in the federal system, the court held that in federal trials the Fourth Amendment forbids the use of evidence illegally seized by federal law enforcement officers; otherwise, the Fourth Amendment would be reduced to a mere "form of words".[7]

---

1 Ceza Muhakemesi Kanunu [CMK] [Criminal Procedure Code], Kanun no (Law no): 5271 R.G. (Official Gazette): 17.12.2004, Sayı: 25673 Kabul Tarihi (enacted): 4.12.2004, art. (md.) 217.

2 YCGK. E: 2005/7-144 K: 2005/150 T: 29.11.2005.

3 AYM., Siyasi Parti Kapatma Davası [The Case of Political Party Closure], E: 1999/2 K: 2001/2 T: 22.6.2001.

4 Nur Centel – Hamide Zafer, *Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Beta, 10. Bası, Istanbul, 2013, s. 690 *citing to* E. Şen, *Türk Ceza Yargılaması Hukukunda Hukuka Aykırı Deliller Sorunu [The Issue of the Illegality of Evidence in Turkish Criminal Procedure Law]*, Beta, Istanbul, 1998, s.9.

5 A. Rıza Çınar, *"Hukuka Aykırı Kanıtlar" [Illegal Evidence]*, TBB Dergisi, Sayı 55, Ankara, 2004, s. 42.

6 Weeks v. United States, 232 U.S. 383 (1914).

7 Joshua Dressler- Alan C. Michaels, *Understanding Criminal Procedure: Investigation*, Lexis Nexis, 5. Bası, 2010, s. 347; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

In *Mapp v. Ohio*[8], the effect of the exclusionary rule created in *Weeks* was extended to state criminal trials by the Fourteenth Amendment due process clause[9], which prohibited the use of evidence illegally obtained by state government officials at state trials. The Court held that:

"As to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured]... only after years of struggle". They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." "[10]

The philosophy of each amendment and of each freedom is to assure no man is convicted on unconstitutional evidence. Moreover, the exclusionary rule is an essential part of the Fourth and Fifth Amendments, and both state and federal attorneys operate under the enforceable prohibitions of the same amendments.[11] Therefore, evidence unconstitutionally obtained cannot be used at both state and federal trials.

II. EVIDENCE TO BE EXCLUDED

A. Evidence Obtained From Unreasonable Searches and Seizures

The constitutions of Turkey and the United States (U.S.) both prohibit unreasonable searches and seizures. In the Turkish Constitution, the prohibition is formed under various rights such as the right to liberty and security (Art.19)[12],

---

8 Mapp v. Ohio, 367 U.S. 643 (1961).

9 In *Wolf v. Colorado*, the Supreme Court decided that the Fourth Amendment is applicable to states through the Due Process Clause of the Fourteenth Amendment and that the federal exclusionary rule created in *Weeks* isn't constitutionally required. By overruling *Wolf*, *Mapp* shows that the exclusionary rule is an essential part of the Fourth Amendment.

10 *Mapp*, 367 U.S. at 657 *quoting* Bram v. United States, 168 U.S. 532, 543-544 (1897) and Feldman v. United States, 322 U.S. 487, 489-490 (1944).

11 *A.g.e.*

12 English translation by the Turkish Grand National Assembly:

"Everyone has the right to personal liberty and security.

No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law:

Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or

the right to have a private life (Art.20)[13], the inviolability of the domicile (Art. 21)[14], the right to communicate (Art. 22)[15]. In the U.S. Constitution, however, there is only one and broader provision: the Fourth Amendment.

---

rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Arrest of a person without a decision by a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law.

Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge.

(As amended on October 3, 2001; Act No. 4709) The person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the above specified periods. These periods may be extended during a state of emergency, martial law or in time of war.

(As amended on October 3, 2001; Act No. 4709) The next of kin shall be notified immediately when a person has been arrested or detained.

Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence.

Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

(As amended on October 3, 2001; Act No. 4709) Damage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law."

[13] "Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated. (Sentence repealed on May 3, 2001; Act No. 4709)

(As amended on October 3, 2001; Act No. 4709) Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order from an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted.

(Paragraph added on September 12, 2010; Act No. 5982) Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to

The Fourth Amendment of the U.S. Constitution mentions that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The articles in the Turkish Constitution that are mentioned above are in a more descriptive and detailed form than the Fourth Amendment of the U.S. Constitution.

Other sources for unreasonable searches and seizures are the Turkish Criminal Procedure Code and states' criminal procedure codes in the U.S. Turkey is a unitary state and has only one criminal procedure code that is applied all around its territory. However, the U.S. is a federal state consisting of fifty states and each state has its own constitution[16] and criminal procedure code[17]. Thus, in addition to the reasonableness inquiry under the U.S. Constitution, constitutions and criminal procedure codes of states establish standards for determining reasonableness within each state.

In the U.S. system, what constitutes a search is commonly discussed in the Supreme Court decisions, whereas, in the Turkish system, whether the

---

and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged bylaw or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

14 "The domicile of an individual shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order from an agency authorized by law in cases where delay is prejudicial, again on these grounds, no domicile may be entered or searched, or the property seized therein. The decision of the component authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of the seizure; otherwise, seizure shall be automatically lifted."

15 "(As amended on October 3, 2001; Act No. 4709) Everyone has the freedom of communication. Privacy of communication is fundamental.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order from an agency authorized by law in cases where delay is prejudicial, again on the above-mentioned grounds, communication shall not be impeded nor its privacy be violated. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted. Public institutions and agencies where exceptions may be applied are prescribed in law."

16 Brien A. Roche- John K. Roche- Sean P. Roche, *Law 101*, Sphinx, 2. Bası, Illinois, 2009, s. 10.

17 *A.g.e.*, s. 12.

requirements for specific kinds of searches are fulfilled is the question asked by the Court of Cassation. As a result of this, in the U.S. system, there are plenty of decisions discussing the meaning of a search, while, in the Turkish system, the Court of Cassation focuses on this inquiry in almost none of its decisions.

This difference may also stem from the fact that the existence of several kinds of searches creates an assumption that there is a legitimate expectation of privacy. If these were not technically "searches" in the legal concept, the Code wouldn't include them. Moreover, the Turkish Court of Cassation doesn't make any review of constitutionality. That review is the duty of the Constitutional Court. Ever since an amendment to the Constitution in 2010[18], every individual is entitled to appeal for any breach of constitutional rights. This could lead to "the meaning of search" inquiries in the Constitutional Court as it is mostly related to the question whether the right to privacy has been violated.

1. The Meaning of a "Search"

a. General

In the U.S. system, the meaning of a search is related to the concept of the violation of the right to privacy. After *Katz v. United States*[19], explained below, even though the Fourth Amendment only mentions persons, papers, effects, and houses, the Supreme Court no longer applies the "constitutionally protected area" requirement while interpreting the Fourth Amendment. In *Katz*, electronic surveillance of a public booth is considered a search for the purposes of the Fourth Amendment. Thus, even if a search is not at a suspect's house, persons, papers or effects, the electronic surveillance of oral communication will be considered as a search.

In the Turkish legal system, similar to other systems, a search is an investigation method for the purpose of seizing a suspect, evidence or effects in home or other places. The Code of Criminal Procedure (CMK) considers it as a measure of protection of evidence that has effects on the right to liberty and security, the right to have private life, the inviolability of domicile, and the right to communicate. Some professors think that a "search" is not a measure of protection of evidence; but as a way to obtain evidence.[20]

---

[18] Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [The Statute Amending Some of the Articles of the Constitution], Kanun no: 5982 Tarih: 07.05.2010, art.18, 25. The statute amended the article 148 of the Constitution. According to the article 25 of the statute, the Constitutional Court would begin accepting the applications within two years after the amendment. The Court began reviewing the applications in 2002.

[19] Katz v. United States, 389 U.S. 347 (1967); Ronald Jay Allen- William J. Stuntz- Joseph L. Hoffmann- Debra A. Livingston- Andrew D. Leipold, *Criminal Procedure: Investigation and Right to Counsel,* Wolters Kluwer Law & Business, 2. Bası, New York, 2011, s. 361-64.

[20] Nur Centel – Hamide Zafer, *a.g.e.*, s. 375.

In the U.S. system, the Fourth Amendment to the Constitution protects houses, papers, persons and effects. The U.S. Supreme Court (in *Katz* case) deemed electronic surveillance a search and placed communications under the Fourth Amendment protection. Other kinds of "possible" searches that are not written explicitly in the amendment are under the scrutiny of the Supreme Court. The Court first decides whether there is a legitimate expectation of privacy technically required for a search and then applies the requirements of the Fourth Amendment.

Different from the U.S. Constitution, the Turkish Constitution has three special provisions about searches in different places. The articles all protect the right to privacy in general terms. Specifically, houses are protected under the right to privacy and the inviolability of domicile (Art. 21); papers, persons and effects are protected under the right to privacy (Art. 20); communications are protected under the right to communicate (Art. 22). These provisions require a warrant and some reasons to justify an intrusion on these rights. The justifications for searches can be maintaining national security and public order, prevention of a crime, protection of public health and morals, or protecting other people's rights.

The Turkish Criminal Procedure Code also provides several specific rules for searches in these areas. It also requires probable cause to issue a warrant. The justice of the peace must consider the requirements mentioned both in the Constitution and the Code.

b. Legitimate Expectation of Privacy

According to the Fourth Amendment to the U.S. Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The text of the Fourth Amendment mentions only the search of persons, houses, papers and effects. One can think that the prohibition against unreasonable searches and seizures is solely for these places. However, in *Katz v. United States*- the milestone for the way we understand the Fourth Amendment today, the Supreme Court ruled that the Fourth Amendment protects not places, but people.[21] FBI agents tapped Katz's phone calls made from a phone booth without a search warrant. The issue was whether interception of communications by an electronic listening and recording device attached to the outside of the public telephone booth constitutes a search and thus whether the police needed a warrant. According to the Court, the scope of the Fourth Amendment governs not only the seizure of tangible items, but

[21] *Katz*, 389 U.S. at 351.

extends to the recording of oral statements. The Fourth Amendment protects people, not simply areas. The man in the telephone booth wants uninvited ears, not intruding eyes.[22] The Fourth Amendment protects the constitutional "right to privacy".[23] Although booths are not on the list of protected areas mentioned in the Fourth Amendment, an individual has a legitimate expectation of privacy in a telephone booth and the police, thus, must have a warrant to attach an electronic listening and recording device to the outside of a telephone booth.

The "legitimate expectation of privacy" is the main rule to be considered when deciding on the question whether there is a search. There is a two prongs test to understand if an area is private[24]: 1) Subjective expectation of privacy: whether a suspect exhibited an actual expectation of privacy. 2) Objective expectation of privacy: whether the society recognizes the suspect's subjective expectation of privacy as reasonable. Cases when a suspect's subjective expectation of privacy is not acknowledged as justifiable are explained below:

i. "The third-party doctrine":

The cases with regard to the third party doctrine involve the use of undercover agents[25] and informants, bank records[26] and pen registers[27]. The third parties in these cases are, respectively, a secret agent, a bank and a telephone company. The information that a defendant willingly handed over to a third party is not under the protection of the Fourth Amendment. The rationale is that in revealing the information to a third party, the suspect assumes the risk that that person can convey the information to the Government.[28] There are two types of criticisms of the third party doctrine: doctrinal and functional.[29] Regarding the doctrinal critique, individuals normally expect privacy in their

---

22 *A.g.e.*, s. 352.

23 *A.g.e.*, s. 349.

24 Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 78, 79.

25 United States v. White, 401 U.S. 616 (1971); Ronald Jay Allen- William J. Stuntz- Joseph L. Hoffmann- Debra A. Livingston- Andrew D. Leipold, *a.g.e.*, s. 380-81. In contrast to the U.S. law, authorization of an undercover informant to get information from the suspect constitutes a search in the Turkish System. To empower a public official as an undercover agent, there must be a warrant and more than probable cause and no other feasible means to obtain evidence. CMK art. 139.

26 United States v. Miller, 96 S. Ct. 1619 (1976).

27 Smith v. Maryland, 442 U.S. 735, 741 (1979). The Court distinguished pen registers from the listening device employed in *Katz*. A pen register is an electronic device recording the telephone numbers dialed. It neither acquires the contents of communications nor discloses the identities of the persons called. These devices do not hear sound; they disclose only the telephone numbers that have been dialed.

28 Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 569-70 (2009).

29 *A.g.e.* s. 570.

bank records, phone records and other third party records.[30] As Justice Marshall mentioned in his *Smith* dissent, "It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative."[31] The functional critique is that the third party doctrine gives the government more power than is consistent with a free and open society.[32] According to Justice Marshall, "...Permitting governmental access to telephone records on less than probable cause may ... impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society."[33]

Despite of these criticisms, Prof. Orin S. Kerr believes that the third party doctrine ensures technological neutrality in Fourth Amendment rules. The use of third parties has a substitution effect: It enables wrongdoers to take public aspects of their crimes and replace them with private transactions.[34] For example, the pen register information would substitute for the same information that the police would have obtained without warrant by watching the suspect on public streets.[35] Similarly, the checking account records in *United States v. Miller* have a substitution effect on otherwise publicly observable transaction.[36] If there was no technological development, the same information could be obtained without a warrant. Thus, the doctrine makes sure that the Fourth Amendment is neutral to the technological improvements.

ii. "Knowing exposure":

In *California v. Greenwood*, the investigator asked the trash collector to turn over Greenwood's garbage bags to her. The Supreme Court ruled that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment protection".[37] Since any member of the public could see the trash and evidence of criminal activity, it is not reasonable to expect the police to ignore the evidence.

iii. "Anyone could see":

In *California v. Ciraolo*, the police inspected the backyard of a house from an airplane flying at 1.000 feet and discovered marijuana. The Court held that since anyone could (not would) see it, the inspection is not a search.[38]

---

30 *A.g.e.* s. 571.

31 *Smith*, 442 U.S. at 750 (Marshall, J., dissenting).

32 Orin S. Kerr, *a.g.e.*, s. 572.

33 *Smith*, 442 U.S. at 751 (Marshall, J., dissenting).

34 Orin S. Kerr, *a.g.e.*, s. 573.

35 *A.g.e.*, s. 577-78.

36 *A.g.e.*, s. 578-79.

37 California. v. Greenwood, 486 U.S. 35, 41 (1988); Ronald Jay Allen- William J. Stuntz- Joseph L. Hoffmann- Debra A. Livingston- Andrew D. Leipold, *a.g.e.*, s. 386.

38 California. v. Ciraolo, 476 U.S. 207 (1986).

iv. "Public is commonly there with sufficient regularity":

In *Florida v. Riley*, the police observed a greenhouse from their helicopter at 400 feet and discovered marijuana. The Court held that as the public is commonly there with sufficient regularity, the observation is not a search.[39]

v. "Commonly used by public":

In *Kyllo v. United States,* the police used a thermal imager to scan Kyllo's home and detected marijuana. The sense enhancing thermal imager is not in general public use and the details of the home wouldn't previously have been knowable without physical intrusion.[40] Thus, this is a search and the police need a warrant.

vi. "Open fields doctrine":

Open fields are accessible to the public. Fences or "No Trespassing" signs do not effectively bar the public from viewing these fields in rural areas. There is no societal interest in protecting the privacy of the activities that occur in open fields, i.e. the cultivation of crops.[41] Thus, the society does not recognize a suspect's subjective expectation of privacy in open fields as reasonable.

vii. "Dog sniff searches":

A dog sniff search of a *suitcase* does not technically constitute a search because it is a sui generis search that reveals only the existence of contraband. A canine sniff by a well-trained narcotics detection dog doesn't expose non-contraband items that otherwise would remain hidden from the public.[42] It also doesn't require opening the luggage. The manner that the search is conducted is much less intrusive than a typical search. The owner is not subject to same embarrassment and inconvenience with more intrusive investigative methods.[43] All these factors makes dog sniff searches sui generis.

A dog sniff search of *the exterior of a car* is not a search so long as the car is legitimately stopped, the stop is not unreasonably long beyond the time necessary to issue a warning ticket and the police conduct ordinary inquiries incident to such a stop.[44]

---

[39] Florida. v. Riley, 488 U.S. 445, 454 (1989).

[40] Kyllo v. United States, 533 U.S. 27, 40 (2001); Ronald Jay Allen- William J. Stuntz- Joseph L. Hoffmann- Debra A. Livingston- Andrew D. Leipold, *a.g.e.*, s. 399-400.

[41] Oliver v. United States, 466 U.S. 170, 179 (1984).

[42] United States v. Place, 462 U.S. 696, 707 (1983).

[43] *A.g.e.* s. 707.

[44] Illinois v. Caballes, 125 S. Ct. 834 (2005).

Drug sniffing by a dog on *the front porch of a home* is a search, since the front porch of a home is a part of the curtilage. A curtilage is both physically and psychologically linked to the home, where the expectation of privacy is heightened and constitutionally protected for the Fourth Amendment purposes.[45]

Similar to the U.S. law, The Turkish police can conduct dog sniff searches of luggage and cars without warrant. According to the article 18/ i of the Regulation on Investigative and Preventative Searches[46], the police may do dog sniff searches without a warrant in a way that will not reveal inside of the searched material. The Customs Regulations[47] (Art. 72/A-e) also permit routine dog sniff searches of cars at borders.

To sum up, in cases when an individual's subjective expectation of privacy is not legitimate, the search that is conducted is not technically a "search" within the meaning of the Fourth Amendment and is not subject to the warrant and probable cause requirements of the Amendment.

2. Types of Searches

a. The United States

The U.S. Supreme Court classifies searches according to their purposes: Searches for ordinary criminal law enforcement/crime control purposes and special needs searches for beyond the need of ordinary law enforcement. The former is conducted to generate evidence and investigate a criminal after a crime is committed, while the latter is more of preventive or administrative nature and government has other legitimate concerns than investigation.

Reasonableness is the heart of all search inquiries, regardless of whether a search is for law enforcement purposes or for special needs beyond the need of ordinary law enforcement. In searches for law enforcement purposes, the reasonableness inquiry is satisfied by balancing the privacy intrusion against the law enforcement need. In special needs cases, the balancing test is between the legitimate expectation of privacy and government's legitimate special need. *Vernonia Sch. Dist. 47J v. Acton* case supports this conclusion: "Whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests".[48]

---

[45] Florida v. Jardines, 133 S. Ct. 1409, 1410, 1411 (2013).

[46] Adli ve Önleme Aramaları Yönetmeliği [A.Ö.A.Y.], R.G.: 01.06.2005 S: 25832.

[47] Gümrük Yönetmeliği, R.G.: 07.10.2009 S: 27369.

[48] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).

Regarding searches for law enforcement purposes, the level of cause increases in proportion to the level of intrusion. The levels of cause are as follows: 1) "articulable reasonable suspicion" (that criminal activity is afoot, the suspect is armed and dangerous) for stops and frisks (*Terry, J.L.*)[49]; 2) "probable cause" for searches and seizures (*Katz*)[50]; 4) "more than probable cause" for a surgery to retrieve a bullet (*Winston*)[51].

With regard to special needs searches for non-criminal law enforcement purposes, "reasonableness" balancing standard is applied to determine the legitimacy of governmental action.[52] Searches without individualized probable cause may even be reasonable. In *Acton*, which is a case regarding searches for regulatory needs, the Court ruled that "A search unsupported by probable cause can be constitutional…when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"[53]. In two other special needs cases, the Court ruled the same:

In *O'Connor v. Ortega*[54]*:*

"Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here would impose intolerable burdens on public employers."

Similarly, in *New Jersey v. TLO:*

"accommodation of privacy interests of school children with substantial need of teachers and administrators for freedom to maintain order in schools does not require strict adherence to requirement that searches be based on probable cause to believe that subject of search has violated or is violating the law; rather, legality of search of student should depend simply on reasonableness, under all the circumstances, of the search."[55]

"The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly

---

[49] Terry v. Ohio, 88 S. Ct. 1868, 1869 (1968); Florida v. J.L., 529 U.S. 266 (2000).

[50] *Katz*, 389 U.S. 347 (1967).

[51] Winston v. Lee, 105 S. Ct. 1611, 1613 (1985).

[52] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 312.

[53] *Acton*, 515 U.S. at 653.

[54] O'Connor v. Ortega, 107 S. Ct. 1492, 1493 (1987).

[55] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[56]

Whether there is a need for individualized suspicion depends on the type of a special needs case. For searches stemming from administrative and regulative special needs, there is no need to have individualized suspicion and a warrant: drunk driving checkpoints (*Sitz*)[57]; border checkpoints (*Martinez-Fuerte*)[58]; stopping a car and asking questions when investigating a crime (*Lidster*)[59]; prison safety cautions (*Florence*)[60]; drug testing of athletes and participants of extracurricular activities (*Vernonia, Earls*)[61] etc. These are programmatic searches. Searches with investigative special needs also do not require a warrant, yet there must be individualized suspicion. These are generally conducted by people other than police officers, such as teachers at school (*T.L.O*) and government employers at work (*Ortega*).

b. Turkey

There are two kinds of searches: Investigative or preventive. The former is to obtain evidence for criminal investigation, while the latter is to prevent commission of a crime or regulate some activities.

With regard to investigative searches, the Turkish Criminal Procedure Code includes several provisions for different places that are subject to search: 1) homes, offices or other places that are not open to public, persons, effects and papers; 2) offices of lawyers[62]; 3) computers[63]; 4) electronic surveillance[64]; 5)

---

56 *A.g.e.*, at 340.

57 Mich. Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).

58 United States v. Martinez Fuerte, 96 S. Ct. 3074 (1976).

59 Illinois. v. Lidster, 124 S. Ct. 885 (2004).

60 Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012).

61 *Acton*, 515 U.S. at 646; Bd. Of. Educ. Of Indep. Sch. Dist. No.92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002).

62 Searches at the office of lawyers: There is a strict warrant requirement. The public prosecutor and president (or his representative) of the bar association for which the lawyer is registered must be present during the search. CMK art.130.

63 There is a strict warrant requirement for searches of computers. There must be no other way to get evidence to issue a search warrant. CMK art.134.

64 A warrant issued by a justice of the peace, or if there is danger in delay, a written order from a public prosecutor is necessary for identification and record of a communication as well as the use of information obtained from signals. Afterwards, the public prosecutor must immediately submit his decision to the justice of the peace for approval and the justice of the peace shall make a decision within twenty-four hours. If the duration expires or the judge decides the opposite way, the measure should be lifted by the public prosecutor immediately (CMK art.135). [Feridun Yenisey, *Turkish Criminal Procedure Code [Ceza Muhakemesi Kanunu]*, Beta, 1. Bası, İstanbul, 2009, s. 141- 42]. The Court of Cassation ruled that it is illegal to use evidence

authorization of undercover informants[65]; 6) image or voice recording and surveillance by technical devices[66].

As a general rule, i.e. searches of home, office or other places not open to public, persons, effects and papers, a search must be conducted to arrest a suspect or to obtain evidence for the alleged crime. Similar to the U.S. law, the Turkish system also requires probable cause that the suspect committed a crime. While there is a strict warrant requirement in the U.S. law, the Turkish system is more flexible. In cases when there is danger in delay and there is no time to get a warrant from a justice of the peace, a public prosecutor can issue a written order. Thus, if quickness is necessary for crime investigation purposes, the prosecutor has the right to allow a search. Furthermore, if there is danger in delay and the public prosecutor is not available, the superior of the security force can issue a written order for searches of places other than "homes, offices or other places not open to public". If there is no such risk in lateness, the police have to get a warrant from the justice of the peace[67]. Searches for the purpose of arresting a suspect or gathering evidence could be conducted in the suspect's or another person's home, office or other places belonging to him, as well as effects or persons. To search another person's home, there must be some specific facts to conclude that the person or evidence sought is at the place that

---

obtained from interception of communications without a warrant in violation of the right to privacy and communication. Y. 8. CD. E: 1999/9021 K: 1999/9538 T: 09.06.1999.

There must be more than probable cause and no other way to obtain evidence to issue a warrant.

The communication between a suspect and people with privilege to withdraw from testimony cannot be recorded. If the interception of communication between these people is realized afterwards, it must be immediately destroyed.

This measure is applicable only for the crimes mentioned in the related article (CMK art. 135).

65 A warrant issued by a justice of the peace, or if there is danger in delay, a written order of a public prosecutor is necessary to authorize a public official as an undercover agent. Other requirements are "more than probable cause" and lack of other available means to obtain evidence. This measure is applicable only for the crimes mentioned in the related article (CMK art.139).

In the U.S. law, elicitation of information by undercover agents doesn't even constitute a search under the third party doctrine. Interestingly, in Turkish law, it constitutes a search and must be conducted when there is no other way to obtain evidence. More than probable cause is required as well. The U.S. law doesn't attribute any legitimacy to the subjective privacy interest of a suspect, whereas the Turkish Law permits deception of a suspect by undercover agents only when some strict conditions are fulfilled.

66 There is a warrant requirement to monitor a suspect in the suspect's office or in places open to public. There must be more than probable cause and no other available means to get evidence. This measure is applicable only for the crimes mentioned in the related article (CMK art. 140).

67 CMK art. 119.

will be searched.[68] According to a scholar, this rule makes the suspicion level closer to more than probable cause.[69] Since the search will be conducted on the property of somebody not engaged in the offense, the police must have more concrete facts to support that the place contains evidence.[70]

With regard to preventive searches, it can be conducted for two main purposes: 1) to maintain public order and security, to protect other people's rights, to protect public health and morals, and to prevent any commission of crimes[71] 2) for administrative purposes[72]. Regarding the first purpose, there must be reasonable cause that reasons for a search mentioned in the regulation exists.[73] The article 19 of the Regulation on Investigative and Preventative Searches (Adli ve Önleme Aramaları Yönetmeliği) mentions the places that could be subject to such preventative searches: i) places where people enjoy their freedom of assembly and association; ii) entry and exit doors of universities upon request of rector or dean in exigent circumstances; iii) dormitories; iv) entry and exit of settlements; v) public transportation or private vehicles; vi) places of business and entertainment-for the purpose of preventing smuggling; vii) entry and exits of stadiums; viii) association and organizations; ix) other places open to the public and "often crowded". A justice of the peace must issue a warrant, except in cases of danger in delay when a written order of a governor is enough. Different than investigative searches in which a public prosecutor is authorized in cases of danger in delay, a governor's written order is needed in preventive searches.[74]

It is forbidden to conduct preventive searches at homes, places of business that are not open to public and attachments of these places, *even with a court order*.[75] Some scholars criticize this provision. According to a scholar,

---

[68] CMK art.117. Additionally, it is forbidden to conduct searches at night in "homes, offices or other places not open to public". The police can search these places during daytime except in danger in delay, or to catch a suspect red-handed, or to catch a fugitive. CMK art. 118.

[69] Doğan Soyaslan, *Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Yetkin, 4. Bası, Ankara, 2010, s.300.

[70] *A.g.e.*

[71] A.Ö.A.Y. art. 19, 20.

[72] A.Ö.A.Y. art. 18. According to Prof. Yenisey, preventive searches for administrative and inspection purposes are not technically "searches". *See* Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *Muhakeme Dalı olarak Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Beta, 16.Bası, Istanbul, 2008, s.980.

[73] A.Ö.A.Y. art. 20/1.

[74] P.V.S.K. art. 9.

[75] A.Ö.A.Y. art. 19; Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *Muhakeme Dalı olarak Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Beta, 16. Bası, Istanbul, 2008, s. 979-80.

disallowing the police to enter a home (even with a warrant or a written order of a governor) to protect individuals' safety is illogical.[76] He emphasizes that one of the duties of the police is to protect people's life. The police and even ordinary people can protect other's safety under self-defense or the necessity doctrine.[77] Even though P.V.S.K. does not allow such entrance, the police must enter into a house under the Criminal Code[78].[79]

Regarding preventive searches for administrative purposes, the police need not get a warrant or a written order from a governor. There is no need to have individualized suspicion. This type of preventive searches are conducted for inspection purposes such as control of licenses and other documents of cars and other vehicles, control of places open to the public in terms of public safety and security, requesting proof of identity, passport controls at borders, sweep controls by electromagnetic devices and dogs.[80]

3. Levels of Suspicion

The fundamental rule to decide on the level of suspicion is a "balancing test" under a reasonableness inquiry.[81] Government interest to conduct a search must be compared to the privacy interest of a suspect. There is a sliding scale approach to searches and seizures.[82] The scale of reasonable searches and seizures may require different levels of suspicion depending on the privacy intrusion and government interest in conducting a particular search: probable cause, reasonable suspicion, non-individualized suspicion[83], and more than probable cause in rare occasions.

a. Probable Cause

When the facts and circumstances within a police officer's "knowledge and of which they had reasonably trustworthy information" are sufficient to warrant

---

[76] Doğan Soyaslan, "*İdari Denetim ve Aramalar" [Administrative Searches]*, Prof. Dr. Fırat Öztan'a Armağan, Turhan, 2. Bası, Ankara, 2010, s. 2884.

[77] *A.g.e.*

[78] Türk Ceza Kanunu [T.C.K.] [Criminal Code], Kanun no: 5237 R.G.: 12.10.2004, art. 25.

[79] Doğan Soyaslan, "*İdari Denetim ve Aramalar" [Administrative Searches]*, Prof. Dr. Fırat Öztan'a Armağan, 2. Bası, Ankara, 2010, s. 2885.

[80] A.Ö.A.Y. art. 18; Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *a.g.e.*, s. 980.

[81] *T.L.O.*, 469 U.S. at 355.

[82] "The Supreme Court never stated that there is a sliding scale concept of probable cause, but it has developed an alternate sliding scale approach to searches and seizures: it has said that some searches and seizures may be conducted on a lesser degree of suspicion than probable cause." Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 137.

[83] Non-individualized suspicion is the characteristic of administrative searches explained in the previous part.

a man of reasonable caution in the belief that an offense has been or being committed, probable cause exists.[84] Although it seems that probable cause is a theoretically uniform term, it is mostly affected by the seriousness of a crime and intrusion on privacy.

The common way to get some knowledge about crimes is through informants. In the U.S. law, the Court applies a totality of circumstances test to decide on whether information supplied by an informant constitutes probable cause.[85] This is the new view. Indeed, this view is the flexible version of the old view established by the Aguilar-Spinelli cases.[86]

In the Aguilar-Spinelli test, the Court looks for an informant's veracity, basis for knowing, and sufficient facts of criminality. For one thing, veracity is the reliability of an informant. Veracity can be corroborated through observation of innocent facts. However, it can't be self-verifying. For another thing, basis for knowing is the way an informant knows about a crime. The depth and detail of the tip can corroborate the basis for knowing. Thirdly, sufficient facts of criminality are facts suggesting that a crime is committed. Seemingly innocent facts are not enough. There must be facts considered as criminal. If one of these requirements is not satisfied, the court decides that there is no probable cause to issue a warrant. However, after *Gates*[87], the Court looks for these elements not as strictly as before, that is, in a more flexible way. The difference from the old view is that one of these elements can substitute for or support another one. In *Gates*, the anonymous informant (no veracity) gives a very detailed tip to the police about Gate's involvement in selling drugs. Agents corroborate this tip through innocent facts. Since the veracity of the informant is corroborated through innocent facts observed by officers, the Court decided that the probable cause requirement is satisfied.

In Turkish Law, what is required to issue a warrant is called "makul şüphe"[88]. When translated, "makul şüphe" means reasonable suspicion. At first glance, it seems that suspicion requirement for issuing a warrant in the Turkish system is lower than the U.S. legal system.[89] Yet, it is not. The problem arises from the selection of words. The scopes of "reasonable suspicion (makul şüphe)" defined in the Regulation on Investigative and Preventative Searches

---

84 Brinegar v. United States, 69 S. Ct. 1302, 1303 (1946).

85 Illinois v. Gates, 462 U.S. 213 (1983).

86 Aguilar v. Texas, 84 S. Ct. 1509 (1964); Spinelli v. United States, 89 S. Ct. 584 (1969).

87 *Gates*, 462 U.S. at 269.

88 CMK art. 116.

89 In the U.S. System, reasonable suspicion is a lower standard than probable cause and it is required for stop and frisk. That's why I first thought that the Turkish criterion is lower.

and the "probable cause" defined by the U.S. Supreme Court are similar. According to the Article 6 of this Regulation:

"Reasonable suspicion is suspicion stemming from general life experience obtained during the course of life. In deciding reasonable suspicion, the place and time of search, the condition and manners of the person who will be searched, the features of effects that the suspect carries must be taken into consideration. There must be corroborating indications supporting tips. The suspicion must base on specific facts. There must be particular facts showing that evidence or person being searched may be found in the place under search."

In the U.S. system, in Brinegar v. United States case[90], the Court gave an exhaustive definition about what constitutes probable cause:

"...more than a bare suspicion and exists where the facts and circumstances within knowledge of the officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed".

Probable cause must exist with regard to these facts: 1) in the case of an arrest, an offense has been committed and the person to be arrested committed it, and 2) in the case of a search, a specifically described item subject to seizure will be found in the place to be searched.[91]

To understand the reason of this controversy, we must rely on the European Convention of Human Rights (ECHR), the agreement between member states of the Council of Europe. Turkey, which is one of the members, tends to adjust its codes to the standards of this convention. Moreover, in the hierarchy of norms, the ECHR precedes the Turkish Criminal Procedure Code. This stems from the constitutional norm mentioning that if there is any controversy between an agreement on human rights and a code, the norms of the agreement will be applied instead of the code.[92] As it has such a substantial effect on the Turkish law, the Turkish Criminal Procedure Code may be influenced from the ECHR and this could be the reason why it includes a term equal to reasonable suspicion translated as *"makul şüphe"*.

The E.C.H.R. mentions "reasonable suspicion" ("makul şüphe" in Turkish) as a requirement for arrest. The article 5 of the ECHR prohibits deprivation of liberty and security except for some reasons. One of the reasons in the provision is that:

---

[90] Brinegar v. United States, 338 U.S. 160 (1949).

[91] Joshua Dressler - Alan C. Michaels, *a.g.e.*, s. 116.

[92] The Turkish Constitution art. 90.

"(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on **reasonable suspicion** of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

In some of its decisions, the European Court of Human Rights (ECtHR) explained what "reasonable suspicion" means:

"A "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.[93] What may be regarded as 'reasonable' will however depend upon all the circumstances."[94]

Another source mentions that:

"…it can only be regarded as reasonable if it is also based on facts or information which objectively link the person suspected to the supposed crime. There will, therefore, have to be evidence of actions directly implicating the person concerned or documentary or forensic evidence to similar effect. Thus, there should be no deprivation of liberty based on feelings, instincts, mere associations or prejudice (whether ethnic, religious or any other), no matter how reliable these may be regarded as an indicator of someone's involvement in the commission of an offence…"[95]

As seen above, the scope and content of "reasonable suspicion" in the ECHR and CMK and "probable cause" in the U.S. System are equivalent. The only difference is the terms being used. Thus, to grant a warrant, the courts both in the U.S. and Turkey must take into consideration the same criteria.

b. Reasonable Suspicion

The Fourth Amendment to the U.S. Constitution requires probable cause for only searches and seizures. It doesn't explicitly mention which criterion is applicable for stops and frisks. Another requirement of the Fourth Amendment

---

[93] Erdagoz v. Turkey, Eur. Ct. H. R., Eur. Ct. H.R., Application no. 21890/93, 1997, §51, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["erdag%F6z"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58108"]} (last visited Sept. 10, 2014).

[94] Fox, Campbell and Hartley v. United Kingdom, Eur. Ct. H.R., Application no. 12244/86-12245/86- 12383/86, 1991, § 32, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57721#{"itemid":["001-57721"]} (last visited Sept. 10, 2014); European Court of Human Rights, *Guide on Article 5- Right to Liberty and Security,* 2012, s. 13, http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (last visited Sept. 10, 2014).

[95] Monica Macovei, *The Right to Liberty and Security of the Person*, Council of Europe, 2002, s. 25-26, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent? documentId=090000168007ff4b (last visited Sept. 10, 2014).

is "reasonableness". Although there is no such specific provision in the Constitution for stop and frisk, the Court created "reasonable suspicion" requirement for stop and frisk by interpreting the "reasonableness requirement" of the Fourth Amendment. In making reasonable suspicion determination, police officers entitled to draw on "their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' "[96]

The differences between "probable cause" and "reasonable suspicion" are: 1) While probable cause involves a substantial basis for concluding that a search will turn up criminal evidence or that the person seized is guilty of an offense, a few specific and articulable facts with reasonable inferences from these facts would justify the intrusion in reasonable suspicion standard.[97] 2) Unlike probable cause that relies on "reasonable person standard", reasonable suspicion is based upon "the standard of a reasonable police officer".[98]

In *Terry v. Ohio*[99], the Court rejected the idea that stop and frisk are outside the scope of the Fourth Amendment since they don't reach to the level of search and seizure (classical stop and frisk theory). The Court perceives an arrest and a stop as a seizure of a person and a frisk as a search: "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."[100] The Court also noted that the classical stop and frisk theory serves to divert attention from the central inquiry of the Fourth Amendment, which is reasonableness.[101] In *Pennsylvania v. Mimms*, the Court similarly mentioned "the touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security"[102]. Reasonableness depends on a balancing test: the government interest to search or seize against the invasion which the search or seizure entails.[103]

---

96 Joshua Dressler - Alan C. Michaels, *a.g.e.*, s.273; United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

97 Joshua Dressler - Alan C. Michaels, *a.g.e.*, s. 272-73.

98 J. Hirby, *Definitions of Probable Cause v. Reasonable Suspicion*, The Law Dictionary (featuring Black's Law Dictionary 2nd edition), http://thelawdictionary.org/article/definitions-of-probable-cause-vs-reasonable-suspicion/ (last visited Sept. 16, 2014).

99 Terry v. Ohio, 392 U.S. 1 (1968).

100 *A.g.e.*, at 16, 17.

101 *A.g.e.*, at 19.

102 Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) citing *Terry* 392 U.S. at 19.

103 *Terry*, 392 U.S. at 21.

The Court, in *Terry*, emphasizes the difference between a stop and an arrest, and between a frisk and a search. The police must have suspicion that the person "may be" connected with criminal activity to stop and detain a person briefly. The more the police have suspicion, the longer the stop would be. Upon suspicion that he may be armed, the police have power to frisk him for weapons. If the stop and the frisk gave rise to probable cause that the suspect has committed a crime, the police would have power to arrest and conduct a full incident search of the person.[104]

The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.[105] The officers must not exceed the reasonable scope of a frisk when patting down the outer clothing. They can't place their hands in pockets or under the outer clothing until they feel weapons. They can reach and remove the guns only after they feel weapons during the frisk.[106]

In Turkish Law, there must be a "reasonable level of suspicion at a degree of anticipation" that a suspect either has committed/will commit a crime or potentially armed and dangerous, in order to stop him. This requirement, I believe, is similar to reasonable suspicion requirement in *Terry*. Suspicion must be corroborated with specific facts, observations and professional experience. A stop must not be arbitrary and longer than necessary to get the answers to the questions stemming from suspicion.[107]. During a stop, an officer may ask questions about the behaviors of the suspect leading to suspicion. During questioning, if he gets reasonable and satisfactory answers to his questions, he can't prevent the suspect from leaving. The suspect does not have to answer the questions. If the police officer, during questioning, has more suspicion that the suspect is armed, he can search for weapons (frisk).[108] Only if he feels weapons during the frisk, he can reach inside the pockets and remove the guns. The rules are similar to the U.S. system in this regard.

c. More Than Probable Cause

The touchstone of the Fourth Amendment is the "reasonableness test".[109] In each case, the government interest in conducting a search or seizure must be balanced against individual's privacy intrusion. The level of suspicion that is

---

[104] *A.g.e.*, s. 10.

[105] *A.g.e.*, s. 19; Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (Justice Fortas, concurring).

[106] *Terry*, 392 U.S. at 30.

[107] A.Ö.A.Y. art. 27.

[108] A.Ö.A.Y. art. 27.

[109] *Mimms*, 434 U.S. at 107.

necessary for a search depends on whose interest is superior/more important or how significant in a particular case.

More than probable cause is generally required in rare occasions such as highly intrusive bodily searches. In *Winston,* the Court ruled:

"... surgical intrusion into attempted robbery suspect's left chest area to recover bullet fired by victim was unreasonable under the Fourth Amendment where surgery would require suspect to be put under general anesthesia, where medical risks, although apparently not extremely severe, were subject of considerable dispute, and where there was no compelling need to recover the bullet in light of other available evidence."

Because there was other substantial additional available evidence that the suspect committed the alleged crime, there was no compelling government and public interest to get the bullet out. On the contrary, the privacy interest is more substantial than it is in an ordinary Fourth Amendment search. Surgery without the patient's consent is almost totally a divestment of the patient's control over surgical probing beneath his skin.[110] Therefore, the government interest doesn't justify the physical intrusion on the patient's body without his consent, and the cause level must be more than probable cause.

In Turkish law, electronic surveillance[111], searches of computers[112] and authorization of undercover agents[113] require more than probable cause. This may be because of high intrusion that these searches entail. Electronic surveillance intrudes not only the right to privacy but also the right to free expression. The officer conducting surveillance may acquire private communications not related to the particular investigation. Similarly, the police may have knowledge about other unnecessary and private details of a suspect's life during searches of computers. Further, undercover agents deceive suspects to obtain necessary information from them. All these are considered as high intrusions in the Turkish system and justify setting a higher standard than probable cause.

4. The Meaning of a "Seizure"

a. Seizure of Property

In the U.S. law, the Fourth Amendment protects not only people's privacy interests but also possessory interests and freedom of movement. A search

---

[110] Winston v. Lee, 105 S. Ct. 1611, 1613 (1985).

[111] CMK art. 135.

[112] CMK art. 134.

[113] CMK art. 139.

threatens the former, and a seizure the latter.[114] The seizure involving a possessory interest is called 'seizure of property', whereas the seizure related to freedom of movement is called 'seizure of persons'.

A seizure of property occurs when there is some "meaningful interference" with an individual's possessory interest in that property.[115] The interference occurs when an officer exercises control over a suspect's premises by *destroying it*, or *removing it* from the suspect's actual or constructive possession, or *securing the premises*. If the police prevent a person from entering or taking away or destroying his personal property, this means securing the premises.[116] The interference must be "meaningful" to constitute a seizure. If a police officer merely picks up an object just to look at it or moves it for a small distance, it doesn't constitute a seizure because it's not "meaningful".[117]

In Turkish law, seizure is a measure that removes the possessor's use of authority for the purposes of gathering evidence or future confiscation[118]. If a person gives his property with consent, the police can secure those items without a warrant. If there is no consent, the police can seize them with a warrant[119]. The Turkish Criminal Procedure Code includes one general and some specific rules regarding different kinds of seizures. Other than the general rule, the code specifically mentions some kinds of seizures that can be conducted on real estates, shares, assets; mails; and computers.[120]

b. Seizure of Persons: Arrest

i. The United States

What constitutes a seizure differs whether a person seized is sitting still or running away. If the person is sitting still, there is no seizure if a reasonable innocent person would feel free to decline the officer's request or otherwise terminate the encounter.[121] If the person is running away, there must be either a submission to the authority or an application of physical force to constitute a seizure. Merely a show of authority is not enough.[122]

---

[114] Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens J., concurring).

[115] United States v. Jacobsen, 104 S. Ct. 1652, 1653 (1984).

[116] Joshua Dressler - Alan C. Michaels, *a.g.e.*, s.104.

[117] *A.g.e.*

[118] T.C.K. art. 54-55.

[119] Nur Centel- Hamide Zafer, *a.g.e.*, 9. Bası, Istanbul, 2012, s. 377; CMK art. 123.

[120] CMK art. 128, 129, 134.

[121] United States v. Bostick, 501 U.S. 429 (1991); United States v. Drayton, 536 U.S. 194 (2002).

[122] California v. Hodari D., 111 S. Ct. 1547 (1991).

The rationale of an arrest is to prevent flight risk and maintain public safety. It is a seizure that has important consequences such as restraint and loss of liberty and other people's suspicions for the arrestee. For instance, the arrestee can lose his job, or it can cause other problems in relationships with people. Especially for these reasons, there must especially be probable cause to arrest somebody. According to the ancient common-law rule, the police can arrest without a warrant for 1) a felony or a misdemeanor in presence of officer, 2) felonies not committed in his presence but he has reasonable grounds for the arrest, and 3) breach of peace.[123] Misdemeanors need not amount to breach of peace. That is, a police officer can arrest a person without a warrant if he saw that the suspect committed a misdemeanor punishable only by fine.[124]

If a suspect is in public, the police do not need an arrest warrant to arrest the suspect. However, if the suspect is at his home, the police need an arrest warrant (no need for a search warrant) and reason to believe that the suspect is inside.[125] If he is at a third party's home, the police need both search and arrest warrants.[126] In this case, not only the suspect's freedom of movement but also the third party's privacy is under intrusion. That's why we need two different warrants.

The Fourth Amendment prohibits unreasonable searches and seizures. The police must not only have probable cause to make an arrest, but they must not use unreasonable and excessive force when arresting or temporarily detaining a suspect.[127] The use of deadly force is reasonable only when force is necessary to stop escape and when the police officer has probable cause to believe that the suspect poses a significant threat of death or injury to the officers or others.[128] In *Garner,* the Court held that if the fleeing suspect is apparently unarmed and non-dangerous, it is unreasonable to fire a fatal shoot. According to the Court:

"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. …… the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect…"[129]

---

[123] United States v. Watson, 96 S. Ct. 820, 825 (1976).

[124] Atwater v. Lago Vista, 532 U.S. 318, 336 (2001).

[125] Payton v. New York, 100 S. Ct. 1371 (1980).

[126] Steagald v. United States, 101 S. Ct. 1642, 1643 (1981).

[127] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 154.

[128] *A.g.e.*, s. 155.

[129] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

Hence, after *Garner,* it is unreasonable to use deadly force just to prevent escape of an apparently unarmed suspect. The use of fatal force is justified, only if the fleeing suspect poses a serious threat to other people or an officer's life/ physical integrity.

What is implicit in Garner's excessive force analysis is the reasonableness analysis. The *Graham v. Connor* case expressly stated that all claims of the excessive use of police force - deadly or not- in the course of arrest, an investigatory stop and other 'seizure of a free citizen' should be analyzed under the Fourth Amendment and its reasonableness standard. The seriousness of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, whether he is actively resisting arrest or attempting to evade arrest by flight are significant factors to be considered when applying reasonableness standard.[130]

ii. Turkey

The Turkish law has two circumstances when a person can be arrested: first, when a suspect is caught red-handed, and second, when the conditions of an arrest warrant or a warrant for pre-trial detention exist. In the first possibility, anybody in the society- including the police- can seize the suspect.[131] The Criminal Procedure Code explicitly authorizes other citizens to catch the suspect.[132] Yet, ordinary people cannot enter into the house of the suspect to seize him. They can only take measures to prevent him from escape, i.e. locking the door.[133]

In the second possibility, the police can conduct an arrest in cases when the conditions of an arrest warrant or a warrant for pre-trial detention are met and there is danger in delay.[134] An arrest warrant may be issued for fugitives or in cases when a suspect disobeys a summons or is unavailable.[135] The conditions to issue a warrant of pre-trial detention are:[136] 1) more than probable cause regarding the commission of a crime, 2) specific facts indicating flight risk or more than probable cause regarding possible destruction of evidence or danger of threatening witnesses, victim or other people, or the commission of any of the serious offenses enumerated in the Code 3) the punishment of the offense must require at least two years of incarceration 4) It must be reasonable to

---

[130] Graham v. Connor, 490 U.S. 386, 395, 396 (1989).

[131] Doğan Soyaslan, *a.g.e.*, s. 305, 306.

[132] CMK art. 90.

[133] Doğan Soyaslan, *a.g.e.*, s. 300.

[134] If there is no danger in delay, the justice of the peace must issue an arrest warrant.

[135] CMK art. 98/ 1, 2, 3.

[136] Doğan Soyaslan, *a.g.e.*, s. 307; CMK art. 90, 100.

detain somebody, when the duration of incarceration is considered. If all of these conditions are met and there is danger in delay and a public prosecutor or their superior is unavailable, police officers can arrest a person without a warrant or any order.[137]

The police must use reasonable force when making an arrest. The police must use force for the purpose of breaking the resistance of the suspect so long as it is in proportion to the level and nature of the resistance.[138] There are three types of force: physical force, forces other than weapons such as the use of handcuffs, and weapons. The level of force can increase gradually from physical force to forces other than weapons and to weapons, depending on the nature of resistance. The police are eligible to use weapons under circumstances mentioned below[139]:

i. Self defense

ii. When physical force and forces other than weapons weren't enough to defuse resistance. The use of weapons, in this case, must be in proportionate to the level of resistance and the purpose of breaking it.

iii. For the execution of a warrant of arrest or detention, or to prevent the flight of the suspect caught red-handed. Weapons can be used just to apprehend him and in proportion to the purpose of preventing the flight. At first, the fleeing suspect must be warned to "stop". If he keeps fleeing, the police can fire the gun into the air to warn him again. If he still keeps fleeing and there is no way to apprehend him, the police may shoot him in proportion to the purpose to catch him.

The Turkish law allows the police to use weapons to stop a fleeing suspect. However, it doesn't mean that the Turkish law allows the police to shoot and kill in cases when a suspect is fleeing and there is no threat to officers or other's safety. Use of a weapon must be in proportion to the purpose of stopping the fleeing suspect.[140] For example, instead of shooting at his head, a police officer must shoot the suspect at his leg when he is only running without any danger to others. A police officer may decide on the place that he will shoot at the suspect's body depending on the degree of the threat that suspect poses to his or others' safety. The targeted place on the body may vary from his leg and upper

---

[137] CMK art. 90/ 2.

[138] Polis Vazife ve Selahiyetleri Kanunu [P.V.S.K.] [The Statute on Duties and Powers of the Police], Kanun No: 2751, Tarih: 14 Temmuz 1934, art. 16/3. The scope of the authority to use force consists of physical force, other forces such as handcuffs, baton, pressurized water, teargas, barriers, dogs and horses of the police, other vehicles, and weapons.

[139] P.V.S.K. art. 16/ 7, 8.

[140] *A.g.e.*

body to his head. The important thing for the police is to act reasonably in consideration of the danger.

5. The Warrant Requirement and Its Exceptions

The Fourth Amendment to the U.S. Constitution requires a warrant to conduct a search on an individual's homes, papers, effects and persons. Similarly, the Turkish Constitution and Criminal Procedure Code have warrant requirements for searches at homes, papers, effects and persons. The Code also mentions that in cases where there is danger in delay, a public prosecutor's written order would be enough to conduct a search. In places other than "homes, offices or places not open to public", the superior of the security force can issue a written order to conduct a search, if there is danger in delay and the public prosecutor is unavailable.

Danger in delay is present when there is no time to get a warrant from a justice of the peace and when lack of immediate action would lead to 1) loss of evidence, 2) suspect's flight, or 3) difficulty in identifying the suspect.[141]

a. Exigent Circumstances

i. The United States

Exigent circumstances in which a warrantless search is lawful may exist in these circumstances: 1) Hot pursuit of a suspect[142]: immediate and continuous pursuit is required to constitute a hot pursuit.[143] 2) Destruction of evidence 3) Threat to the police or other's safety.[144]

In exigent circumstances, the police can act without a warrant, but must still have probable cause. The police also can freeze the situation while they're getting a warrant. For example, in *Illinois v. McArthur*, an officer prevented McArthur from going inside his home while other police officers were getting a search warrant.[145] The court held that the police officer's refusal to allow defendant to enter residence without a police officer until a search warrant was obtained was a "reasonable seizure" that did not violate the Fourth Amendment.[146]

---

[141] A.Ö.A.Y. art. 4.

[142] *Hayden*, 387 U.S. 294, 310 (1967).

[143] *Welsh*, 466 U.S. at 753.

[144] Minnesota v. Olson, 495 U.S. 91, 100 (1990).

[145] *McArthur*, 121 S. Ct. 946 (2001).

[146] *A.g.e.*

Officers can create their own exigency so long as they don't violate or threaten to violate the Fourth Amendment. While deciding on whether the exigency created by the police has negated the reasonableness of a warrantless search, the Court considers objective factors, not the subjective intent of police officers. In *Kentucky v. King*, the police knocked on the door and declared their presence. When they heard the sounds indicative of things moving-which is sufficient to establish that evidence was being destroyed[147], they got into the house without a warrant. In this case, by knocking on the door and announcing their presence, the police created their own exigency. Since the police did not create the exigency through an 'actual or threatened violation of the Fourth Amendment', the warrantless entry is allowed to prevent destruction of evidence.[148]

The gravity of underlying offense is an important factor in deciding whether to apply an exigency exception. The Court does not apply this exception for minor offenses, such as drunk driving. In *Welsh*, the suspect was driving erratically. The officer checked his registration on the system, learned the identity of the suspect, proceeded to his home, entered into the home without a warrant, and finally arrested him for drunk driving. The court ruled that a warrantless entry for a minor offense couldn't be justified on the grounds of exigent circumstances such as hot pursuit of a suspect, threat to public safety or destruction of evidence.[149]

ii. Turkey

Danger in delay and exigency are two possibilities when the police can conduct warrantless searches. Actually, exigency is a form of 'danger in delay'. Yet, the prejudice it may cause in case of delay is more imminent. In this regard, non-immediate risk of destruction of evidence and flight risk[150] are circumstances when danger in delay is present. Hot pursuit of the suspect[151], protecting other's safety[152] and immediate risk of destruction of evidence (when caught red-handed)[153] are considered as exigent circumstances where there is no time to get a warrant or a

---

147 Kentucky v. King, 131 S. Ct. 1849, 1855 (2011).

148 *A.g.e.*, s. 1862.

149 *Welsh*, 466 U.S. at 751; Ronald Jay Allen- William J. Stuntz- Joseph L. Hoffmann- Debra A. Livingston- Andrew D. Leipold, *a.g.e.*, s. 457.

150 A.Ö.A.Y. art. 4-a.

151 A.Ö.A.Y. art. 8-d.

152 In terms of defense of others. A.Ö.A.Y. art. 8-f.

153 There is no explicit rule mentioning that the police may conduct a warrantless search when there is immediate risk of destruction of evidence. Yet, the A.Ö.A.Y. art. 8-f. mentions that the police need not get a warrant to catch a suspect red-handed. One of the purposes of this provision is to prevent immediate destruction of evidence. That's why I believe the police may conduct a search to prevent destruction of evidence in cases when a suspect is caught red-handed. A.Ö.A.Y. art. 8-f.

written order. In the first case, there must be at least either a written order of a public prosecutor, or the superior of the security force when the public prosecutor is inaccessible. The superior of the security force cannot issue an order for searches at home, offices, or other places not open to the public.[154] In the second case, however, the police can conduct a search without a warrant or a written order.[155]

1. Hot pursuit of a suspect:

In cases when a suspect is fleeing from a police officer, or there are indications that a suspect was/is committing a crime and the police officer is on pursuit to seize him, the officer can conduct a search without a warrant at homes or automobiles that the suspect had entered, in order to seize the suspect.[156]

2. Destruction of evidence:

The U.S. Law includes two different possibilities about searches: a search could be either with or without a warrant. In contrast, the Turkish Law has a third possibility: in circumstances where there is danger in delay, a public prosecutor's written order is required to conduct a search. If he is unavailable, the superior of the security force can issue a written order, except for places not open to the public.

If it is probable that evidence will be lost and there is no time to get a warrant from the justice of the peace, danger in delay is present.[157] The public prosecutor's written order (later subject to approval) would be enough to conduct a search. If danger in destruction of evidence is imminent and there is no time to get a written order from either the public prosecutor or the superior of the security force[158], i.e. the suspect is caught red-handed, the police can conduct a search without getting a written order.[159] If danger is not imminent, he must get a written order.

3. Threat to officers' or other's safety:

Warrantless searches that are conducted to protect society or individuals from any harm are lawful.[160] The basis of this rule is the right of an individual to defend a third party against an attack by using reasonable force.

---

[154] CMK art. 119 and A.Ö.A.Y. art. 4, 7.

[155] According to Prof. Yenisey, the Constitution art.20 commands that searches without a warrant or a written order conducted in exigent circumstances be submitted to the justice of the peace within 24 hours, regardless of whether there is any seizure or not. Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *a.g.e.*, s. 1013.

[156] A.Ö.A.Y. art. 8/d.

[157] A.Ö.A.Y. art. 4.

[158] Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *a.g.e.*, s.1013.

[159] A.Ö.A.Y. art. 8-f.

[160] A.Ö.A.Y. art. 8-f.

b. Automobiles and Containers Therein

In the U.S. Law, automobiles are not subject to the warrant requirement of the Fourth Amendment. The old rationale for the automobile exception was forward and backward exigency. Forward exigency demonstrates the mobility of cars.[161] *Chambers v. Maroney* case argues that all automobiles are "mobile" even if they sit unoccupied in a police impoundment lot.[162] Backward exigency demonstrates the unforeseeable need for a warrant. These two reasons for the exception are also mentioned in *Chambers*: "The circumstances that furnish probable cause to search are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily mobile".[163]

The new rationale for automobile exception is that automobiles have lesser expectation of privacy. In *Cardwell*, the Court applied the expectation of privacy standard, instead of the unforeseeable need and mobility. It ruled that "The search of a vehicle is less intrusive…One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects".[164] In this case, even if the police could practically have got a warrant (no unforeseeable need) and the vehicle was not mobile (in public parking lot), the Court ruled that because there is a lesser expectation of privacy in vehicles, there is no need to get a warrant.

Before *California v. Acevedo*[165] overruled *Arkansas v. Sanders* case, there were two kinds of container searches in automobiles. First, there can already be probable cause focused on a container and it may be later coincidentally placed in a car (*Chadwick and Sanders*).[166] The search of a container in the car must be conducted with a warrant. Second, the police may have probable cause to search a car and a container happened to be found during a lawful and a warrantless search (*United States v. Ross*).[167] Yet, the Court overruled its decision in *Sanders* that requires a warrant, and stated that "the protections of the Fourth Amendment must not turn on such coincidences".[168] It additionally ruled that "The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause."[169]

---

[161] Carroll v. United States, 267 U.S. 132 (1925).

[162] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 214.

[163] Chambers v. Maroney, 399 U.S. 42, 51- 52 (1970).

[164] Cardwell v. Lewis, 417 U.S. 583, 584, 586 (1974).

[165] California v. Acevedo, 500 U.S. 565 (1991).

[166] Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

[167] United States v. Ross, 456 U.S. 798 (1982).

[168] Acevedo, 500 U.S. at 580.

[169] *A.g.e.*, s. 579.

After *Acevedo* that re-stated *Ross*, the object of a search and places in which there is probable cause that it may be found are main elements to be considered in container searches in cars.[170] Thus, we may conclude that if the police have probable cause as to a container, they can search just the container without a warrant. If the police have probable cause as to the whole car, they can conduct a warrantless search in places where there is probable cause that the object of the search may be found.[171] Similarly, if the police have probable cause, they can search a passenger's belongings that are capable of containing the object of the search.[172]

In Turkish Law, the Criminal Procedure Code requires a search warrant for places not open to public, such as homes, offices etc. It does not explicitly state that there must be a warrant for searches of automobiles. Yet, it implicitly requires a warrant. For one thing, even though anyone can see inside of a car, it is still considered as a private place of individuals.[173] Second, automobiles are one of the places that are not open to public access and we may infer that a warrant is necessary. Further, A.Ö.A.Y. art.5&7 explicitly requires a warrant for searches of automobiles, which supports our inference.

The police can conduct quick searches in a vehicle without a warrant in cases when there is some suspicion that it contains contrabands, weapons, ammunition, explosive materials and narcotics.[174]

a) Plain View Exception

During a lawful search, the police can discover any other evidence that is not specified in the warrant. The evidence could be related either to the offense of the search or to any other offense(s) unrelated to that particular investigation. In these circumstances, the question is whether the police can seize these items that are in plain view.

In the U.S. Law, the plain view doctrine has two requirements: 1) The police must be legitimately on the premises. The item must be found in an area where the police have the right to be. 2) It must be immediately apparent that items are subject to seizure. In *Arizona v. Hicks*, it is mentioned that there must be probable cause to believe that the item is contraband or seizable.[175] If the

---

[170] *A.g.e.*, s. 579-80.

[171] United States v. Ross, 456 U.S. 798 (1982).

[172] Wyoming v. Houghton, 526 U.S. 295 (1999).

[173] Ersan Şen, "*Araç Araması" [Search of Cars], August 2013,* http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1065968-arac-aramasi (last visited Sept. 15, 2014).

[174] A.Ö.A.Y. art. 8/1- e.

[175] Arizona v. Hicks, 107 S. Ct. 1149 (1987).

police feel an illegal object during a lawful pat down of a suspect, it must be immediately apparent that the item is seizable.[176]

"Inadvertence" is not a requirement of the plain view doctrine. In *Horton v. California*, the Court emphasized that the Fourth Amendment does not prohibit warrantless seizure of evidence of crime in plain view, if the discovery of evidence was not *inadvertent*. Even though *inadvertence* is a characteristic of most legitimate "plain view" seizures, it is not a necessary condition".[177]

In Turkish Law, if evidence related to the offense under investigation (that is not specified in the search warrant) or evidence regarding another offense is found during a lawful search, the police must protect the evidence and immediately inform the public prosecutor about the situation. The police must request a written order from the public prosecutor or from the superior of the security force (if prosecutor is unavailable), to "seize" the evidence. The police must get the approval of a justice of the peace within twenty-four hours. The justice of the peace must declare his decision within forty-eight hours beginning at the moment of the seizure; otherwise, the seizure will automatically be removed.[178]

6. Searches Incident to Lawful Arrests

Sometimes, the arrest of a suspect could be dangerous as he is a potential criminal and he may tend to hurt other people or destroy any evidence that could be used at his trial. Thus, it is necessary to take some measures immediately after an arrest to prevent this.

In the U.S. Law, with regard to searches of people and places, the police can search a person, anything on the person, and the person's grab area where he might gain weapons or destroy evidence immediately after a lawful arrest.[179] The police also can do a protective sweep in the immediate area for confederates where they have reasonable articulable suspicion regarding the presence of dangerous people. This sweep must be conducted at places confederates could be hiding. The Supreme Court held that "...the Fourth Amendment permits properly limited protective sweep in conjunction with in-home arrest when the searching officer possesses reasonable belief based on specific and articulable facts that area to be swept harbors individual posing danger to those on arrest scene."[180]

---

[176] Minnesota v. Dickerson, 113 S. Ct. 2130, 2132 (1993).

[177] Horton v. California, 496 U.S. 128, 130 (1990).

[178] CMK art. 138/1; A.Ö.A.Y. art. 10.

[179] Chimel v. California, 395 U.S. 752 (1969); United States v. Robinson, 414 U.S. 218 (1973).

[180] Maryland. v. Buie, 110 S. Ct. 1093 (1990).

Regarding searches of cars, the police can search the grab area of an unsecured arrestee to protect arresting officers and to safeguard any evidence of the offense of arrest that the arrestee might conceal or destroy. The police may search a vehicle incident to a lawful arrest only if the arrestee is unsecured within reaching distance of the passenger compartment at the time of the search. Moreover, the police can search a car after arrest when it is reasonable to believe that there is evidence in the vehicle relevant to the crime of arrest.[181]

In Turkish Law, immediately after an arrest, the police must take precautions to prevent any possible destruction of evidence or harm to others.[182] This is a general rule that gives the police some discretion to decide on the existence of destruction of evidence/danger of harm to people and the places that carry this risk. Thus, they may search people, places and cars in consideration of these two factors under the reasonableness standard. The police must not act arbitrarily and search places where there is no risk of destruction of evidence or danger to others.

7. Consent

In the U.S. Law, validly obtained consent may justify a warrantless search regardless of whether there is probable cause or not.[183] Consent is valid only if it meets following conditions: 1) Voluntariness,[184] and 2) granted by someone with real[185] or apparent[186] authority to give consent, and 3) the search conducted must not exceed the scope of the consent granted.[187,188]

The voluntariness of consent is determined under the totality of circumstances. The important requirement is lack of coercion or threat.[189] The factors demonstrating coercion may be: 1) a show of force by the police that would suggest to the person that he is not free to refuse the consent, i.e. display of guns, 2) the presence of large number of officers, 3) persistent requests for consent after a refusal, 4) evidence related to the consenting person's age, mental condition, level of education, sex and race that indicates that his free will

---

181 Arizona v. Gant, 556 U.S. 332 (2009).

182 Yakalama, Gözaltına Alma ve İfade Alma Yönetmeliği [The Regulation on Arrest and Custodial Interrogation] R.G.: 01.06.2005 S: 25832, art. 6/ 2, 3; Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *a.g.e.,* s. 977.

183 Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 249.

184 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

185 United States v. Matlock, 415 U.S. 164 (1974).

186 Illinois v. Rodriguez, 497 U.S. 177 (1990).

187 Florida v. Jimeno, 500 U.S. 248 (1991).

188 Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 249.

189 *Schneckloth,* 412 U.S. at 227.

was compelled by the officer's conduct.[190] While knowledge of the right to refuse consent is one of the factors that will be taken into account, it is not a prerequisite for an effective consent to search.[191]

Consenting people must have either real or apparent authority upon premises. Third party consent issue arises if somebody other than the suspect consents to a search. With regard to the "real" authority, the validity of consent depends on whether a co-occupant physically presents when officers requested the search. If he is not present, other co-occupant may allow the search of the shared place against him.[192] The rationale is that one who shares the authority over a property with others assumes the risk that other occupants might permit the search of the common area.[193] If he is physically present and refuses to permit the entry to the home, the consent given by another occupant is not valid and does not justify the warrantless entry of home.[194]

Regarding "apparent" authority, an objective standard must be applied. The test announced by *Illinois v. Rodriguez* is: "would the facts available to the officer at the moment…`warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises? … If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid."[195]

The standard for analyzing the scope of consent is objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[196] Whether or not the consenting suspect *subjectively* thought about the container that was actually under search is unimportant. What we must consider is whether the officer acted *objectively* reasonable in interpreting the suspect's consent to include the right to open that particular container.[197]

Different than the U.S. law, consent does not make a warrantless search lawful in Turkish law. Actually, until 2007, the Regulation on Investigative and Preventive Searches included a rule that deems a warrantless search with consent lawful.[198] Yet, the Council of State abolished the rule on the grounds

---

[190] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 252.

[191] *Schneckloth,* 412 U.S. at 227.

[192] United States v. Matlock, 415 U.S. 164 (1974).

[193] *A.g.e.* s. 171 n.7.

[194] Georgia v. Randolph, 126 S. Ct. 1515, 1516 (2006).

[195] Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990).

[196] *Jimeno*, 500 U.S. at 251.

[197] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 257.

[198] A.Ö.A.Y. art. 8-f.

that government and individuals have unequal powers that may lead to involuntary consents. According to the Court, by consenting, a person waives his right to privacy. One cannot relinquish or abandon his right to privacy, which is indispensable. Allowing consent searches can ease the violation of the right to privacy. Consent is not one of the occasions stated in the Constitution justifying privacy intrusion as well.[199] Hence, for these reasons consent can no longer justify warrantless searches. From my point of view, consent is an important tool that saves time in investigations, especially when we consider the high workload of police officers and courts. Instead of abolishing the consent rule, we must specify the possible coercive acts and oversee the police to prevent coercive police acts leading to involuntary consent.

B. Evidence Obtained During Police Interrogation

a) Totally Involuntary Statements

The Fifth Amendment mentions "no one shall be compelled in any criminal case to be witness against himself." That is, any compulsion of police officers rendering a statement involuntary would be unacceptable.[200] Any statement obtained in the police custodial interrogation must be voluntarily given by the suspect's free will, in order to be used as evidence at trial. Voluntariness inquiry is a fact specific totality of circumstances test. The Court must consider not only the details of the interrogation itself such as the nature, amount and intensity of police inducements or other pressures, but also personal characteristics, attributes and background of a defendant.[201] There must be a coercive police activity to find that a confession is involuntary. The confession stemming from an effect of mental illness cannot be considered as involuntary.[202]

Similarly, the Turkish Criminal Procedure Code requires a statement to be based on the free will of a suspect. A suspect's free will cannot be constrained namely by ill- treatment, torture, giving medicine, exhausting him, deception, coercion or threat, offer of unlawful benefit or other means affecting free will. If these means are used during interrogation, the statement obtained in the interrogation cannot be used as evidence at trial, even if the suspect willingly gave the statement. The code protects human dignity in the related article (Art. 148/1).

---

[199] D. 10.D. E: 2005/6392 K: 2007/948 T: 13.03.2007; D. IDDK. E: 2007/2257 K: 2012/1117 T: 14.09.2012; Nurullah Kunter- Feridun Yenisey- Ayşe Nuhoğlu, *a.g.e.*, s. 979.

[200] Bram v. United States, 168 U.S. 532, 540 (1897).

[201] Jimmie E. Tinsley, *Involuntary Confession: Psychological Coercion*, 22 Am. Jur. Proof of Facts 2d 539, 543 (1980).

[202] Colorado v. Connelly, 479 U.S. 157 (1986).

In a murder case, the suspect invoked his right to silence at interrogation. The police videotaped the conversation between the suspect and a police officer in the waiting hall of the courthouse, and wanted to use his confession as evidence at his trial. The Turkish Court of Cassation ruled that secretly videotaping the suspect's conversations without his knowledge – despite of his invocation of the right to silence- constitutes a deception. The statements obtained as a result of deception are totally involuntary and cannot be considered evidence.[203]

b) Lack of Miranda Warnings

In *Miranda v. Arizona*, the Supreme Court ruled that police custodial interrogation has an inherently compelling nature.[204] The case brought some procedural safeguards to make sure that a suspect gives statements with his free will without compulsion. These safeguards, which are called "Miranda warnings", are as follows: Warning the suspect that 1) he has the right to remain silent; 2) anything said can and will be used against him in the court; 3) he has the right to consult with a lawyer and to have a lawyer with him during interrogation; and 4) if he is indigent, he can get a lawyer to represent him. Without these warnings, the statements taken in custodial interrogation are inadmissible at trial.

The Miranda warnings are required when there is a custodial interrogation. We must thus determine the meanings of custody and interrogation. There are two inquiries essential to the "custody" determination: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave".[205] When analyzing the circumstances "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning" may be relevant factors.[206] In this regard, a conversation with a police officer at the police station does not necessarily mean that the person is under custody.[207] Similarly, a person may be in custody in his own home. In *Orozco v. Texas*[208], for example, the Court held that the suspect was in custody when four police officers entered his bedroom and questioned him there at 4.00 am.[209] The examination of circumstances mustn't depend on the subjective views of either the

---

[203] Y. 1. CD. E: 2003/3819 K: 2004/299 T: 16.2.2004.

[204] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[205] Thompson v. Keohane, 516 U.S. 99, 112 (1995).

[206] Howes v. Fields, 132 S. Ct. 1181, 1189 (2012).

[207] California v. Beheler, 463 U.S. 420 (1984).

[208] Orozco v. Texas, 394 U.S. 324 (1969).

[209] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 470.

interrogating officers or the person being questioned.[210] There must be an objective assessment from the suspect's perspective: what a reasonable person in the suspect's position would have understood from the situation. Would a reasonable person think that he is free to end the conversation and leave? Would a reasonable person believe that he was under arrest or in "the functional equivalent of formal arrest"[211]? In this regard, if an officer's conduct would suggest a reasonable person in the suspect's position that he is "functionally under arrest", although the person subjectively thought that he is not, Miranda warnings are required prior to interrogation.[212]

Regarding the determination of interrogation, there must be 'express questioning or its functional equivalent'. Functional equivalent of the express questioning can be 'any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the defendant'.[213] The functional equivalent of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police".[214] The police officer's subjective intent to elicit an incriminating response is not essential to this determination.[215] The incriminating response refers to any inculpatory or exculpatory statements that the prosecution may introduce at trial. The phrase "incriminating response" means both inculpatory and exculpatory statements that the prosecutor likely will use at trial.[216]

c) Invocation and Waiver of Miranda Rights

After the police read the Miranda warnings, a suspect can either invoke or waive his right to silence and the right to counsel. The invocation of the right to silence and the right to counsel must be clear[217], unambiguous, and unequivocal[218]. If the right to silence is invoked, the police must stop questioning and 'scrupulously honor' the suspect's 'right to cut off questioning'.[219] They can question the suspect two hours later about a different crime so long as they re-Mirandize him.[220] If the right to counsel is invoked, the

---

[210] *A.g.e.*, s. 468.

[211] Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

[212] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 468.

[213] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[214] *A.g.e.*

[215] Joshua Dressler- Alan C. Michaels, *a.g.e.*, s. 473.

[216] *Innis*, 446 U.S. 291, 301 n.5.

[217] Edwards v. Arizona, 451 U.S. 477, 486 (1981).

[218] Davis v. United States, 512 U.S. 452, 454, 462 (1994).

[219] *Mosley*, 423 U.S. at 104.

[220] *A.g.e.*, s. 104, 105, 107.

police cannot interrogate the suspect until an attorney is present.[221] Further interrogation cannot take place unless the suspect himself initiates further communication with the police.[222] Even if the suspect consults an attorney at the first part of the conversation, the officers cannot re-initiate the conversation without the attorney's presence again. This is because "the Fifth Amendment protection against re-initiation of questioning of accused that has requested assistance of counsel is not terminated or suspended when suspect has consulted with an attorney..."[223] If the invocation is ambiguous, the police can ask clarifying questions to help protect the rights of the suspect and to minimize the chance of suppression. Yet, they have no obligation to clarify.[224]

After the rights are read, a suspect can waive his rights. The waiver must be 1) express or implied, and 2) voluntary, 3) knowing and intelligent. For one thing, an explicit statement of waiver is not necessary. "The prosecution...does not need to show that a waiver of Miranda rights was express. An implicit waiver of "the right to remain silent" is sufficient to admit a defendant's statement into evidence."[225] Waiver can be inferred from the actions and words of the person interrogated.[226] Secondly, the relinquishment of the right must be "the product of free and deliberate choice rather than intimidation, coercion, or deception."[227] Finally, to make a knowing and intelligent waiver, the suspect must be fully aware of "both the nature of the right being abandoned and the consequences of the decision to abandon it."[228] Whether a waiver is 'voluntary' and 'knowing and intelligent' must be analyzed under the totality of circumstances. Specific facts and circumstances surrounding a particular case such as background, experience and conduct of the accused must be taken into account.[229]

In Turkish Law, Miranda warnings must be given even before the custodial interrogation: the police must give the warnings immediately after the arrest.[230] The police must give written warnings. Only if it is impossible to find the written document at the time of an arrest, the police can give oral warnings.[231]

---

[221] *Edwards*, 451 U.S. at 482 (1981).

[222] Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983).

[223] Minnick v. Mississippi, 111 S. Ct. 486 (1990).

[224] *Davis*, 512 U.S. at 454, 461- 62.

[225] Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010).

[226] North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[227] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[228] *A.g.e.*

[229] *Edwards*, 451 U.S. at 482-83.

[230] CMK art. 90/4.

[231] Yakalama, Gözaltına Alma ve İfade Alma Yönetmeliği [The Regulation on Arrest and Custodial Interrogation], art. 6/4.

The police must again deliver the Miranda warnings before interrogating the suspect.[232]

The Court of Cassation reviews the trial court decisions on the grounds of compliance with law. The Criminal Procedure Code prohibits any use of illegally obtained evidence at trial and requires the Court of Cassation reverse the case[233]. Since the Code also requires the interrogation begin with the reminder of Miranda rights, the lack of this requirement would be unlawful under the Code and make the evidence illegally obtained. Miranda rights must be given at the beginning of the trial as well.[234] The precedents of the Court of Cassation are mostly with regard to the lack of warnings at trial- rather than at police interrogation. The Court reversed a significant amount of cases because of the lack of Miranda rights prior to questioning at trial.[235] In an earlier decision, the Court ruled that the Miranda rights are the cores of the right to defend oneself. The rights are mandatory and required for public order. Even if the suspect is acquitted, lack of these warnings at trial leads to the reversal of trial court decisions.[236]

CONCLUSION

As it is seen, both Turkish and the United States law have similar requirements with slight differences. Their principal purposes are to protect the privacy interests of individuals from unduly and arbitrary government intrusions and to prevent police officers from compelling an individual to incriminate himself. Regarding unreasonable searches, while the U.S. system bases upon a strict distinction between searches conducted with and without a warrant, the Turkish system is more flexible and has an additional third possibility: a written order of a public prosecutor in cases of danger in delay. In cases when the public prosecutor is unavailable, the superior of the security force can issue written orders.

Other important difference is that in the U.S. system, statements obtained by undercover agents do not hold any legitimate expectation of privacy under the third party doctrine, whereas, according the Turkish system they are considered as deception if obtained without fulfilling warrant and more than

---

[232] CMK art. 147.

[233] C.M.U.K. art. 307, 308, 321 (still valid); CMK art. 289/1-i.

[234] CMK art. 191/3-c.

[235] *Bkz.* A. Rıza Çınar, *a.g.e.,* s. 53-54; YCGK. E: 1995/6-238 K: 1995/305 T: 24.10.1995; Y. 1.CD. E: 2005/1478 K: 2005/3290 T: 16.11.2005.

[236] YCGK. E: 1994/6-322 K: 1994/343 T: 19.12.1994; YCGK. E: 1995/6-163 K: 1996/66 T: 26.3.1996.

probable cause standards. That is, the former system does not deem it a search; the latter has strict requirements to prevent arbitrariness.

I am aware that exclusionary rule is an integral part of the topic of "illegally obtained evidence". Yet, it was not possible to scrutinize that topic in this article, as it is another nuanced and complicated subject. I hope to analyze the Turkish and the U.S. views of the exclusionary rule in a future article.

BIBLIOGRAPHY

Constitutions, Statutes and Regulations

Adli ve Önleme Aramaları Yönetmeliği [A.Ö.A.Y.] [The Regulation on Investigative and Preventive Searches], R.G.: 01.06.2005 S: 25832.

Ceza Muhakemesi Kanunu [CMK] [Criminal Procedure Code], Kanun no (Law no): 5271 R.G. (Official Gazette): 17.12.2004 Sayı: 25673 Kabul Tarihi (enacted): 4.12.2004.

Gümrük Yönetmeliği [The Customs Regulations], R.G.: 07.10.2009 S: 27369.

Polis Vazife ve Selahiyetleri Kanunu [P.V.S.K.] [The Statute on Duties and Powers of the Police], Kanun No: 2751, Tarih: 14 Temmuz 1934.

The Turkish Constitution

The United States Constitution

Türk Ceza Kanunu [T.C.K.] [Criminal Code], Kanun no: 5237 R.G.: 12.10.2004.

Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [The Statute Amending Some of the Articles of the Constitution], Kanun no: 5982 Tarih: 07.05.2010.

Yakalama, Gözaltına Alma ve İfade Alma Yönetmeliği [The Regulation on Arrest and Custodial Interrogation] R.G.: 01.06.2005 S: 25832.

Cases and Internet Sources

Aguilar v. Texas, 84 S. Ct. 1509 (1964).

Arizona v. Gant, 556 U.S. 332 (2009).

Arizona v. Hicks, 107 S. Ct. 1149 (1987).

Arkansas v. Sanders, 442 U.S. 753 (1979).

Atwater v. Lago Vista, 532 U.S. 318 (2001).

Bd. Of. Educ. Of Indep. Sch. Dist. No.92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002).

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

Berkemer v. McCarty, 468 U.S. 420 (1984).

Bram v. United States, 168 U.S. 532 (1897).

Brinegar v. United States, 69 S. Ct. 1302 (1946).

California v. Acevedo, 500 U.S. 565 (1991).

California v. Beheler, 463 U.S. 420 (1984).

California v. Hodari D., 111 S. Ct. 1547 (1991).

California. v. Ciraolo, 476 U.S. 207 (1986).

California. v. Greenwood, 486 U.S. 35 (1988).

Cardwell v. Lewis, 417 U.S. 583 (1974).

Carroll v. United States, 267 U.S. 132 (1925).

Chambers v. Maroney, 399 U.S. 42 (1970).

Chimel v. California, 395 U.S. 752 (1969).

Colorado v. Connelly, 479 U.S. 157 (1986).

Davis v. United States, 512 U.S. 452 (1994).

Edwards v. Arizona, 451 U.S. 477 (1981).

Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012).

Florida v. J.L., 529 U.S. 266 (2000).

Florida v. Jardines, 133 S. Ct. 1409 (2013).

Florida v. Jimeno, 500 U.S. 248 (1991).

Florida. v. Riley, 488 U.S. 445 (1989).

Georgia v. Randolph, 126 S. Ct. 1515 (2006).

Graham v. Connor, 490 U.S. 386 (1989).

Horton v. California, 496 U.S. 128 (1990).

Howes v. Fields, 132 S. Ct. 1181 (2012).

Illinois v. Caballes, 125 S. Ct. 834 (2005).

Illinois v. Gates, 462 U.S. 213 (1983).

Illinois v. Rodriguez, 497 U.S. 177 (1990).

Illinois v. Rodriguez, 497 U.S. 177 (1990).

Illinois. v. Lidster, 124 S. Ct. 885 (2004).

Katz v. United States, 389 U.S. 347 (1967).

Kentucky v. King, 131 S. Ct. 1849 (2011).

Kyllo v. United States, 533 U.S. 26 (2001).

Mapp v. Ohio, 367 U.S. 643 (1961).

Maryland. v. Buie, 110 S. Ct. 1093 (1990).

Mich. Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).

Minnesota v. Dickerson, 113 S. Ct. 2130 (1993).

Minnesota v. Olson, 495 U.S. 91 (1990).

Minnick v. Mississippi, 111 S. Ct. 486 (1990).

Miranda v. Arizona, 384 U.S. 436 (1966).

Moran v. Burbine, 475 U.S. 412 (1986).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

North Carolina v. Butler, 441 U.S. 369 (1979).

O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

Oliver v. United States, 466 U.S. 170 (1984).

Oregon v. Bradshaw, 462 U.S. 1039 (1983).

Orozco v. Texas, 394 U.S. 324 (1969).

Payton v. New York, 100 S. Ct. 1371 (1980).

Pennsylvania v. Mimms, 434 U.S. 106 (1977).

Rhode Island v. Innis, 446 U.S. 291 (1980).

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Smith v. Maryland, 442 U.S. 735 (1979).

Spinelli v. United States, 89 S. Ct. 584 (1969).

Steagald v. United States, 101 S. Ct. 1642 (1981).

Tennessee v. Garner, 471 U.S. 1 (1985).

Terry v. Ohio, 392 U.S. 1 (1968).

Texas v. Brown, 460 U.S. 730 (1983).

Thompson v. Keohane, 516 U.S. 99 (1995).

United States v. Arvizu, 534 U.S. 266 (2002).

United States v. Bostick, 501 U.S. 429 (1991).

United States v. Chadwick, 433 U.S. 1 (1977).

United States v. Drayton, 536 U.S. 194 (2002).

United States v. Jacobsen, 104 S. Ct. 1652 (1984).

United States v. Martinez Fuerte, 96 S. Ct. 3074 (1976).

United States v. Matlock, 415 U.S. 164 (1974).

United States v. Miller, 96 S. Ct. 1619 (1976).

United States v. Place, 462 U.S. 696 (1983).

United States v. Robinson, 414 U.S. 218 (1973).

United States v. Ross, 456 U.S. 798 (1982).

United States v. Watson, 96 S. Ct. 820 (1976).

United States v. White, 401 U.S. 616 (1971).

Warden Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

Weeks v. United States, 232 U.S. 383 (1914).

Winston v. Lee, 105 S. Ct. 1611 (1985).

Wyoming v. Houghton, 526 U.S. 295 (1999).

AYM., Siyasi Parti Kapatma Davası [The Case of Political Party Closure], T: 22.6.2001 E: 1999/2 K: 2001/2.

D. 10.D. E: 2005/6392 K: 2007/948 T: 13.03.2007.

D. IDDK. E: 2007/2257 K: 2012/1117 T: 14.09.2012.

Y. 1. CD. E: 2003/3819 K: 2004/299 T: 16.2.2004.

Y. 1.CD. E: 2005/1478 K: 2005/3290 T: 16.11.2005.

Y. 8. CD. E: 1999/9021 K: 1999/9538 T: 09.06.1999.

YCGK. E: 1994/6-322 K: 1994/343 T: 19.12.1994.

YCGK. E: 1995/6-163 K: 1996/66 T: 26.3.1996.

YCGK. E: 1995/6-238 K: 1995/305 T: 24.10.1995.

YCGK. E: 2005/7-144 K: 2005/150 T: 29.11.2005.

Erdagoz v. Turkey, Eur. Ct. H. R., Eur. Ct. H.R., Application no. 21890/93, 1997, §51, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["erdag%F6z"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58108"]} (last visited Sept. 10, 2014).

European Court of Human Rights, *Guide on Article 5- Right to Liberty and Security,* 2012, s. 13, http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (last visited Sept. 10, 2014).

Fox, Campbell and Hartley v. United Kingdom, Eur. Ct. H.R., Application no. 12244/86-12245/86- 12383/86, 1991, § 32, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57721#{"itemid":["001-57721"]} (last visited Sept. 10, 2014).

HIRBY J., *Definitions of Probable Cause v. Reasonable Suspicion*, The Law Dictionary (featuring Black's Law Dictionary 2nd edition), http://thelawdictionary.org/article/definitions-of-probable-cause-vs-reasonable-suspicion/ (last visited Sept. 16, 2014).

MACOVEİ Monica, *The Right to Liberty and Security of the Person*, Council of Europe, 2002, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4b (last visited Sept. 10, 2014).

ŞEN Ersan, *"Araç Araması" [Search of Cars], August 2013,* http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1065968-arac-aramasi (last visited Sept. 15, 2014).

Books and Articles

ALLEN Ronald Jay - STUNTZ William J. - HOFFMANN Joseph L. - LİVİNGSTON Debra A. - LEİPOLD Andrew D., *Criminal Procedure: Investigation and Right to Counsel,* Wolters Kluwer Law & Business, 2nd ed., New York, 2011.

CENTEL Nur – ZAFER Hamide, *Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Beta, 10. Bası, İstanbul, 2013.

ÇINAR A. Rıza, "*Hukuka Aykırı Kanıtlar" [Illegal Evidence]*, TBB Dergisi, Sayı 55, Ankara, 2004.

DRESSLER Joshua - MICHAELS Alan C., *Understanding Criminal Procedure: Investigation*, Lexis Nexis, 5. Bası, 2010.

KERR Orin S., *The Case for the Third Party Doctrine*, 107 MİCH. L. REV. 561 (2009).

KUNTER Nurullah - YENİSEY Feridun - NUHOĞLU Ayşe, *Muhakeme Dalı olarak Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Beta, 16.Bası, Istanbul, 2008.

ROCHE Brien A. - ROCHE John K. - ROCHE Sean P., *Law 101*, Sphinx, 2. Bası, Illinois, 2009.

SOYASLAN Doğan, "*İdari Denetim ve Aramalar" [Administrative Searches]*, Prof. Dr. Fırat Öztan'a Armağan, Turhan, 2. Bası, Ankara, 2010.

SOYASLAN Doğan, *Ceza Muhakemesi Hukuku [Criminal Procedure Law]*, Yetkin, 4. Bası, Ankara, 2010.

YENİSEY Feridun, *Turkish Criminal Procedure Code [Ceza Muhakemesi Kanunu]*, Beta, 1. Bası, İstanbul, 2009.