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The Condition of Search Warrant in Turkish Law for Urgent Cases of Search and Comparative Law

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Abstract: Due to the change dated 2001 and numbered 4709 in the 20th and 21st articles of the 1982 Turkish constitution, a search warrant that is issued by the authorized judge or magistrate is required in order to authorize police officers to search a person or place to obtain evidence for presentation in criminal prosecutions. This constitutional change has brought about diminishing powers of police force and an increase in the crime rate in the society. The fight against crime and some legal measures and actions now prevent crimes as much as possible. The condition of a written search warrant even for urgent cases of search creates an obstacle for the police force and other officers in the way of resolving the mysteries behind criminal acts. It is often too late or impossible to conduct a search until the warrant is issued by the appropriate judge or magistrate. The previous incidents and related statistics in Turkey show that this type of constitutional changes is likely to increase the crime rate and risk of unresolved cases. In order to resolve this serious problem, it is recommended that the condition of a warrant for urgent cases of search should be removed from the constitution and the pertinent articles of the criminal law. The international law does not enforce such a condition for Turkey or any other country. This study aims to contribute to the comparative law in this respect and have an impact on the judicial reforms of other countries to analyze the case of Turkey and take appropriate action accordingly.

Key words: Constitution · Police force · Search · Written search warrant · Criminal law

INTRODUCTION

In recent years, Turkey has undergone some radical changes in the criminal prosecution system as a part of the democratization process within the adaptation program for the European Union (EU) membership. The adaptation to the EU law is considered as one of the most significant reasons for such changes. These changes affect criminal law directly and often adversely, in dealing with crimes. For example, the revised laws do not include the law with number 5271 [7], which was passed in 2005 in order to allow the police force to intervene in urgent cases of crime. The legal means of dealing with crimes have not always proven to be the most effective, as evidenced[1] by the examples from the UK [1]. It is emphasized in this paper that mechanisms that allow resolving unknown aspects of crime effectively will help reduce the crime rate.

In criminal prosecution, there have been a number of examples such as shortened periods of interrogation, which have adverse effects in resolving and dealing with crime. The recent changes in Turkey in the criminal law have had negative impacts in dealing with crime.[2]

In this study, one of these changes, namely, 'the condition of a search warrant for urgent cases of search' is examined with its legal dimensions and practical implications. This is different than the search warrant[3] issued by the judge in normal circumstances, which is outside the scope of this study[4]. The 'search' under this study includes a 'narrow definition of search'[5], which is search of persons, the place they reside, their offices, vehicles and their belongings. Evidence that is obtained through illegal means, which would not be considered by judges or magistrates, is not within the scope of this study.

The objective of this study is to evaluate the impact of the condition of a search warrant for urgent cases of search and demonstrate that it is not the only option for dealing with crime effectively in globalised legal systems and democracy and prove through the experiences in Turkey that it can jeopardize criminal prosecution. Such legal amendments have been on the level of the constitution in Turkey. This makes the enforcement laws difficult to change and more permanent, in line with the constitutional change[6].

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This study takes a comparative perspective by examining the legal systems of other countries. The data pertaining to Turkey are supported by several statistics and survey data.

Firstly, the terminology about dealing with crime and search is clarified through conceptualizations. The link between dealing with crime and search is highlighted in this paper. Secondly, types and conditions of search are analyzed. The outcomes of these types in terms of public order are stressed. The paper is concluded with some recommendations for effective means of fighting against crime.

Concepts of 'Dealing with Crime' and 'Search'

General Aspects of These Concepts

Concepts of Dealing with 'Crime' and 'Search': Dealing with crime includes all activities related to reducing crime in a society. In Turkey, these activities are carried out by the police force and 'jandarma', which is a special unit of the armed forces. These two forces are called 'kolluk' together, which means security forces for internal security and peace.

Crime prevention is one of the main duties of kolluk forces. In the contemporary age, crime prevention includes pre-emptive measures and actions taken to discourage people from committing crime. This encourages the involvement of other institutional agents in dealing with crime. 'Dealing with crime' is a comprehensive concept, which embraces all activities that are related to pre-emptive actions and measures to stop crime.

Criminal prosecution system, which consists of security forces, magistrates and judges and is designed to deal with crime effectively, requires a different approach. This approach entails multiple functions and operations of each institutional agent and a detailed examination of cause and effect relationships. [7]

'Search'[8] is an activity[9] to find out 'unknown'.[10] In previous studies, search is referred to obtaining evidence or the person who is seized [6], [18], [57].

'Judicial search' consists of the legal exception[11] to respecting the privacy of personal life.[12] The search is subject to rules and procedures and this was previously to protect personal and proprietary rights. In the USA, the protection of the privacy of personal life has been put at the forefront of the debate and concomitant practices by a law entitled *'Katz v. US'*[13] that was brought into effect in 1967.[14] Therefore, it is important to observe the law in implementation.

Search can be carried out provided that a 'reasoned suspicion' exists. The objective of the search is to gather the suspect[15] and/or evidence related to crime. The suspicion must be a reasoned and logical[16] one.

According to the 1968 law entitled 'Terry v. Ohio', 'reasoned suspicion' involves an outcome of the analysis of the police force, which is based on their experience and careful investigation of precedent cases.[17] In the Turkish law, the 'existence of reasoned suspicion' is a sufficient condition for urgent searches and all associated cautions to be taken.[18]

The impact of judicial search and pre-emptive measures in dealing with crime: Judicial duties and pertinent activities are very important in dealing with crime. Effective undertakings of the judiciary and resolving crime in a minimum span of time will have a psychological implication for people who will be discouraged to commit a crime. Since 'the maintenance of public order through pre-empting crime' and 'maintenance of public security through liberty and freedom' are two contradictory concepts', the balance of contradictions is essential for a peaceful, crime-free and democratic society.[19] In terms of the aims of searching crime, an ideal crime policy should balance the 'dual process model', which is to protect human rights and the 'crime control' model, which is to pre-empt crime taking place.[20] In Northern Ireland, there have been some reforms to comply with human rights and the European Police Ethics.[21] These reforms can be viewed as an example to the 'dual process model' approach. However, these reforms[22] do not have the specific objective of dealing with crime.

Those countries, which adapt the 'crime control' model, emphasise the criminal institutions and their prosecution authorities. In such systems, reasoned suspicion about a person is a sufficient condition to activate judicial mechanisms to pursue activities in dealing with associated crime. If emphasis is put on the personal liberties and freedom unduly, it will be more difficult to pre-empt crime and this will encourage those who have the tendency to commit a crime.

Whether decline of the power and authority of the police force has a direct impact on commitment to crime can be investigated by looking into the increase and decrease in cases of crimes.[23] For example, in Turkey, in 1990, 92285 cases were observed. This figure was 93009 in 1991 and 102288 in 1992. This shows an incremental increase. However, a more dramatic increase is observed in the years of 1993, 1994, 1995 and 1996. The figures are 174366, 187872, 221610 and 275368 respectively.

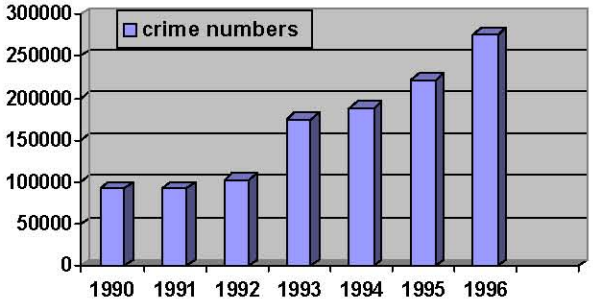

Fig. 1: The impact of benefiting from suspicion on the increase in cases of crime

As Soyaslan[24] argues, this demonstrates the impact of reforms in terms of increasing the tendency to commit a crime (Figure 1). This reform, which is necessary for international democratisation standards, is significant to show that any amendments to law that favour the suspect will encourage crime in a society.

It is evidenced that such changes that restrain the power and authority of the police force delay the criminal prosecution system to function properly in dealing with crime. This causes a concern in the society and a public opinion can be formed about ineffective judicial and security system as a result. This means lack of trust to the governmental authorities by citizens.

As can be inferred from the preceding discussion, the constraints on the power of police forces will delay and even, obstruct the process of dealing with crime. Therefore, the balance of the right to search by police forces and human rights should be carefully observed in a democratic nation-state. This balance entails empowering the police forces in a way that they can effectively resolve crime. This will be explained in further detail in the ensuing sections of the paper. It is important to clarify what is meant by 'search' first and establish the multiple aspects of this concept.

The Condition and Scope of Written Search Warrant for Judicial Search in Urgent Cases

Definition, General Information, the Situation in Terms of the Constitution and Pertinent Laws: Considering its effects on dealing with crime, the most important change in the ways judicial search is conducted is that a written search warrant by authorized judges or magistrates is required now. This was introduced in 2001 with the change numbered 4709 in the 20th and 21st articles (see: [11]) of the Turkish constitution. The most important consequence is that it became "a constitutional stipulation" to have a written warrant by appropriate authorities to search in urgent cases.

However, the related provision in the Turkish constitution must be the very exception of the constitutions of such countries as the US, Germany, Belgium, France, Canada, Colombia and Poland. As is known, the word "warrant" encompasses verbal ones as well unless it is not preceded by the word "written". In this regard, it is a fact that the 22nd article of the Belgian constitution [62], the 12th article of the Netherland constitution [10], the 50th article of the Polish constitution [61] and the 13th article of the German constitution [31] impose some provisions about judicial search but they do not include any condition of written search warrant in urgent cases. The German constitution specifies that the authorized people can issue search warrants to allow police officers to search people and/or places in urgent cases in the ways the laws require but it does not stipulate that the search warrants are absolutely required to be issued in written form in urgent cases.[25]

Such constitutions as those of Turkey and Colombia specify that the authorized people can issue search warrants in urgent cases too and leave the details to the laws. The 50th article of the Polish constitution [61], the 72nd article of the Danish constitution [15] and the 24th article of the Canadian constitution [9] declare that private life and houses are inviolable and the ways and conditions of investigating about them are to be determined by laws. The 28th article of the Colombian constitution [56] ensures that a house cannot be searched in any way as long as there is not a written document produced by the authorized people. However, the 32nd article of the same constitution specifies that a written search warrant is not required when detectives need to get into a house in an urgent case to search or catch a person red-handed.

The 7th article of the 1982 Canadian constitution [9] indicates that individuals are free and the 8th article ensures that people can be stopped and searched only in situations determined by the laws. However, the 24th and

some other articles of the same constitution specify that exceptions can be made to the constitutional assurances about the fundamental rights when there are evident unlawful acts and security officers can use their own authority.

Even in the Kenyan constitution [49] enacted in 2005, which was 4 years after the changes in the 1982 Turkish constitution, there is not a provision requiring a written search warrant in urgent cases.[26] If the change made in the Turkish constitution had been to the purpose, it would have set an example for the Kenyan constitution. It is a notable fact that even Kenya, which is not a country as economically and socially developed as Turkey, did not feel the need to make such a provision in its constitution.[27]

The Consequences of Such Constitutional and Legal Provisions That Make Dealing with Crimes Harder:

The Juridical Circumstances Created by the Provisions in Question: The following can be mentioned about the situation brought about by the constitutional and legal provisions requiring written search warrant for juridical search in urgent cases in criminal persecutions:

- According to the new arrangements in Turkish law, search warrants now have to be "written" in all the situations when delay might cause serious problems. Such documents are either ones ordering to search or those approving the searches demanded and they are valid only when transmitted to the law enforcement officers to search.

We infer from the report of the justice commission and the bill on changes in the code of criminal procedure [8] that written warrants for judicial search are justified with the requirement that every procedure in preliminary criminal proceedings has to fit the principle of being written. This justification was drawn up by the justice commission of the Turkish Grand National Assembly. The requirement of written warrant for judicial search in urgent cases had not been in any of the drafts submitted by the Cabinet to the Assembly, but it was added by the justice commission.[28]

However, the need of a written search warrant for judicial search in every case even when delay is likely to cause problems is inherently paradoxical.[29] Most of the Turkish jurists [46] report that it leads to some consequences which are unbearable in a state of law. Indicating that the change has been disadvantageous, Gözler [30] mentions that any police officer now has to wait for a written warrant even when he needs to search an armed person haphazardly caught red-handed.

As is known, constitutions are written documents of overall law codifying all the other rules in a system. In this respect, the Turkish constitution has a binding quality too and the laws, bylaws, regulations and any other code may not include provisions contrary to it. Therefore, it would be unconstitutional to enact any law contrary to the constitutional provision that a search warrant issued by authorized judges or magistrates is required in order to authorize police officers to search a person or place in urgent cases (the same opinion: [30]).

- Due to the new legislation on criminal procedure in Turkey, it is a must that public prosecutors issue the warrants for searching houses or other enclosed spaces.

In comparison with the former criminal procedure, the powers of the law enforcement officers in Turkey have been restricted in two ways:

- Searching in an urgent case may now be only after a written warrant.
- It is prescribed that written warrants shall be issued by public prosecutors when enclosed spaces are to be searched and by chief law enforcement officers if public prosecutors cannot be reached when a person, his possessions and/or vehicle is/are to be searched. Such restrictions in the powers and authority of the officers have prevented them from dealing with crimes instantly.[30]

When law enforcement officers have to wait for a written search warrant and cannot begin instantly to conduct judicial search in urgent cases, evidences can be hidden or wiped out or the suspect can run away. For instance; if someone saw Hezbollah militants hogtying a person and called police officers patrolling, they would not be able to immediately break into the place to search the suspects and/or criminal evidences [46]. The same restriction would apply to a more urgent case than the abovementioned one, which refers mainly to progressing offences. For instance; when a person is seen enter a house with drugs, urgent action is needed to stop him from getting rid of them in some way. Waiting for a written warrant to do it would be almost inconceivable but it is what the constitution and the provision of law both now require. For example, in an operation carried out in

due form in the city of Istanbul, the law enforcement officers entered a house by using force as the householder refused to open the door. During the delay in entering the house, he had tried to extirpate the drugs in a stove. The officers managed to take the half-burnt drugs out of the stove [44]. The event should draw attention to the fact that law enforcement officers are now not able to search enclosed spaces as long as they cannot reach public prosecutors, which would threaten the social order the most.

- As mentioned above, the constitutions of modern, democratic countries do not require search warrants to be given in written form when people, houses, possessions or vehicles need to be searched instantly in urgent cases. Moreover, the obligation to wait for a written warrant "only" causes police officers to lose time and affects them adversely in their fight against crime.

The rationale for the aforementioned bill on changing some articles of the Turkish constitution, which became a law numbered 4709 in 2001 [60], is not an evident one about why search warrants in urgent cases have to be issued written. It is written in the bill that the changes are all aimed at adaptation to the European Convention on Human Rights. Nonetheless, there is not a piece of information talking about why the people authorized by laws have to issue only "written" search warrants for judicial search in urgent cases. Furthermore, the European Convention on Human Rights does not include a condition that a written search warrant issued by the authorized judge or magistrate is required in order to authorize police officers to search a person or place in urgent cases.

In terms of comparative law; it can be mentioned that the laws on criminal prosecution in Austria [55] (articles 139-141) and Germany [54] (article 105) authorize police officers and auxiliary staff working on behalf of public prosecutors to instantly conduct judicial search in the cases when delay might be unfavourable or judges cannot be reached. The same principle is adopted in the police legislation in the German state of Bayern [26].

In the US and such European countries as Finland[31], Denmark and England, law enforcement officers are authorized to instantly search people and places when delay might be disadvantageous.[32] In American law, police officers are authorized to search without a warrant in urgent cases and when they feel that they have to arrest people, will find evidences or obtain ones that might get lost [2]. In England, police officers have the authority to break into houses when they see that there are adequate reasons for arrest.[33]

The English law dated 1984 on the police and judicial evidences gave absolute authority to police officers to get into and search enclosed spaces. The police now can immediately arrest people for offences and in the cases mentioned in the law on public order. The exercise of their authority is not conditional on the presence of cases when delay might be disadvantageous. While England has never deprived its police of authority for fear that it might be abused [32], one of the major reasons why law enforcement officers had to renounce some of their powers in Turkey seems to be the presumption that they are liable to abuse the authority they are given.

A few years after the constitutional and legal changes in Turkey, the reforms of the code on criminal procedure in Austria (see: [55]) in 2004 and 2006 did not require written search warrants for judicial searches in urgent cases, which is definitely worth noting. In some other countries such as China where reforms in judicial system have recently been implemented,[34] it is ensured that officers can instantly search people and places in urgent cases needing no search warrants written.

- In terms of the analyses of whether it is required in different countries to have a written search warrant in urgent cases, the provisions in the legislation in Turkey about verbal order should be mentioned:

Due to the 137th article of the Turkish constitution, civil servants have to follow any kind of legal orders. However, this requirement applies only to the orders about civil service and judicial search, which can be considered to be a judicial service, is not within the scope of the administrative law. Moreover, the condition of written search warrant imposed by the constitutional change in 2001 is now a provision which is as binding as the 137th article and it was promulgated after the 137 th article. In addition, while the abovementioned condition is in the section of "fundamental rights and duties", the 137th article is in the "administrative affairs" section of the constitution.

Under these circumstances; the provision "Except when it is an urgent case for which orders can be verbal, public prosecutors shall issue the written warrants to be executed by law enforcement officers", which was added with the change numbered 5560 to the 161st article of the

new code of criminal procedure, cannot be claimed to give officers the authority to conduct judicial searches with verbal orders in urgent cases. This would be unconstitutional as the constitution itself absolutely requires search warrants issued by authorized judges or magistrates in order to authorize police officers to search a person or place to obtain evidence for presentation in criminal prosecutions.

Furthermore; the Constitutional Court of Turkey repealed the provision enabling law enforcement officers to search people, places and things with no obligation to have a warrant in urgent cases, which had been in the 97th article of the former code of criminal procedures numbered 1412. In its verdict of annulment, the Supreme Court found the article in question against the provision in the 20th and 21st articles that searches in urgent cases must always be with a written warrant [58]. For these reasons and more, it is certain that judicial search is improbable without a written warrant (the same view in [66]) in Turkey.

- Due to the Turkish constitution and the law on criminal prosecution, written search warrants in urgent cases are to be given only to judicial law enforcement officers. When they are insufficient, public prosecutors can use their authority and give the warrants to preventive police force, which the abovementioned law requires to take on judicial law enforcement duties. Nonetheless, the former code on criminal procedures did not include such a distinction. It is evident that the new provisions impose some indirect restrictions on officers to be ordered to conduct judicial searches.
- Delay in judicial searches because of the obligation to wait for written orders is particularly against the principle that any kind of delay must be avoided. This makes revelation of crimes more difficult than it would normally be and causes inhibition of the freedom of claiming rights.

Under these circumstances, defendants and victims cannot properly use the right to obtain evidences, which is granted and ensured by the state. It is always probable that traces and evidences might disappear or criminals might escape while waiting for a written warrant.

Furthermore, although ignoring people's consent would restrict their right to exculpation, Turkish Council of State repealed the provision of the Judicial and Preventive Searches Regulation that had allowed consented searches.[35]

- It has been sought some ways to solve the problems caused by the absolute requirement of written search warrant: Thanks to the provision of the law numbered 2559 enabling the police to search with a verbal order in urgent cases, officers sometimes act with less concern. However, it should be noted here that the requirement of written warrant is still followed with utmost care despite the abovementioned provision. There are some claims also about this provision that it is unconstitutional because of the reasons that have been touched upon.

As is known, evidences obtained unlawfully cannot be taken into consideration. Therefore, evidences collected searching people and/or places after a verbal order cannot have an essential function in criminal prosecutions as it would be obviously unconstitutional.

Examples from Practices: The constitutional change requiring a written search warrant even in urgent cases has caused several problems in practice. Two related cases and their analyses are provided below:

The First Case: On a day after the enactment of the new code of criminal procedure, the police in the city of Adana were pursuing a burglary suspect just after he committed the crime. The man got into a house and did not hesitate to turn the lights on. As they did not have the search warrant they were supposed to be given immediately, the police officers left the place where they had been waiting in front of the building. People living around called the police again to tell them that the man was still in the house and the officers went back to the place to look for the man even on the roofs. Seeing that the man had not left the house yet, they threw pieces of stone to the windows to warn the man. He responded throwing them back at the police officers. As the search warrant did not arrive and the house could not be broken into, the suspect was not caught [43].

The Second Case: In Istanbul, which is the biggest city of Turkey, a person who had been imprisoned for motor vehicle theft and mugging stole a car with his two friends. The police began to follow the group driving around. Before long, the officers managed to capture two of them. Thinking that the escaping suspect, who had been arrested before, could have gone to the house belonging to his family, the police officers encircled the house as they were not able to get into it for not having a search

warrant required by the new penal law. After two hours, they submitted to the owner the warrant they had finally been given and entered the house. Nevertheless, they could find neither the man nor any traces or evidences [51]. It was most probably because he had fled in some way before the officers could get in with a search warrant.

The Analysis of the Two Events in Terms of Our Subject Matter: The cases can be conceived better if they are analysed in terms of our subject matter and not considering the variables about whether it was necessary to take the precautions to stop the men from escaping.

Could the Police Officers Get into the Houses Without a Search Warrant?: As the information provided above suggests, the current legal conditions in Turkey do not allow the police to get into enclosed spaces without a written warrant even in urgent cases[36] and when people are caught red-handed. The events were both urgent cases and reasoned suspicion existed, but this could have changed nothing for the police officers there.

However; the law enforcement officers in the US, Canada and New Zealand[37] do not need even verbal orders to use their authority to break into enclosed spaces.[38] In the "Santana v. U.S." case in the United States of America in 1976, it was accepted that the police officers did not need a search warrant or the consent of the landlord and they normally used their authority to break into the house and arrest the person who had taken refuge there at the end of a hot pursuit after being caught red-handed.[39] Two other examples are the verdicts of the American Supreme Court in 1969 in the *"Chimel v. California"* and *"US v. Edwards"* cases[40], in which it was concluded that the officers rightfully broke into the houses to prevent the suspects from running away and getting rid of the evidences. It is a fact worth noting that the Court considered the events not only urgent cases but also ones requiring the officers to catch the suspects red-handed.

Due to the Police Law in Germany, the police are not required to have consent when a reasoned and logical suspicion exists and they can search people or places even if nobody might be caught committing a crime.[41] The German Federal Law on the Police authorizes officers to instantly carry out searches when a suspect or evidence is to be obtained, people can be stopped from committing crimes and delay might cause serious criminal problems [27].

After that event in Istanbul, some jurists defended the view that the police should have been able to break into the house without a warrant and arrest the suspect pursued for a long time.[42] However, the jurists who had prepared the bill on the change of the penal system sharply disagreed [51] and we think they were right. Since the constitution and the code of criminal procedure unexceptionally require a written search warrant even in urgent cases, the provisions cannot be interpreted in any other way around.

As the Cases Were Obviously Urgent, Would Radioed Verbal Instructions Have Been Enough for the Law Enforcement Officers to Break In?: According to Turkish law, written warrants can be replaced in urgent cases by public prosecutors' instructions transmitted by radio (see: [68]). Nonetheless, there is not a provision enabling that method to take the place of the "search warrants issued in written form".

Could the Police Officers Get in by Getting the Consent of the Householders or People Using the Houses?: The reason we ask this question is that we aim to analyse whether it is necessary to have a written warrant when people to be searched give their consent. The answer must be "it was impossible for them to get in with the particular aim of conducting a search".[43] Because, the law requires a warrant issued by authorized judges or magistrates and this means that people's consent can have no function unless a written search warrant is obtained. Furthermore, due to the verdict numbered 2003/3396 and dated 21/11/2003, the 10th Division of the Council of State repealed the provision in the Judicial and Preventive Searches Regulation allowing "searches based on consent". The provision "Nobody can be punished for acts committed with somebody else's consent given about a right he can consciously and fully exercise", which was enacted in 2005 by the Turkish Penal Law numbered 5237, cannot be interpreted to be allowing searches based on consent. Moreover, on 19/1/2006, the 10th Division of the Council of State stopped the execution of the provision in the Judicial and Preventive Searches Regulation allowing searches based on consent, which had been readopted in consideration of the abovementioned law.[44] Thus, although it is a requirement of the right to exoneration of people who freely give their consent to search, this kind of searches was banned in Turkey.

Some intellectuals[45] think that a person's consent would not be valid in such a situation as it is not possible for him to give up his own liberty. This can be objected on account of the fact that voluntary consent cannot be interpreted to be giving up liberties. In an urgent case when the constitution or laws do not require a judge or magistrate's warrant for a search, ignoring a person's free will and voluntary consent would be unlawful itself.[46]

In England, people can be searched if they give their consent after being informed that they have the right to refuse it.[47] In the US, the 1973 law entitled "*Schneckloth v. Bustamonte"* laid emphasis on the requirement that people to give their consent be notified of their right to refuse police officers' demand for search.[48] The sets of laws in England and the US stipulate that people who are wanted to be searched be asked for their consent.[49] In Turkey, far from doing that, the legislation now does not even mention searches based upon free consent. Therefore, with its abovementioned writ preventing search of enclosed spaces, vehicles, possessions or people even if consent is granted, the Turkish Council of State acted in a way contradicting the constitution and gist of human rights.

In the first one of the events being analysed here, the suspect got into somebody else's house. However, it was not possible for the law enforcement officers to get in that house even by obtaining the consent of a person using or owning it. In the *"Illinois v. Rodriguez"* case in the US in 1990, the consent of the third party having the authority over the house was concluded to be valid.[50] According to the 32nd article of the Colombian Constitution [56], it is possible for law enforcement officers to get into a house with dwellers' consent if a person pursued after being seen committing a crime takes refuge there.

Would Getting into the Houses in the Cases Have Been Considered Searching?: As searching means the activities and efforts to find someone or something, getting into a house to catch a suspect already seen committing a crime cannot be considered searching. In the aforementioned decisions of the American courts, nothing inconvenient was found in the police's entrance to the enclosed spaces after hot pursuits. In the decisions cited, some deciding factors were naturally the facts that the people getting into the houses were already suspects and the police knew that they were going to find them there. In the first event we have been analysing, the suspect even threw stones through the window at the law enforcement officers. In such a case, it should not be considered to be a search if officers just get in and catch the suspect not searching anywhere or anybody. Nonetheless, the law enforcement officers in Turkey always have to wait for the issue of a warrant stipulated by the constitution and related provisions. This means that getting into a house to find something already known where is regarded as a judicial search in this country.

Were the Law Enforcement Officers Supposed to Inform the Homeowners or Those Who Were Using the Houses?: In such urgent cases, the law enforcement officers in the US are allowed to get into enclosed spaces without informing anybody. If need be and they see that the case is urgent enough to justify themselves, they are authorized to break doors down to get into enclosed spaces.[51] In Turkey, the police can enter a house by using force only if the dwellers object to it after being informed. In the second one of the events analysed, the police got into the house with a search warrant and informing the dwellers. If they had resisted, the police could have used force to enter.

Could the Difference Between Day and Night Be a Determining Factor in Terms of Asking for a Warrant and Searching the Houses?: The first event occurred in daytime and the police were free of the disadvantages of conducting search when it is night. The American law authorizes law enforcement officers to search in daytime and at night.[52] Due to the Turkish Code of Criminal Procedure, searches at night can be conducted only when somebody is to be caught in the act, delay might cause serious problems and escapees are to be arrested again. As a former chief of police who tried to enforce the laws for years, I observe that night searches have recently been restricted to a great extent in practice for some particular reasons such as adaptation to the European Union. In the second one of the events analysed, a search warrant could not be obtained probably because the suspect was not seen committing an offence.

The Assessment of the Statistics: Apart from the fact that the constitutional changes in 2001 have encouraged people to commit crimes preventing the police from conducting searches instantly, another consequence to be noted here is the increase in the crime rate in the society.

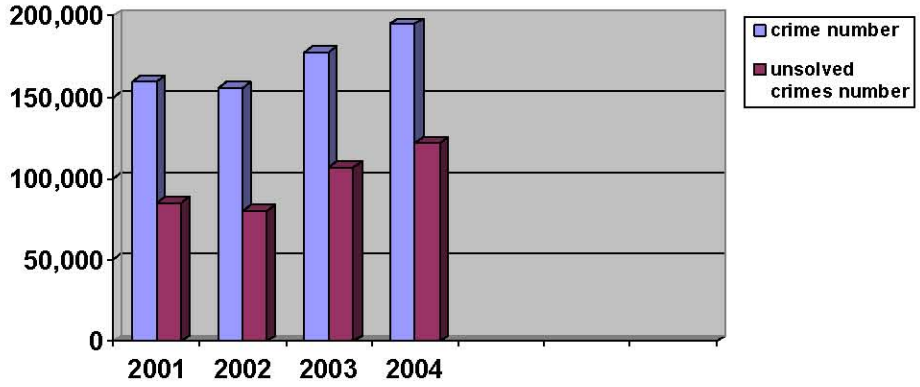

Fig. 2: The Comparison of Crime and Unsolved Crime Numbers in terms of Years

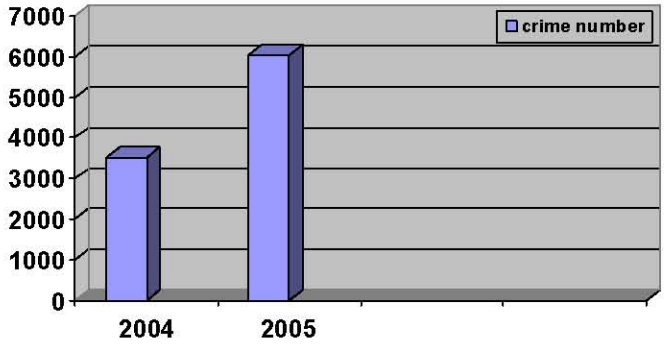

Fig. 3: The Comparison of the Crime Numbers in the months of July in 2004 and 2005

In 2001, the numbers of the crimes and unsolved crimes were 160.000 and 85.000 respectively. As is seen, the rate of the unsolved ones was 53%. The numbers of the crimes and unsolved crimes in 2002 were 156.000 and 80.000 respectively, which means the rate of the unsolved ones was 51%. Starting from 2003, it can be seen an apparent increase in the numbers. In Ankara Chamber of Commerce's report [25] which provided us with those data, the increase is emphasized with the heading "The dramatic increase in 2003 in the numbers of crimes and unsolved crimes". The report indicates that 107.000 of the 178.000 crimes committed in 2003 remained unsolved and the rate of the unsolved ones went up to 60%. In 2004, the numbers of the crimes and unsolved crimes were 195.000 and 122.000 respectively and the rate of the unsolved ones increased to 62% (Figure 2).

Despite searching thoroughly, it could not be found any particular statistics indicating that establishing stricter criteria for judicial search has a decreasing or increasing effect on crimes. The change in the Turkish constitution in 2001 gave the suspects of such crimes as terror and smuggling some rights like informing their families about being taken into custody and having lawyers. The suspects of other crimes had already been given those rights before. The statistics above show how the crime numbers were affected after 2001 by the condition of written search warrant in urgent cases.

In 2005 when the new code of criminal procedure was enacted, judicial searches pursuant to a written warrant began to be conducted without any concessions. The increase in crimes in 2005 and the following years grew out of some other factors and the fact that the police were deprived of the authority to instantly act to stop crimes.

The comparison of the crime rates in some years before and after 2005 supports our claim that there has been an increase with the changes and the requirement of written warrant for search in urgent cases.

According to the 2004 - 2005 statistics [1] for the offences disturbing the peace in the responsibility area of the police, the number of the burglaries was 3509 in July, 2004. It went up to 6030 (Figure 3) in the first July following the enactment of the new criminal procedure law, which is almost a twofold increase.

In July, 2002, the number of the crimes unsettling the proper order in public spaces was 25822. The rate of the increase in the July of the succeeding year was nearly

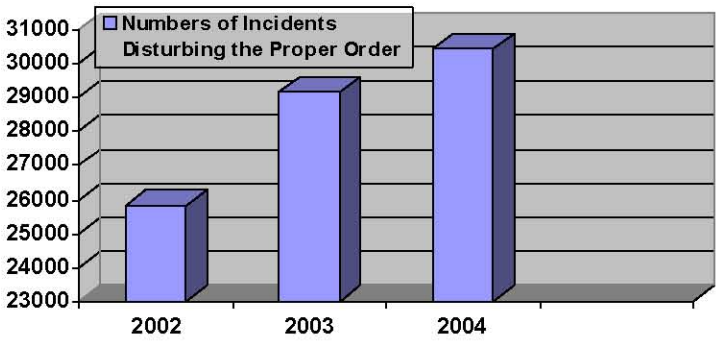

Fig. 4: The Comparison of the Incidents Disturbing the Proper Order in terms of the Years between 2002 and 2005

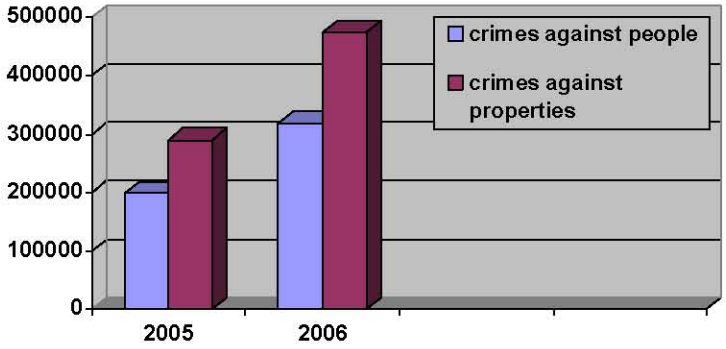

Fig. 5: 2005-2006 Comparison of the Incidents Disturbing the Peace

12% and the number went up to 29154 [47]. According to the 2004 - 2005 statistics [1] for the offences disturbing the peace in the responsibility area of the police, the numbers of the incidents in the months of July in 2004 and 2005 were 30420 and 43100 respectively. As is seen, while the average increase rate over the years is 11%, the rate of the increase in 2005 was over 70% (Figure 4).

It is seen that the aforementioned reasons kept being factors in the increase in the crime rate in 2006 as well.

In 2005, 197.996 was the number of the crimes directed at individuals such as murder, damaging, threatening, rape and kidnap. The rate of the increase in 2006 was 61%. In 2005, the crimes against property like theft, extortion, arson, plunder and swindle were committed 289.765 times. The rate of the increase in that kind of crimes in the following year was 64% [34] (Figure 5).

Considering the same issue in terms of the total number of the unsolved crimes in *The Annualized Distribution of The Files on Unsolved Crimes at Chief Public Prosecutor's Offices* [12],[53] it can be seen that 2001 and the following years have witnessed vast increases in the numbers of the unsolved crimes files that judicial authorities have had to deal with. The numbers of the files in 1999, 2000, 2001, 2002, 2003, 2004 and 2005 are 145.685, 152.655, 197.860, 256.844, 322.584, 338.248 and 498.370 respectively (Figure 6).

The table below shows that in "The Effects of the New Criminal Procedure Law on Crimes" questionnaire, to which 234 people responded in 2005, the commonest belief was that the changes would cause an increase in the number of the crimes [63] (Figure 7).

In another questionnaire in 2007 entitled "Do you think the powers of the police force are enough?" [59], 80% of the respondents stated that the police had lost some of their powers. The results of this questionnaire, to which 151 people replied on the Internet, are given in the chart below (Figure 8).

Only volunteers were to complete the questionnaires. Consequently, the respondents were people who were interested in such issues as criminal prosecution, powers and authority of law enforcement officers and fight against crime. Therefore, the questionnaires should be trusted considering their methods, meanings and messages.

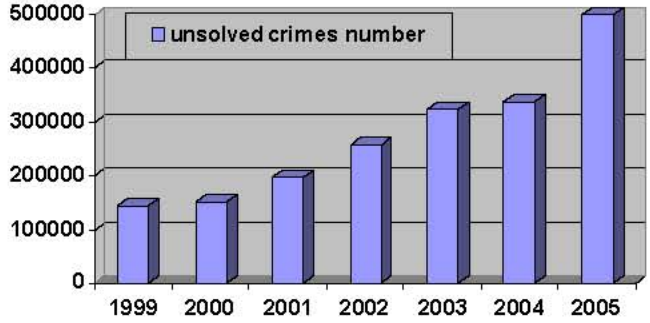

Fig 6: The Annualized Distribution of the Files on Unsolved Crimes at Chief Public Prosecutor's Offices

The human rights standards in Turkey will be raised.	9.40% (22)
The powers of the police will be diminished.	14.53% (34)
Prosecutors will be given more powers.	4.27% (10)
Lawyers will get richer.	12.82% (30)
The crime rate in the society will increase.	26.92% (63)
The fight against crime will be more effective.	2.99% (7)
Criminals will have freedom than victims.	24.79% (58)
None.	0.85% (2)
I do not know.	3.42% (8)

Fig. 7: The Effects of the New Criminal Procedure Law on Crimes Questionnaire

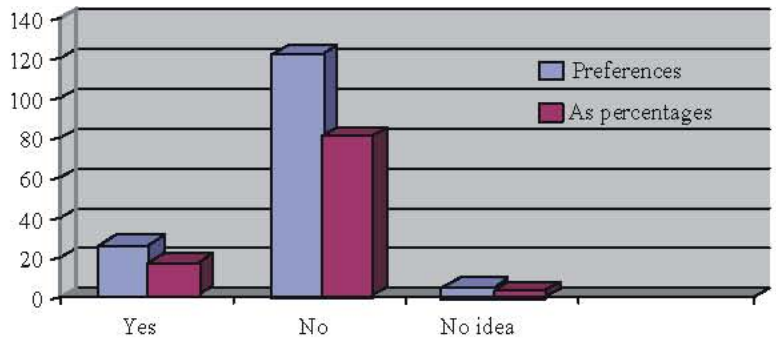

Fig. 8: The Sufficiency of the Powers of the Police Questionnaire

What we observe in daily life justifies the beliefs declared in the questionnaires. Lately, the rate of those who want the police to be given more powers has never been lower than 70% and the reactions pushed the government to enhance the authority of the police with the law numbered 5560. The sole reason chief law enforcement officers have been entitled to issue written search warrants in urgent cases is because of the fact that it is often so hard to quickly reach public prosecutors when people, things, vehicles or enclosed spaces need to be searched immediately. The reactions kept being produced as the change did not meet the needs of the law enforcement officers in their fight against crime. Accordingly, the law numbered 5681 gave to the police some powers like acting instantly in urgent cases. Taking all these into consideration, the reliability of the questionnaires is automatically ensured.

As can be seen in the statistics and questionnaire results given above, the new criminal procedure law has encouraged people to commit crimes and made the fight against them harder. During the days when the draft of the law was being discussed in the Justice Commission,

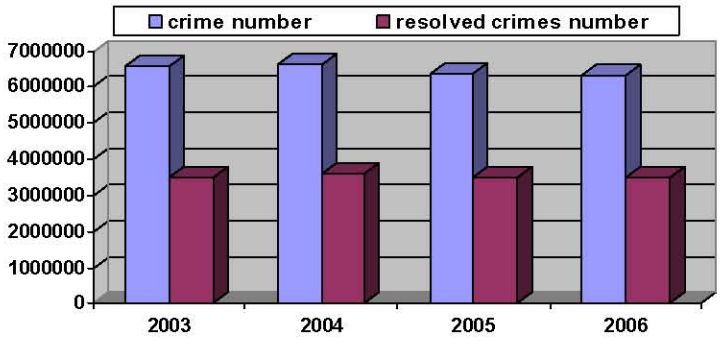

Fig. 9: The Numbers of the Crimes and Unsolved Crimes in Germany between 2003 and 2006

the media was reporting the strong objections of the representatives of the police and gendarmerie claiming that they would lose many of their powers [50]. To grasp the situation, it would be enough to consider just the claim that the new system would soon disturb the public order and make the country a paradise for criminals [23] as it required the police to get a written warrant from prosecutors to use any of their powers. The constitutional change in 2001 rendered the law enforcement officers in Turkey completely impotent to search, which is contrary to the security laws in the western world [13]. The author of this study, who worked as a chief of law enforcement officers for long years, has never heard a member of the law enforcement agency express an opposing view.

The aforementioned numbers suggest that the crime rates have been increasing considerably. It can be claimed that the reason is not the condition of written search warrant or any other changes and the crime rates and unsolved crimes are increasing in Europe too.

The numbers of crimes in Germany in 2003, 2004, 2005 and 2006 were 6.572.135, 6.633.156, 6.391.715 and 6.304.223 respectively. The decrease is plainly evident. The rates of solving the crimes in those four years were 53.1, 54.2, 55.0 and 55.4 [54], which points to an increase (Figure 9). It is an undeniable fact that some of this success lies in the power of the German police force to conduct instant searches.

An Offer of Solution: In Turkey, the absolute requirement of a written search warrant even in urgent cases and similar provisions open up the possibility that the public order might be paralysed for the sake of democratization. Law enforcement officers must be equipped with the powers they need in their fight against crime. Otherwise, social collapse is due [32].

It is against the principles of law not to give authority for fear of abuse of power to the people who need it. It can always be possible to check whether law enforcement officers abuse their authority and punish them if they are doing it. Furthermore, it is not possible to claim that crimes will be reduced as the punishments have been made severer. Crimes cannot be punished unless they are solved.

In order to wage effective fight on crime, one of the most urgent measures to implement is abolishing the constitutional requirement of written search warrant issued by the authorized judge or magistrate to authorize police officers to search a person or place to obtain evidence for presentation in criminal prosecutions. The police must be equipped with the authority to decide on search when they cannot reach prosecutors.

Giving the police some powers under control would not bring discredit on the rule of law; on the contrary it would guarantee it.

RESULTS AND DISCUSSION

Some radical changes have been made in the criminal prosecution system in Turkey. A significant one is the constitutional requirement that a written search warrant be issued even in urgent cases of judicial search.

Even though the constitution and laws of no country contain a similar one, making such a provision in Turkey has deprived the law enforcement officers of many of their powers and encouraged people to commit crimes steadily increasing.

Those changes, which would surely astonish every person having a grasp of this study, have astonished lots of occidental jurists too and made Turkey almost a paradise for criminals. Although the consequences are clearly seen, the government and legislative bodies seem

to resist abolishing the constitutional requirement of written search warrant even in urgent cases of search. What needs to be done is quite obvious: The word "written" should be removed from the constitution and law enforcement officers should be given the powers they are in need of. In public law, equipping people charged with solving and preventing crimes with authority is a corollary of the principle of equivalence between duties and powers.

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[1] As a matter of fact, the policies to eliminate the reasons for crimes instead of trying to prevent them with penalties are a subject of criminology and an indispensable part of modern crime prevention methods. In this study suggesting that the attempt to reduce crimes with penalties would not be an effective way to combat crimes, ([33]:14); it is reported that nearly 50 laws were enacted or changed in England between 1997 and 2004, but they did not contribute to the reduction of crimes in any way and 58% of the people arrested in 1997 for committing a crime were resentenced during the following 2 years for different crimes.

[2] In a seminar where what effects the new criminal prosecution system in Turkey had produced in the first 6 months, [13] it is reported that Scott Optican, one of the participants, was astounded to hear about the changes and said that the powers lost could make the country a paradise for criminals.

[3] According to the Turkish constitution, some authorized officers (public prosecutors) were able to order others to conduct judicial searches in urgent cases (when delay might cause serious problems). The orders were not required to be written. When public prosecutors could not be reached, law enforcement officers were authorized to search places in the presence of two people at least. After the aforementioned constitutional change requiring written warrants, some radical changes were made also in the provisions with regard to the criminal prosecution. Due to the code of criminal procedure numbered 5271, which replaced the former one numbered 1412, only public prosecutors have the authority to issue search warrants in urgent cases. The condition that the warrants be written was a consequence of the same code (Compare: [14]. In accordance with the subsequent changes made with the law numbered 5560, only "people, their possessions and vehicles" can now be searched with the written warrants of chief law enforcement officers unless public prosecutors cannot be reached.

[4] As is the case in all democratic countries (for example, [28]: 67, 68; [31]), in Turkey, magistrates decide the judicial searches when delay would not cause any problems. The documents produced by magistrates are called *"karar"* (decisions). *"Emir"* (Orders) are the documents produced in urgent cases by other authorities than magistrates ([17]: 319, 320). The change in question is that the constitution and laws now require the orders to be written to conduct searches even in urgent cases (Compere: [14].

[5] The term "search" can also be used for such actions as wiretapping and hot pursuit. Even if secretly listening to other people's telephone conversations or chasing or following someone else would be the actions least relevant to the term of search, they can still be considered some kinds of search. It is perhaps possible to use the appellations "listening search" and "following search" for the actions of wiretapping and hot pursuit. Optican ([45]: 23) reports that tracing with technical equipment is mainly considered to be a kind of search in the USA and the official decisions by judicial authorities are in that direction. New Zealand law considers taking samples from body parts a search ([45]: 19). To name that activity as a kind of search, we can use the term "examination search". In German Law, the word "search" is not used for such actions ([24]: 103).

[6] The coalition in which there were also social democrats, who supported the constitutional change in 2001, probably intended to make it hard to repeal. As is the case in many other countries, the constitutional changes in Turkey are based on stricter procedures and conditions than the amendments to laws are. Below are the details of why there were no acceptable reasons for those changes.

[7] [4]: 204-208

[8] In fact, *unknown* refers to people, things, information and documents not known what or where. However, it is not possible to have strong opinions on how many people knowing about it would make an item of information not unknown anymore. In comparative law, there is no uniformity among the views on what secrecy exactly is. In the USA, extracting information about bank records is not considered to be a search. It is accepted that a person is not concerned for secrecy or privacy if he has shared any information about himself with any other person ([45]: 24). In Turkey, even such records are viewed as confidential and magistrates are to decide whether they can be searched or not.

[9] [40]: 337

[10] [40]: 337

[11] [16]:13; [40]: 337

[12] [16]:13; [40]: 337

[13] [52]:141

[14] [39]: 769, 770

[15] For the search of a person who is not a suspect, there have to be signs indicating that either some evidences or the culprit is near.

[16] [40]: 343; [57].

[17] [17]: 294

[18] In England, the law on defeating terrorism dated 2005 includes such powers as catching and searching the people who might resort to or cause terror even if they have not committed crime before ([65]: 4). The searches of that kind can be called preventive searches in law. As in the case in England, reasoned suspicions are sometimes favoured in the fight against such crimes as terrorism that could severely threaten the public peace and in the balance between the extent of reasoned suspicions and the damage the events may cause.

[19] [3]: 122

[20] [21]: 234-241.

[21] [19]: 502.

[22] [19]: 502.

[23] The right to benefit from defendants was first given to suspects with the change dated 1992 and numbered 3842 in the code of criminal procedure. The suspects of terrorism and smuggling were excluded. Due to the reforms of criminal procedure that followed, there remained no exception between suspects ([24]: 91).

[24] [53]: 168

[25] [28]: 67, 68; [31]

[26] The 45th and 63rd articles of the Kenyan constitution suggest that home is private and inviolable. The 45th article ensures that no one can be caught, stopped and searched. However, the 32nd and following articles indicate that the fundamental rights can be limited for such reasons as security and safety.

[27] That we chose the Kenyan constitution might seem interesting but there were some reasons. Firstly, Kenya is one of the poor countries that have newly acknowledged the supremacy of the law. Secondly, benefiting from comparative law and other constitutions is a requirement of constitutional engineering for any country to prepare a new constitution. Therefore, it is not a remote possibility that the Turkish constitution with its changes in 2001 might have been taken into consideration to prepare the Kenyan constitution. Lastly, as one of the newest ones, it reflects how the recent constitutions approach the subject matter we are dealing with.

[28] It should be noted here that most of the members of that commission were lawyers and none of them were formerly security officers. It is also interesting that the commission chosen to produce the report was not the internal affairs commission, which had some members who were once security officers.

[29] [35]: 113.

[30] [35]: 113.

[31] In Finland, the police have the authority to infringe upon some of the fundamental rights solely for conducting search in urgent cases and investigating crimes. It can be found in the related Finnish law the provisions about that (See: [37]: 10, 11).

[32] [17]: 331

[33] Compare: [5]: 79; [17]: 331

[34] [42]: 497, 498.

[35] Detailed information about it is given below. It is not touched upon here to avoid reiteration.

[36] Urgent cases, which refer to times when delay is likely to cause problems or inconvenience, are ones in which it might be impossible to catch suspects or collect evidences if it is not acted quickly. In fact, the Supreme Court of Turkey stressed in one of its verdicts that reasonable causes must be given for the existence of any case in which delay could be inconvenient. This was the official decision numbered 57 of the 7th Criminal Chamber of the Supreme Court on 22/06/2005 (See: [67]: 21).

[37] [45]: 26, 27.

[38] Moreover, in such countries as the US, New Zealand and Canada, law enforcement officers are entitled to stop and search vehicles without needing any kind of warrant or order if a reasoned suspicion exists. It is accepted that privacy in a car is less than at home ([46]: 27). Some representative examples are the decisions of the American Supreme Court in the cases of *"California v. Acevado"* in 1977 and *"Delaware v. Prouse"* in 1979 ([52]: 147-149).

[39] [64]: 35.

[40] [52]: 145

[41] See: [36]: 121.

[42] Bedri Eryýlmaz, who is one of those experts on criminal prosecution, works at Turkish Police Academy Faculty of Security Sciences. The view in question is highly interesting as it shows that the police tend to demand the authority to instantly conduct judicial searches in urgent cases.

[43] It is an act violating the inviolability of home to get into a house or enclosed space without the consent of the owner or people using it. The consent has to be for a search inside, not only for getting in.

[44] See: [67]: 14, 49.

[45] For example; [20]: 244.

[46] [16]: 62; [38]: 54

[47] [22]: 116, 117.

[48] [64]: 49.

[49] [45]: 46.

[50] [45]: 47.

[51][29]:43

[52] [29]: 43, 44.

[53] The numbers involve the terrorism and smuggling crimes and the files of that year together with the ones transferred to the following year. Therefore, it is not a discrepancy that there is a difference between the numbers and the ones in the report of Ankara Chamber of Commerce on crime rates and unsolved crimes.

[54] [48]: 14, 22