

# ESSAY

## Conference on Comparative Law—Recent Developments in European, American, and Turkish Law: “Team Kansas” Goes to Turkey

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### I. INTRODUCTION

From May 27, 1996 to June 1, 1996, the University of Kansas School of Law and Marmara University, with the support of the Dedeman Foundation, co-sponsored an international conference in Istanbul and Ankara, Turkey. The formal title of the Conference was “The International Symposium on Comparative Law: Recent Developments in Public Affairs—European, American, and Turkish Applications.” The first half of the Conference was held in the historic city of Istanbul, Turkey, where participants addressed the legal and fiscal aspects of environmental affairs, privatization and deregulation, and the use of informatics. The second half of the Conference was conducted in Ankara, the capital of Turkey, and consisted of two simultaneous programs. One program focused on new trends in constitutional law, economic crimes and justice reform. The other program—which was conducted at the Turkish Police Academy—addressed the general topic of “Modern Methods of Criminal Investigation and Human Rights” while dealing with the specific topics of “Proactive Policing and Police Investigation,” “Search and Seizure,” and “Arrest and Interrogation.”

The primary purpose of the Conference was to bring together an international group of scholars, lawyers, judges, government officials, and other public policy makers to exchange ideas and insights about the current and evolving state of the law in the areas set forth above. As Turkey continues its evolution toward a legal system modeled largely

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upon continental European systems, the goal was to expose those in positions of authority in Turkey to innovative ideas and solutions that have been employed by other countries with similar legal systems. To this end, the Conference solicited the participation of American, British, German, French, and Turkish lawyers, judges, ministry officials, and university faculty.

As a co-sponsor of the Conference, the University of Kansas School of Law committed several of its faculty to attend and speak at the Conference on the various topics to be addressed. In particular, Professor John Peck participated in the session addressing the legal and fiscal aspects of environmental affairs, delivering a talk on water law and the regulation of water rights in the United States. Professor Richard Levy addressed recent developments in American constitutional law. Associate Professor Stephen McAllister spoke on recent developments in American law regarding economic crimes, in particular the use of the civil suit provisions of the federal Racketeer Influenced and Corrupt Organizations Act. Professor David Gottlieb, one of the Conference workhorses, spent three days at the Turkish Police Academy in Ankara participating in panel discussions of proactive policing, search and seizure, and arrest and interrogation for the benefit of hundreds of future Turkish police officers.

By the end of the Conference this group of Kansas Law faculty had come to identify itself—and to be identified by its Turkish hosts—as “Team Kansas.” What follows is a brief summary by the members of Team Kansas in conjunction with our sponsor, Dr. Feridun Yenisey of the Marmara University Faculty of Law, of the topics addressed and perspectives offered during the Conference.<sup>1</sup> In addition, Team Kansas offers some comments and observations on the legal system of Turkey and the country itself, which most of us were visiting for the first time. The law school has begun an effort to strengthen its international ties, and this conference in Turkey was a significant step in that process. The many contacts established with Turkish, English, and German faculty already have begun to prove fruitful for the law school and should continue to do so in the future.

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1. We have not attempted to summarize the presentations each and every speaker made during this comprehensive, week-long conference. Rather, the following summaries reflect primarily those sessions in which the members of Team Kansas either participated, were observers or were able to obtain English translations of the presentations made.

## II. THE CONFERENCE TOPICS

### A. *Legal and Fiscal Aspects of Environmental Affairs*<sup>2</sup>

My invitation to the conference came from Professor Yenisey in the summer of 1995 when he was a guest for dinner in our home. He mentioned that Marmara University Law School was going to sponsor an international comparative law conference. I responded that if one of the subjects included my area of water law, I would be interested in attending and participating. Later, he informed me that one of the topics was environmental affairs. While water law may fit generally under the topic of environmental affairs, we generally use the term "environmental law" in America to refer to environmental protection matters such as air and water quality and solid waste disposal. I chose to speak on water transfers in Kansas, a subject that includes questions about effects on the environment. Professor Yenisey indicated that I would still fit generally under the category. It turned out that my topic seemed to be of considerable interest to the audience, but not because of its environmental law repercussions.

I was the last of four speakers on the first day of the conference, held at the Hotel Dedeman in Istanbul. The format used was the same on each of the four days of the conference. The day's topic was announced by a law professor from Marmara University, most often by Professor Adnan Tezel, formerly Vice Chancellor of the University. The official languages were Turkish and English, with simultaneous translation provided in these languages via separate receivers and head phones for the audience and the speakers. For each speaker Marmara University provided a commentator, generally a professor from Marmara University or a Turkish government official. Participation by the commentators varied. Some would introduce the subjects at some length before turning it over to the participant. Some would forego introductions and would comment at length after the presentation by the participant. Others would merely ask for questions from the audience following the presentation. Each participant had two hours set aside for the introduction, the presentation, the follow-up remarks by the commentator, and the questions and comments from the audience.

The other three participants spoke on subjects directly relating to the announced subject of environmental affairs. The first speaker was Jean Pirlot, from Belgium, on assignment in Turkey for the European Union (EU), who spoke in English. He provided an analysis of the role that the EU is playing in environmental matters and the difficulties encountered

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2. The primary author of this section is Professor John C. Peck. First person references are to Professor Peck.

when individual countries have environmental regulations that differ from what the EU is attempting to provide. Next, Professor Hans Jarass of the University of Muenster, Germany, who also spoke in English, provided a detailed overview of recent developments in German environmental law. He informed us of a new constitutional provision that is designed to protect the environment, and also discussed difficulties in meshing German law with new policies of the EU. After lunch, Professor Rusen Keles of the Ankara University Faculty of Political Sciences provided a comparable analysis of Turkey's environmental law. He pointed out some of the difficulties Turkey would have upon entry to the EU in conforming to EU environmental policy. For example, if water pollution control is measured by the levels of pollutants found in the water as opposed to the levels allowed to be discharged into the waters, Russia could create problems for Turkey by discharging pollutants into the Black Sea, which empties into the Marmara Sea via the Bosphorus Strait.

Frankly, after hearing these three excellent talks, I was afraid that my topic would be of little interest and perhaps not quite on point. I was told informally by a Marmara University professor, however, just prior to taking the podium, that Turkey is vitally interested in the general subject of water transfers. Turkey is in the process of implementing the Southeastern Anatolia Project, a project that will involve construction of several major dams in the Tigris-Euphrates Basin to provide irrigation water to the Harran Plain. Downstream from Turkey in this basin lie Syria and Iraq. Difficulties have arisen over water allocation among these countries.

My talk focused on legal and financial aspects of water transfers in Kansas. I used two proposed water transfers to explain our law and to illustrate the numerous legal questions that would likely arise from such transfers: the proposed water transfer by the City of Hays, located in the Kansas River Basin, from the Circle K Ranch in Edwards County in the Arkansas River Basin and the proposed water transfer by the City of Wichita, located in the Arkansas River Basin, from Milford Reservoir in the Kansas River Basin.

I summarized the American law of water rights and placed Kansas in the Western States' prior appropriation doctrine. I then summarized eight different problems: (1) questions of acquiring the water right and of the extent eminent domain could be used by cities to acquire water rights long distances away; (2) problems in changing the water rights from irrigation to municipal use; (3) minimum streamflow legislation; (4) the Kansas Water Transfer Act;<sup>3</sup> (5) water quality questions (whether Hays, for example, could insist that nearby irrigators curtail long-used and

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3. KAN. STAT. ANN. §§ 82a-1501 to -1508 (Supp. 1995).

generally accepted farm chemical application to prevent pollution of the aquifer); (6) interstate repercussions, using the *Kansas v. Colorado*<sup>4</sup> lawsuit before the Supreme Court of the United States as an example; (7) the Federal Government's interest in maintaining navigation in the navigable rivers; and (8) Federal legislation such as the Endangered Species Act.<sup>5</sup> Regarding financial aspects of such transfers, I discussed various transaction costs and third party effects of the transfers.

The questions from the audience focused almost exclusively on the interstate aspects. How might such transfers affect Missouri? How do states resolve interstate allocation problems? What is the U.S. Supreme Court's role in dispute resolution? The reason for their questions was their concern about the Southeast Anatolia Project, which will involve diversions that will affect the flow of the Euphrates River into Syria and thence into Iraq. The position of Kansas downstream from Colorado on the Arkansas River is comparable to that of Syria and Iraq vis à vis Turkey, so I was expressing some sympathy with the concerns of Syria and Iraq.

The audience was particularly interested in how we attempt to resolve our problems. I explained three historic methods of interstate water allocation: the Supreme Court's method, using "equitable apportionment"; Congressional allocation; and interstate compact. I suggested that I favor compacts over other methods, and I explained how some of our compacts were fairly general in the allocation language, while one compact, the Big Blue River Compact with Nebraska, was fairly specific.

On the surface it appeared that we share some similar problems in interjurisdictional allocation of water. The upstream states in America, like Colorado, are generally the ones who, because they control the water, are reluctant to discuss the problem of water allocation until they are forced to do so by a decision of the Supreme Court. Members of the audience, however, told me that unlike Kansas's situation with Colorado, it is the upstream country—Turkey—that wants to resolve the problems by negotiation; the downstream countries of Syria and Iraq have not been willing to discuss the problem.

My Turkey trip was the final leg of a trip that took me to visit with water law professors and water officials in Italy and Israel. In Israel, I had discussed Israel's water problems with engineering professors at the Technion, Israel's technical university in Haifa. There, after describing the hydrological and legal problems of Israel water law, they stressed the difficulties in negotiating with potentially belligerent international neighbors—Jordan, Syria, and the Palestinians. Here again, in Turkey,

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4. 115 S. Ct. 1733 (1995).

5. 16 U.S.C. §§ 1531-44 (1994).

I was hearing about water allocation disputes among countries that are potential military adversaries. I concluded my follow-up question and answer period with the observation that I felt that, in light of these types of international problems with potential military aspects, Kansas's problems with Nebraska and Colorado seemed somewhat less overwhelming than they had seemed to me prior to my trip.

*B. Legal Aspects of Privatization and Deregulation*<sup>6</sup>

1. Professor Dr. Ozer Ertuna (University of Bosphorus, Istanbul, Turkey)

Professor Dr. Ozer Ertuna spoke on privatization in Turkey. He observed that Turkey has made serious efforts to privatize many industries during the past ten years, but he expressed skepticism regarding the success of those efforts. Professor Ertuna suggested that the primary reasons for less than full success in Turkey's privatization efforts are the lack of clearly defined objectives and the absence of a legal system designed to facilitate privatization. In particular, he stated that Turkey needs well-developed competition laws in order to increase the quality of competition in the market. Professor Ertuna discussed two different aspects of Turkey's privatization efforts: the privatization of management and the privatization of ownership. He again suggested that Turkey's current laws do not adequately address the problems that arise in the transfer of management and ownership from public control to the private sector, nor do the laws sufficiently facilitate such transfers. In closing, he suggested that Turkey should create an autonomous privatization administration to restructure and privatize various Turkish industries.

2. Professor Dr. Fadullah Cerrahoglu (Marmara University, Istanbul, Turkey)

Professor Dr. Fadullah Cerrahoglu addressed the constitutional background for privatization efforts in Turkey. He pointed out that, although the Turkish Constitution<sup>7</sup> does not address privatization, the Constitutional Court of Turkey has treated privatization as analogous to nationalization which, under the Turkish Constitution,<sup>8</sup> can be accomplished only through

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6. This section was drafted by Professor McAllister on the basis of English translations of the presentations. No member of Team Kansas participated in this session.

7. TÜRKİYE CUMHURİYETİ, reprinted in XIX CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1994 (Gisbert H. Flanz trans.) (reprinting the Constitution promulgated by Law Number 2709, as of Nov., 7, 1982 and as amended by Act No. 4121, July 23, 1995).

8. See generally *id.* art. 47.

legislation. Thus, privatization in Turkey must be achieved through legislative, rather than administrative, efforts in order to withstand constitutional scrutiny. Professor Cerrahoglu observed that Turkey enacted a general privatization law in 1994 which was not challenged as unconstitutional in the Constitutional Court and is, therefore, no longer subject to challenge except in the context of an actual case that implicates the law. He further noted that the privatization law excludes from its scope all Public Economic Establishments, which are defined as those public enterprises that produce and market goods and services which are in the nature of a monopoly.

Professor Cerrahoglu then discussed the problem of foreign investment in Turkish privatization efforts. Foreign investment in Turkish industries that are being privatized is greatly restricted by law, and under the decisions of the Constitutional Court. The Constitutional Court also has adopted a fairly narrow view of contractual matters the parties to a privatization effort may enter in order to defeat the jurisdiction of the Turkish courts. Moreover, the parties cannot agree contractually that an industry is not a Public Economic Establishment and, therefore, not subject to Turkey's privatization law; that decision ultimately rests with the courts. In sum, Professor Cerrahoglu's description of the legal environment surrounding Turkey's privatization efforts reveals a relatively complex process that generally disfavors significant participation by foreign investors and which is characterized by uncertainty regarding the scope and application of the privatization laws.

### *C. The Use of Informatics and Legal Consequences<sup>9</sup>*

#### 1. Ted J. Holynsky (Syracuse University College of Law, Syracuse, New York)

Mr. Ted Holynsky, Syracuse University School of Law, discussed how Westlaw, Lexis and the Internet/World Wide Web can be used to expand legal research and education, pointing out that legal on-line research in databases such as Westlaw or Lexis is current, comprehensive, and efficient. Also, Westlaw's and Lexis's ability to search large legal databases efficiently allows for accurate and economic legal researching. But he further observed that presently, legal on-line research on the Internet/World Wide Web has limitations. The recent archiving of law materials on World Wide Web sites is not of a comprehensive nature. Mr. Holynsky also pointed out that the popularity of the World Wide

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9. This section was drafted by Professors McAllister and Dr. Yenisey. No member of Team Kansas participated in this session.

Web can be used to counteract technological isolation and to serve as a legal teaching tool to offer courses in electronic legal research.

## 2. Defense Attorney Haluk Inanici

Defense Attorney Haluk Inanici, who specializes in property rights related to computer software, addressed the problems of the computer programming companies in Turkey. The Code of Intellectual Property was amended in 1995 and new provisions have been introduced which are designed to prevent the copying of software. A 1991 amendment to the Turkish Criminal Code punishes the destroying of electronic data. The courts however, are not familiar with the recent developments in the area of computers and software, and have difficulties in applying these new regulations. Defense Attorney Inanici gave many examples from the rulings of the courts and generally criticized the situation.

## 3. Dr. M. Tören Yücel (Judge, General Director, Ministry of Justice, Ankara, Turkey)

Dr. M. Tören Yücel addressed the problems of utilizing computer programs in the criminal justice context. He concluded as follows:

Whether used for management or documentation purposes the objective of computerization is the same: to improve the quality of the public service provided by the administration of justice, and enable Turkish Courts at every level, from the first instance courts to the Court of Cassation, to process each case within a reasonable time.

The aim, thus, of investing in computerization is to provide citizens with prompt and reliable justice, so that each citizen either maintains or regains his confidence in the justice system. After all, a well-functioning justice system is the condition for a well-functioning democracy. Increasingly, technical means, especially computer systems, are being introduced into the administration of justice. This requires that the administration should also be given the possibility of employing skilled experts. We must also recognize the fact that the success, or otherwise, of systems will be based on the user's acceptance.

## 4. Ministerialrat Dr. Manfred Mohrenschlager (Bundesministerium der Justiz, Germany)

Dr. Manfred Mohrenschlager addressed the problems of legislation in the area of computer-related crime. He observed that advances in technology have greatly expanded the opportunities for traditional types of crime—such as fraud, espionage, and the distribution of pornography—as well as creating new categories of crime, for example, the destruction or alteration of electronic data or the unauthorized use of computer equipment. Dr. Mohrenschlager discussed the problems of defining computer crimes, using illustrative examples drawn from laws passed by countries around the world. He also noted the difficulty in

determining the appropriate criminal policy that should justify such laws and the goals they should seek to achieve. In particular, he discussed whether general criminal law proscriptions should be applied to computer crimes or whether new laws specifically targeting computer crimes are required. Lastly, Dr. Mohrenschlager addressed several categories of computer crimes, again utilizing illustrative examples from around the world. These categories included "hacking," "interception," "obtaining of and trafficking in passwords," "distribution of computer viruses," "data protection" offenses, and "misuse of the Internet."

5. Professor Dr. Duygun Yarsuvat (Istanbul University, Faculty of Political Science, Istanbul, Turkey)

Professor Dr. Duygun Yarsuvat made a presentation on legislation regarding computer-related crimes. He observed that due to technological developments, it was necessary to add a new chapter<sup>10</sup> to the Turkish Criminal Code in 1991,<sup>11</sup> in order to deal with computer crimes.

*D. New Trends in Constitutional Law*<sup>12</sup>

My participation in the session on New Trends in Constitutional Law proved to be an interesting and informative experience. Speakers included Professor Dr. Martin Morlock, University of Jena, Germany, Professor Dr. Vural Savas, Marmara University, Dept. of Economics, Faculty of Political Science Istanbul, Turkey; and myself. Although each of us addressed the topic from a somewhat different perspective, the talks, the commentary, and the subsequent questions brought out many interconnected themes and issues.

1. Professor Dr. Martin Morlock (University of Jena, Germany)

Professor Morlock, who was the first speaker in our session, provided an excellent introduction to the subject. His comprehensive and systematic survey of constitutional developments in Germany began by identifying the various types of trends that might be encompassed in the topic. These included: (1) amendment of the text of the constitution itself, (2) the emergence of new problem areas for constitutional regulation, (3) changes in the substantive resolution of previously considered problems, and (4) developments in the methodology of constitutional analysis. Professor Morlock then discussed new problem

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10. See Criminal Code arts. 525a-525d. For an English translation of the Turkish Criminal Code, prior to the 1991 Amendment, see *infra* note 32.

11. See *id.* Act No. 3756.

12. The primary author of this section is Professor Richard E. Levy.

areas, new solutions to old problems, textual changes, and the relationship between the constitution and the state.

Professor Morlock observed that new constitutional problems generally are created by the interrelated forces of social change and technological progress. To illustrate this general point, he cited the industrial revolution, in which technological progress fueled a far-reaching social upheaval that produced a host of new problems requiring new constitutional solutions. He then listed a number of contemporary developments and new problem areas, including the environment and environmental protection, the proliferation of new forms of mass media, the protection of personal data in the information age, biotechnology, achieving equality for women and minorities, and the internationalization of law. These problem areas, Professor Morlock concluded, are addressed in a dynamic process that draws into question the fundamental roles of basic constitutional institutions, such as the legislature and the courts.

Turning to new solutions to old problems, Professor Morlock concentrated on two areas in which new insights and external developments have produced a reconsideration of constitutional doctrine. First, new forms of organized crime, particularly of international dimension, have potentially altered the balance between the state's essential duty to protect its citizens and the preservation of the fundamental rights guaranteed to those citizens under the constitution. American observers will certainly recognize that similar issues are raised by recent responses to problems such as international terrorism and gangs. Second, and also familiar to American observers, is the question of ordering the political process to preserve democracy. In pointing to the corrupting influence of money on the political process, to the widespread potential for conflicts of interest, and to the distancing of politicians from the interests of their constituents, Professor Morlock might easily have been discussing politics in the United States rather than Germany.

Professor Morlock then described two basic changes in the relationship between the constitution and the state. First, while the constitution was originally conceived as a means of organizing the government and limiting the government in its relations with the citizen, it has increasingly come to represent a more fundamental ordering of the state and society. As such, the state is increasingly vested with affirmative duties to achieve the good society, which necessitates corresponding changes in constitutional concepts. Second, the state itself is eroding from both above and below. International organizations and institutions (particularly in Europe) increasingly perform functions that previously were those of the state, and state authority is correspondingly eroded. Conversely, forces such as nationalism have caused the disintegration of some of the newly independent east bloc countries, and called attention to the role of consent as the fundamental norm of a constitutional state. Ultimately,

these developments point to the need for new concepts of the state to account for the new forms of national and international entities that are emerging.

2. Professor Dr. Vural Savas (Marmara University, Dept. of Economics, Faculty of Political Science, Istanbul, Turkey)

The Constitutional Law session was honored by the participation of Professor Savas, a former Justice of the Turkish Constitutional Court, whose paper (like mine) focused on the constitutional treatment of economic interests. Professor Savas is an economist, not a lawyer, and he brought the insights of political economists and public choice theorists to bear on the Turkish Constitution of 1982,<sup>13</sup> critiquing that Constitution from the perspective of such noted figures as Hayek and Buchanan. Professor Savas's main point was that the Turkish Constitution provides too many social "rights" that demand government intervention into private activity, and does not do enough to guarantee individual actors' "freedom" from government intrusion.

The critique began with Article 2 of the Turkish Constitution, which declares that Turkey is a "democratic, secular, and Social State governed by the rule of law"<sup>14</sup> and with Article 5, which lists the fundamental aims and duties of the state.<sup>15</sup> The concept of a "social state" implies that the state has an obligation to ensure the social well-being of its citizens. This kind of affirmative obligation is confirmed by the duty "to ensure the welfare, peace and happiness of the individual and society" included in Article 5. The creation of a social state in the Turkish Constitution is an example of the trend toward the use of the constitution to effect a fundamental ordering of the state and society, as observed by Professor Morlock.

In Professor Savas's view, however, these concepts are not only hopelessly vague, but suffer from the more fundamental flaw of encouraging government intervention into private economic matters. The underlying problem, according to Professor Savas, is the failure to distinguish between "rights" and "freedoms." Economic rights are defined positively and create governmental responsibilities with respect to individuals, while economic freedoms are defined negatively and prevent government intervention. The social state contemplated by the 1982 Constitution incorporates an extensive catalogue of social and economic rights and duties,<sup>16</sup> under which the failure of the government

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13. See TÜRKİYE CUMHURİYETİ, *supra* note 7.

14. *Id.*, art. 2.

15. *Id.*, art. 5.

16. See *id.* arts. 41-65.

to intervene in the economy on behalf of individuals creates a claim that the government has acted unconstitutionally. Such claims, however, are essentially unenforceable because Article 65 of the 1982 Constitution provides that the state need only fulfill its social and economic duties to the extent that its financial resources permit.<sup>17</sup> The net result, Professor Savas observed, is to permit uncertain, unlimited, and discretionary government intervention in private affairs.

Professor Savas then discussed other provisions of the Turkish Constitution of 1982 that encourage or permit government intervention into economic affairs. Certain provisions specifically authorize or direct the government to control private enterprise in accordance with national economic requirements and social objectives and to take other measures to promote the sound and orderly functioning of markets.<sup>18</sup> These provisions are virtually unlimited; they do not define the requirements or objectives to be served or explain what it means for a market to operate in a sound and orderly manner. Other provisions give the government broad power to tax, to spend (without necessarily taxing to pay for it), and to print new money,<sup>19</sup> but place no constraints on these powers. Fueled by the demands of the social state, the natural tendency is for government to adopt programs that it cannot or will not pay for with taxes, instead incurring debt and printing new money.

In conclusion, Professor Savas again emphasized that because rights demand government intervention, expanding the catalog of rights means a consequent diminution in freedom. He then called for constitutional changes to constrain the political power to intervene in economic life, including enhanced protections for economic freedoms and structural changes, such as separation of powers.

### 3. Professor Richard E. Levy (Team Kansas)

The subject of Professor Savas's talk proved fortuitous for me, because my paper and presentation also dealt with the constitutional protection of economic interests. But while Professor Savas addressed the lack of protection afforded these interests under the Turkish Constitution and called for changes in the constitutional text to impose constraints on government (Professor Morlock's first type of trend), I focussed on recent changes in the United States Supreme Court's treatment of several constitutional doctrines that afford protection to economic interests (Professor Morlock's third type of constitutional trend—new solutions to old problems). In a sense, my talk provided a case study of how the

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17. See *id.*, art. 65.

18. See generally *id.*, arts 166-67, 172-73.

19. See, e.g., *id.*, arts. 87, 161-65.

types of constitutional protections advocated by Professor Savas have worked in the United States. As I described in my talk, the United States Supreme Court is "rethinking the regulatory state." Recent decisions involving separation of powers, federalism, the Contracts Clause, and takings law have reinvigorated doctrines that had either been repudiated or had lain dormant since the New Deal period. These developments are part of the Court's longstanding difficulty in finding a middle ground that provides some measure of constitutional protection to economic interests without unduly constraining the government's ability to address social and economic problems.

The story of the "switch in time that saved nine" is familiar to most American lawyers. During the "*Lochner*<sup>20</sup> era," from the turn of the century until about 1937, the Supreme Court blocked both state and federal efforts to regulate economic activity by invoking a variety of doctrines. Some of these doctrines, such as federalism and separation of powers, were structural. Others, such as substantive due process and the Takings and Contracts Clauses, were "rights based." Although the Court did not always overturn efforts to regulate economic activity, it did so with some frequency. Matters came to head when the Court ruled unconstitutional major portions of President Franklin Roosevelt's "New Deal" legislative program to combat the Great Depression. Roosevelt responded by proposing his controversial "court packing" plan, which would have enabled him to appoint up to six new Supreme Court Justices. That proposal ultimately proved unnecessary, however, when Justice Roberts, who had previously opposed regulatory legislation, switched his position and, with it, the balance of power on the Court. The new majority, which accepted the regulation of economic activity, was strengthened over time as the conservative Justices who had opposed the New Deal left the Court and Roosevelt replaced them.

The post-New Deal Court repudiated or abandoned the restrictive doctrines that had prevailed during the *Lochner* era, and those doctrines were widely criticized as the epitome of improper judicial activism because the Court had substituted its policy preferences for those of the politically accountable institutions of government. For many years thereafter, it seemed that there were no constitutional limits on government regulation of economic activity. Federal power, particularly under the Commerce Clause, was read broadly to support wide-ranging federal regulatory programs. Separation of powers doctrines were relaxed to permit the growth of administrative agencies to implement those programs. Economic interests were relegated to the lowest levels of substantive protection afforded by due process and equal protection. The

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20. *Lochner v. New York*, 198 U.S. 45 (1905).

Contracts and Takings Clauses were interpreted to permit government regulation notwithstanding significant adverse affects on contract and property rights.

Since the late 1970s or early 1980s, however, the Supreme Court has, in a number of diverse decisions, apparently reinvigorated several constitutional doctrines that protected economic interests during the *Lochner* era. The decisions came in two "waves." The first wave of decisions lasted from the late seventies through the mid-eighties, and involved the Contracts Clause, an initial pass at federalism, and separation of powers. Without going into detail here, this wave is striking because the Court first surprised observers by using these long-dormant doctrines to invalidate regulatory measures in broadly reasoned opinions with potentially sweeping implications, and then retreated from those implications by narrowing (or even overruling) those decisions until they provided little or no additional protection for economic interests. The second wave began more recently in the late 1980s and is still ongoing. It encompasses a series of decisions in the takings area that may greatly enhance the protection of economic interests and a potentially significant reinvigoration of federalism-based limits on federal power, culminating in the well known *United States v. Lopez*<sup>21</sup> decision.

In the final analysis, it is difficult to predict what the outcome of the second wave of decisions will be. The answer may depend on why the Court retreated from the implications of its earlier decisions in the first wave. Perhaps the Justices who favored restricting the regulatory state lacked the necessary votes, regarded the doctrinal areas involved as inappropriate, or were awaiting better opportunities to move constitutional doctrine toward greater protection of economic interests. If so, then the second wave of cases may be the harbinger of a fundamentally reoriented constitutional doctrine that will dramatically alter the shape of government.

The other possibility, and one that I tend to lean toward, is that the Court continues to have difficulty finding a middle ground. Although there may be a majority in favor of some enhanced protection for economic interests, the implications of *Lochner* era doctrines are very difficult to limit once the genie is let out of the bottle. Thus, the Court may have backed off of the first wave of decisions because it was unable to control their implications and it was unwilling to force the massive restructuring of government that reinvigorating those doctrines would bring. If so, we might expect the Court to encounter similar difficulties with its recent federalism and takings decisions, and to narrow those decisions in subsequent cases. On the other hand, the Court may be more

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21. 115 S. Ct. 1624 (1995).

comfortable with those implications today, or takings law and federalism may provide more suitable vehicles for a sustained, yet modest, reinvigoration of doctrines that restrict the regulatory state.

### *E. Economic Crimes*<sup>22</sup>

For all modern countries, economic crimes are a problem. The more sophisticated the economy, the more sophisticated and complex such crimes may become. Often economic crimes are difficult to detect and prosecute, perhaps heightening the importance of the deterrence provided by the penalties for such crimes and underscoring the need for modern sophisticated investigatory methods such as electronic surveillance. The problem of economic crime is a significant one in the United States and many European countries. Turkey, bridging as it does two continents and having a modern economy, is in an obvious position to encounter similar problems. Thus, one session of the conference addressed the topic of economic crimes, offering presentations and dialogue regarding American, German, and Turkish perspectives on such problems and the ways to address them.

#### 1. Professor Dr. Ernst Joachim Lampe (University of Bielefeld, Germany)

Professor Dr. Ernst Lampe made a presentation on the topic of economic crime in Germany over the past twenty years. After observing that German unification and the evolution of the European Community's economic relationships have created vast opportunities for economic crime in Germany, Professor Lampe addressed the problem of defining what constitutes an economic crime for purposes of invoking the criminal law and criminal sanctions against violators. The first theory he identified he referred to as the "systematic" definition, which he explained as labeling only those offenses which jeopardize an entire market or economy as economic crimes. The second theory is the "damage-related" definition, which categorizes crimes as economic by virtue of their impact on specific targets, such as a company. Lastly, he suggested that the most reliable definition may be one that simply refers to conduct that causes economic harm, although such a definition is necessarily imprecise and leaves much undefined.

Professor Lampe then examined the German experience with economic crime over the past twenty years. He observed that the breakdown of socioethical norms condemning economic misconduct has resulted in an increasing need for legal sanctions in order to deter such conduct.

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22. The primary author of this section is Professor Stephen R. McAllister.

Professor Lampe stated that, in Germany, the creation of prosecutors who primarily focus on economic crimes, as well as the formation of investigatorial agencies and prosecutorial teams that are experienced in economic matters, has resulted in considerable progress in combating economic criminal activity. He commented, however, that such cases still frequently remain difficult to prosecute because of the difficulty of obtaining evidence and the international nature of many business conspiracies. Professor Lampe further observed that legislation defining economic crimes is less than satisfactory in Germany. Professor Lampe noted that many activities, such as construction bidding fraud, have not yet been proscribed by statute. Professor Lampe closed by suggesting that greater prosecutorial and enforcement authority should be given to international bodies such as the European Community and the United Nations in order to combat effectively international economic criminal activity.

## 2. Professor Stephen McAllister (Team Kansas)

I presented a paper on the utilization of the civil suit provisions of the Federal Racketeering Influenced and Corrupt Organizations Act (RICO)<sup>23</sup> as a tool for dealing with economic crimes. Turkey has no remotely comparable provisions in its civil law and, instead, handles economic crimes only through its criminal justice system. Thus, I presented an overview of civil RICO, with its treble damages and attorney's fee provisions, as a possible additional approach or tool that Turkey might consider in dealing with the problem of economic crime.

In my presentation, I briefly addressed the history of the federal government's efforts to combat organized crime in the United States. I also commented briefly on other federal statutory measures—such as the provisions regarding electronic surveillance and the federal witness protection program—enacted at or about the same time as RICO as part of a larger package of federal legislation that targeted organized crime. I then presented an overview of the operation of both the criminal and civil provisions of the RICO statute. This overview included discussion of the statutory definitions of “racketeering activity,”<sup>24</sup> the “pattern” requirement,<sup>25</sup> and other aspects of the statute, including the significant decisions of the Supreme Court of the United States interpreting those terms and concepts. In particular, I stressed the provisions regarding treble damages and the awarding of a plaintiff's attorney's fees in civil

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23. 18 U.S.C. § 1961-68 (1994).

24. *See id.* § 1961(1).

25. *See id.* § 1961(5).

RICO suits,<sup>26</sup> and their potential effect as an additional deterrent to economic criminal activity.

Following this overview, I discussed the use of civil RICO suits in the United States, beginning with its dormancy during the 1970s and early 1980s, its sudden jump in usage in the mid- and late 1980s, and its substantial but relatively level use during the 1990s. I gave examples of the many ways in which civil RICO has been used, both in the context of seeking civil redress for traditional economic crimes and in cases not so directly related to the original purposes of the statute, including ordinary business disputes and abortion protester cases. I further pointed out that, unlike the criminal RICO provisions, the civil provisions rarely are used to seek redress for losses resulting from traditional organized crime activities. Instead, the civil provisions have been utilized in a wide variety of other contexts, probably because of the potency of the remedies of treble damages and attorney's fees. Lastly, I noted that there have been many proposals to limit the scope of the civil RICO provisions and that Congress recently limited the statute's reach in the context of securities fraud cases.<sup>27</sup>

After my presentation, which consumed approximately forty-five minutes, I responded to more than an hour's worth of questions from the audience of government officials, university faculty, attorneys, and police academy students. All of this was accomplished through simultaneous translation since all but one of the questioners offered their inquiries in Turkish (which I do not speak or understand). The simultaneous translation involved me wearing a headset through which I received the English translation (and scribbling notes furiously on a pad of paper) while my questioner was standing three feet to my right and addressing the audience. Needless to say, it made for an interesting dialogue.

The questions ranged from the fairly theoretical to the eminently practical, and covered a wide spectrum of topics related to (and not always so related to) my presentation. For instance, I was asked to suggest guidelines for Turkey to follow in the event it decides to permit government wiretapping (I suggested limited statutory authorization with significant judicial oversight requirements); I was asked whether electronic surveillance is permitted or utilized in civil RICO cases (to which I answered generally no); I was asked whether I thought giving the government the power to conduct electronic surveillance was a good way to combat organized crime since, in the questioner's opinion, organized crime has infiltrated the government (to which I responded that I hoped that was not the case in the United States); and I was asked whether

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26. See *id.* § 1964(c).

27. See *id.*

prosecuting and removing from power the “godfathers” of organized crime (the questioner specifically referred to American movies at this point) was an effective means of eliminating the criminal organizations they lead (to which I responded yes, at least when combined with measures such as the forfeiture of assets).

The lively exchange following my presentation, and the many questions I received, amply demonstrated to me that many Turkish government officials and lawyers are very concerned about the problem of organized crime and the methods for combating such activity under a rule of law, especially the practice of electronic surveillance. Indeed, I have been invited to schedule a return engagement to speak about the wiretapping laws in the United States, and to discuss the potential civil liability of government officials for violations of citizens’ civil liberties, such as in a section 1983<sup>28</sup> suit against state officials or a *Bivens*<sup>29</sup> action against federal officials.

*F. Justice Reform*<sup>30</sup>

Professor Dr. Ejder Yilmaz of the Ankara University School of Law addressed the problems of the Turkish justice system with regard to the civil courts. Professor Yilmaz observed that economy of procedure is closely related to human rights; the high cost of litigating a case may be an obstacle to the recognition and enforcement of an individual right. Dr. Yilmaz also discussed court delays, which are a very important point in justice reform and which are related to case load. For example, in 1993 there were 3,285,789 cases in the Turkish courts, but only 4,803 judges, indicating that the civil courts in Turkey face a very heavy case load.

Professor Fusun Sokullu Akinci, a member of the Faculty of Law at Istanbul University, addressed the problems of prisons. Giving examples from the United States, she discussed modern methods of imprisonment.

Professor Dr. Sulhi Dönmezer, a member of the Faculty of Law at Marmara University, reported the results of recent field research related to the administration of criminal justice in Turkey, which Professor Yenisey conducted under the sponsorship of the TESEV Foundation. Professor Dönmezer explained several proposals for reform arising from

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28. 42 U.S.C. § 1983 (1994). *See also* *Monroe v. Pape*, 365 U.S. 167 (1961).

29. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

30. No member of Team Kansas was scheduled to speak about justice reform, the topic of the final day of the conference and, due to a misunderstanding about the conference dates, no members of Team Kansas were in Ankara on the final day for the closing session and gala banquet. Instead, we were all on our way to Istanbul for our return flights to the United States. The brief summaries of the presentations of selected speakers from this session therefore have been provided by Professor Dr. Feridun Yenisey.

that study of the Turkish criminal justice system. In particular, he emphasized fair trial and free press issues as primary reform concerns.

### III. THE POLICE ACADEMY—MODERN METHODS OF CRIMINAL INVESTIGATION AND HUMAN RIGHTS

#### A. *Team Kansas Perspective*<sup>31</sup>

##### 1. Purpose/Background

The third portion of the conference, on "Modern Methods of Police Investigation and Human Rights," was held in the Police Academy in Ankara. Its audience was of a different character than the audience for the first two sessions, as it included hundreds of Turkish police cadets. Our purpose was somewhat different as well—the discussions on criminal investigation were intended not only to share information among academics, but to help in the process of introducing hundreds of Turkish police officers to current criminal procedure issues. The mixture of police cadets, lawyers, judges, and academics turned out to be a lively one, and in the course of the proceedings, we touched on questions that are now "hot button" issues for Turkey in both the domestic and international arenas.

As with other aspects of Turkish law, Turkey westernized and modernized its criminal regulations in the 1920s, following the overthrow of the Ottoman Empire and the establishment of the modern Turkish Republic. The criminal code, adopted in 1926,<sup>32</sup> was based upon the Italian Penal Code of 1909. Since its enactment, the code has been amended on a number of occasions. In 1986, a controversial draft of a complete revision was first proposed, and aspects of the new code continue to be debated by a commission of which Professor Yenisey is a member. In the meantime, although the basic structure of the criminal justice system is modeled more on continental than Anglo-American norms, the country has recently passed criminal procedure enactments that bear a decidedly American influence—for example, police are now required to give the equivalent of *Miranda* warnings and evidence that is illegally seized may be subject to exclusion.

These changes have occurred at what appears to be an important moment in Turkey's history. If the central problem in criminal procedure is the tension between the need to protect public safety, on the one hand,

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31. The primary author of this section is Professor David J. Gottlieb.

32. CRIMINAL CODE (Statute No. 765) (Turk.). For an English translation of the Criminal Code of 1926, as amended to 1964, see THE AMERICAN SERIES OF FOREIGN PENAL CODES (Tuğrul Ansay & Mustafa Yucel eds., 1965) (Orhan Sepiçi & Mustafa Ouaçık Trans.).

and to protect the human rights of individual citizens, on the other, Turkey has been required to face the tension in acute form. On the one hand, over the past decade the country has been required to face a serious drug distribution problem caused by the transshipment of narcotics across Turkey by organized crime groups. Another problem, equal to or more serious than the narcotics issue, has been the reality of terrorism caused primarily by the PKK,<sup>33</sup> a Kurdish separatist group. While the country has thus faced what it regards as severe threats to internal order, its government has also been subject to criticism by national and international human rights authorities for allegedly failing to prevent serious human rights violations, particularly as respects mistreatment of suspects in custody.

The country has recognized that the education of its police is a high priority if human rights standards are to be enforced. The most generous legislative and judicial pronouncements concerning the rights of suspects will be hollow if they are administered by law enforcement professionals hostile to those standards or unwilling to educate local police officers to adhere to them. Thus, the central police academy at which we spoke provides a four-year course for future police officers, including education in legal aspects of police activity. The academy faculty, many of whom spoke at the conference, include individuals who have received law and graduate training both in Turkey and in foreign law schools, particularly in England.

Because of the importance of these issues to the police and to the society, the conference attracted a significant amount of attention. We were met, on the morning of the first day, by a military band and guard. The sessions themselves were attended by upwards of 300 people. The audience included police trainees, attorneys, faculty at the academy, judges, and consular officials. Parts of the conference were reported by the BBC, excerpts were shown on local television, and an account of the conference even made it across the ocean in an NPR report on Turkey.

The sessions themselves were challenging efforts at cross-cultural and cross-language exchanges. The sessions were held in an auditorium in the police academy that was not equipped to handle simultaneous translation. Most of the audience did not understand English, and I understood neither Turkish nor German. Our mode of communication therefore was consecutive translation, with each of the speakers speaking a few sentences or paragraphs, followed by translation of the portion of the presentation. Although at the beginning this mode of communication seemed awkward, by the end of the week we had managed to develop an understanding sufficient to communicate even our jokes.

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33. The Kurdistan Workers Party.

There were three topics selected for the program, one for each day. After these presentations, we would gather and take questions from the audience for up to two hours. The days usually closed with Turkish jurists or professors discussing the laws of Turkey and providing the perspective of our host country on the issue.

## 2. Proactive Policing and Police Investigation

The first day was devoted to issues of proactive policing: efforts the police may engage in before crime occurs or laws respecting police investigation of criminal activity before particularized suspicion exists. The three foreign guests ended up taking very different approaches to the topic.

Professor Michael McConville of the University of Warwick, England, chose to speak about the use of informants and agents provocateurs, practices on the rise in England as a result, in part, of controls placed on police interrogation. Over the past generation, police in England have been required to assimilate detailed codes of practice that regulate police interrogation. Restricted in what previously was their principal means of producing evidence against a suspect, that suspect's confession, police forces have increasingly moved to more deceptive means of uncovering drug and street crime. The use of informants has increased, as have police "sting" operations. In contrast to the fairly clear guidelines that the police are provided when seeking confessions, the police in Britain are able to act in almost unregulated fashion in the use of informants. Professor McConville noted the general power of the court to exclude evidence if its admission would have an adverse effect on the fairness of the proceedings, and he identified the infrequent situations where that power has been used to exclude evidence gathered by informants or by the use of entrapment.

In my presentation, I also focused on areas of police activity that are essentially unregulated. Before doing so, I attempted to explain two features of American criminal procedure law—the fact that our police forces are decentralized and, in the main, unregulated by our various state and national legislatures, and the fact that the bill of rights to our constitution has, for better and worse, functioned as a critical device to regulate the limits of police investigation. I then spoke about the history of the Fourth Amendment's requirements of a warrant based upon probable cause, and, in particular, described the kinds of colonial "proactive policing" that the amendment was designed to prohibit. I then described two categories of governmental activity that are unaffected by a requirement that the police act upon suspicion: where the government is acting for administrative reasons unconnected with traditional law enforcement ends and when the government activity is not a "search" for

Fourth Amendment purposes. The remainder of my talk was an attempt to describe the kinds of surveillance in which the government can act without suspicion, such as aerial overflights, intrusions upon "open fields" or public land generally, the use of pen registers and beepers, consensual electronic surveillance, and the use of informants.

Professor Edwin Kube of the Bundeskriminalamt in Germany, spoke about a different issue entirely, that of community policing. He noted that community policing in Germany is a fairly recent phenomenon, and that only a few jurisdictions have experimented with it. Current efforts have attempted to develop a multi-agency approach focusing on community-based crime prevention.

Professor Kube identified several cities that have established local crime prevention councils. These programs have sought to bring together representatives from the police, local, state, and communal agencies, and private organizations to identify community problems and try to develop coordinated responses. For example, in the Northern State of Schleswig-Holstein, the local efforts are supported by a central state crime prevention council that provides the local programs with information and technical assistance. In the Southern State of Baden-Württemberg, community surveys have been undertaken by researchers to identify the needs and expectations of the citizens.

### 3. Search & Seizure

The second day of the proceedings focused, in general terms, on the law of search and seizure. Georg Schuh, liaison officer of the Bundeskriminalamt in Germany, spoke about practical problems facing the police in arrest, search and seizure, and interrogation in his country. He emphasized the limits placed upon the police by the German constitution. In our presentations on the Anglo-American perspective, Professor McConville and I attempted to summarize the approaches taken by our systems of criminal procedure with respect to search and seizure. We covered the law of our respective countries concerning the right of the police to search incident to arrest, to "stop and frisk," to engage in administrative searches such as roadblock checks, and to engage in searches upon consent. Although American and English law differ in significant respects, we both emphasized the efforts of government, largely successful, in the past several years, to expand governmental powers to search. We also described what we believed to be some of the dangers posed by this increase in allowable police discretion, particularly as perceived by minority communities.

The questions from the audience on search and seizure produced a lively discussion on both days. Although I did not spend time discussing the exclusionary rule in my presentations, members of the audience were

aware of the rule, and I was asked a number of questions about the current controversy over its scope. I explained how our "rule" of exclusion developed as a result of the Court's belief that it was the only effective way to compel adherence to Fourth Amendment norms. I also explained the myriad exceptions that have developed as a result of our reluctance to ignore relevant evidence that may be useful in convicting suspects.

The other speakers described the similar tensions in their countries. Although England and Germany do not have an exclusionary rule similar to ours, the courts in both countries have experienced the conflict between the need to deter police misconduct and the need to combat crime. Both countries, in fact, permit the exclusion of illegally seized evidence in certain cases and permit its admission in some.

We were also asked pointed questions about the racial divides in England and the United States, and their effects upon law enforcement. One of the memorable questions posed by a police cadet was whether our high rates of crime demonstrated the inefficacy of our constitutional model. I began by detailing the studies that report the relatively low percentage of prosecutions affected by our exclusionary rules, but took the occasion to identify other differences between our country and Western Europe that might account for different crime patterns. When I described the firepower possessed by our citizenry, there was an audible gasp among the cadets. They apparently were unaware that in the United States the police are facing a citizenry as well armed as the police. Needless to say, they were even more amazed as I described the current legislative efforts to legalize concealed weapons possession.

#### 4. Arrest and Interrogation

The third day was given over to discussion of police interrogation. Professor McConville's paper described abuses by the police during interrogation that led to the passage of the Police and Criminal Evidence Act of 1984.<sup>34</sup> That statute mandates codes of practice to regulate the police and provides for warnings of any confessions obtained. He also described the reaction to this legislation represented by the more recent Criminal Justice and Public Order Act,<sup>35</sup> which, for the first time, permits adverse inferences to be drawn in English prosecutions from a suspect's failure to speak to the police.

During my discussion, I attempted to describe our constitutional regulations of police interrogation, beginning with the Fourteenth Amendment's requirements that confessions be voluntary and not

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34. Police and Criminal Procedure Act, 1984, ch. 33 (Eng.).

35. Criminal Justice and Public Order Act, 1994, ch. 60 (Eng.).

produced by physical or mental torture, and then continuing to the *Miranda* doctrine and its many qualifications. Because of some of the accusations concerning the treatment of suspects in Turkey, and because the police have recently had imposed upon them the requirement to give *Miranda*-style warnings, I was expecting my presentation to generate a number of questions. I was not disappointed. I spent a good deal of time responding to questions about *Miranda* and its exceptions, as well as explaining some of the similarities and differences between American and British police practice.

*B. Turkish Perspective*<sup>36</sup>

1. Purpose/Background

The Criminal Code adopted in 1926,<sup>37</sup> based on the Italian Penal Code of 1909, has been amended many times. A draft of a complete revision of the Criminal Code was presented to the Grand National Assembly in mid-1986. The proposed changes evoked objections from jurists and civil rights advocates. The proposed revisions are being worked on now by a commission, whose President is Professor Dönmezer. Professor Yenisey is a member of this reform commission.

In Turkey, the principal agencies devoted to internal security and law enforcement are the National Police and the Gendarmerie. The laws establishing the organization of police at operational levels distinguish three categories of activities or functions: administrative, judicial, and political. "Administrative" refers to those sections performing the usual police functions relating to the safety of persons and property—enforcement of laws and regulations, traffic control, apprehension of military deserters, location of missing persons, and keeping track of foreigners resident or traveling in Turkey. The judicial police work closely with the public prosecutors to assist in organizing evidence for trials. The political police work to combat groups whose actions or plans are identified as contrary to the security of the Republic.

The chief problem since the 1970s has been terrorism and the transshipment of illegal narcotics through Turkey by organized crime groups. The Turkish National Police have cooperated fully with the United States and the international narcotics law enforcement community in efforts to stem this traffic. Its narcotics units have been expanded to all provinces. A Department of Operations for Combating Terrorism was also formed.

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36. The primary author of this section is Professor Dr. Feridun Yenisey.

37. CRIMINAL CODE, *supra* note 32.

The educational level of the police is very important in regard to human-rights standards in a country. Police authorities recognized that the low educational level of the police was a contributing factor in violations of legal rights and mistreatment of suspected persons. In Turkey a person in the lowest grade of police is expected to have completed junior high school. Police training consists of a nine-month basic course at police schools. Candidates for higher rank are sent to the Police Academy at Ankara from which students graduate as sergeants after a four-year course.

A shortage of personnel, inadequate training, and a lack of proper equipment contributed to the poor record of the police in dealing with violence. Concerns expressed by the Turkish Parliament, bar associations, and other non-governmental bodies, as well as international groups, have contributed to some improvements. The penal system, nevertheless, continues to be efficient.

The Research Center for Human Rights, Criminal Law and Criminology at Marmara University is working to improve the human rights dimensions of the Turkish Police by organizing different activities like symposia and field research in criminal justice. The recent "International Symposium on Comparative Law" described in this article was designed to transfer knowledge from western countries to the Turkish Police regarding proactive policing, search and seizure, and arrest and interrogation.

## 2. Proactive Policing and Police Investigation

The police<sup>38</sup> in Turkey are divided into two groups: general police and special police. General police are those police under the supervision of the Ministry of Interior, "military police" and "watchman"; special police include "traffic police" and "village lookouts." There are two stages to the criminal justice process: the investigatory stage and the trial stage. The investigatory stage is based on a written report that is non-adversarial and, in principle, secret.<sup>39</sup> When the Public Prosecutor is informed of the occurrence of a crime, he is required to undertake an investigation in order to determine whether there is a necessity for commencing a

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38. The strength of the police force was 3,673 in 1982, 3,781 in 1986. In 1986 there were 68 female police officers.

39. However, after the 1992 amendment of Article 143 of the Code of Criminal Procedure, the advocate of the defendant is entitled to see all the records in the dossier and make free copies of them. See CODE OF CRIMINAL PROCEDURE (Law No. 1412) (Turk.); see generally Feyyaz Golcukiu, *Criminal Procedure*, in INTRODUCTION TO TURKISH LAW, 243, 244-46 (Tugrul Ansay & Don Wallace eds., 1987).

prosecution.<sup>40</sup> The police have the duty to investigate criminal offenses and to take emergency measures necessary to clarify the facts.<sup>41</sup>

According to the outcomes of the field research conducted by Marmara University,<sup>42</sup> in 47.1% of the cases, the police get the complaint first.<sup>43</sup> Notification is mostly made by private individual.<sup>44</sup>

In 92% of the cases, the identity of the defendant was evident to the police at the time they received notice of the complaint.<sup>45</sup> The average lapse of time between the first notice of the crime and the first investigative actions is one day.<sup>46</sup> This differs slightly according to the type of crime.<sup>47</sup>

Inspection of the crime scene is an important part of the police investigation. It is obvious that the inspection of the crime scene is not necessary in each crime. In the field research of Marmara University, out of the 1105 files, there are 289 cases that contain data about the inspection of the crime scene.<sup>48</sup> Crime-lab analyses have been conducted in 121 files<sup>49</sup> and in 298 files there are findings about some physical examinations, like alcohol tests.<sup>50</sup> This number appears low.

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40. See CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 153/1.

41. See *id.*, art. 156/1.

42. The survey was conducted by faculty and research assistants at Marmara University [hereinafter Marmara University Research] (on file with author). 1105 files have been inspected and each of them has been recorded into a question form. Many researchers helped to fill out the questionnaires which then has been transferred into a special computer program.

43. Regarding all the inspected files, in 521 cases (47.1%) the first investigative official learning about a committed crime was the police. See *id.* In 420 files (38%) the prosecutor was informed first and in 41 files (3.7%) it was the gendarme. See *id.* It is interesting to notice, that the trial court and many various state offices were the first to be informed about a crime. If we examine the situation according to the type of court, then the results vary: crimes under the Court of the Peace police are reported to the court in 51% of files, and to the Public Prosecutor in 41.5% of files. Offenses tried by the Court of General Jurisdiction will be most frequently reported (43.2%) to the prosecution office, and for offenses tried by Courts of Assize and by Juvenile Courts, the offense will be reported first to the police, and then to the gendarme. See *id.*

44. Out of 1105 offenses 692 have been reported by private individuals, 137 have been by complaint, 260 have been sued ex officio, and 6 were subject to private claim. See *id.*

45. In 526 files (51.8%) the complaint or notice about the commitment of a crime was known by the police or prosecutor the same day, in 72 files (7.1%) within one day. See *id.* In 57% of Courts of Assize' cases, the information is filed the same day, 40% in Courts of the Peace and 60% in Courts of General Jurisdiction. See *id.*

46. There are data in 717 files relating to this time period and in 445 cases (62%), the investigative action of the police was conducted on the same day. See *id.*

47. There are 192 files dealing with petty offenses data and in 150 of them the first action is on the same day, in ordinary crimes the percentage on the same day is 52%, in heavy crimes 58% and in juvenile offenses 75%. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

The police and prosecutor tend to rely mostly upon oral statements of the defendant or of the victim. Real evidence is gathered only in very important cases and the examination of physical evidence is not conducted in a refined way. This outcome is not surprising given the current structure of the Turkish Police, which does not provide special regulations relating to the detectives. There should be a special unit within the police composed of experts who only conduct crime-scene investigations. There are some recent efforts to improve this situation.

The first police actions during the preliminary investigation may include conducting a search on the suspect (in 5.9% of the reported cases), arresting the suspect and holding in pre-trial detention (in 5.9% of the reported cases) and interviewing the victim (in 4.9% of the reported cases).<sup>51</sup> There is no registered search for scientific evidence as 'the first move' of the police within the inspected files. This kind of investigation is only seen afterwards. Within the reported cases, an investigation for the domicile address of the alleged offender appears as the first move of the police in 2.4% of the cases.<sup>52</sup> In cases where the suspect has been arrested after being caught in the act of committing the crime, searching the defendant is another form of investigation. There are data in 188 files indicating that the police conducted some activities aimed at seizing the suspect. These findings show us that in the majority of cases the police do not first discern if there is probable cause and then start to search for the defendant. According to our opinion, the police must be trained to determine probable cause first and only after that take additional steps.

At the end of the investigation, the police present the results in the form of a written report to the public prosecutor. The lapse of time between the first investigative action and the report to the public prosecutor is usually less than one day.<sup>53</sup> This short period of time is obviously not sufficient to conduct detailed investigations. The regulations of the Code of Criminal Procedure<sup>54</sup> and its application contributes to this outcome. According to recent rules, police are not entitled to continue the preliminary investigations after the defendant has been arrested; therefore, the police attempt to conduct all investigations within twenty-four hours. The clearance rate of the crime through police

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51. In cases tried by the Courts of Aggravated Felonies, the police interviewing of future witnesses (2.5%) comes into consideration. *See id.*

52. *See id.*

53. 88 files (9%) indicate that on the same day the police started to investigate, the report was submitted to the prosecutor. *See id.* In another 118 files (21%) this time period was one day. *See id.* In ordinary crimes tried by the courts of general jurisdiction, in 52% of the cases the police submitted the report on the same day. *See id.*

54. CODE OF CRIMINAL PROCEDURE, *supra* note 39.

investigations is 46.2% and goes up to 53.8% in heavy crimes and up to 69% in juvenile crimes. This outcome tends to show that the police make more intensive investigations if the crime charged is an important one.

### 3. Search and Seizure

Since 1985, the police have had the power to search persons in order to prevent harm to others. According to Article 15 of the Police Code, a search of the person may be ordered by a high ranking police official if there are facts that indicate that danger exists or that violent acts will be committed. Universities were considered protected against entry by the police. In 1973, however, there was an amendment to the Police Code; if it was reported that crimes had been committed in the University buildings, the police have the right of entry.<sup>55</sup> The powers to search persons stopped upon a reasonable suspicion is not regulated in the Code of Criminal Procedure. Search of the individual during the search of the premises is mentioned in Article 94 of the Code of Criminal Procedure.<sup>56</sup> A person may be searched when there are reasonable grounds for suspecting that the person is carrying evidence of a crime or that he has committed a crime.

Only a judge may order the entry into a domicile. Entry into the domicile of the suspect to conduct a search therein is based on two justifications: first, to arrest the suspect and, second, to seize evidence.<sup>57</sup> The Police Code provides a limited power of entry to search the domiciles of persons who are not under suspicion.<sup>58</sup> The power to enter and search public buildings is larger; however, at night this power is limited. There is an exception to the rule only if the crime is flagrant, or if entry is necessary to recapture an escaped arrestee or prisoner.<sup>59</sup>

Seizure is possible for two kinds of goods: everything that can serve as evidence and goods to be confiscated (*e.g.*, weapons that were used in committing the offense or goods that are prohibited, like illegal drugs). If the possessor gives up such goods voluntarily, those goods will be kept in custody. If there is no consent, the police are entitled to seize them using force.<sup>60</sup> Goods that are in possession of persons who have the right to withhold testimony according to Article 47 of the Code of Criminal Procedure are exempted from seizure. Official documents in state offices,

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55. See POLICE CODE art. 20.

56. See CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 94.

57. See Police Code art. 20.

58. See *id.*, art. 95.

59. See *id.*, art. 96.

60. See *id.*, art. 86/2.

communications between defense counsel and client,<sup>61</sup> and printing material used by the press,<sup>62</sup> are exempt from seizure.

During the preliminary investigation a Justice of the Peace is entitled to give an order for seizure of goods. After prosecution has begun the court must decide within three days if the prosecutor or his auxiliaries seized the items without a judicial order.<sup>63</sup> The Code of Criminal Procedure regulates only the standard provisions relating to search and seizure, without giving details, and does not contain any regulation relating to wiretapping. The Turkish Law with respect to private life<sup>64</sup> must be refined.

According to the outcomes of the Marmara University Research, the number of cases where a search was conducted with a judicial warrant is six and search upon the order of the prosecutor is also six.<sup>65</sup> In contrast, there were 201 warrantless searches recorded.<sup>66</sup> There are thirty-two judge orders and thirty orders of the Public Prosecutor relating to seizure, and 191 warrantless seizures.<sup>67</sup> As the results of field research indicate, the number of cases where a search or seizure is based on a court's order or a judge's determination is low. A 1992 amendment regarding the exclusion of unlawfully obtained evidence<sup>68</sup> should have helped this weak point of the system.

#### 4. Arrest and Interrogation

##### a. Arrest

When a flagrant felony has been committed, the accused can be arrested without a written order of a judge.<sup>69</sup> Any citizen may arrest a person who is in the process of committing a flagrant felony, or during hot pursuit, if the offender may escape or can not be identified. Additionally, the public prosecutor and the police have the power to order an arrest in cases where the judge might have ordered pre-trial detention and there is a danger of undue delay in the judge's issuing such order.<sup>70</sup> If the arrest is related to a flagrant crime, the arrested person will be

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61. *See id.*, art. 136/3.

62. *See* TÜRKIYE CUMHURİYETİ, *supra* note 7, art. 30.

63. *See* CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 90.

64. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, 224.

65. *See* Marmara University Research, *supra* note 42.

66. *See id.*

67. *See id.*

68. CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 254/2.

69. *See id.*, art. 127.

70. *See id.*, art. 127/1.

brought to the Justice of the Peace within twenty-four hours for interrogation. The time necessary to bring him before the judge is not included in the twenty-four hour requirement.<sup>71</sup> For crimes committed by three or more persons the period between arrest and presentation for interrogation may be increased to four days by a written order of the Public Prosecutor, if the collection of evidence becomes difficult. If this period of time does not suffice, the Public Prosecutor may ask the Justice of Peace for an order to extend the period up to eight days.<sup>72</sup> The arrested suspect will be immediately taken to the appropriate court if a prosecution has already been instituted.<sup>73</sup> If the arrested person so requests, his lawyer has the right to be present during the interview.<sup>74</sup>

There is an important difference between arrest and pre-trial detention under Turkish Law. Pre-trial detention always requires the written order of a magistrate, and for crimes involving punishment, may not exceed six months. However, if the crime provokes public anger or if the accused has no domicile or home or can not identify himself, he may be arrested and placed in pre-trial detention. The length of pre-trial detention following arrest does not depend on the crime and may continue until the reasons for arrest no longer exist.<sup>75</sup> If the arrested person is released, either because the time limitation of detention has run or because the Justice of Peace has ordered his release, the same person may not be arrested for the same actions again, unless there is new and sufficient evidence against him. To arrest the suspect again the Public Prosecutor must provide a written order.<sup>76</sup> A new remedy against such arrest was introduced in Turkish Law in 1992; the arrested person or his lawyer, his legal representative, his first and second degree relatives, or his spouse have the right to demand a decision from the Justice of the Peace against the written order of the Public Prosecutor relating to the prolongation of the detention period or the arrest itself.

#### b. Interview and Interrogation

Turkish law makes a distinction between the interview (*ifade alma*) of the suspect by the police or public prosecutor and the interrogation (*sorgu*) conducted by the judge. Information obtained in the latter can be used as evidence during the trial. Special provisions apply to the

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71. See *id.*, art. 128/1.

72. See *id.*, art. 128/2.

73. See *id.*, art. 129.

74. See *id.*, art. 136.

75. See *id.*, arts. 104/3, 128/3.

76. See *id.*, art. 128/5.

interview of the accused by the police or by the public prosecutor, as well as to the interrogation by the judge.<sup>77</sup>

The first requirement is that the police must ask the identity of the suspect before interrogating him and write down the suspect's identity. The suspect must give correct answers regarding his identity. In order to verify the identity given, the police may ask several authorities. As far as our data show, the police have only verified this information with the registrars in thirty-three reported cases and conducted research in thirty-one cases.<sup>78</sup> In other cases, the oral statement of the related person was regarded as sufficient.

After the identity of the suspect is determined, the suspect must be charged and be informed that he has the right to engage counsel on his behalf. If he can not hire counsel he may demand a lawyer be appointed by the Bar Association of that district. If the accused demands a lawyer be appointed by the Bar Association, that lawyer has the right to be present during the interview as long as this does not cause any delay in the investigation. There is no requirement of a written authorization for the requested lawyer. Further, the suspect is entitled to inform his or her relatives about the arrest and must be informed of this right. The suspect must be informed that he has the legal right to be silent. He must be given notice that he can demand the collection of exculpatory evidence. Questions about his personal status will be asked.

An official report of the interview must be prepared. This report must contain the following: (a) the place and date where the interview took place; (b) the names and positions of the people who were present during the interview, including the identity of the suspect; (c) a statement that the above mentioned requirements were completed, or, if some of them were not, the reason why; (d) a statement of the facts; and (e) a statement that the official report has been read by the suspect and his defense lawyer, if he was present, and that they had signed the report, or if they have not, the reasons for their refusal.<sup>79</sup>

In the Marmara University Field Research, there are 1100 files containing data regarding interviews. Seven hundred and eleven of them are related to the interview of the suspect. In 389 cases, this interrogation was conducted either by the public prosecutor or by the court during the trial.<sup>80</sup> In 26.9% of the inspected files, the first act of investigation by the police is interviewing the suspect.<sup>81</sup> The duration of the police interview is not evident as the police did not take notes about the

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77. See *id.*, art. 135.

78. See Marmara University Research, *supra* note 42.

79. See CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 135.

80. See Marmara University Research, *supra* note 42.

81. See *id.*

beginning and end of the interview. These findings indicate that in some cases the police finish its investigation without interrogating the suspect and, similarly, the prosecutor files a case without interviewing the related person. This outcome is expected under the existing legislation, as the Code does not proscribe that the police or the public prosecutor ask questions of the suspect regarding the accusations. The Code of Criminal Procedure lists the forbidden methods of interviewing suspects.<sup>82</sup> The testimony during the interview must be freely given. The use of torture, drugs given by force, stress or pressure tactics, fraud, physical violence and force, and devices that influence the free will are forbidden. After the 1992 amendment, continuing an interview once the defendant has become tired constitutes an illegal method and leads to automatic exclusion of any evidence obtained. The offer of illegal promises is also forbidden.<sup>83</sup> Evidence that has been obtained through illegal methods is excluded, even if the individual gives his consent.<sup>84</sup>

The findings of the Field Research related to the confessions show that 37% of the suspects have admitted fully that they had committed the alleged crime, 14% have made partial admissions and 11% have admitted while giving some explanations. Thirty-seven percent of the interrogated suspects have denied committing the crime. According to this outcome, 63% have confessed during the interview. Twenty-two suspects denied their confessions at trial, claiming they were coerced by police misconduct. However there are twenty-eight reports about physician examination with no indications that these confessions were coerced. Therefore, we may conclude that the allegations of torture being an institutionalized application in Turkey is not borne out by our findings dealing with ordinary crimes not subject to State Security Courts.

Under the Turkish Code of Juvenile Courts, the police are not entitled to interview the juvenile suspects, only the prosecutor has this authority. Despite this provision, the police conducted interviews of juvenile suspects prior to 1992.<sup>85</sup> However, after the exclusionary rule was introduced in 1992,<sup>86</sup> the police may no longer conduct interviews of the juvenile suspects.

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82. See CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 135a/1.

83. See *id.*, art. 135a/2.

84. See *id.*, art. 135a/3.

85. Police interrogated the juvenile suspect in 38.1% of cases tried in Juvenile Courts. This is the highest percentage among all jurisdictions. See Marmara University Research, *supra* note 42.

86. See CODE OF CRIMINAL PROCEDURE, *supra* note 39, art. 254/2.

#### IV. CONCLUSION

Turkey is a country at the crossroads. Its largest city, Istanbul, where the first part of the conference was held, straddles the Bosphorus as the bridge between Europe and Asia and the gateway between the Mediterranean and Black Seas. As a result, Turkey is where Western and Eastern cultures meet, interact, and must come to some resolution, a process that has not always proven to be peaceful. Since Ataturk led the country to independence in 1923, Turkey has attempted to maintain a Western-style secular state while accommodating its Islamic majority, many of whom are deeply religious.

In another sense, Turkey is at the crossroads because the challenges confronting this large and diverse nation have never been more acute. As population growth and urbanization swells its cities, Turkey struggles to develop the infrastructure, economic base, and public and private institutions to improve the conditions of its people. Because western European countries, particularly those in the European Union, have relatively strong and developed economies, one important strategy for achieving these goals is to seek closer ties with Europe and, ultimately, membership in the European Union. This goal has taken on added urgency in light of recent geopolitical changes and the accelerating pace of European unification. For a country in Turkey's position, of course, the precise degree of integration with Europe presents difficult questions, insofar as it may entail the erosion of some traditional aspects of Turkish culture. Nonetheless, it seems clear that some further integration into Europe is desirable.

An essential prerequisite to further integration into Europe, however, is the development of the Turkish legal system and institutions. Thus, the purpose of the "International Symposium on Comparative Law" was to assist in this development by bringing together knowledgeable experts from the United States, Europe, and Turkey to discuss the role of law and legal institutions in public affairs. As admittedly biased observers and conference participants, Team Kansas is confident that the conference has and will achieve these goals.

Overall, Team Kansas's visit to Turkey proved to be an immensely enriching and rewarding experience for all of us, on both a professional and personal level. We were touched by the seemingly boundless hospitality of our hosts, and amazed by the breadth and scope of the conference they had put together. We were also struck by the daunting challenges that confront Turkey, and hope that we contributed in some small way to Turkey's efforts to meet those challenges.