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CONFESSIONS AND THE RIGHT TO COUNSEL: REFLECTIONS ON RECENT CHANGES IN TURKISH CRIMINAL PROCEDURE

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My topic for today — the law of confessions and the right to access to counsel — has been the subject of numerous reform efforts in Turkey over the past several years. These reform efforts began with the 1992 amendments to the Criminal Procedure Code and continued through the 1997 amendments to the Code and the 1998 Regulations on Police Interrogation approved by the Ministers of Justice and the Interior. The proposed 1999 Draft of the Turkish Criminal Procedure Code builds upon these reform efforts, extending them, as I understand it, to all criminal cases, including those coming before the State Security Courts.

As a result of these efforts at reform, to an outsider looking in (particularly one from the United States) there is much that looks

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surprisingly familiar about Turkish confessions law. Moreover, when such an observer comes — as I do — with a belief that criminal justice systems that are founded upon a respect for personal liberty and basic human rights are the hallmark of a free and democratic society, the current system in Turkey is one that appears worthy of considerable commendation.

However, there are two areas in which I would suggest that further reform in Turkey might profitably be considered.

The first would be to extend the same rights and protections to those who are being detained and interrogated in cases before the State Security Courts as are enjoyed by individuals currently charged with more basic or traditional criminal offenses. As I've already said, I believe proposals to achieve just such reform are incorporated in the provisions of the new draft code.

The second area is more problematic. It is one that plagues most criminal justice systems, including my own and most of the member states of the European Community — that is, the recurrent disparity between what is required of the police by way of law and what happens in actual practice in the police station in many cases. I will propose some suggested bases for reform here as well.

Let me start with the need to bring practices in the State Security Courts in line with more basic Turkish criminal procedure.

Suspects charged with basic crimes in Turkey enjoy a privilege not to incriminate themselves which translates into a right to insist that any statements they make are freely given and not the result of torture, drugs, stress, pressure tactics or fraud.

They enjoy the right to the assistance of counsel immediately upon apprehension and the right to appointed counsel if they cannot afford counsel.

In addition, they enjoy the right to certain caution requirements (what we in the United States would call Miranda warnings) — that is, formal advisement by the police of the suspect's right to silence, counsel and appointed counsel.

Lastly, a suspect charged with common, individual crimes must be brought before a judicial magistrate within 24 hours.

By way of contrast, a person apprehended for crimes within the jurisdiction of the State Security Courts only enjoys the right to counsel once he is formally arrested or made subject to a formal order of a judge extending the time of detention beyond the four-day period that may be authorized by the public prosecution when collective crimes are alleged. In short, this means, as I understand it, that those accused of collective crimes before the State Security Courts do not have a right to counsel during the first four days of their detention. Nor do they have a right to appear before a magistrate during this period. Lastly, even when the right to counsel does come into play (after the expiration of the four day period), if I read the August 21, 1998 Regulation of the Ministries of Justice and Interior correctly, the right to appointed counsel for those who cannot afford counsel does not apply to crimes falling under the scope of the State Security Courts.

I would like to suggest that these limitations on the procedural rights of those charged in State Security Courts are not in keeping with the spirit of reform that is at the heart of the rest of the Turkish Penal Code; that they are not in keeping with most modern efforts to control excessive conduct on the part of police; that they are not required as a legitimate need of all states to combat terror; and that by providing a period of incommunicado control of the suspect by the police, they increase the possibility of torture and other like mistreatment of the accused.

There is no doubt that terrorism represents a threat to a state's very existence and can justify measures that might not be considered in less threatening times. It is also true, however, that there is no greater measure of a state's commitment to the human liberties of its citizens than its protection of those rights during times of strife and discontent. Indeed, as the Israeli Supreme Court observed in its recent opinion outlawing torture of terrorist suspects, the interrogation practices of the police in a given regime are indicative of the regime's very character.

Most member states of the European Convention on Human Rights do not permit such an extended period of incommunicado detention of terrorist suspects as is currently permitted in Turkey — even though many of these states have faced very grave threats of terrorism. Indeed, even a state such as France, which permits holding a terrorist suspect for as long as four days before bringing him before a magistrate, still allows such a suspect the right to confer with counsel after the first twenty hours of police custody.

My own country, which has recently experienced its own unpleasant encounters with terrorism (in such well-publicized incidents as the Oklahoma City and World Trade Center bombings), still adheres to a rule that requires that a suspect be brought before a magistrate as soon as is reasonably possible. The test of reasonableness has been variously measured as being as short as six hours and certainly no longer than 48 hours when the issue is the legality of a warrantless arrest. Moreover, the right to counsel adheres immediately upon accusation or the initiation of custodial interrogation, no matter what the nature of the charge.

My mention of the approaches of other countries is not done with the intent of suggesting that these other countries have got it right and Turkey is wrong. Quite the contrary, I believe that Turkey has developed quite an enlightened approach toward issues of police interrogation. I merely wish to suggest that this approach be adopted across the full spectrum of interrogation contexts — including cases alleging terrorism before the State Security Courts.

I do this against the backdrop of police excesses that Turkey has experienced in the past. Torture and other mistreatment of prisoners has been a documented problem in the past in Turkish jails. Turkey has taken great strides to address this problem and, indeed, the European Committee for the Prevention of Torture acknowledged in a 1997 report that Turkey is moving in the right direction with respect to its treatment of prisoners. Nonetheless, reports by local bar associations, human rights organizations and public officials in Turkey indicate that even though Turkey has made significant progress on this front, the mistreatment of prisoners remains a problem, particularly during periods of pre-trial interrogation.

It is with this in mind that I question the restrictions on counsel and judicial intervention for a four-day period of incommunicado custody of the suspect in state security cases. By creating such a substantial period of total police control with no possibility of outside intervention, a situation is created that can all too easily be abused by those law enforcement figures who may be so inclined.

This is why I read the draft code of criminal procedure as another major step in Turkey's efforts to bring progressive reform to its rules of criminal procedure.

As I understand the draft code, it would limit the detention period for suspects charged with collective crimes before State Security Courts to

48 hours; would make the right to counsel effective immediately upon detention; and would extend the right to appointed counsel to such cases. This builds upon the reform efforts that have characterized the last 10 years of Turkish criminal procedure modification and is another significant step in Turkey's efforts to ensure the proper treatment of suspects in its criminal courts.

Now let me address the other issue I wish to raise — that is, the disparity between what is required by law and what often actually occurs in the quiet secrecy of the police station. This is a problem in Turkey, although such disparity problems exist in most other countries as well.

In my own country, such disparity is a significant problem. Despite the fact that the right to silence and the right to counsel are part of the fundamental guarantees of our Constitution (in what we call “The Bill of Rights”) and despite the fact that we proudly enforce these rights with an exclusionary rule, we are told that American police often fail to honor these rules and then, worse, lie — even under oath — to avoid application of the exclusionary rule. In fact, it is a frequent enough problem in the American criminal justice system that it has spawned its own term — “testilying” (which is, of course, a combination of two English words — testifying and lying). In such “swearing contests” between the accused and the police as to what happened, judges are more likely to credit the version of the police than they are to believe the obviously self-serving allegations of the suspect. Recently, in Great Britain a more ominous form of this has been brought to light — that is, the actual fabrication by police of confessions in at least a couple of notorious terrorist trials (the Birmingham Six and the Guilford Four).

It is against this backdrop of problems in my own country that I observe that Turkey appears to experience a very serious discrepancy between what the law requires by way of protection of the accused and what the police actually provide in the police station. For example, despite the guarantees that regularly charged defendants be brought before a court within twenty-four hours, and suspects under the jurisdiction of the state security courts be brought before a magistrate within four days, it is reported that this limit is frequently exceeded. According to a recent report of the Istanbul Bar Association, this is achieved in a variety of ways, including falsification of the time of apprehension on the appropriate forms, obtaining extensions from prosecutors in cases where they should not be granted, etc.

Again, according to a report of the Istanbul Bar Association, as well as reports by organizations such as the European Committee for the Prevention of Torture, even though Article 136 of the Turkish Code of Criminal Procedure explicitly guarantees to all suspects the right to confer with counsel, this right is often ignored by police. For example, a report of the Committee for the Prevention of Torture noted that, as recently as 1997, the head of the anti-terror department of the Istanbul Police Department had claimed that not a single suspect in his custody had ever sought to make use of the right. The 1998 report of the Istanbul Bar Association indicated that even when prosecutors have issued written orders for contact between the suspect and his attorney, this was obstructed under such pretexts as the suspect being taken out for an inspection of the place of the crime.

More significantly, despite the explicit guarantee in Article 135 that suspects be informed of their rights, and the more specific requirement of the Prime Minister's Circular of December 2, 1997 that this be done in writing pursuant to a specific form, the 1998 report of the Istanbul Bar Association alleges that this is often not done at all — or if done, done long after the suspect has been taken into custody and subjected to interrogation. This seems to derive in part from the belief among many police that Article 136 does not apply to “preliminary discussions” but only to the taking of a formal statement — when, in fact, Article 136 applies quite specifically from the outset of police custody (at least for non-state security cases).

Lastly, and most problematically, despite the very significant efforts of Turkish authorities to change this, the torture of suspects — particularly those charged with crimes before the state security courts — remains a problem. The Turkish public has periodically been outraged by some of the more publicized examples of this, including the cases of Metin Göktepe, Gulderen Baran and the fourteen teenage suspects in Manisa.

In the time remaining to me I would like to make several suggestions regarding how Turkey might take steps to bring police behavior into line with what is required by Turkish law. Some of the suggestions reflect the experience of other countries; others are specific to the Turkish situation.

First of all, I would reiterate my recommendation that Turkey pass the proposed draft of the criminal procedure code that would end the lengthy incommunicado interrogation of suspects before the State Security Courts. If there is concern that police do not always do what is required

of them, then it is difficult to justify this level of police control of the process. Access to the courts and counsel is a basic means of ensuring the legality of the interrogation procedure.

Second, when there are indications that police may be misinterpreting the law (such as when the right to counsel attaches) then the appropriate authorities should clarify the law for them in no uncertain terms and make clear that they will be held accountable to the law.

Next, I would recommend that Turkey do what Great Britain has done — that is, require that all police interrogations be videotaped. I realize this presents a resources problem, particularly in smaller, more rural parts of the country. I realize also that my own country has talked about doing this for years and still does not require videotaping as a general rule. Nonetheless, there is probably no greater deterrent to official misconduct by the police than the knowledge that their actions are being recorded.

In addition, I would urge that Turkish prosecutors and Turkish judges take more seriously the allegations by defendants of torture and mistreatment in individual cases. There is a normal human reaction to discount such allegations as self-serving and less than credible when they come from someone accused of serious criminality. Thus, it is not surprising to learn that the chief judge of the Ankara State Security Court was quoted recently as saying that allegations of mistreatment are “the standard made-up defense of State Security Court defendants.” Nonetheless, if we know that mistreatment does occur in general, then we must resist the temptation to assume that specific allegations of it must always be false. Turkish courts are empowered not only with the power to punish individual officers under sections 243 and 245 of the Turkish Penal Code but with the relatively new power of excluding unlawfully obtained evidence pursuant to sections 135A and 254 of the Turkish Code of Criminal Procedure. Although anecdotal evidence suggests that courts have utilized this powerful suppression tool in minor cases, so far its use in serious cases is less evident. Courts must be prepared to enforce these exclusion remedies even when enforcement leads to the failure of criminal prosecutions.

I say this knowing that reluctance to impose the exclusionary remedy can be readily found in my own country when the consequences of its application might be to undermine the prosecution of a serious case. This evasion is achieved sometimes through explicit exceptions to the rule and sometimes through questionable findings of fact and law regarding the actual conduct of the police. In individual cases where the

abstract ideal of fair treatment of the accused is balanced against the specific evidentiary needs of a particular criminal prosecution, the temptation is frequently to say "not in this case." The accumulated effect of many such decisions can be the silent repeal of the exclusionary remedy. Countries such as yours and mine that have concluded the only successful way to oversee the actions of law enforcement is through a rule of exclusion must have the courage of their convictions. If we are not prepared to exclude unlawfully obtained evidence in cases where its loss will be felt, then we will never experienced the full deterrent potential of such a rule.

As yet a further recommendation, I would urge that there be greater respect in Turkey for the defense function in criminal cases. I know that Turkey, like many countries in Europe, has, in recent years, modified the inquisitorial roots of its criminal justice system to provide a more significant role for defense counsel. Despite this (or perhaps because of this) defense attorneys are sometimes viewed with distrust and often with disrespect in Turkey. This discourages lawyers from practice in this area and marginalizes the practice of criminal law. The defense of accused criminals (and particularly accused terrorists) is not itself subversive activity. Instead, in a system such as Turkey's, it is a vigorous sign of a system's commitment to the rule of law.

Lastly, I would urge Turkey to reassert prosecutorial control of the interrogation practice. In theory, Turkish law authorizes the public prosecutor to conduct the investigation in the preparatory stage. In reality, particularly in State Security cases, security forces control the process. In the past, I know that judicial police have been proposed as one way of reasserting prosecutorial control in this area. I am also aware that such proposals have failed for a variety of reasons. Whether or not this particular proposal is worth reconsidering, at a minimum greater monetary resources should be accorded to the prosecutor with the explicit purpose of reasserting greater prosecutorial inspection and oversight of detention and interrogation facilities.

This is a pivotal time in Turkey. It is a time of profound sorrow as the horrible aftereffects of the recent earthquake are still being measured. It is also a time of much ferment and change. Indeed, if there is one possible plus to be found in the terrible tragedy of this past summer, it seems to be that it has provoked Turks to look at old problems in new ways. Such rethinking in the area of criminal justice began, of course, long before this summer and has, in fact, been going on for the better part

of a decade. Hopefully this conference and, in some modest way, my comments, will be of benefit as you continue this process of reform.

