

III

**CASE ON THE CONSTITUTIONALITY
OF ARTICLES 141 AND 142 OF THE
PENAL CODE**

Turkish Penal Code which is based upon the Italian (Zanardelli) Code of 1889, was enacted on March 13 1926. Some of its articles have always been subject to criticism. Especially articles 141 and 142 of the said code which prohibit the establishment of the societies with the tendency of communism or establishment of domination of one social class over others or making the propaganda for this matter or for anarchy have been criticized among the scholars¹. In fact these articles do not belong to Zanardelli code but to the new Italian Penal Code of 1930. The Turkish Penal Code has been amended more than twenty five times since its enactment. So the said articles have been adopted to the turkish penal code on 1936 from articles 270 and 272 of the Italian Penal Code of 1930 and later have been amended four different times.

1) For these discussions see :

- Derbil**, Anti Demokratik Kanunlar, İnsan Hakları Yıllığı, Ankara, 1954.
Balkanlı, Mukayeseli Basın ve Propaganda, Ankara, 1961.
Gözübüyük, Türk Ceza Kanunu Şerhi, Ankara, 1961.
Çağlayan, Türk Ceza Kanunu, volm. 1, Ankara, 1962.
Arıkan, 141 ve 142. maddelerin hikâyesi, Cumhuriyet Gazetesi, 28/1/1963, no. 13827.
Özek, Düşünce Hürriyeti ve 141. madde, Milliyet, 8/12/1964.
Erem, Türk Ceza Hukuku, volm. II, Ankara, 1965.
Kapanı, Freedom to Destroy Freedom, The Collection of Essays in Honour of Prof. Ernst E. Hirsch, Ankara, 1966.
Öztürk, Türk Ceza Kanunu Şerhi ve Tatbikatı, volm: I, 1966.
Türk Ceza Kanununun 141 ve 142. maddeleri hakkında Anayasa mahkemesine verilen mütalâa, Yön, 30/12/1966.
Alacakaptan, Demokratik Anayasa ve Ceza Kanununun 141 ve 142. maddeleri, AHFD. volm. XXIII, n. 1-4, 1967.

With the new spirit brought by the new Constitution of 1961 Turkish Labor Party whose program is based upon the socialist doctrine have requested from the Constitutional Court the annulment of these articles. Upon this request, the Supreme Court, on September 25, 1965, decided upon the conformity of articles 141 and 142 of the penal code to the Constitution and therefore refused the case². You will find the opinion of the Court, delivered by the majority, in the following:

**E v a l u a t i o n o f t h e e s s e n c e o f t h e
c a s e (*)**

The first paragraph, of which the annulment is requested, of Articles 141 and 142 of the Turkish Penal Code, reads as follows :

Article 141/1 :

Whoever attempts to establish or establishes or arranges or conducts and administers the activities of, societies in any way and under any name, or furnishes guidance in these respects, with the purpose of establishing domination of a social class over other social classes, or exterminating a certain social class or overthrowing any of the established basic economic and social orders of the country, shall be punished by..."

Whoever conducts and administers some or all of such societies shall be punished by..."

Özek, Düşünce Özgürlüğü açısından 141 ve 142., Ant Dergisi, n. 31. 1967.

Özek, Anayasa Mahkemesi ve 141 ve 142. maddeler, Ant Dergisi, n. 32-33, 1967.

Giritli, Bugünkü Anayasamız Sosyalizme Kapalı mıdır?, Milliyet 15/3/1967.

Yalçın, 141 ve 142. maddeler, Akşam 22-24 Ağustos 1967.

Köseoğlu, Türk Ceza Kanunu, Ankara, 1968.

Savcı, Hürriyet Üzerine Düşünceler, İstanbul, 1968.

Giritli, Anayasa Mahkemesi, 141-142 ve Komünizm, Milliyet, 5/8/1968.

Özek, 141-142, İstanbul, 1968.

2) File no. 1963/173. Decision no. 1965/40. Date of Decision 25/9/1965, published in official Registre, no. 12656 - dated 25/7/1967.

(*) The Petitioner's claims are omitted since they are summarized in the evaluation of the Essence of the Case.

"Article 142/1 :

Whoever makes propaganda with the purpose of establishing domination of one social class over others, exterminating any of the social classes, overthrowing any of the established basic economic or social orders of the country or totally exterminating the political or legal orders of the State, shall be punished by...".

As it is understood upon the study of the provisions mentioned above :

In the first paragraph of Article 141 : to attempt to establish or to establish, or to arrange or to conduct and administer the activities of, or to furnish guidance to, societies in any way and under any name, with the purpose of : a) establishing domination of a social class over other social classes; b) exterminating a certain social class; c) overthrowing any of the established basic economic or social orders of the country; and

In the first paragraph of Article 142 : to make propaganda in any way, with the purpose of : a) establishing domination of one social class over others; b) overthrowing any of the basic economic or social orders established in the country; c) exterminating any of the social classes; d) totally exterminating the political or legal orders of the State;

are considered crime and therefore prohibited.

To examine the contradiction of these articles to the Constitution, the clauses (Whoever attempts to establish or establishes, or arranges or conducts and administers the activities of societies under any name or furnishes guidance in these respects, with the purpose of establishing domination of a social class over other classes) of the Article 141 and (Whoever makes propaganda with the purpose of establishing the domination of one social class over others) and (makes propaganda, in any way, with the purpose of totally exterminating the political and legal orders of the State) of the Article 142, are taken under consideration prior to the rest, with an intention of evaluating them under different views.

I) First of all, the tendencies to attempt to establish or to establish, or to arrange or to conduct and administer the activities

of societies in any way and under any name, or to furnish guidance in these respects, with the purpose of establishing domination of a social class over other classes and to make propaganda, in any way with the purpose of establishing domination of one social class over others, are contradictory to the provisions of Article 2 of the Constitution, which reads as "The Turkish Republic is democratic State abiding Law, with laïc, nationalist and socialist ideas based upon the human rights and the basic principles mentioned in the Preamble" and also to the purpose of the provisions that take place in the Preamble, such as :

(Affected by Turkish nationhood which always considers the development of our nation among the other nations of the world, as a dignified and equal member, gathering the individuals of the same national concept and aim, as a whole, sharing their joys and sorrows and mutual destiny; with the full knowledge of Atatürk reforms and revolutions, national integrity, and the spirit of the fights of independence; to establish a democratic State with all the basic social and legal requirements, providing for the protection of human rights and liberties, national integrity, social justice and the protection and the security of individual and society).

In the event of domination of one social class over the others, the separate joys and sorrows of the classes will take the place of mutual destiny, and therefore the togetherness brought and provided by the Constitution will be abolished. The conflicting feelings of the classes will have an effect on the national unity and will lead to the breach of peace in the country. Most probably, the class struggles will cause the violation of laws and the efforts to dominate or not to be dominated will lead to scuffle. The struggles to establish a class domination will result in the destruction of the principles of the completeness and continuity of national integrity, as it takes place in the Constitution, the attachment of sympathy and feelings to the reforms of Atatürk and the spirit of national survival.

The spirit of survival has the meaning of taking any burden and sacrifice eagerly in order to protect the nation as a whole. As a result of the hatred due to the class struggles, this spirit will

lose its strength the national integrity and a class domination cannot exist together. In the latter, the sovereignty belongs to the dominating class rather than to the nation as a whole.

The domination of one social class over others cannot possibly be adjusted and adopted to the reforms of Atatürk. These reforms carry out the purpose of developing a Turkish Nation in accordance with the civilization of our age. All of these reforms are done for the nation as a whole.

The domination of one social class over others is also not agreeable with the human rights and freedoms.

Our Constitution, in its various provisions, provides for the rights and the obligations of the individuals. The class domination, which restricts these rights and obligations to the favour of the dominating class and confers privileges, may not be fit the principles of human rights and freedom.

These tendencies are also against the principles of social justice and social security. Because these principles cover all persons, despite of the social group they belong, rather than one certain class. It cannot be claimed that, in a State where there is the system of class domination, the principles of social justice and social security exist for all persons.

These tendencies are in contrast to the Supremacy of rule of Law. The kind of a State order, as established by our Constitution, cannot be separated from that of a Law abiding State's. Law abiding State is an order where the rule of law applies to all - acts and activities. It is obvious that this order cannot exist together with the presence of a class domination.

These tendencies may lead to the hinderence of the practice of the principle of secularity; because where the class domination exists, all of the strength and the will against the intensive powers to obstruct this principle, fades away.

These tendencies are in contrast with a democratic State and with the motive of Turkish Constitution which states that "Turkish Republic is a democratic State, refusing all kinds of reign, or the

types of individual or group tyranny", and also with the provision stated in the last Article of the same : "Turkish State is a Republic".

The democracy is a type of government where the sovereignty is not possessed by one person or a group of persons to the favour of certain groups alone, but to the favour of the nation as a whole and where the free and general elections are accepted as the only way of holding an office or leaving as well, and where, to say it in short, the principles of democracy are applied in general. These principles cannot exist in class domination.

The 4th and the 12th Articles of the Constitution contain clear and specific provisions in connection with the paragraphs which are asked to be annulled.

In Article 4, it is said that "The sovereignty belongs to the Turkish Nation without any condition or limitation. The nation practices this sovereignty through competent bodies, of which the terms are set by the Constitution. The practice of this sovereignty may not, in any way, be turned over to one single person or to a certain group or a class. No person or organization can claim the practice of sovereignty power if not based upon the provisions of the Constitution".

This article of the Constitution brings certainty to the matter. The article, very obviously refusing any class domination over other social classes, makes this matter unconstitutional by stating that "the sovereignty belongs to the Turkish Nation without any condition or limitation".

The third and the second paragraphs of this Article very clearly state that the sovereignty will be practiced by the competent organized body set by the Constitution under specific basic conditions, and aside from this clarify that no other persons, or groups, or classes can claim to possess it.

In Article 12, the provision "Everyone is equal under the law, despite of the differences of language, race, sex, political opinion, philosophic beliefs, religion and creed. No persons, families, groups, or classes may be privileged" takes place.

Class domination is also prohibited by this Article of the Constitution. There is no doubt that the second paragraph, which, with the provision of "No persons, families, groups and classes may be privileged", prohibits even the certain privileged groups and classes, also intends to forbid the class domination which is a further conflict to human rights and freedoms and therefore to the Constitution.

Also, Article 57 of the Constitution contains provisions prohibiting class domination. Especially, the first paragraph of this Article, stating that "The regulations, programs, and the activities of political parties are required to be in agreeable condition with the basic rule of national integrity and the principles of democracy and laicity, which are based upon the human rights and freedoms. The parties which disobey this provision are to be closed permanently" provides for the political parties not to become a power to demolish the democratic order; the human rights and freedom and the principle of laicity.

As stated above, the Turkish Republic is a type of a State which refuses all kinds of group or class sovereignty. This principle may be found in the motive of the Article 1, as well as in the Article 2 in which the qualifications of the Turkish Republic are specified.

The political parties with the purpose of class domination, cannot also exist as a Constitutional organization, for, then, they breach the peace of individuals and obstacle the human rights, and for, then, they also are in contrast to the principles of democracy and laicity of a Law abiding State. It is obvious that the organizations of these intentions will try to abolish the democratic order and the fundamental principles of the Republic. Hence, with this reasoning the conclusion is reached that the provision which takes place in the first paragraphs of the Articles 141 and 142 of the Penal Code, stating that "to attempt to establish or to establish, or to arrange, or to conduct and administer the activities of, societies in any way and under any name, or to furnish guidance in these respects, with the purpose of establishing domination of a social class over other social classes, and to make propaganda with the purpose of establish-

ing domination of one social class over others... will be punished", are not in contrast to the Constitution.

II) The provision which prohibits making propaganda with the purpose of totally exterminating the political and legal orders of the State, in the first paragraph of the Article 142 of the Turkish Penal Code, is not also in contrast to the Constitution. Because this tendency is very likely to lead to anarchy. And the anarchy being in contrast to a democratic State and foreseeing the complete demolition of the Constitution, it is very clear, without a need for further explanation, that the provisions forbidding anarchy are in conformity with the Constitution and is a course of action to protect its existence.

III) The provisions, besides those mentioned above, which also take place in the first paragraph of the Articles 141 and 142, which are asked to be annulled, prohibit the tendencies such as :

(Article 141/1) the attempt to establish or the establishment or to arrange, or the conduct and administration or furnishing guidance with this respect, of societies in any way and under any name, with the purpose of; — exterminating a social class —, overthrowing any of the established basic economic or social orders of the country; and

(Article 142/1) To make propaganda, in any way; — to overthrow any of the established basic economic or social orders of the country; — to exterminate totally the political or legal orders of the State.

In order to understand the nature of these acts, the reasons of adopting the prohibiting provisions into the Penal Code, a further attention should be given to the matter and the motives related to these provisions should be examined, as well.

The first paragraph of the Article 141 and 142, which are asked to be annulled, are adopted to our Penal Code from the Articles 270 and 272 of 1930 Italian Penal Code — which as whole is adopted as 1889 Law — by Law number 3038, dating 1936, and later have been changed at four different times, by Laws number 3531, 4934, 5435 and 5844.

After the change made by Law number 3038, the provisions relating to the subject read as follows :

The provision which takes place in the first section, — under the title of “Crimes against the country” —, of the first chapter, — with the heading of Crimes against the security of the State” —, of the second book of the Penal Code, which begins with Article 125, provides for the protection of the country from the aggressive and offensive actions towards the political and territorial integrity of the State, yet does not prohibit the attempts of establishing political regimes that are based upon force or Communism. With the help of Articles 270 and 272 of 1930 Italian Penal Code, in 1936 protective provisions are inserted into our Penal Code, on these matters by the Law numbered 3038.

Every State have felt the necessity to protect its regime against the everspreading danger of revolutionary socialism (Communism) which does not recognize national integrity, and especially demand for a world wide revolution. So, because of these reasons the gape of Law in this respect have been tried to be filled with the Law numbered 3038, in 1936.

Article 142 :

“Whoever makes propaganda in order to establish the domination of one social class over others, or to exterminate a social class or to overthrow the political and legal regime of the State, shall be punished.

In case, the propaganda is made in order to obtain the aforesaid purposes by force, the punishment shall be (.....) heavy imprisonment”.

As it will be observed through the comparison of the provisions of the Laws 3038 and 3531, the use of force has been eliminated as one of the elements of the criminal act, but then separately furnished as an aggravated fact.

In short, the motive of these changes reads as follows :

“Articles 141 and 142 are two important Articles of our Penal Code which contain the provisions to protect the regime. These provisions are sufficient to protect the regime completely in the

country. Because, excluding the fine punishment set by the Code of Societies, the present legislation does not prohibit the acts of propaganda, or the establishment, or the administration of such societies, as well as not incriminating those who establish or become active in the Board of Directors or own, or rent the property of aforesaid societies, if, or when, the act does not contain the element of the use of force.

Aside from these, with the latest modifications of the Constitution, the policy of State control, laicity, democracy, nationalism and revolutionism are accepted as the basic qualifications of the State. And there is not a protective penal provision for the acts of establishing or administering the societies of else purposes. By the modification of these two Articles, this gape is filled, and without any hesitation, it has been defined that this propaganda can be made orally, by act, or by any types of publication. (Register of Proceedings of the Grand Turkish National Assembly, year 1938, volm. 26, s. number 320).

The modification of Articles 141 and 142 as of 13.6.1946, made by Law number 4934, reads as follows :

Article 141 :

"Whoever establishes, organizes, or arranges, or conducts and administers the activities of a society with the purpose of establishing the domination of one social group over the others, or exterminating certain social groups, or overthrowing the economic and social orders established in the State, will be punished. (.....).

If the force has been needed and used to reach the aim, the punishment required will be (.....) heavy imprisonment".

Article 142 :

"Whoever makes propaganda with the purpose of establishing the domination of one social class over the others, or exterminating one social class, or overthrowing the established economic and social orders of the State, will be punished.

If the propaganda requires the usage of force to reach the purpose, the required punishment will be (.....) heavy imprisonment".

The motive of the said modification is as follows :

(...This modification has been made in order to change the Articles which are adopted in 1938, to accord to the needs and the qualifications of the country. And upon the studies of the provisions pertaining to the establishments of the parties, only prohibition is set for the societies and the parties of foreign base, or inspired from those; but not for the societies established for the benefit and interest of certain social class.

Article 141 is not against the parties established upon the class differences. Because, in a democratic regime, parties are not established to overthrow or to dominate each other. This Article, prohibiting the domination of one social class over the others, and the societies established with the purpose of exterminating certain social classes, prevents the party domination and provides for the principle of democracy with the existence of more than one party... (Registres of Proceedings of the Grand Turkish National Assembly, year 1946, volm. 24, s. number 171).

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Articles 141 and 142, as modified by Law number 5435, reads as follows :

Article 141 :

“Whoever establishes, organizes, arranges or conducts the activities of a society with a purpose of establishing domination of a social class over other social classes, or exterminating a social class, or overthrowing the established basic economic and social orders within the country, shall be(.....) punished.

Whoever established, organizes or arranges, or conducts a destructive society with the purpose of overthrowing any of the basic political and legal orders of the State, will be punished as stated in the first paragraph.

The heavy imprisonment required for those who establishes, organizes, arranges or conducts and administers a society, which accepts the use of force and violence and threat as an element to reach to the aims mentioned in the paragraph above, or, although this matter is not clearly mentionned to be done so, if the use of force, violence and threat are seemingly found necessary to obtain the results, may not be less than (.....)”.

Article 142 :

"Whoever in any way, makes the propaganda , in order to establish, within the country, the domination of one social class over the others, or to exterminate one social class, or to overthrow the established economic and social orders of the country, or to demolish the political and legal orders of the State (.....) will be punished.

If the propaganda includes the use of force and violence in order to reach to the purposes mentioned in the paragraph above the punishment given in accordance with this article may not be less then (.....)"....

The first sections of Articles 141 and 142, as in force today, after the modifications made by the Law number 5844, states :

Article 141/1 :

"Whoever attempts to establish or establishes or arranges or conducts and administers the activities of, societies in any way and under any name, or furnishes guidance in these respects with the purpose of establishing domination of a social class over other social classes, or exterminating a certain social class or overthrowing any of the established basic economic and social orders of the country, shall be punished by...".

"Whoever conducts and administers some or all of such societies shall be punished by.....".

Article 142/1 :

"Whoever makes propaganda with the purpose of establishing domination of one social class over others, exterminating any of the social classes, overthrowing any of the established basic economic or social orders of the country or totally exterminating the political or legal orders of the State, shall be punished by.....".

In short, the motive of this modification is :

"...Democracy is an ideal. And the only source this ideal is based upon, is freedom. Several kinds of political systems arose in accordance with the various interpretations of freedom under different philosophies. Protective course of action and self defense is necessary against fascist regimes which had found the opportunity to develop before the Second World War in the countries such

as Germany, Italy, and Japan, and also against the political societies which aims to keep alive this ideal, by completely refusing the ideals of democracy.

There also exists a Marxist democratic concept, aside from the political regime which is called fascist, not denying the freedom and the ideals of democracy, yet conceiving these values rather different from the meaning that they carry. And in order to reach their goal with the Machiavellist belief, considering every sort of measures and possibilities legitimate and permissible.

Actually, Marxism does not only consist of a doctrine but also brings into view a general concept about the human and world. Marxist view does not only have an economic doctrine as it is generally thought, but at the same time consists of a political doctrine.

The essence of the Marxist political doctrine is the arbitrary power of domination, in other words dictatorship. Since freedom and domination cannot exist together, Marxist political view may not in any way be in connection with the actual democracy. On the contrary, it is quite right to accept the Marxist political doctrine as the opposite view of actual democracy (.....).

Therefore, in order to protect the individual and the society against all movements that create domination, restrict freedom and lead to despotism, State should establish sufficient rules in its legal order

Articles 141, 142, and 163 of the Turkish Penal Code, as the way they are applied today, contain the provisions that protect the civil rights of the Turkish citizens, provided by the Constitution and the Turkish Democracy, against the excessive movements, destructive activities and the acts which restrict the freedoms. (.....).

Actually, the need for a law maker to be vigilant of the destructive activities of excess formation, is quite obvious. The acts of invasion that base upon the foreign sources and carry out the purposes of demolishing citizens' rights and the country's independence, show great proficiency in concealing the destructive purposes they follow, stand out facing the Turkish Society with various

garments. Following the procedures and the methods suitable to the circumstances of the present these acts show great skill in protecting themselves against the effects of defense measures. It is for these reasons that the lawmakers should carefully follow these destructive activities which are aimed at the heart of Turkish society and democracy, and therefore the legislation is set up accordingly by designating and confirming new protective measures against their new methods. The modification of our Penal Code's 141st, 142nd and 163rd. Articles are based upon the aforementioned observation. (.....).

In the first paragraph of Article 141, to give guidance for the establishment of communist organizations, to establish, to arrange, to lead or to administer them are regarded as crimes. The purpose is defined as "the establishment of domination of one social class over other social classes". The purpose inclined with another clause of the same article, stating (the organizations with the purpose of partly or completely exterminating one social class or the economic orders within the country) is to inculcate socialist or other sorts of organizations of a forcible manner (.....).

Economic and political order circumspections, because of their complex meaning, are made use of with the purpose of comprehending all kinds of destructive and defeating activities. Therefore, forexample, economic order dispose of all legal pretext with an economic content, as well as being an order in relation with the individual freehold. The industry, agriculture, and commerce orders, set forth by the Law, are also within the circle of economic order. In accordance with this, those without an economic background constitute a legal order. (.....).

The second paragraph of the same article carries out the purpose of inculcating and punishing the defeat movements of anarchism that pursue the restruction of the social structure as a whole replacing it with disorder and disorganization. To make a better explanation of this, it is agreed upon supplementing the second paragraph with the word "total". The extend meaning of the "political and legal order" phrase within this paragraph, is the whole of the political and legal orders that form the State". (Register of

proceedings of the Grand Turkish National Assembly, year 1951, volm. 10, s. no : 264).

The Government's draft of the Law which is based upon the motives mentioned above and which includes the violence as the element of the crime, the final draft of the Law together with the report of Commission of Justice, also including the violence as an element of the crime, are presented to the General Assembly and after the discussions — for and against — the draft is accepted excluding the violence to be an element of the crime.

These motives show that the reason for the aforesaid provisions to be included in our Penal Code is to protect our democratic Constitutional regime against the ideas which are not in accordance with the principles of Democracy. Our Penal Code, with its provisions which had been subject to law suit, prohibit the endeavour of the establishment of the doctrines such as fascism, anarchism and racism which cannot be reconciled with freedom and the democratic State abiding Law.

The systems such as fascism and racism are prohibited and put under the treatment of penalty by the provisions aside from those are subject to this law suit : Through the wordings of the written motives, it is clearly understood that the provisions take place in the first paragraphs of the articles only provide for the prohibition of the endeavours that lead to communism.

It is quite obvious that Communism does not accord to the principles of the Turkish Republic which has the qualities of a national, democratic, laic and social State abiding Law based upon the human rights. Because it is a known fact that Communist Doctrin, as one of its basic qualities, provides for the domination of the proletariat and the extermination of freehold and refuses all basic rights and freedoms that do not encourage its own system. It is also obvious that a system like this is not suitable to the existence of a Constitution.

With these reasonings, aforesaid provisions, prohibiting the attempts to establish or to establish, or to arrange, to conduct and administer the activities of, the societies with the purpose of exter-

minating a social class or overthrowing any of the established social orders within the country, in order to develop a communist regime in our country, or to make propaganda with these purposes, are not contradictory to the Constitution.

Also, referring to section 1, it is not repeatedly mentioned that the prohibition of organizing a society with the purpose of establishing domination of one social class over the others, which, obviously, is in the context of communism, or the tendencies of making propaganda with the purposes that takes place in this Article, is not in contrast to the Constitution.

The plaintiff advances that the terms used in Articles 141 and 142's first paragraphs cannot easily be defined, and are far from the clarity, therefore will lead to incriminate the acts which are not crimes in fact, and have a confusing nature. By excluding "the use of force" which was present in the Government's draft of the Law, as one element of the offense, caused to increase these incidents, and therefore, the aforesaid sections are in contrast to the 33rd Article of the Constitution colliding with the principle of *Nullum Crimen sine Lege*.

As a general outline, the provisions subject to the law suit which are, above, explained in detail, prohibit : 1) to organize a society with the purpose of establishing domination of one social class over other social classes and to make propaganda with this intent; 2) to make propaganda to cause anarchy in the country; 3) to organize a society and to make propaganda with the purpose of helping to develop the Communist doctrine.

In relation with these three tendencies, it is an inaccurate claim to say that the meanings and the context of the aforesaid provisions are not clear. Because, it is not only easy to determine the nature of these tendencies in doctrine, but is also possible to define it as the practice of communism and class domination in other countries.

And, since these tendencies, clearly and definitely incriminated by the provisions of the Law, are confirmed and declined, it cannot be said that that the principle of "nullum crimen sine lege" is defeated.

The fact that the "force" is excluded as an element of the offence does not make the claims, that Articles defeat the principle of "nullum crimen sine lege", correct.

There is no doubt that the domination of one social class over other social classes cannot be the results of free will, but of force. The very same fact is true in anarchism, too.

Speaking of Communism, we should remember that the communist system carries out the purpose of exterminating the social classes other than proletariat, by forcefully demolishing the democratic, social and economic order, replacing it with its own order, and coming into power with a revolution. Aside from this, it is an obvious fact that, even an organization without the intention of revolt and only aiming to come into power through the current legal orders, will depend on the use of force when, and if, intends to develop a communist system.

The activities and the existence of such societies have two phases : Before they obtain the administrative power and afterwards. During the second phase, that is after to obtain the administrative power, in order to establish a communist regime, the use of force is an absolute requirement, even if it will not be found necessary to use force to obtain the power to govern. Those who makes the preparatory works of this purpose by propaganda, or by helping the establishment of such societies are certainly aware of the need to use force in the future activities of developing and establishing their system. It is because of this that in the provisions subject to this law suit, the use of "force" is not separately mentioned as an element of the offence when the preparatory activities of establishing a communist regime is prohibited.

As it will be understood from the explanations above, each one of these tendencies contain the element of force, and the fact that it is separately indicated, does not defeat the principle "Nullum Crimen sine Lege".

Therefore, the provisions subject to lawsuit are not in contrast to Article 33 of the Constitution.

The Plaintiff claims that these Articles are in contrast to the basic principles of the Constitution, and are the expression of fascist point of view, which are suitable to a Fascist State and Society and despite of four different modifications at four different times still have the affect of its original fascist character; helped to establish the single party and the land master regime in our country; and thus reflects a philosophy completely contrast to the democratic point of view and living, liberal and humanist philosophy; should all be examined separately and one by one.

Every regime and State felt the necessity of protecting its own order and system against Marxism which came into practice with the revolution of 1917 and against Fascism which developed shortly after. Some regimes, though essentially very different from each other, agreed upon the defense measures and adopted similar provisions in their Penal Codes.

It is not correct to make it appear as if, with the adoption of Articles 270 and 272 of 1930 Italian Penal Code to 1936 Turkish Penal Code, essential fascist provisions are brought into Turkey.

Because, as explained above, the provisions subject to lawsuit only provides for the prohibition of class domination, anarchy and communism. It is not possible to get the meaning of protection for one party regime, the land masters, and that the fascist views are being defended through these prohibitions.

There remains the fact that with the provisions which take place in the 3rd section of Article 141 and 2nd section of Article 142, which are not asked to be annuled, the principles of fascism are clearly prohibited. This proves that the provisions subject to lawsuit, although adopted from fascist Italy neither protects fascism nor carries out the provisions which appropriate the fascist understandig society.

On the other hand, great changes took place in the economic and political life of Turkey, since that date : multy party system overtook the place of single party system, indirect suffrage changed to be direct suffrage, yet these articles did not in any way hinder these developments or changes. So far that during the modification of these provisions in 1946, enclosed written motives of the modification state that the purpose of the modification is to able the continuity of multy party system.

These shows that the provisions requested to be annuled have not been static, rivalry and an obstacle for the development.

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The claim of the Plaintiff saying that our Constitution is, without any limitation, open to socialism, is another matter to be examined.

Petitioner, in his oral explanation, summarizes his view saying that : "...Our Constitution which limits the right of freehold to the favour of the public; provides for land reform; expresses that all of the private enterprise activities may be placed under State management in accordance with the public interest; provides for each person to earn a salary suitable to human dignity; carries out the matters of planed economy, social health and social security.

A Constitution dealing with these matters is a Constitution open to socialism. It is not necessary to state within the constitution that it is a "socialist" Constitution. On the contrary, it is a Constitution which puts limitations to capitalism and liberalism. What are these limitations? ... Public interest. The Constitution attributes the State for an immediate application of these duties. One of the Articles of the Constitution states that the State will put into action all of these social duties only when she is economically able. Yet this does not mean that (Ah, I am not able therefore I cannot do!) No! She has the duty to establish an economical ability as well. For this she will depend on etatism. She will help to the development of national welfare throughout the State, so that she could put into action more of her duties day by day. Therefore, our Constitution is a Constitution with absolutely no limitation in regard to Socialism" and claims that the provisions requested to be annuled does not allow the spreading of socialist views.

It is not possible to give a definite definition of socialism which is observed to be applied differently in various countries, or easy to indicate a State as a true example of socialist practice. Including the Communist countries, neither of the socialist countries were able to apply the doctrine as a whole.

Even this alone shows that the claim indicating our Constitution as a Socialist Constitution, is not proper.

On the other hand, the motives of the Constitution and a study upon the congressional history of the Constitution supports

this conclusion. The Constitution Commission of the Representatives in the 13th page of the report enclosed to the draft, states that : "...It is with this reason that the provisions relating to the social rights which had been accepted unanimously in the Universal Declaration of Human Rights, have become legal principles taking place in all of the Constitutions as a real victory of human freedom and dignity. (.....)".

Yet, it is necessary to clarify once more that the recognition of social rights does not absolutely mean the acceptance of socialism as some people points out incorrectly. Today, even in the countries which are in no relation to socialism, both the Social State idea and that social rights are recognized. Social rights are the result of humanism and the feeling of justice, not of an economic doctrine. They are the logical and unescapable results of the respect for human dignity and the recognition of individuals as holy beings. Finally, there is no sense in worrying by pointing out that the economic power of the State will not be efficient to cover these needs. Because the 51st Article (the 53rd of the present Constitution) includes the provision to avoid these sorts of worries. (The registres of the proceedings of the Assembly or the Representatives volm. 2, s. no : 35).

In the written motive of the principle of Social State, 2nd Article of our Constitution, it is said that : "The Turkish Republic is a Social State. In other words it is based upon the principles of social justice and work".

"Social State" does not only provide for the individuals the classical rights, but also is aware of the duty to provide for their necessary material needs in order to help them live as human beings. A modern Constitution has to recognize certain social rights of the individuals and the citizens in accordance with the jurisprudence and the political science and opinion of State, as of our time, which accept that an individual deprived of minimum means of living, health, education and especially a home to live in, cannot in the real sense be free.

Today's State (Welfare State) with the duty to provide for a comfortable living for every class of people, will protect the poor and low income, the workman and employee who depend on to the others for their works. (.....).

Finally, it is also necessary to mention that the States which are inconsiderate of social justice, cannot stop the public to be driven to totalitarianism by the extreme left and extreme right movements. (.....).

To have the duty to provide for a comfortable living for every class of people is not only a security, but at the same time is the un-failing guarantee of democracy for the future of public life. Because, the best shield to affect communism, to make it worthless is the establishment of social justice. (Registry of proceedings, volm. 2, s' no : 35).

The Chairman of the Constitution Commission, while presenting the draft to the Representatives, have said that : "...The second nature of our Constitution is that it is not a doctrinal Constitution. Our Constitution is strictly closed to these sorts of extreme tendencies. Through this, we are, once more, able to prove the traditional tendencies of our nation. The third nature of our Constitution (...) is that it contains the essence of democracy and Law abiding State. Finally, as another qualification. It absolutely does not carry any significance showing that our nation has a certain philosophy on these matters, although the welfare and the future of our nation is deeply taken under consideration, and the principles of humanity are fully agreed upon". (The Assembly of Representatives, Register of proceedings, volm. 2, page : 366).

The Speaker of the Constitution Commission, during the discussions of the Constitution's draft as a whole at the Assembly of Representatives, said the following :

".....Friends! In this Constitution, there is absolutely no doctrine. This Constitution contains none of the party programs. It neither contains socialism nor liberalism, nor any other (ism). This Constitution has a (colourless) — yet not uncharacteristic — nature. It makes the application of any party program which accords to the civilization of the 20th Century possible. Etatism could be applied as well as liberalism, in accordance with it. But Communism could never be applied. Socialism could be applied because it respects the human rights and recognizes the principles of democracy, social rights, and the existence of Law abiding State. Together with these it has a social understanding. Also, the liberalism of the 20th Century may be applied as well. Because that, also, re-

cognizes the existence of social rights and respects human dignity, in its real sense; But not the liberalism of the 19th Century when the 8 years old boys were used to clean high chimneys and were left to their death after they became too tired. (.....).

A study of Anglo-Saxon surroundings shows us that even there the most developed social ideas, forexample, belong to the most liberal Beverich. Today's liberalism is socialist. Today, favouring social ideas, is the most important and the first rule of being civilized. To favour social ideas is the real remedy to keep Communism away from the country. Yes, sociality is not a doctrin any more. Even in the most liberal Country such as Switzerland, as mentioned in Professor Kening's book, these characteristics of Swiss democracy stand out : Switzerland is a liberal democracy, a socialist democracy, as well. For Switzerland, too, socialism has become an undeniable qualification of the State...". (volm. 2, page 494).

The same speaker, again during the general discussions, upon the hesitations whether socialism would go as far as totalitarianism, clarified that : "...A Constitution which declares the qualifications of socialism, also contains the principles and the qualifications of democracy, liberalism, and the law abiding State. We said that in order not to misinterpretate the word "social", liberal should be included as a qualification of democracy as well, with the purpose of defining the existence of classic rights. In other words it was found necessary to add term the principles of freedom and human rights.....".

During the discussions of various Articles of the Constitution at the Representatives' Assembly, the speakers of the Commission made certain explanations in accordance with this matter :

During the discussions of Article 4 : "...This Article is established as a provision against those who defend the doctrine of one class domination, in other words, of the proletariat dictatoriat. The elections reflect the sovereignty of people. But, if the administration leans to a regime alike to the dictatoriat of proleteriat after the elections, Turkish Constitution cannot be for it. So, the meaning intended to be given by the word "class" is this, or else as the benefits of the classes, forexample the doctrins and arguments of the socialist parties is not included in the context of the Article. But, this Constitution not only outlaws the parties with the intention of

obtaining the power to the benefit of one social class, also leaves it completely out of its scope". (Assembly of Representatives, Register of Proceedings, volm., 2, page 711).

During the discussion of Article 11 : "...We cannot reach a conclusion if we only consider the half of a judicial decision. The thoughts, and especially the establishments should only be considered as a whole. (Where will the socialism lead to?) Yes, it would lead as far as to communism. If our Commission had only said that the Turkish Republic is a social State, then a danger of this sort might have been true. But, if we say that it is a law abiding State, a democratic State, a liberal State which considers the human rights, this danger may not exist. The principles of democracy and law abiding State designates the limits of the socialist destination. I will completely me social! Under which circumstances? Under the conditions of taking no further steps towards eliminating the classic rights and freedoms and the law of the individuals. (.....). (Representatives' Assembly, Register of Proceedings, volm. 3, page : 46).

During the discussions upon Article 38 : "...Our opinion differ from our friends' who considers the classic liberal economic system as a doctrin : They, as the Commission, do not want a Constitutional provision, that is impartial to all of the economic doctrines and programs that suit to democracy. (.....). We say that : The Constitution of a democratic regime or system should be impartial to all sorts of economic systems, economic plans and programs which are in accordance with the principles of the State. The Constitutions should not specifically declare a particular regime liberal or socialist. In the future, the public vote will decide for the economic system to be applied. (.....).

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Petitioner, in the request, claims that the first paragraphs of Article 141 and 142 are in contrast to Articles 10, 11, 12, 20, 21, 56, 57 and 155 through Article 8.

In Article 12 of the Constitution it is said that everybody is equal under the Laws without any discrimination of language, political opinions, philosophy, religion and race. No one, no family, or class can be privileged by the recognition of an immunity.

It is quite clear, without the need of further explanation, that this Article is not in contrast to Articles asked to be annulled, which prohibits the tendencies of communism and anarchism.

The clauses of the same Article, prohibiting the class domination, are not also, as explained above in the previous paragraphs in contrast to Article 12, on the contrary, provides for the same purpose. For this reason, the plaintiff's claim that this Article is in contrast to Article 12 is incorrect.

Coming to the claim that Articles subject to lawsuit are contrast with Article 20; on this matter the plaintiff says that : "Article 20 of the Constitution gives a full recognition to the expression of all sorts of thoughts and beliefs by speech, writing, drawing, or any other way. This absolute right and freedom can only be limited by a law suitable to the wordings and the context of the Constitution. These limitation can never be to the essence of the basic rights and freedoms .

According to this claim, it is understood that the plaintiff is aware that these rights can be limited in accordance with Article 11, yet comes to the conclusion that the Articles asked to be annulled limits the essence of these rights.

Actually, the Articles of 141 and 142, by prohibiting the establishment of the societies with tendencies of Communism, or the establishment of domination of one social class over others, or the propaganda for this matter or for anarchy, set forth firm restrictions over the right to establish a society and the freedom of thought which take place in Article 20 and 29.

Our Constiuttion, setting out the general principle in regard to the freedom of thought and opinion by Article 20 distinguishes the ways and the procedure of the expression and the publication of these thoughts and opinions, in the Articles following.

As a matter of act, Article 21 of the freedom of education and art, Articles 22-27 of the press and publication, Articles 28-29 of the assembly and demonstration and the establishment of the societies set out the provisions in relation with the ways of practicing these rights mentioned in these Articles. Therefore, the individuals, whenever they want to express their opinions and beliefs will have to obey the limitations set forth by these Articles. Upon the expression of opinions and thoughts, beyond the ways set forth by

these Articles, Article 11 of the Constitution carries forth general restrictions by limiting specific basic rights and freedoms. In this Article, it is said that : "Basic rights and freedoms can only be restricted by Law in accordance with the language and the context of the Constitution. Legislation, even with the reasons such as public interest, general moral, public order, social justice and national security, cannot limit the essence of a right and freedom" As it is observed, the Article accepts the limitation of basic rights and freedoms by Law only in accordance with a clearly open provision of the Constitution, yet these limitations can never be to the essence of the rights even if the reasons are given such as public interest, public order, general moral, social justice or national security.

Since the freedom of press and information is limited by Article 22, and the freedom to establish a society by Article 29, and since Article 11 carries out certain reasons for the restriction of basic rights and freedom, the tendencies prohibited by the Articles which are asked to be annuled are in the general scope of these restrictions.

On the other hand, the aforesaid restrictions do not effect the essence of the rights and freedoms since they do not completely abolish the right of establishing societies, but only limit the practice of this right to a certain degree.

So, the provisions asked to be annuled do not form a contradiction to the Constitution.

Petitioner, reaching the conclusion that the freedom to teach, to lead to research and the freedom of publicity, of the social sciences are being prohibited, puts forward the claim that Article 142 is in Contrast to Article 21 of the Constitution and that this freedom cannot even be limited to a certain degree.

As it was mentioned, the provisions of the aforesaid Articles do not restrict the scholastic researchs and studies upon these subjects. As long as they do not form the characteristics of a sort of propaganda the study, research, publicity, teaching and the lectures of all sorts of social sciences, Communism, and Anarchy for that matter, are not in the content of this Article. Without any doubt, these sciences have certain ways of teaching and learning, suitable to their nature and specific methods of research and study, as well. To obey these ways and methods, in other words to abide

to the qualifications of "science" and the conditions set out by Article 21, the studies of science and art are free.

Article 142/1, which is asked to be annuled, does not prohibit these scientific tendencies, but those with the characteristics of making a propaganda. The job to designate the difference belongs to the competent judge of the Case.

Article 142/1 not restricting the freedom of science and art, therefore not being in contrast to Article 21 of the Constitution, makes the petitioners' claim forwarded to this matter incorrect.

Petitioner also claims that the Articles asked to be annuled are in contrast to Articles 56 and 57 of the Constitution. And on this matter the defense of their point of views may be summarized as: "These Articles abolishes the bases of political opinions of social nature and the freedom of organizingly gathering around this opinion. Because they prohibit the establishment of organizations with the purpose of re-arranging or changing the economic and social order of the society in accordance with the essence of "Labour" or to make propagande on this matter. Naturally, the possibilities will be searched to arrange the relationships of different social classes with separate social and political view and, in accordance with the scientific nature of the political parties, one or more political parties will be established to the best interest of those who live with their "Work" and also the propaganda will be made in order to establish a political, social, and economic order which serve best to their interest. Yet, Articles 141/1 and 142/1 prohibit both the establishment of these parties, and the propaganda for this matter. Therefore, these Articles are in contrast to the Article 56 and 57 of the Constitution".

As mentioned before, Articles asked to be annuled prohibit the establishment of societies with the purpose of class domination and Communism, and together with them the propaganda for anarchy. In this respect, the establishment of societies (including the political parties) and the propaganda with the purposes aside from those, are not in the content of these prohibitions.

On the other hand, Article 57 of the Constitution states that the reglement, programme, and the activities of the political parties have to be in accordance with the basic provisions of the principles of democratic and laic Republic, based upon the human rights and

freedoms and the basic provisions of the integrity of the State together with her nation and country. And the parties which do not obey to the said principles will be closed permanently.

Since the political party which attempts to establish a class domination or to bring the Communist regime, makes propaganda for this or for anarchy, are to be closed permanently — in accordance with Article 57 of the Constitution — Article 141 and 142 which prohibit and therefore punish these tendencies are not in contrast to the Constitution. On the contrary, they are not only in accordance with the provisions of the Constitution, but also, in some respect, form the sanctions of these provisions.

Hence, according to these reasons petitioners' claim on this matter is incorrect.

(.....)

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Conclusion

In the first, paragraph of the Article 141 of the Penal Code whoever attempts to establish or establishes or gives assistance or arranges and organizes the activities of a society, of any sort or name, with the purpose of : a) establishing domination of one social class over other socials classes,

b) exterminating one social class,

c) overthrowing any of the established basic economic and social orders of the Country.

In the first paragraph of Article 142 of the same Code whoever makes propaganda, in any way :

e) on the matters listed above as (a), (b), (c),

d) to completely exterminate the political and legal orders of the State,

are incriminated.

On the 29th day of June, 1965 the decision is given that :

1 — Provisions mentioned above as (a) and (d), which are provided in the Articles asked to be annuled, are not in contrast to the Constitution, since the class domination is clearly refused and

prohibited by the Constitution and the latter having the nature to lead to anarchy.

2 — The prohibitions, as mentioned in (b), (c), and (ç), of the establishment or the propaganda of, the societies which accepts Communism does not include the establishment and the propaganda of, the societies which carry out the purposes in accordance with the Constitution or to develop socialism within the measures set by our Constitution.

On the date of June 29, 1965 the decision is given : unanimously on the paragraphs (a) and (d); and with the majority, having the dissenting votes of Şemsettin Akçaoğlu, Celalettin Kuralmen, Sait Koçak, and Muhittin Gürün, on paragraph (b); also with the majority, having the dissenting votes of those mentioned above together with the dissenting vote of İbrahim Senil on paragraph (c)¹.

Chairman Lütfi Akadlı	Vice-Chairman Rifat Göksu	Member Cemalettin Köseoğlu
Member Asım Erkan	Member Şemsettin Akçoğlu	Member İbrahim Senil
Member A. Şeref Hocaoğlu	Member Salim Başol	Member Muhittin Yörük
Member Lütfi Ömerbaş	Member Ekrem Tüzemen (due to his death on 5/9/1966 his signature cannot be obtained)	

Translated by
Dr. Duygun YARSUVAT

1) The Dissenting opinions are omitted.