

EVALUATION OF LEGISLATION REGULATING AND LIMITING THE FREEDOM OF THE PRESS (*)

by

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I

INTRODUCTORY REMARKS

1. — Before entering the main subject of this paper, which is the appraisal of laws regulating and limiting the freedom of the press, we feel the need for making some introductory remarks even though this may broaden our approach. Since an appraisal always necessitates a comparison, it is obvious that it would be impossible for us to appraise these laws without establishing some standards required for our purpose.

The Notions of Freedom of the Press, of Thought and of Convictions :

2. — In general freedom of the press can very well be described as the freedom of expressing news, thoughts, ideas, and convictions without interference and their propagation by publication¹.

Therefore, freedom of the press comprises the freedom to gather, interpret and criticize news, ideas, thoughts and convictions.

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1) Sulhi Dönmezer, The Press Law Vol. I, 2nd Edition, Istanbul 1964, P. 12.

tions, to reproduce them in print and to publish and distribute these printed materials. The lack of one of these rights can damage the freedom of the press. We see from this description that freedom of the press does not concern only the rights and freedom of publishers and writers, but also concerns those of readers, listeners and spectators.

This description makes clear that freedom of speech and freedom of expressing thoughts and convictions have precedence on freedom of the press. At any rate if the right of expressing ideas, thoughts and convictions with words did not exist, then freedom of the press would also cease to exist. In other words, we might say that freedom of the press is the actual means of getting alive the freedom of expressing ideas, thoughts and convictions. Of course, when we say freedom of thoughts and convictions, we understand today the freedom of publishing ideas and convictions through various ways and means. Freedom of thought and convictions comprises the publishing of these and the liberty for everyone to form and establish his own ideas and convictions. Essentially the legal order is not concerned with ideas and convictions unless they are made public. Freedom of thought and convictions implies that "no one can be forced to disclose his thoughts and convictions".

Freedom of thought and convictions becomes a question of the freedom of the press the moment the ideas and convictions are put into printed form and their numbers increased. Therefore, we might very well say that freedom of thought is given a practical value by freedom of the press.

Freedom of the Press as a Social Right :

3. — Let us make clear that modern Press Law has proposed to establish freedom of the press as a kind of social right. This has important and serious legal consequences. In fact, in modern times, it has been established that precautions taken in order to obtain a passive attitude in the executive towards the Institution of the Press were not enough for the promotion of its existence and

2) Sulhi Dönmezer, *The Limits of the Freedom of Opinions and Thought* (Review of the Istanbul Law Faculty Vol. XXIX, No. 3).

for the performance of its functions. Economic conditions, in some cases the liability to pay taxes, difficulties in procuring material, such as paper and machinery, might put the press under a bondage in spite of all available legal guarantees because certain realities take their roots in the chaos of economic life; freedom of the press might very well become a freedom in the narrower sense of the word, from which only a few people with a certain amount of capital and influence might profit. Therefore, in general, in accordance with the prevailing system of mixed economy, Governments being indifferent to the vital requirements of the press, would not necessarily harm its legal existence. However, in this case, it would cease to be a freedom from which it might be possible to profit. That is why, in modern Press Law, freedom of the press should be accepted as a sort of social right.

This concept of its being a right of this sort enables the press to ask the government for its assistance in providing paper, ink machinery, various technical equipment, etc., and also to request that the laws be so regulated as to permit the press to use in the easiest way all the facilities which are in the hands of the State. Freedom of the press, being essentially a right, results in the fact that, in order to ensure that as many citizens as possible make use of this freedom, governments have to undertake definite efforts and that a citizen has the right to request from the Government more tangible activities in this respect³.

Sedition and Freedom of the Press :

4. — The above mentioned connection between freedom of the press and freedom of expressing thoughts and convictions necessitates an analysis of the seditious crimes from the point of view of the freedom of the press⁴. When propagation of some ideas,

3) Sulhi Dönmezer, The Press Freedom in our new Constitution (Review of the Istanbul Law Faculty Vol. XVIII No. 3-4).

4) On Seditious Crimes refer to: Fernand Terron-Luelen Solal, *Le Droit de l'Information*, Paris 1951, P. 310. Zechariah Chafee Jr., *Government and Mass Communications*, 1949, P. 395; Dönmezer - Erman, *The Theoretical and Practical Penal Law*, Vol. I, 3rd Edition, 1965, P. 383; Sulhi Dönmezer, *Thoughts, Art and Crime* (Newspaper Milliyet).

thoughts and convictions are subjected to a penalty, this is called sedition. Seditious crimes have a long history. In fact, because the propagation of some ideas; thoughts and convictions are accepted as being against the public interests or contrary to social life and morals, the publishing of these, through the press or other means of communication, is regarded as a criminal offence. In periods during which there has been a censoring of the press, there was no question of such offences. As was stated by Beaumarchais in the middle of the 19th Century, "The press was free provided it did not deal with public authority or with religion and politics".

From the second half of the 19th Century, great efforts were exerted especially in France and England to give the press a freedom of thought in the real sense of the word and in that respect to annulate seditious crimes. These efforts had an influence on other European countries. But in spite of all these efforts, no country including these two, could ever eliminate the concept of sedition entirely⁵.

Nowadays this sort of crimes in various countries can be grouped into three :

1) *Political Sedition* : (Dishonoring the nation, the constitutional and legal authority, or disrespect towards legislative powers and foreign nations).

2) *Anti-social Sedition* . (The praising of anarchy, of criminal action or of evil).

3) *Seditious Offences Against Religion, Faith and Morals* : (Obscenity, violation of religious traditions and Diffamation of religion⁶).

Offences called seditious libel which are encountered in Anglo-American countries are one of the most remarkable examples of the crimes of sedition⁷.

5) Fernand Terrou-Lucien Solal, op. cit.

6) Fernand Terrou-Lucien Solal, op. cit.

7) For instance any provocation in order to create hatred and contempt against the King, his successor, against the Royal Constitution, the Parliament or Legislation is punishable as per provisions of the Law of 1880, article 162.

Criteria in Defining Seditious :

5. — What are the criteria applied to whether the expression of some ideas and convictions might or might not be considered as an offence in Comparative Law, and what are the limits?

Let us make it clear that from the above we understand these criteria differ according to the political regimes of countries, according to convictions and ideologies, or according to certain interest groups having a preponderant effect on the case.

For instance in communist countries, the criteria is very strict. Only ideas which teach and praise Marxism are considered as acceptable; no freedom and no possibilities for their being propagated are granted to other ideas and convictions.

On the other hand, even in democratic countries criteria differ from one country to the other. As an example, let us consider the criteria applied in Italy and the United States⁸ :

Article 21 of the Italian Constitution is almost identical with Article 20 of our own Constitution. The Italian Constitutional Court in decision (dated July 8, 1957), on whether or not article 654 of the Penal code might be considered as violating the Constitution, states that "The Constitution, while establishing the right to express freely ideas and convictions, cannot be construed as having accepted activities which are against public order and peace and that these activities are not in accordance with the essential notion and its practice stipulated in Article 21". Therefore the High Court has decided that, in case there is danger to public security and order, the freedom of expressing ideas and convictions may be restricted.

According to this concept, an abstract probability of public disorder, or a concrete possibility in this respect, might result in the teaching, suggestion or propagation of some ideas or convictions might be considered as an offence. Thus, the Italian Constitu-

8) On these subjects refer to **Sulhi Dönmezer**, Limits of the Freedom of Thoughts and Opinion (Istanbul Law Faculty Review, Vol. XXIX, No. 3).

9) Article 645 stipulates: "Any seditious action, in a public place or a place open to the public, or engaging in activities that would create commotion, unless the action cannot be considered as a graver offence, is punishable by imprisonment of up to one year."

tional Court has decided that, if the expression and propagation of some ideas, thoughts or convictions constitute a kind of provocation for the upsetting of public institutions and if this provocation results in the damaging of public order and peace, then the propagation and the teaching of these ideas might be accepted as an offence and that would not be considered as contrary to the Constitution¹⁰.

The criterion applied by the American Supreme Court is also not very different from the above. In fact, although U.S. Constitution establishes the free expression of ideas and convictions and stipulates that Congress will pass "No law restricting the freedom of speech and press", following the First and Second World Wars, when Laws were passed in order to protect the State against internal disorder, the Supreme Court considered the First Amendment and the way it should be interpreted. The Supreme Court, with its famous decision of 1919 (*Schenk vs. United States*) applied a criteria which is valid even today. In order to determine whether or not a law restricting the freedom of speech and convictions is a violation of the First Amendment, it is necessary to examine the words and sentences, the conditions in which they were used, and whether by their qualities they represent *a clear and present* danger to Society; in case there is such a danger, then the law can prohibit such manifestation of basic evil through the rights granted to the Congress.

When in 1948, the Smith Act was extended to cover Communist activities, the Supreme Court in deciding whether or not this law was against the Constitution did not see anything unconstitutional in prosecuting the Communist Party leaders on the basis of this law. In fact, the Court (*Dennis vs. United States*) broadened and emphasized the above mentioned decision and recognized that, even if a remote possibility of a danger to society existed, it would constitute a sufficient reason for the suppression of the idea. With another decision (*Sates vs. United States*) although the Smith

10) On this subject refer to Annarosa Pizzi, Problems involved in the Protection of Fundamental Human Rights and Liberties in the Practice of the Italian Constitutional Court (Journal of the International Commission of Jurists, 1963 Vol. IV, No. 2, P. 294).

Act was confirmed as being in compliance with the Constitution, a discernment was made in terms of the necessity to discriminate between defence of an abstract doctrine and efforts exerted towards illegal action. However, as was stated by Justice Holmes, we might say that the difference is very slight and every idea essentially possesses a provocative and inciting factor.

The Notions of Regulating and Restricting Freedom of the Press :

6. — In social life, in order to enable as many people as possible to benefit from rights and freedoms granted, it is imperative that a system of rules or regulations be established in this respect. Every rule and regulation necessitates the setting up of some restrictions, and due consideration should be shown in this connection.

Therefore, as is the case in all other freedoms, we deem it necessary that a distinction be made in respect to freedoms concerning the press and the expression of ideas and convictions, i.e., "Regulating the Freedom of the Press", and "Restricting the Freedom of the Press".

Both the notions of "Regulating" and "Restricting" contain some interdictions. But, those contained in regulating freedom of the press, are those which are indispensable for everybody to enjoy this freedom. They aim at eliminating a probable abuse of the freedom. Restrictions are those interdictions which do not offset a probable abuse.

These two, (restrictions for the sake of regulating; and (restrictions for the sake of restricting) can also be defined as (necessary restrictions) and (restrictions damaging to freedom).

In view of the above we might say that the rights which form freedom of the press are naturally subject to a system of regulations but such restrictions can never be those which are harmful to freedom¹¹.

The main topic of our paper being the evaluation of Turkish legislation in this respect, we thought it feasible to give briefly an account of the rights forming the freedom of the press, and

11) Refer to Sulhi Dönmezer, The Press Law, 2nd Edition P. 69.

to show which are the standardized restrictions denoting a system of regulation¹².

Freedom of the press is composed of the rights mentioned herebelow :

- 1 *The right of knowing, reaching and gathering news,*
- 2 *The right of interpreting, analyzing and criticising of news, ideas and opinions,*
- 3 *The right to print news, ideas and convictions and the distribution of these printed materials.*

Every right denotes a connection between two persons. As expressed in the afore-mentioned paragraphs in freedom of the press the active subject is those persons in whose favor this is guaranteed, and the passive subject is the State. The rights created by the freedom of the press being under the guarantee of the Constitution are in reality rights concerning all citizens¹³.

Having thus summarized freedom of the press, to prevent abuse of the rights which make this freedom, setting up some regulations enforced by penal sanctions is necessary and this should be considered as the regulation of that freedom. Of course, the above mentioned restrictions play an important part in freedom of the press.

These are some interdictions which are accepted as regulating restrictions by commun law of the European community :

- a) *Protection of the State against internal disorder and external attacks :*
 1. Publishing of news that would endanger national security,
 2. Revealing military secrets,
 3. Revealing State secrets,
 4. Disclosing discussions in secret parliamentary meetings or other official meetings,

12) For further details refer to Sulhi Dönmezer, *The Press Law*, second edit. Istanbul 1964, P. 72.

13) See: Bourquin, *La Liberté de la Presse*, P. 155; Jean Koelliker, *Liberté et Statut de la Presse Moderne*, P. 39; Terrou-Solal, (afore-mentioned work P. 44).

5. Publication of news that would handicap the orderly course of justice,
6. Deliberate publication of false news endangering public order,
7. Publication advocating rebellion and revolutions against legitimate public authority,
8. Discrediting Legislation and inciting disobedience,
9. Insults or offence to the executive body or the chief of state,
10. Insulting the nation or foreign nations,
11. The praising of anarchism, praise of criminal action and criminals, provocation to crime,
12. Insulting religion,
13. War mongering propaganda and recism, provocations that would create commotion among social classes,
14. Propaganda against birth increase,
15. Provocation of soldiers to disobedience,
16. Offences and insults directed towards the representatives of public authority.

b) Protection of Public Morals :

1. Offences against public decency and chastity; pornographic publications,
2. Publication of news about suicides and sexual relations with close relatives (incestus),
3. Publications concerning family life and private lives,
4. Publications which are contrary to consideration of public health and hygiene,
5. Publications that would damage children's and young people's morals and that would lead them to delinquency.

c) Protecting honor and dignity of persons :

1. Libels directed to individuals,
2. Libels directed to groups,
3. Offences against the memory of the dead,
4. Disclosing matters concerning private and family life.

d) *Protecting the Orderly conduct of Justice :*

1. Disclosure of secret sessions, publication of documents pertaining to preliminary investigations,
2. Publications that would influence the court or the judge.

Sanctions Against the Freedom of the Press :

7. — In order to preserve the existence of freedom of press it is imperative that sanctions be applied against the abuse of rights pertaining to this freedom. In fact the use of every right presupposes a responsibility. Comparative and common law have recognised two major sanctions in this respect :

1. Responsibility resulting from press offences,
2. The right to reply and correct.

8. — *Responsibilities :* In democratic countries there are two attitudes in respect to responsibilities resulting from press offences; 1) To apply the general stipulations of the Penal Code and of the Criminal Code of Procedure; or 2) to introduce special laws and regulations for press offences¹⁴. In Europe the second attitude generally prevails. In both cases the right of "Anonymity" is recognized.

9. — *The Right to Reply and Correct :* In modern law, the right to reply and correct is recognized as a necessary institution for the protection of the individual. However, this right, if not limited by strict conditions could create results that would damage the very foundation of freedom of the press. That is why, legal systems have accepted that these rights be used in such a way that no damage would be done to the freedom of publishing or to the protection of the journalist's property and that regulations be introduced in this respect¹⁵.

14) For all these instances refer to: **Sulhi Dönmezer**, *Press Offences*, Istanbul 1945, P. 101; **Sahir Erman-Çetin Özek**, *Detailed Press Law and Fertinent Regulations*, 2nd Edition, Istanbul 1954 P. 57.

15) For the Right to Reply refer to our following works: *The Right to Reply* (Review of the Istanbul Law Faculty, Year 1941); *Press Offences*; Istanbul 1946, P. 129. *La Nouvelle Loi sur la Presse*, (Annales de la Faculté de Droit d'Istanbul No. 2 year 1952); *The Right to Reply in the New Press Law in light of Comparative Law* (Review of the

10. — *New elements in the Freedom of the Press* : It is our understanding today that new elements have been added to the freedom of the press and that the first of these is that the executive power, by taking some positive actions, should exert some efforts to meet the needs and requirements of the press. Again, as a result of modern conceptions the public authority should give equal treatment to all members of the press. It is an accepted fact that laws and regulations allowing discrimination because of political convictions or other factors are damaging to the freedom of the press, and constitute a restriction on it.

11. — *Economic Restrictions* : In order to declare that the freedom of the press really exists, it is imperative that as many citizens as possible be in a position to use freely and in fact the press media for publishing their own ideas and opinions. Therefore, it is necessary that some economic factors having an actual influence on the press be eliminated as much as possible and that some legal precautions be taken in this respect to preserve the existence of press freedom, such as taking measures to prevent the trend towards monopoly, eliminating illegitimate economic pressures, applying a tax policy that would enable the survival of new publications, etc.

II

TURKISH LEGISLATION

(THE TURKISH CONSTITUTION IN RESPECT TO FREEDOMS OF IDEAS, THOUGHTS AND CONVICTIONS AND FREEDOM OF THE PRESS)

We will try to evaluate Turkish legislation governing the freedom of the press on the basis of the standards already mentioned

Istanbul Law Faculty, Vol. XIX No. 12) *Le Droit de Réponse d'après la Loi turque sur la Presse et les Principes du Droit Comparé* (Annales de la Faculté de Droit d'Istanbul, 1955 No. 4-5). For a very thorough study on the Right to Reply refer to **Zechariach Chafee Jr.**, *Government and Mass Communications* Vol. I P. 131. On this subject see also **Ermann-Özek** afore-mentioned work.

above. We will take up the subject first of all in light of the Constitution.

Press Freedom in our Constitution :

12. — We can sum up as follows the principles governing the freedom of the press under our new constitution :

1) The new concept of freedom of the press in the Constitution aims at protecting press freedom against political groups forming a majority in the parliament. Because the 1924 Constitution did not bring enough guarantees to the freedom of the press, and because of past experiences, even provisions that might be considered as details were included in the new Constitution. Following past experiences and trends in this respect in foreign countries, six articles pertaining to the freedom of the press were incorporated in the Constitution (Articles 22-27). Thus among countries of the world, our Constitution contains some of the most detailed provisions in this regard, almost twice as long as the Greek Constitution which was considered as having the one of the most extensive sections pertaining to freedom of the press.

2) The Constitution recognized freedom of the press as a social right. Article 22, Paragraph 2, clearly stipulates that "the State takes measures necessary to promote freedom of the press and that of information". It is obvious that the State has the responsibility to undertake necessary means for the promotion of freedom of the press, and information. Again in the article 23 paragraph 3, it is stated that "newspapers and periodicals can profit from all the media and facilities in the hands of the State or in those of Economic State Enterprises or organizations allied to them on an equal basis". Here, we see that the principle of equality is essential.

3) The new Constitution also incorporates in itself all practical regulations and guarantees in order to promote freedom of the press. These principles and guarantees can be summed up as follows :

1° Except in very exceptional cases which are clearly stated, freedom of the press and that of information cannot be restricted, even by law.

2° Except in clearly mentioned exceptional cases, no prohibition to publication can ever be established.

3° In principle no newspaper or periodical can be taken out of circulation.

4° Every Turkish citizen is free to edit a newspaper or periodical. No requirement of special license or permission can never be established in that respect by law.

5° The issuing and publishing of newspapers or periodicals are regulated by law. But this law can never be of such a nature as to handicap free publication of thoughts and opinions, and it can not contain political, economic, financial, or technical limitations in this respect.

6° Printing offices, their annexes and printing machines cannot be confiscated or prevented from being operated even if they are considered as accessory to crimes.

7° The right to reply and to correct can only be used in cases when personal honor and dignity is concerned and in case of false statements and it is regulated by law. Only a judge can decide whether the reply or correction should be published.

4) The Constitution, taking into consideration that an unscrupulous press could not retain its freedom, has stipulated as follows :

1° Freedom of the press can only be restricted by law in order to protect national security and public morals, in cases when an offense is directed against the honor and rights of individuals, in case of provocations of crimes, and in order to ensure the judiciary to work in accordance with the spirit of justice.

2° Only in these cases and within the limits shown by law can a judge order the prohibition of a specific publication.

3° No law can eliminate the right to reply and to correct.

4° The right to proof in libel cases has been granted as a Constitutional right.

In terms of Press freedom, we can evaluate our Constitution as follows : Our new Constitution, on the basis of past experiences, has created a system with a full guarantee in respect to press freedom and has thus eliminated the legal crisis prevailing in our country up to its adoption. That is why we are personally proud

to be one of the participants in the preliminary work of preparation of the prescriptions concerning freedom of the press in the new constitution as a chairman of the sub committee.

Freedom of Opinion and Thought in Our Constitution and Seditious Crimes in our Legislation in General :

13. — We have already referred to the very close connections between the freedom of expressing opinions and thoughts and the freedom of the press in parts 2, 4 and 5 of this paper, have explained what the situation is in respect to Comparative Law. While appraising legislation in Turkey, it is again necessary to refer to the pertinent stipulations of our Constitution.

Article 20 of our Constitution explains the freedom of opinion and thought as follows : *"Everyone is entitled to the freedom of opinion and thought; he can freely express or publish his opinions and thoughts, orally or in written form or through pictures, individually or as member of a group. No one can be forced to disclose his thoughts or opinions"*. This is the essential provision of the Constitution in connection with the expression of opinions and thoughts. Apart from this, Article 21 stipulates the right to propagate science and art.

Whether the freedom of opinion and thought, as provided in Article 20 of our Constitution is absolute or not and, should every law dealing with a seditious offence be considered as contrary to the Constitution? This subject has been brought to the Constitutional Court, during trials concerning the following codes : Law No. 38 concerning "Action Damaging to Constitutional Order and Harmful to Public Security and Peace"; Article 31 of the Press Law No. 5680 pertinent to foreign publications, and Articles 312 and 142 of the Turkish Penal Code¹⁶. The High Court did not find these

16) See Decision No. 3 1963/161 K 1963/83 dated April 8, 1963 stating that the Law dated March 5, 1962 No. 38 Article I Paragraph B, concerning some actions threatening constitutional order, national safety and public peace is not contrary to the Constitution. (For an analysis of this subject see Sulhi Dönmezer, Limits of the Freedom of Thought and Opinion, Limitations affecting the Spirit of Freedom (Review of the Istanbul Law Faculty, Vol. XXIX P. 3); Sulhi Dönmezer, Freedom

laws contrary to the Constitution and thus expressed its views concerning the meaning of Article 20. Here is a summary of the reasoning made in occasion of the trial on the Law No. 38 :

1^o When freedom of opinion and thought is expressed through various means such as in words, in writing or in pictures, they can be restricted in order to preserve the existence and continuation of society. Because the disclosure of opinions and ideas harmful to social life could damage the security of the State, in order to reconcile this freedom with societal common living and democratic order, it is necessary to create a balance.

2^o It is imperative that Article 20 should be considered and understood in context with other stipulations of the Constitution. The Constitution, because it is based on a realistic idea of liberty, freedom of thought is promoted in order to express ideas and convictions in conformity with an orderly State and democratic concepts. The disclosure of ideas that would damage laicism and democratic order and that which would divide the State and the entity of the nation could not be construed as being part of the freedom of thought.

3^o In fact, the Declaration of Fundamental Human Rights has confirmed and established that no stipulation in the declaration should be interpreted in such a way as to grant to a State, a group or individual, the right to engage in activities that would result in the annihilation of rights mentioned therein. Therefore, freedom of thought and opinion can be restricted by law, as per Article 11 of the Constitution, "in compliance with the wording and spirit of the Constitution".

of Thought and Opinion in our Constitution (Newspaper Milliyet, October 1, 1963). Decision No. 3. 1963/170, K. 1963/178 dated November 4, 1963, about the article 31 of the Press Law not being contrary to the Constitution. (For an analysis on this subject see **Sulhi Dönmezer**, Foreign Publications and the Turkish Constitution, (Review of the Istanbul Law Faculty Vol. XXX No. 1-2), Decision No. 3. 1963/193 K/1964/9 dated January 29, 1964, about the Article 312 of the Penal Code not being contrary to the Constitution. (See R. G. No. 11725, June 11, 1964). The decision about Article 142 not being against the Constitution has not been published yet.

The Court has expressed its views on the occasion of a suit to prove that Article 312 of the Penal Code is against Articles 11, 19, 20 and 21 of the Constitution : It is stated that the elements of crime in Article 312, i.e. (to provoke hatred and enmity in different social classes in a way dangerous to public welfare) are clearly stipulated in The same Article of the Turkish Penal Code. The claim that this article violates fundamental rights that are under the guarantee of the Constitution is entirely out of place. To allow in a dangerous way the provocation of hatred and enmity between different social classes for the safety of the general public would be to demand the disruption of peace and harmony among the people. Such an idea can never be accepted. Those preparing the Constitution, on the contrary, were trying to prevent such a situation. As a matter of fact, the preface of the constitution clearly stipulates this inclination.

Our own evaluation of Article 20 of the Constitution is the following : In our opinion, the text of Article 20, should be understood in this manner : There can be no legislation whatsoever that could give the right to control before publication, free expression of ideas and convictions orally, in a written way, through pictures, or through some other means of communication. But there can be provisions that would control the time and place of speech. These by no means restrict freedom. They are only regulating it. The law can restrict the freedom of some distinct thought and opinion, if found to be provocative and dangerous to public peace and order. We are in accordance with the opinions that stipulate that Article 20 should be considered in the full context of the Constitution. However, limitations brought up by a law should be such as not to interfere with the very foundation and spirit of freedom of opinions and ideas and should also be based, as per Article 11 of the Constitution, on such causes as public morals, public order, social justice, or national security. According to Article 11, this restriction may be a limitation of form or a limitation of content. It is our opinion that limitation on propaganda and teaching of an idea should not necessarily require an invitation to open and definite action. In any event most of ideas comprise a degree of action.

14. — In this phase of our analysis, let us underline and carefully point out two considerations :

1° Article 20 of the Turkish Constitution is not absolute. In compliance with the above mentioned principles, it tends to provide for some restrictions concerning the disclosing of opinions and thoughts through the press or through some other media. That is to say, it can recognize seditious offences. But this does not mean that it is absolutely necessary to introduce seditious crimes, or that this is something to be recommended. On the contrary, unless there is absolute necessity, no seditious offences should be introduced as they are something to be avoided as much as possible. In fact, such seditious crimes, being essentially vague and prone to create hesitations, can be a real danger to the promotion of science and art, thus resulting in a lack of interests and activity in society.

2° We can not deny that the decisions of interest groups having a preponderant effect and place in society and the social system will play a big role in the application of limitations stipulated by Article 11 of the Constitution. Therefore, it is never easy to decide whether a crime of opinion has ever really evolved. As a matter of fact, the leaders of some ideologies, while they are in opposition or in disgrace, are always defending freedom of thought whereas, when they come to power through a revolution, the first thing they do is to introduce the concept of sedition without delay, in order to protect their own political interests.

Having thus evaluated the Constitution in the light of freedoms of thought and of the press, we can have a look at the legislation governing the rights comprising freedom of the press.

III

TURKISH LEGISLATION

(RIGHTS COMPRISING THE FREEDOM OF THE PRESS AND PROVISIONS IN OUR LEGISLATION)

Difficulties of Reviewing such a Large Subject in a Conference of this Type :

15. — Stipulations concerning the expression of thoughts and opinions are dispersed among various codes. Our legislative system

and essentially our Press Law, contrary to, for example, the French Press Law of 1881, have regulated the administration of the publication of periodicals and responsibilities pertinent to press offences and have created very limited number of press offences. Therefore, in order to perform our duty it is necessary that we make a search among various codes.

Of course, it will not be possible for us to review entirely all the legislation pertinent to freedom of the press. Therefore, we only try to give as complete an idea as possible in this respect, and we will take up our own legislation more fully as compared to Comparative Law¹⁷.

Pertinent legislation :

16. — 1) Legislation concerning the right to know, to gather and to disseminate the news :

In Turkey, laws pertaining to the gathering of news are not very different from those of other democratic countries. Article 30 of the Press Law, if applied within the spirit and the aim of the legislator, can not damage the right to gather news. At any rate, Comparative law permits such restrictions. Limitations set up in order to secure the impartiality and superiority of the judiciary is accepted by the Agreement for Protection of Fundamental Human Rights and Paragraph I, Article 10, of its Supplemental Protocol¹⁸.

The right of gathering news has been strengthened by Article 481 of the Penal Code concerning crimes of libel. In fact, this

17) For further details in this subject see **Sulhi Dönmezer**, The Press Law, P. 172.

18) The Agreement for the Protection of Human Rights and Fundamental Liberties in Europe, Article 6, Para. 2 stipulates that the judgment is public. However, in democratic societies, sometimes the social order, national safety, public morals or the protection of children's interest or the interest of the two parties make it imperative that in exceptional cases publicity might be wholly or partially limited in regard to the public or the members of the press.

article has been so amended in November 29, 1960 that the right to demand proof was able to function properly¹⁹.

Again with Article 34 of the Constitution, the right to demand proof has become a right granted by the Constitution. It has been claimed that Article 31 of the Press Law concerning the knowledge and gathering of news was against Article 17, 20 and 21 of the Constitution. But the Constitutional Court, in its decision No: E. 1963/170, K. 1963/173, of July 5, 1963, decided that this was not so. In our opinion, the decision was right, and we think that the article is a regulating restriction²⁰.

Here is a summary of the principal reasoning of the Court : there is no stipulation whatsoever in the Constitution pertaining to importation of foreign publications. In fact, Article 22 is concerned only with local publications. The preparatory work for the Constitution has shown that the legislator did not intend Article 31 to be contrary to the Constitution. Even when laying down restrictions concerning foreign publications, the legislator were not bound by Article 11 of the Constitution, because there was no provision in this respect concerning fundamental right and duties, as stipulated in the introductory reasoning of Article 31, destructive publications reaching Turkey might be prevented. At the same time no arbitrary action can be taken in the application of the article.

We have already expressed our own views in an article published previously. In our opinion Article 31 is not contrary to the

19) On the subject of the Right to Demand Proof refer to **Sulhi Dönmezer**, a Comparative Study of the Proof of Material Truth in Libel (Review of the Istanbul Law Faculty, Vol. VI No. 1-2). **Sulhi Dönmezer**, The Right to Demand Proof in Press Offences (Review of the Izmir Bar); the Right to Demand Proof and Law No. 6834 (works published in the honor of Ord. Prof. Samim Gönensay, P. 151); several articles published in newspapers: Strengthening the Right to Demand Proof (Yeni Sabah No. 5415) Right to Demand Proff in Press Offences in view of the New Law (Yeni Sabah). For the new situation on the subject of the Right to Demand Proof refer to **Sulhi Dönmezer**, Remarks on the new Article No. 481 (Review of the Istanbul Law Faculty, Vol. XXIX No. 1-2, year 1963) **Sulhi Dönmezer**, Le Droit de la preuve de la verité en droit turc dans le cadre du droit comparé (Revue de Science Criminelle et de Droit pénal comparé, Paris 1965, No. 2 P. 373).

20) See article mentioned in Note 16.

Constitution. In fact, the same stipulation exists in the laws of other foreign countries, namely in France. Since it is not possible to take action against the publisher, or to punish him in Turkey, it is better to take extra precaution in order to prevent the offensive material from entering the country. However, great care should be taken by the Council of Ministers, to avoid abuse of this authority, and not to take decisions that would be hard to comply with, as is often the case. Nevertheless, a necessary authority cannot be eliminated merely because it is misused. In any event, it is always possible to correct such situations, through the Administrative Court by juridical ways.

17 - II) The Right to Interpret, Analyze and Criticize News, Opinions, Ideas and Thoughts :

Let us mention that there are provisions in the following Articles of the Penal Code pertaining to this right : 125, 127, 128, 129, 132, 133, 134, 136, 137, 138, 139, 142, 145, 147, 149, 153, 154, 155, 158, 159, 161, 161, 162, 163, 164, 167, 175, 192, 195, 197, 198, 229, 242, 253, 273, 311, 312, 364, 365, 401, 426, 427, 428, 471, 472, 481, 484, 485, 487, 489, 490, 526, 576.

Most of these articles have been amended after the Revolution of May 27, 1960, and many stipulations restricting unnecessarily the Press Law were abolished. However, some restrictions can be found in Articles 142 and 312 of the Penal Code. It would be worthwhile to ponder for a while on these articles.

18. — Article 142 is composed of 7 paragraphs :

a) The first paragraph refers to the following offences :

1° Making propaganda in order to establish the sovereignty of one social class over others, and establishing a dictatorship of that class, eliminating the others.

2° Propaganda in order to eliminate a social class by force.

3° Propaganda in order to destroy the prevailing social and economic order as a whole.

4° Working for the annihilation of the State's political and juridical order; that is to publicize anarchism.

b) The second paragraph refers to propaganda concerning the administration of the State by one person or group of persons; that is to say, propaganda for a dictatorship not based on social classes. The propagation of Fascism is considered as a crime.

c) Here are the crimes referred to in the third paragraph :

1° Propaganda aiming at the annihilation of public rights granted by the Constitution in order to promote racism. That is to say, to make propaganda in favor of racism.

2° Propaganda in order to weaken or annihilate national sentiments.

d) Part four is concerned with praise or support of the aforementioned criminal actions.

The remaining parts refer to mitigating circumstances.

Our Constitutional Court did not consider Article 142 as being unconstitutional. Since the decision of the court has not been published yet, we do not know the reasoning.

On our part, we might say that, although many objections to Article 142 have been expressed, these are mostly directed to the first paragraph where communistic propaganda is considered as a crime. It has been pointed out that since the article is not considered sufficiently clear, it can lead to unnecessary and unjust prosecutions, that the penalty is very heavy, and that the text requires further work in terms of clarification.

Our point of view is as follows : If there is accord on the prohibition of the propaganda to establish the dictatorship by force of a social class over the others and annihilation of other social classes, then further studies can of course be made for clarification of the text. But let us also point out the fact that there are some who claim, because the law is not properly applied, that communist propaganda is going ahead, full speed, they also consider the text as not being clear enough, and that the law is not applied according to its spirit. This is the only point in common between those who are in favor of the article and those against it. During the 3rd Coalition Government a commission was formed to clarify the text of the article and a new text was prepared in this respect. We, too, consider the penalties as being too heavy and, due to this, the law can not be applied properly.

In this connection, let us look at a decision of our Supreme Court. (No. E. 1/P - 158 - K. 150, dated April 19, 1965). "...the writing as a whole be considered or not a communist propaganda but if it is trying to effectively propagate a view, the aim of which is against the social, political and economic order and the rights of citizens which are guaranteed by the Constitution and also procure the dictatorship of a social class over others, then the first paragraph of Article 142 is violated. The most remarkable thing about this decision is that rather than being against a certain economic way of life, its aim is to prevent propaganda that would create a dictatorship based on the ultimate authority of a certain social class. Therefore, we might say that it brought some clarification to Article 142 of the Penal Code.

19. — As for the objections directed to Article 312 of the Penal Code; propaganda in the struggle between social classes should certainly be acceptable in the civilized sense of the word. We can even state that such a struggle is a necessity and a sign of development. Therefore, it is commonly recognized that such propaganda cannot be considered as an offence. This kind of propaganda is considered a crime only in Yugoslavia, Egypt and Brazil. In a country where the establishment of Socialist parties is acceptable, not to allow propaganda on social struggles, would be unthinkable. Let us at once state that our Article 312 does not consider such propaganda a crime. What is forbidden and considered as a crime is *Provocation that would create commotion between social classes and harmful to public welfare*. The activities punishable by Article 312 is the propagation of ideas that would create hatred and enmity among social classes (See section 14 above in this connection). At any rate, such stipulations exist in the German and Italian codes and nobody considers them as being anti-democratic.

20. — The codification of laws concerning offences against Atatürk was very welcome since it gave protection to the ideals of the basic Turkish National Movement.

21. — The first article of "the law concerning the Freedom of Conscience and Meeting" stipulates that anyone who, by exploiting religious sentiments or religious books or religious sacred

things, are making propaganda in order to obtain political or personal benefit or power, will be subject to from one to five years' imprisonment. If the offence is in written form, then the penalty is increased at the rate of fifty per cent. The same stipulation is again repeated in Article 163 of Penal Code. Now we are witnessing the introduction of a very remarkable crime of sedition. We are convinced that the establishment of this seditious offence is right in terms of national security and public order, and as a part of Atatürk's revolution. Anyway these provisions are based on the Constitution.

22. — Law No. 38 about "Violating Constitutional Order, National Safety, and Peace" were not considered as unconstitutional by the High Court (See Section 14 above in this respect). We must defend the idea that this law has been passed in order to meet the requirements of some unexpected or extraordinary situation²¹. We see also in this law the establishment of various seditious crimes.

23 - III) The Printing of News, Idea, Opinions etc. and the Distribution of these Printed Materials :

A summary analysis of various laws in this respect leads us to state that the distribution of printed materials in Turkey is completely free. If the printed matter is offensive, confiscation of the printed matter is up to the decision of courts. In this respect paragraph 5 of Article 22 of the Constitution is taken into consideration. On the other hand, restrictions on the distribution in Turkey of printed materials published in foreign countries have been explained above, in Section 17.

24. — The Code of penal procedure contains some very remarkable stipulations concerning the above-mentioned right.

a) The nature of trials to be effected in closed sessions has been defined in Articles 373-376 of the Law, and Article 377 has forbidden the publication of materials on closed session trials. Again, in paragraph 3 of the same Law, it is stipulated that, if during a public hearing the case is found to be harmful to the

21) See Sulhi Dönmezer, Freedom of Thought and Opinion (Newspaper Milliyet, October, 1 1963), Limits of the Freedom of Thought and Opinion (Review of the Istanbul Law Faculty Vol. XXIX No. 3).

reputation and dignity of the plaintiff or that of the accused, or if it is considered as harmful to public morale or is of a nature to incite public opinion, the Court can then decide to prohibit publication of the proceedings of the trial and publicly announce the decision. Both provisions are correct and more care should be shown in their application, especially of paragraph 3.

25 — b) In Article 86 of the Law it is stipulated that, if considered necessary for investigation purposes, material proofs can be confiscated or be preserved in some Other way. There are two stipulations in the Constitution for the confiscation or curtailment of the distribution of newspapers and periodicals: 1° Only a Judge can decide whether or not some newspapers or periodicals should be removed from the market, 2° Offences necessitating confiscation of newspapers must be established by Law.

26 — There are some stipulations that prohibit some publications in Article 124 of the Law for Establishing Military Courts and their procedures. But all these are of a regulatiting nature.

27 — We do not think, that it is necessary here to take up stipulations concerning elections or voter registration, or restrictions concerning the protection of children from harmful publications. Those who Would like to have extra information refer to our book, "The Press Law", page 183 and consecutive pages.

28 — Martial Law No. 3832, dated May 22, 1940, stipulates in Article 3, Paragraph IV, that in regions under Martial Law freedom of the press can be restricted or abolished completely.

In an exceptional situation necessitating the proclaiming of Martial Law, or during war times freedom of the press, like many other freedoms can very well be deferred. Therefore, we consider these limitations as regulatory restrictions.

29. — Law No. 1353 requires that all publications since the adoption of the new Turkish alphabet be written in these characters. We consider this a very reasonable restriction since it is connected with the development of the national culture of Turkey.

30 — Apart from these, there are several laws such as the copyright Law, the Code of Obligations and Law 5777, etc., which contain certain restrictions. These are necessary in order to protect copyright or other fundamental privileges.

Responsibilities, the Right to Answer and to Correct :

31 — After having referred to the principles and standards of comparative law we have indicated the situation in our legislation, and have expressed our own evaluations in this respect. In order to complete this review, we think it might be worthwhile to have a look at the Principle of Responsibility resulting from press offences, and at the right to answer and to correct²².

Let us make clear that after the revolution of May 27th, the Press Law has been amended and a democratic aspect has been provided to it. In fact, the responsibility of the managing editor has been regulated and answers have been provided for the everlasting complaints in this respect.

This right to answer and to correct has been amended completely in favor of the press. The answer should be given by the one requesting it to the pertinent criminal court. The judge can effect corrections if he deems it necessary, then gives authorization for the publications of the reply. The journalist can object to the judge's decision through the next higher court. All these principles have eliminated complaints in this respect.

Press offences should be dealt with by specially authorized tribunals, with their own procedures. These are considered to be separate from general procedures, and contain principles for the protection of the freedom of the press.

It would be suitable to state that freedom of the press has gone a long way since the May 27 th Revolution.

IV**DEFECTS**

32. — We would like to complete our paper by designating defects in our legislation both from the point of view of theory and that of application. In this respect we might say that, after the May 27th Revolution the development realized in our legislation

22) For further details refer to Sulhi Dönmezer, Press Offences Istanbul 1946, P. 111 and con. and P. 129 and con.) Erman-Özek aforementioned Book P. 57.

governing the freedom of the press has created some deficiencies from the point of view of personal rights. There are even some that would be beneficial to be considered from the point of view of public benefit.

One of the most important among these is that there is no provision in our laws concerning the publication of matters connected with privacy. Although, denunciations of private life might be considered as a crime, if they are of an insulting nature, the private life of an individual belongs to him and concerns only him. Nobody has the right to interfere. Notwithstanding that this is a principle also accepted by the Constitution, it is always possible to inflict great harm to the person concerned by disclosing and writing about his private life, without showing a hint of insult in the article. For instance no one should be permitted to write about some living in a very religious Moslim environment that pork is eaten in his house. This is a defect and it should be amended.

There is another defect, which is not considered as an offence in our legislation; that is the publishing of some false news that would damage public peace and security.

In Section 26 we mentioned the instances cited in the Constitution in which publications of an offensive nature could be confiscated. In some instances, it is imperative, from the point of view of public security, that these publications be collected as speedily as possible. The necessity of confiscating declarations urging soldiers to rebel, or people to revolt, is obvious. That is why legal authorities should be well prepared in this respect and that laws suggested in Article 22, para. 5 of the Constitution be introduced as quickly as possible.

Let us indicate also some other necessary amendments:

In order that the judiciary be impartial and act according to the justice, we have pointed out the necessity for laws comprising restrictions such as those embodied in Article 30 of the Press Law. In our opinion, Article 30 is deficient in this respect. For instance, Article 30 does not prevent expression of one's opinion in respect to public prosecutors' claims.

If a prosecutor is always subject to published attacks while performing his duty, and feels their enervating pressure on him, he cannot perform his duty in peace, and therefore, public order suffers from it. Nowadays, we see a tendency in the press, either by praising or criticizing, to discuss court decisions. It has become a habit with the press to discuss, even attack, an expert because he did his duty and gave his opinion on the request of legal authorities. This kind of action is preventing the free and proper functioning of justice. It is not acceptable to put the juridical function under the influence of some publication while on the other hand we try to save it from the effects of the executive force. Therefore, it is necessary that some preventive provisions be established in this respect.

The new form of the right to reply and correct has hardened the position of the individual. It has become almost impossible to profit from it. The right to appeal from a court decision should also be granted to the one using the right to reply, just as it has been granted to the journalist.

In compliance with the Press Law, cases concerning press offences are dealt with in special Press Tribunals. These Tribunals meet once a week and they are formed by the senior judges from the regular courts. And, in spite of the provisions for speed, even a small suit involving libel is dragged on for months, even years. That is why, those who have been insulted, prefer not to bring suit. We are of the opinion that some improvements both from the point of view of organization and of procedure would be beneficial in this respect.

The analyses and evaluations which we presented above indicate to what extent the press freedom in Turkey has progressed in a short span of time. In a country which has gone through a revolution such implementation and the effective steps that have been taken in one of the most important areas of freedom as a result of that revolution, is a phase of an era and a chain of events which must be recorded with pride.