

IN THE BAKIRKÖY
31ST CRIMINAL COURT OF FIRST INSTANCE
Indictment No. 2018/24776
Case No. 2018/727 Docket
Between:

Recep Tayyip Erdoğan (Complainant)

- and -

Fatih Polat (Defendant)

EXPERT OPINION BY ARTICLE 19

A. Introduction

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), on the request of Mustafa Söğütü and Devrim Avcı, lawyers representing Fatih Polat, to advise on the compatibility of the charges brought against Polat with international and European law and standards on the right to freedom of expression. This is without prejudice to the consideration of how these same facts may also violate other human rights, including in particular the right to a fair trial. We understand that this opinion will be relied upon by the defendant in the case currently pending before the Bakırköy 31st Criminal Court of First Instance.
2. ARTICLE 19 is an international human rights organisation that advocates for the development of progressive standards on freedom of expression and freedom of information (freedom of expression) at the international and regional levels, and the implementation of such standards in domestic legal systems. ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice on issues concerning the rights to freedom of expression. On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation regularly intervenes in domestic and regional human rights court cases, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work carried out since 1998 as a means of supporting positive law reform efforts worldwide frequently leads to substantial improvements in proposed domestic legislation.
3. ARTICLE 19 has specific expertise concerning freedom of the media and the right to freedom of expression of journalists, and has on previous occasions submitted expert opinions before Turkish criminal courts. Additionally, in May 2016, ARTICLE 19 delivered a training for Turkish judges on international standards on freedom of expression in relation to countering terrorism at an international workshop in Antalya for the Turkish High Level Courts organised by the Council of Europe and the European Union.
4. ARTICLE 19 submits that the criminal prosecution of Polat violates his right to freedom of expression. The following elements are adduced in support of this submission:
 - Part B contains salient points concerning the indictment and evidence;

- Part C analyses the pertinent case law of the European Court of Human Rights (European Court) concerning restrictions on freedom of expression;
- Part D provides an overview of positions on Article 299 by the Council of Europe, United Nations (UN) bodies, European Union, and the Organization for Security and Co-operation in Europe (OSCE); and,
- Part E puts forwards ARTICLE 19's observations in relation to the criminal prosecution of Polat in light of the jurisprudence of the European Court and other relevant materials cited in the previous parts.

B. Charges and evidence

5. Fatih Polat is a journalist and Editor-in-Chief of the newspaper *Evrensel*. He has been the subject of several criminal investigations and court proceedings in relation to his work as a journalist.
6. Polat is standing trial in the Bakırköy 31st Criminal Court of First Instance on charges of insulting the President of the Republic (Article 299 of the Criminal Code). He faces a potential prison sentence of between one and four years, to be increased by one sixth if the offence is found to have been committed in public. Prosecuting the offence in Article 299 is subject to permission by the Minister of Justice (Article 299(3)). The Minister's letter of approval, dated 18 September 2018, was sent to the Office of the Chief Public Prosecutor on 5 October 2018. Furthermore, in application of Article 53 of the Criminal Code, Polat could also be deprived of exercising certain rights, including voting, being elected or exercising other political rights.
7. The charges against Polat stem from a publication of a column on 28 May 2017, on the website www.evrensel.net. The column consisted of a Turkish translation of an article by Craig Shaw (published on www.theblacksea.eu), entitled "Turkish President Erdoğan's family in secret offshore ship deal."¹ Polat published it under the heading "What do those addressed say about these allegations concerning the Erdoğan family?" Shaw's article was reproduced without comment, bar a minimal introduction: "A report was published on theblacksea.eu site the day before yesterday containing some important claims concerning the Erdoğan family. I am publishing the report bearing the signature of Craig Shaw, considering its importance to readers in Turkey, too."
8. Shaw's article was published as part of the Malta Files, an investigative project undertaken by the European Investigative Collaborations network, which brought together 13 media and 49 journalists in 16 countries and 12 languages.² The project set out to show how the eponymous Mediterranean State works as a base for tax avoidance inside the EU, based on a cache of over 150,000 documents leaked from a Malta-based provider of legal, financial and corporate services. Shaw's reports on the hidden wealth and financial dealings of Turkey's political elite have been nominated in the "Investigation of the Year" category at the European Press Prize 2018³ and at the British Journalism Awards 2017,⁴ among others.
9. The impugned article concerns a multi-million US dollar deal between members of the family of President Erdoğan, in particular his son Burak Erdoğan, his brother Mustafa Erdoğan and his

¹ C. Shaw, Turkish President Erdoğan's family in secret offshore ship deal, 26 May 2017, available at <https://bit.ly/2GF7kOe>.

² European Investigative Collaboration, Malta Files, available at <https://eic.network/projects/malta-files>

³ European Press Prize, The Investigative Reporting Award 2018 Nominee, available at <https://bit.ly/2FpsTU4>.

⁴ Press Gazette, Finalists revealed for the British Journalism Awards 2017, 25 October 2017, available at <https://bit.ly/2KYsgDN>.

brother-in-law Ziya Ilgen; Sitki Ayan, a Turkish businessman and friend of the President; and, Azeri-Turkish businessman and billionaire Mübariz Mansimov, owner of the Istanbul-headquartered shipping conglomerate, the Palmali Group. The article alleges that members of President Erdoğan's family, through offshore companies on the Isle of Man and Malta, secretly own an oil tanker named the Agdash, which was "essentially a gift from Mansimov" that has cost the latter at least 21.2 million US dollars and for which, in return, he received the goodwill of the Turkish Government. It also stated that the rest of the cost of the tanker, app. 7 million USD, was paid by Ayan "for reasons which are never explained." The article is accompanied by key documents that were used in the reporting.

10. In the indictment against Polat, the prosecution lists as an evidence the *Evrensel* column, and a statement by Polat confirming his authorship of the column. Based on 16 citations from the column, the prosecutor accuses Polat of insulting the President. This insult was committed by alleging that President Erdoğan takes benefits such as money, goods or properties from Mübariz Mansimov against public means "even though the suspect has no document with concrete evidence nature" (sic).
11. In his defence,⁵ Polat argued that publishing of the column represents a key component of the journalistic profession, i.e. to ask questions. He argued that he contextualised Shaw's article, the text constitutes a report and is not defamatory, and that the headline he placed above the report consists of a question that does not comprise defamation.
12. ARTICLE 19 has reviewed the indictment,⁶ and submits the following observations with regard to the evidence:
 - The article by Craig Shaw that was reproduced as part of Polat's column concerns a matter of the utmost public and political interest, internationally as well as in Turkey. Moreover, it appears to have been researched and written in line with the highest standards of journalistic deontology; and,
 - The article by Shaw and the title and text added by Polat, considered as a whole or when focusing only on the fragments highlighted by the prosecutor, *prima facie* appear to constitute legitimate expression and protected speech under international law and standards.

C. Pertinent European Court jurisprudence

13. Under international law, the right to freedom of expression is not an absolute right. It may be legitimately restricted by the State in certain circumstances. A three-part test sets out the conditions against which any proposed restriction must be scrutinised:
 - The restriction must be provided by law: it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate their conduct accordingly;
 - The restriction must pursue a legitimate aim, exhaustively enumerated in Article 10(2) of the European Convention on Human Rights (European Convention) and Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), namely respect of the rights or

⁵ SPOT, Full text of our Editor-in-Chief Fatih Polat's court statement, 10 February 2019, available at <https://bit.ly/2GFsk7e>.

⁶ ARTICLE 19's comments are based on an unofficial translation of the indictment from Turkish to English. ARTICLE 19 takes no responsibility for errors or inaccuracy based on erroneous translation.

reputations of others, protection of national security or of public order (*ordre public*), or of public health or morals;

- The restriction must be necessary in a democratic society, entailing it must be necessary and proportional; this first aspect entails an assessment of whether the proposed limitation satisfied a “pressing social need” and whether the measure is the least restrictive to achieve the aim.

14. Assessing an impugned measure requires a careful consideration of the particular facts of the case, and should start from the point that it is incumbent upon the State to justify any restriction on freedom of expression.⁷

15. In the present case, the prosecution of Polat for insulting the President constitutes a restriction of his right to freedom of expression. Hence, it must meet the conditions of the three part test stated above. ARTICLE 19 wishes to highlight the following arguments in this respect:

- First, public figures, especially leaders of states, should be subject to the highest level of scrutiny. The European Court has frequently reiterated that freedom of the press “affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders” and that “freedom of political debate is at the very core of the concept of a democratic society.”⁸ Hence, the limits of acceptable criticism are wider as regards a politician than as regards a private individual, because “the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”⁹ The European Court has also repeatedly held that conferring a special legal status on Heads of State that shields them from criticism solely on account of their function or status, amounts to the creation of “a special legal privilege that cannot be reconciled with modern practice and political conceptions”.¹⁰ The Court has also made that finding on several occasions in relation to Turkey specifically.¹¹
- Second, the European Court has stressed that States are not allowed to protect the reputation of others in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power.”¹² It highlighted that “investigative journalists are liable to be inhibited from reporting on matters of general public interest ... if they run the risk, as one of the sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment.”¹³ The Court has found that the fear of such sanctions has a chilling effect on the exercise of the journalistic profession, which works to the detriment of society as a whole and is a factor that goes to the proportionality of the restriction.¹⁴ Accordingly, “the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other

⁷ See, *inter alia*, European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para 41.

⁸ European Court, *Lingens v Austria*, *op. cit.*, para 42. Also see, *inter alia*, European Court, *Oberschlick v Austria (No. 2)*, App. No. 20834/92, 1 July 1997, para 29; *Pakdemirli v Turkey*, App. No. 35839/97, 22 February 2005, para 45; *Artun and Güvener v Turkey*, App. No. 75510/01, 26 June 2007, para 26.

⁹ *Ibid.*

¹⁰ See, *mutatis mutandis*, European Court, *Colombani & others v France*, App. No. 51279/99, 25 June 2002, para 68.

¹¹ See, e.g. European Court, *Pakdemirli v Turkey*, *op. cit.*, para 52; or *Artun and Güvener*, *op. cit.*, para 31.

¹² European Court, *Cumpana and Mazare v Romania*, App. No. 33348/96, 17 December 2004, para 113.

¹³ *Ibid.*

¹⁴ *Ibid.*, para 114.

fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”¹⁵

- Third, Article 10 of the European Convention “protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism.” The Court furthermore has stated that Article 10 “in essence ... leaves it for journalists to decide whether or not it is necessary” to reproduce supporting documents in order to ensure credibility of their reporting.¹⁶

16. The Court must take these standards into account when deciding on Polat’s case.

D. Other relevant international materials

17. ARTICLE 19 observes that Article 299 of the Criminal Code, as well as laws that criminalise insulting heads of state or public officials in general, have frequently been the target of criticism by international and regional governmental organisations, including the Council of Europe, UN bodies, the European Union, and the OSCE.

18. In its 2016 opinion, **the Venice Commission** observed that the provisions of Article 299 of the Criminal Code fail to take into account the emerging European consensus indicating that States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them.¹⁷ The Venice Commission also made comments on concrete prosecutions under Article 299, in particular:

- It observed that many investigations and prosecutions under Article 299 of journalists are related to important matters of public interest. It referred to the European Court’s case law stating that the limits of acceptable criticism are wider for politicians than for private individuals.¹⁸
- It stated that a clear distinction should be made between criticism and insult, wherein restrictions of speech that solely intends to insult the President and that amounts to wanton denigration or gratuitous personal attack would not amount to a violation of the right to freedom of expression, if the sanctions are proportionate. In relation to the latter point, it stressed that prison sentences were very likely to create a chilling effect on society as a whole and could not be considered proportionate to the legitimate aim pursued, i.e. protecting the honour and dignity of the President.¹⁹
- It emphasised that Article 10 of the European Convention protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism. In this regard, however, the distinction between value judgments and statement of facts should be taken into account.²⁰

¹⁵ *Ibid.*, para 115.

¹⁶ European Court, *Fressoz and Roire v France*, App. No. 29183/95, 21 January 1999, para 54.

¹⁷ European Commission for Democracy Through Law (Venice Commission), Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 15 March 2016, para 57.

¹⁸ *Ibid.*, para 65-67.

¹⁹ *Ibid.*, para 68-70.

²⁰ *Ibid.*, para 71-75.

19. Furthermore, in relation to the obligation to obtain the Minister of Justice’s authorisation, the Venice Commission referred to the European Court’s conclusion in the case of *Taner Akçam*²¹ that this purported safeguard does not provide “a reliable and continuous guarantee or remove the risk of being directly affected by the provision because any political change in time might affect the interpretative attitudes of the Ministry of Justice and open the way for arbitrary prosecutions.” It also recalled a similar statement by the Commissioner for Human Rights, who said that this “is not a lasting solution which can replace the integration of the relevant [European Convention] standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention.”²² Overall, the Venice Commission considered that “the only solution to prevent further violations of Article 10 of the European Convention” was to completely abolish Article 299 of the Criminal Code.²³
20. Following a country visit in April 2016, the **Commissioner for Human Rights** of the Council of Europe (HR Commissioner) highlighted a deterioration of protection of freedom of expression in Turkey which included “the striking increase in prosecutions on the basis of certain offences ..., such as the offence of insulting the President of the Republic.”²⁴ The HR Commissioner stressed in relation to Article 299 “that the application of similar provisions was unprecedented in any of the other 46 member states of the Council of Europe, including those where insulting the president is still considered a separate criminal offence. The use of this provision seems to have become a tool for stifling any criticism of the President, and by extension of any policy that he supports, and used indiscriminately and at an unparalleled level against all categories of persons, notably journalists.”²⁵ He said to be “convinced that the use made of this provision is profoundly incompatible with the [European Convention] and amounts to judicial harassment”, in particular in light of the European Court’s case law. The HR Commissioner also supported the Opinion of the Venice Commission that the only solution to these obvious violations is to repeal Article 299.²⁶
21. The **Parliamentary Assembly of the Council of Europe** (PACE) has repeatedly expressed concern about “perennial challenges to freedom of expression” in Turkey, including Article 299 of the Penal Code.²⁷ It has called on the Turkish authorities to revise Article 299 in accordance with the Venice Commission’s Opinion,²⁸ and considers that “the abusive application of Article 299 ... is leading to an undue restriction of freedom of expression.”²⁹
22. In its General Comment No. 34, the **UN Human Rights Committee** (HR Committee) has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the ICCPR upon uninhibited expression is particularly high.³⁰ The Committee expressed concern regarding laws on such matters, including “defamation of the head of state and the protection of the honour of public officials” and has stressed that “laws should

²¹ European Court, *Taner Akçam v Turkey*, App. No. 27520/07, 25 October 2011, para 94.

²² Venice Commission, *op. cit.*, para 92.

²³ *Ibid.*, para 75.

²⁴ HR Commissioner, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, 15 February 2017, para 18.

²⁵ *Ibid.*, para 54.

²⁶ *Ibid.*, para 55.

²⁷ *Inter alia*, PACE, The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member state?, Resolution 2260 (2019), 24 January 2019, para 3.

²⁸ *Inter alia*, PACE, Attacks against journalists and media freedom in Europe, Resolution 2141 (2017), 24 January 2017, para 6-7, in particular 7.4; The functioning of democratic institutions in Turkey, Resolution 2156 (2017), 25 April 2017, para 26.

²⁹ PACE, The functioning of democratic institutions in Turkey, Resolution 2121 (2016), 22 June 2016, para 22. In para 28.1, PACE invited Turkey to repeal Article 299.

³⁰ HR Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, 12 September 2011, para 38.

not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions.”³¹

23. Moreover, in its Concluding Observations regarding the implementation of the ICCPR in Turkey, the HR Committee called on Turkey to *inter alia* “

(a) Consider decriminalizing defamation and, in any case, it should countenance the application of the criminal law in the most serious cases taking into account that imprisonment is never an appropriate penalty ... (c) Bring relevant provisions of the Criminal Code into line with article 19 of the Covenant and apply any restrictions within the strict terms of this provision.”³²

24. The **UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression** (UN Special Rapporteur on FOE) has called on the Government of Turkey to repeal Article 299 of the Criminal Code. Following a visit to the country, he wrote that the “mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties. The criminalization of individuals solely for criticism of the government can never be considered to be a necessary restriction on freedom of expression. Even in the absence of repeal, the Special Rapporteur urges senior public officials to refrain from the harassing use of such tools to silence criticism in the name of ‘insult’ of public authority.”³³

25. The **European Commission** has observed “serious backsliding” in the area of freedom of expression in Turkey, and the imposition of “severe restrictions” on the activities of journalists, human rights defenders and critical voices on a broad scale.³⁴ In its assessment of the legislative environment, the Commission points *inter alia* to the fact that the Criminal Code provides for prison sentences for insulting the President as an instance of Turkish law impeding free speech and running counter to European standards.³⁵

26. In its resolution concerning the European Commission’s 2018 report on Turkey, the **European Parliament** has expressed “serious concern about the disproportionate and arbitrary measures curtailing freedom of expression, media freedom and access to information” and condemned “the high number of arrests of journalists and media workers in the aftermath of the coup attempt” and “the unsubstantiated and disproportionate sentences handed down.”³⁶

27. The Ministerial Council of the **OSCE** has called on Participating States to ensure “that defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States’ obligations under international human rights law.”³⁷ The OSCE Representative on Freedom of the Media, in his review of the Turkish Penal Code in 2005, called the elevated protection of State officials by Article 299 “inadmissible as it chills criticism and free discussion of important public issues”. He wrote that the article “should be deleted from the Criminal Code since its only function is to ban criticism; it does not even refer to any inaccuracy or violation of privacy.”³⁸

³¹ *Ibid.*

³² HR Committee, Concluding Observations on the initial report of Turkey, UN Doc. CCPR/C/TUR/CO/1, 13 November 2012, para 24.

³³ Special Rapporteur on FoE, Report on mission to Turkey, UN Doc. A/HRC/35/22/Add.3, 7 June 2017, para 85.

³⁴ European Commission, Commission Staff Working Document: Turkey 2018 report, SWD(2018) 153 final, 17 April 2018, p. 29.

³⁵ *Ibid.*, p. 35.

³⁶ European Parliament, Resolution on the 2018 Commission Report on Turkey, 2018/2150 (INI), 13 March 2019, para 8.

³⁷ OSCE Ministerial Council, Decision No. 3/18 on the Safety of Journalists, MC.DEC/3/18, 7 December 2018, para 11.

³⁸ OSCE Representative on Freedom of the Media, Review of the Draft Turkish Penal Code: Freedom of Media Concerns, May 2005, p. 10.

E. Observations on the compatibility of the prosecution of Polat with the right to freedom of expression

28. In light of the foregoing international and European standards, ARTICLE 19 submits the following observations to the Bakırköy 31st Criminal Court of First Instance in relation to the criminal prosecution of Fatih Polat with the indictment number: 2018/24776 and CASE NUMBER: 2018/727.

- The provisions of Article 299 do not meet the **criterion of legality**. As outlined above, in order for a norm to be characterised as "law" for the purpose of legitimately restricting the right to free expression, it needs to be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."³⁹ Article 299 does not specify what is meant by "insult." This provides an opportunity for wide discretion to the law enforcement in application and implementation of these provisions.
- Article 299 does **not pursue a legitimate aim**. As discussed above, prohibitions of insult of heads of states and public officials in general - purely on account of their status - especially through criminal law, such as in the present case, invert the fundamental principle in a democratic system that the government is subject to public scrutiny. Heads of states and public officials should tolerate more, not less, criticism than ordinary citizens. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their words and deeds by the media and the public at large. Moreover, vigorous debate about the functioning of heads of states is an important aspect of democracy.
- Even assuming *arguendo* that criminalisation of speech that insults a head of state is a legitimate aim, restrictions undertaken in pursuit of such an aim must still satisfy a **proportionality test** which assesses the severity of those restrictions against the necessity of sanctions. To be necessary, there must be a showing that a legitimate purpose cannot be reasonably achieved by less restrictive means. ARTICLE 19 asserts that criminal penalties in freedom of expression cases – in particular where political speech and "insult" are concerned – are rarely proportionate. ARTICLE 19 considers that the facts of the case at hand do not constitute such an exceptional situation. Moreover, the negative impact of the manifestly disproportionate interference with Polat's right to freedom of expression for Turkish society as a whole is exacerbated by virtue of the "chilling effect" created by the imposition of prison sentences on investigative reporters.

Conclusions

29. ARTICLE 19 finds that Polat's publication was of the utmost public interest, which attracts enhanced protection, as per the established case law of the European Court. The gist of the challenged publication is the murky relationship between members of President Erdoğan's family and certain businessmen. As such, it constitutes a matter of great public and political concern, which moreover forms part of an on-going public debate in Turkey and internationally. Regardless of one's views on the issues raised in Polat's column, the point is to allow this very discussion to occur.

³⁹ HR Committee, General Comment No. 34, *op.cit.*, para 25.

30. In light of these observations, jointly and severally, ARTICLE 19 submits that the criminal prosecution of Polat in this case constitutes an interference that is not necessary in a democratic society and accordingly violates his right to freedom of expression.

London
13 May 2019

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