

IN THE ISTANBUL 2nd CRIMINAL COURT OF FIRST INSTANCE
Indictment No. 2018/20727
Case No. 2018/254 E.
Between:

Ministry of Health (Turkey)

- and -

Bülent Şık

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 Tora Pekin, Can Atalay, Abbas Yalçın, lawyers representing Bülent Şık, to advise on the compatibility of the charges brought against Şık 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, 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 Istanbul 2nd 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 Şık violates his right to freedom of expression. The following elements are adduced in support of this submission:
 - Part B contains ARTICLE 19's comments on the charges and the evidence in Şık case; and,
 - Part C assesses Şık's case in light of the pertinent jurisprudence of the European Court of Human Rights (European Court).

B. Charges and evidence

5. Şık is an academic working on public health and food safety. He has conducted research on areas such as toxic chemicals in food and drinking water and their impact on public health. He was the Technical Assistant Director of the Food Safety and Agricultural Research Centre at Akdeniz University, until he was dismissed from his position by Emergency Decree Law No. 677, published in the Official Gazette No. 29896 on 22 November 2016. Şık is a signatory of the Academics for Peace petition, which called for peace in South Eastern Turkey, and on this basis has been indicted for allegedly making terrorist propaganda in another case.
6. In the case at hand, Şık stands accused of disclosure of prohibited information (Article 336(1) of the Criminal Code), securing prohibited information (Article 334(1)), and disclosure of confidential information in respect of a duty (Article 258(1)). If found guilty, he faces a custodial sentence of 5 to 12 years. In addition, under Article 53 of the Criminal Code, he may also be deprived of the exercise of certain political and other rights.
7. The charges related to the publication by Şık of an article in *Cumhuriyet* newspaper on 16 April 2018, entitled “Report Hidden From the Public,” with the subtitles: “This Is How We Are Poisoned;” “Research Hidden by the Ministry;” “Poison in Food;” and, “Chemicals Are Everywhere.”
8. The Chief Public Prosecutor’s Office in Ankara opened the case based on a complaint filed by a Legal Adviser of the Ministry of Health on 17 April 2018.¹ In the letter, the Ministry alleged that the impugned article revealed information, which should have been kept confidential, in a manner so as to lead to public indignation. The complaint provides the following pertinent information:
 - The Ministry of Health has been running a project entitled “Research Project on Environmental Factors and Their Impacts on Health,” in order to determine and evaluate environmental pollutants and their impact on health in Koceaeli, Antalya, Tekirdağ, Edime and Kırklareli Provinces, located in the Ergene Basin;
 - The Project is composed of 16² sub-projects. In relation to two, namely “Research and Evaluation of Food with Regard to Environmental Influence” and “Research and Evaluation of Potable Water With Regard to Environmental Influence,” the Ministry of Health contracted Akdeniz University to perform the research, on 15 May 2014 and 13 November 2014 respectively. The contract protocols determine the activities to be conducted by the University and include a confidentiality clause;³ and,
 - Şık was involved in the research while he was working as an academic at Akdeniz University, and was dismissed from public service by the above-mentioned Emergency Decree Law. Due to his appointment at the University, Şık had the status of “public officer,” in line with the definition in Article 6 of the Criminal Code, and associated obligations extend beyond the time of his employment.
9. The Ministry of Health complains that Şık⁴ has violated the Criminal Code provisions set out above by publishing information he obtained through taking part in the research. He has published this

¹ Reference 11045126-641.03-03. ARTICLE 19 has reviewed unofficial translations from Turkish into English of the complaint and the indictment, and takes no responsibility for errors or inaccuracy stemming from erroneous translation.

² ARTICLE 19 observes there is a discrepancy between the indictment, which refers to 15 sub-projects, and Şık’s defence, which refers to 16.

³ Article 14.3 of both Protocols provides that “no information, documents and data shall be announced and published without approval from the administration (the Ministry)”.

⁴ The complaint by the Ministry of Health is filed against Şık and alleges that Faruk Eren, the managing editor of *Cumhuriyet*, was complicit. The Public Prosecutor did not retain the complaint concerning Eren, and it falls outside the scope of this expert opinion.

information in *Cumhuriyet*, both in the mentioned article of 16 April 2018 and another article published the following day, entitled “The Ministry Hides, Cumhuriyet Reveals. Which vegetable has arsenic and which water has pesticide?”⁵ In the Ministry’s view, the “information was published in a manner that creates fear and panic among the public,” noting that “these articles have a style to create a perception that all food is poisonous and our environment is surrounded by dangerous chemicals.” Further, in its complaint, the Ministry stated that “discrediting vegetables and fruits, which are important goods for our export, in this absolute manner not only creates fear and panic in the public but also amounts to harm the export in this respect.”

10. Şık sent a written statement to the Chief Public Prosecutor’s Office, who summarised it in the indictment as follows: “He is the author of articles published in Cumhuriyet Newspaper on 16/04/2018 and aimed to share the public health project with the public, inform the public about this issue, to mobilise public institutions that are obliged to solve such issues, and shared information only related to the obligations to protect public health, and published the article within the scope of freedom of expression and media.”
11. The indictment makes summary reference to the Ministry of Health’s complaint in addition to Şık’s statement and to the evidence, which consists of these two documents plus the 16 April 2018 issue of *Cumhuriyet*. Without adducing further analysis and following a fairly cryptic sentence that appears to formulaically echo the criminal code provisions at play, the Public Prosecutor states that “it is understood that the suspect has committed the alleged offences” and requests Şık’s trial.
12. In a lengthy defence statement delivered at the first hearing, Şık adduces *inter alia* the following elements in his defence:
 - He argues that a “scientist is primarily responsible to society, not companies or institutions. Because health and the future of the public are so important that they cannot be entrusted to companies’ or institutions’ short term interests;”
 - Şık states that he was involved in the research project as a faculty member of Akdeniz University’s Research Centre throughout the lifespan of the research project, from collecting samples to writing final reports. He characterises his contribution as planning the research on food and water; developing analysis methods; and, evaluating the data obtained from these analyses. He states that he made significant contributions in particular to the final report about determining environmental pollutants in food. In December 2015, a general evaluation meeting for the project was held in Antalya, where data obtained from the various sub-projects was discussed;
 - Following his signing of the Academics for Peace petition, in early January 2016, Şık’s assignment was not extended and he was forced to resign from his post as Deputy Director of the Research Centre. Soon after, he was dismissed from all research projects in which he was involved, including the Ministry of Health’s. He was dismissed by Akdeniz University pursuant to the above-mentioned Emergency Decree Law;
 - Şık states that in his *Cumhuriyet* articles, he used scientific information he acquired through his research. He notes that the projects were completed by the end of 2015 and that more than three years passed between the final evaluation meeting and the publication of the articles. In his opinion, in public health-related projects that may take many years to complete, publishing warnings to the public where the preliminary data warrant it is an ordinary and correct approach. Moreover, he believes that when there is the possibility of irreversible damage, publishing

⁵ The Public Prosecutor’s Office retained only the 16 April 2018 article in the indictment. ARTICLE 19 observes two further articles were published in *Cumhuriyet* in the same series, namely “They empoisoned our water!” and “The Ministry hides this information, 52 regions with non-potable water”.

research information on public or environmental health that poses concerns to the majority of society, should be considered a necessary action;

- In Şık's view, the research at hand reveals problematic issues for public health. It shows dangerous levels of chemical pollution, resulting from companies' non-compliance with pertinent regulation and public institutions' long-term negligence in this regard. About seven million people live in the Provinces where the research was performed (of whom 21.6% children) and food produced in this area is consumed across Turkey. Accordingly, he deems it is very clear that the information is a concern to a large segment of society. Subsequently, in his opinion the Ministry of Health should have warned other authorities and measures to protect public health should have been taken. Şık notes that the Ministry of Health took no steps in this respect, and has provided no answers to any questions concerning the research findings, including a parliamentary question submitted on 17 April 2018 and questions from the Turkish Medical Association. Şık notes that until this day, the Ministry of Health's only action has been the filing of a complaint against him; and,
- Şık states that he considered it his duty as an academic to publish the articles in *Cumhuriyet* in light of the dangers to public health revealed through the research and the Ministry's inaction in this regard. He states that he wished to inform the public and mobilise public institutions that are obliged to resolve such problems. He says he undertook his actions in defence of the right to live in a healthy environment.

13. ARTICLE 19 has the following remarks in relation to the complaint, indictment and evidence:

- Whereas the information conveyed in the impugned *Cumhuriyet* article is certainly very concerning, ARTICLE 19 does not share the assessment by the Ministry of Health that it was written in a style that creates, or appears to aim to create, a panic among the public. As discussed in the subsequent section, under international human rights standards, broad range of expression attracts the enhanced protection due to statements on matters of public concern, including those related to public health and environmental protection. Here, the gist of the challenged statements is the problematic issues for public health and the state of the environment that poses concerns to the majority of society. As such, they constitute comment on matters of the utmost public and political concern. Regardless of one's views on the challenged statements, the point is to allow this very discussion to occur. Further, it is relevant that no panic followed the article's publication; and,
- It is noteworthy that the information disclosed has not subsequently been challenged in substance, either by the Ministry of Health, by other scientists involved in the research project, or by other experts in the specific field at hand.

C. Assessment of the case in light of European freedom of expression standards

14. 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 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.
15. 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.⁶
 16. In the present case, ARTICLE 19 observes that the criminal code provisions that serve as the legal basis for the interference with Şık’s right to freedom of expression meet the criterion of legality. Further, the European Court has accepted that the prevention of disclosure of information received in confidence can constitute a legitimate aim.⁷ The central issue that falls to be determined, then, is whether the interference is “necessary in a democratic society”.
 17. The need for effective protection of whistle-blowers (persons who bring to public knowledge otherwise undisclosed information) is recognised in numerous human rights instruments to which Turkey is a party, in particular the 2014 Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers. The Recommendation envisages protection of both public and private sector whistle-blowers who report or disclose information either within an organisation or enterprise, to relevant external bodies or law enforcement agencies, or to the public on a threat or harm to the public interest in the context of their work-based relationship. The case law of the European Court establishes that under certain circumstances the disclosure of illegal conduct or wrongdoing at the workplace must be protected, in particular where the employee concerned is a part of a small group of persons aware of what is happening and is thus best placed to act in the public interest by alerting the employer or the public at large.⁸
 18. In order to determine the proportionality of a restriction on the freedom of expression on whistle-blowers, the European Court takes account of the following factors:⁹
 - There should be no other effective means of remedying the wrongdoing that the employee intends to uncover;
 - The disclosure must correspond to a strong public interest;
 - The authenticity of the disclosed information: to the extent permitted by the circumstances, the whistle-blower must carefully verify that the information is accurate and reliable;
 - The interest that the public may have in disclosure must outweigh the detriment to the employer;
 - The whistle-blower must act in good faith and in the belief that the information was true and that it was in the public interest to disclose it. He or she must not be motivated by a desire for personal advantage or by any personal grievance or other ulterior motive; and,
 - The sanction must be proportional.
 19. **First**, in relation to the first of these criteria, ARTICLE 19 recalls that Şık was dismissed from his various roles within the project and with Akdeniz University following his support for the “Petition for Peace,” as were other academics who signed the document. While outside the scope of this expert opinion, ARTICLE 19 disputes the legality of these dismissals.¹⁰ In any case, and regardless

⁶ See, *inter alia*, European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para. 41.

⁷ E.g., European Court, *Guja v Moldova* (GC), App. No. 14277/04, 12 February 2008, para. 59.

⁸ European Court, *Guja v Moldova* (GC), *op. cit.*, para. 72.

⁹ European Court, *Guja v Moldova* (GC), *op. cit.*, paras. 69-97. Also see, *inter alia*, *Heinisch v Germany*, App. No. 28274/08, 21 July 2011, paras. 62-95; *Bucur and Toma v Romania*, App. No. 40238/02, 8 January 2013, paras. 92-120; *Marchenko v Ukraine*, App. No. 4063/04, 19 February 2009, paras. 43-54.

¹⁰ For more detail, see Turkey Litigation Support Project, Amnesty International, ARTICLE 19 and PEN International, Third party Intervention before the European Court of Human Rights in *Telek, Şar, Kivilcim v Turkey*, App. Nos. 66763/17, 66767/17 and 15891/18, 5 March 2019, available at <https://bit.ly/2Wgfbdz>.

of questions surrounding the legality of Şık's dismissal, one of its consequences was to deprive him of any institutional avenues or otherwise effective means of challenging or remedying the Ministry of Health's inaction subsequent to the dangers to public health revealed by his research.

20. **Second**, even though the European Convention does not enshrine any right to a healthy environment as such, the European Court has developed a rich case law in relation to environmental matters on account of the fact that the exercise of a number of Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks. *Inter alia*, the European Court has found violations of:

- The right to life, in relation to public authorities' lack of attention to the need to act preventatively concerning dangerous industrial activities;¹¹
- The right to respect for private and family life and home, in relation to:
 - A lack of access to information about environmental risks;¹²
 - Excessive industrial pollution;¹³
 - Water supply contamination;¹⁴
- The right to freedom of expression:
 - The Court has found a strong public interest in enabling even small and informal campaign groups to be able to carry out their activities effectively, including contributing to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment;¹⁵ and,
 - The Court has established that there must be a reasonable relationship of proportionality between restrictions imposed on the right to free speech of a non-governmental organisation working for the protection of the environment that exercises a watchdog function on the one hand, and the protection of the rights and reputation of others on the other hand.¹⁶

21. Overall, ARTICLE 19 finds that in light of the European Court's jurisprudence, it is well established that there is a strong public interest in living in a healthy environment as well as in being informed about risks to public health stemming from environmental factors.

22. **Third**, in relation to the authenticity of the information conveyed in the impugned *Cumhuriyet* article, ARTICLE 19 observes that the veracity of its contents has not been challenged by the Ministry of Health or by another scientist involved in the research project or expert in the field. Moreover, there are no apparent reasons to doubt Şık's scientific expertise concerning the subject matter or his diligence in performing the specific research.

23. **Fourth**, as already noted above, ARTICLE 19 believes there is a strong public interest in a healthy environment and in being informed about risks to public health stemming from environmental factors. On the other hand, ARTICLE 19 observes that the prosecutor's office has not adduced any particular detriment suffered by anyone as a result of the publication by Şık of the impugned article.

¹¹ E.g., European Court, *Öneryildiz v Turkey* (GC), App. No. 48939/99, 30 November 2004.

¹² E.g., European Court, *Guerra and others v Italy* (GC), App. No. 14967/89, 19 February 1998; *McGinley and Egan v UK*, App. Nos. 21825/93 and 23414/94, 9 June 1998; *Roche v UK* (GC), 19 October 2005; *Vilnes and others v Norway*, App. Nos. 52806/09 and 22703/10, 5 December 2013; *Brincat and others v Malta*, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014.

¹³ E.g., European Court, *Lopez Ostra v Spain*, App. No. 55723/00, 9 December 1994; *Taskin and others v Turkey*, App. No. 55723/00, 10 November 2004; *Fadeyeva v Russia*, App. No. 55723/00, 9 June 2005; *Giacomelli v Italy*, App. No. 59909/00, 2 November 2006; *Tatar v Romania*, App. No. 67021/01, 27 January 2009; *Dubetska and others v Ukraine*, App. No. 30499/03, 10 February 2011; *Cordella and others v Italy*, App. Nos. 54414/13 and 54264/15, 24 January 2019.

¹⁴ E.g., European Court, *Dzemyuk v Ukraine*, App. No. 42488/02, 4 September 2014.

¹⁵ European Court, *Steel and Morris v UK*, App. No. 68416/01, 15 February 2005.

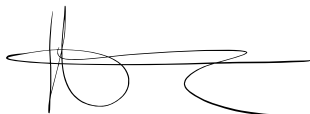
¹⁶ European Court, *Vides Aizsardzibas Klubs v Latvia*, App. No. 57829/00, 27 May 2004.

ARTICLE 19 further notes in particular that no evidence was adduced that the article's publication caused a public panic or damaged exports, as implied in the Ministry of Health's complaint, to such an extent that this could be considered to override the aforementioned public interest.

24. **Fifth**, ARTICLE 19 observes that no reasons were adduced by the Public Prosecutor or by the Ministry of Health that put into question Şık's *bona fides* in disclosing the information. Şık's own statements serve to further demonstrate that he acted in good faith and with a view to protecting the public interest.
25. **Sixth**, in relation to the proportionality of the potential sanctions, ARTICLE 19 notes the European Court's consistent jurisprudence that the imposition of prison sentences for press offences is compatible with Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired as, for example, in the case of hate speech or incitement to violence.¹⁷ Moreover, the Court has confirmed that this high level of protection is afforded not only to the press, but extends to groups and individuals who contribute to the public debate by disseminating information and ideas on matters of general public interest, such as public health and the environment.¹⁸

Conclusion

26. In light of the above considerations, ARTICLE 19 submits that the prosecution of Şık in the case at hand violates his right to freedom of expression, as it constitutes a disproportionate interference that is not necessary in a democratic society.
27. In addition, the other on-going prosecution against Şık and his dismissal by Emergency Decree Law subsequent to his support for the Petition for Peace, foster the appearance that the prosecution in the case at hand is politically motivated. This exacerbates the already problematic chilling effect of this prosecution on society more broadly.



London, 29 May 2019

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¹⁷ E.g., European Court, *Cumpana and Mazare v Romania*, App. No. 33348/96, 17 December 2004, para. 115.

¹⁸ E.g., European Court, *Steel and Morris v UK*, op. cit., para. 89.