

ISTANBUL 43rd CRIMINAL COURT OF FIRST INSTANCE

Case no: 2021/506

Indictment no: 2021/24526

Between:

Republic of Turkey

Public Prosecutor's Office of Istanbul

Prosecution

and

Baransel Ağca

Defendant

EXPERT OPINION BY ARTICLE 19

London

2 November 2023

ARTICLE 19

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Introduction and summary

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation, working globally to promote the right to freedom of expression and information. We have been asked to advise on the compatibility of the charges brought against Baransel Ağca with international and European law and standards on the right to freedom of expression, in accordance with Article 67(6) of the Turkish Code of Criminal Procedure (Law No. 5271). We understand that this opinion will be relied upon by the defendant in the case currently pending before the İstanbul 43rd Criminal Court of First Instance.
2. This opinion analyses the case as it pertains to the exercise of the right to freedom of expression, as guaranteed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (the European Convention) that Turkey has signed and ratified. The Turkish courts are therefore required to consider international and European human rights law in the present case. This is without prejudice to the consideration of how these same facts may also violate other human rights, including the right to liberty (Article 5 of the European Convention), the right to a fair trial (Article 6 of the European Convention), the right to freedom of thought, conscience and religion (Article 9 of the European Convention), and the principle of legality (Article 7 of the European Convention).
3. In the expert opinion, we address:
 - a) The facts of the case relevant for the subsequent analysis;¹
 - b) Overview of key international human rights law standards on the permissible restrictions of the right to freedom of expression, including international standards on blasphemy and religious insult;
 - c) Overview of international human rights standards on “virtual patrolling” (proactive social media monitoring by law enforcement); and
 - d) Our assessment of the present case in the light of these international and European human rights standards.
4. ARTICLE 19 submits that Article 216 para 3 of the Turkish Penal Code (Law No. 5237), under which the defendant is prosecuted in the present case, does not comply with international and European human rights standards, including those on the right to freedom of expression. Hence, the provision in question should be abolished and no charges should be brought against the defendant. Even if this Court were to consider this provision as providing a sufficient legal basis for prosecution under international and European human rights law, ARTICLE 19 submits that the criminal prosecution of the defendant under these provisions violates his right to freedom of expression and should cease immediately.

ARTICLE 19’s expertise on freedom of expression and defamation of religion

5. ARTICLE 19 is an international human rights organisation that advocates for the development of progressive standards on freedom of expression and freedom of information 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 ranging from freedom of expression and national security to hate speech. On the basis of these publications and overall legal expertise, ARTICLE 19 regularly intervenes in domestic and regional human rights court

¹ These are based on an unofficial translation of the indictment against the Defendant, no. 2020/5474, dated 16 July 2020 and the opinion submitted to the case file dated 24 June 2021 issued by the İstanbul Prosecutor’s Office.

cases and comments on legislative proposals as well as existing laws that affect the right to freedom of expression.

6. ARTICLE 19 has on previous occasions submitted expert opinions in Turkish criminal proceedings. ARTICLE 19 holds specific expertise in the subject area that this case is based on—defamation of religions and blasphemy laws and impact of digital technologies on the exercise of the right to freedom of expression. We have conducted legal analysis of multiple national laws of this topic and produce policy recommendations. For instance, ARTICLE 19’s publication “‘Hate Speech’ Toolkit” contains detailed argumentation against religious insult laws and draws a clear distinction between religious hatred that constitutes incitement to violence, discrimination or hostility on the one hand and blasphemy on the other.² We also published a policy briefing on Human Rights Council (HRC) Resolution 16/18 which addresses ‘combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief.’³

The facts and arguments of the parties of the case

7. The defendant, Baransel Ağca, is a Turkish investigative journalist who currently resides in Germany. On 16 September 2021, he was indicted by the İstanbul Chief Public Prosecutor’s Office for “publicly degrading the religious values of a section of the public” under Article 216 para 3 of the Turkish Penal Code, which states that:

A person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace.

8. The prosecution stems from a tweet in which the defendant humorously referred to the historical background of the prohibition of alcohol in Islam. The tweet, posted on 25 December 2020, reads:

In the beginning, Mohammed did not care about wine or anything. Chaos ensued when Abu Bakr started coming to the sermons drunk, making fun of everything Mohammed was saying with remarks such as "exactly bro, I’m sure you’re right". Mohammed ended up prohibiting wine because he was mad at that.⁴

9. Previously, the defendant was investigated for four other tweets relating to the corruption allegations regarding former Minister of Interior Suleyman Soylu, but no charges were pressed. The defence argues that the defendant was investigated on the basis of these tweets about corruption, and then indicted for this tweet which was proactively found by İstanbul Cyber Crimes Combat Unit when looking for an opportune basis for prosecution of the defendant, because it was not possible for investigators to charge the defendant with the four tweets relating to corruption.
10. The prosecution states in the indictment that the evidence in the case was obtained by investigators from the deliberate screening of the defendant’s social media—so called “virtual

² ARTICLE 19, [‘Hate Speech’ Explained. A Toolkit](#), 2015, pp. 29-32.

³ ARTICLE 19, [UN HRC Res 16/18: Consolidating Consensus Through Implementation](#), 2016.

⁴ The original tweet in Turkish reads: “Zaten Muahmed de başta ses etmiyor şaraba falan. Fakat Ebubekir piyizlenip piyizlenip hutbelere alkollü gelince ortalık karışıyor. Muhemmed konuştuğca arkalardan "Aynen abiiii kesin öyledir" şeklinde taşak geçince Muhammed sinirlenip şarabı yasaklıyor.”

patrol activities”—rather than a crime report or complaint regarding the tweet posted on 25 December 2020.

11. Further, the defendant claims that the evidence against him was obtained unlawfully as on 19 February 2020, the Turkish Constitutional Court has found the “virtual patrol activities” unconstitutional and annulled the provision⁵ granting the police the authority for “virtual patrol activities” on the grounds that it did “not correspond to an essential societal need.” The Constitutional Court concluded that the law allowing for the practice is not in line with the requirements of a democratic society.”⁶
12. ARTICLE 19 notes that the case arose from the deliberate screening of the defendant’s social media rather than a crime report or complaint against him in relation to the evidence. This fact raises concerns as to the adverse effects of digital surveillance by law enforcement on the exercise of the right to freedom of expression. Separately, it invokes the element of legality under national law, which is examined in the specific context of the case in the following section.

Applicable international standards on the right to freedom of expression

13. As a party to the ICCPR and the European Convention, which form part of Turkish law, the Turkish courts are required to consider the international and European standards on freedom of expression when deciding this case. ARTICLE 19 points out that under these standards, the right to freedom of expression is not an absolute right. It may be legitimately restricted by the State in certain circumstances. Under the so-called three-part test any restrictions:
 - **Must be provided for by law:** any restriction 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;⁷
 - **Must pursue a legitimate aim,** exhaustively enumerated in Article 10(2) of the European Convention and Article 19(3) of the ICCPR. Although protection of the reputation or rights of others is one of the legitimate grounds, the protection is only provided to individual persons and, in some instances, of groups and persons, not to abstract entities such as religions, beliefs, ideas or symbols;
 - **Must be necessary in a democratic society:** any restriction must be necessary and proportionate; 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. Second, the proportionality lens should be used to assess the nature and severity of

⁵ See Additional Article 6/18 of the Law No. 2559 on the Duties and Authority of Law Enforcement. The annulled provision read, “The police, where a crime is committed in the virtual environment, is authorised to access the identity information of internet users, and to conduct research in the virtual environment for the purpose of determining the Public Prosecutor’s Office that will take on the case. Access providers, location providers, and content providers shall provide the unit established by law enforcement for combating these crimes with the requested information.”

⁶ Constitutional Court of the Republic of Turkey, Judgement of 19 February 2020, E. 2018/91, K. 2020/10, RG 30/4/2020 No. 31114 paras 98-102.

⁷ See, *inter alia*, the European Court of Human Rights (the European Court), *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, App. No. 17224/11, 27 June 2017; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, App. No. 931/13, 27 June 2017; *De Tommaso v Italy*, App. No. 43395/09, 23 February 2017; *Fernández Martínez v Spain*, App. No.56030/07, 12 June 2014, para. 117; *Cumhuriyet Vakfı and Others v Turkey*, App. No. 28255/07, 8 October 2013; or *Ahmet Yıldırım v Turkey*, App. No. 3111/10, 18 December 2012.

the penalties imposed.⁸ A measures cannot be regarded as necessary where a less restrictive means could be employed to achieve the same end.

14. Additionally, Article 20 para 2 of the ICCPR stipulates that States must prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” While States are obliged to prohibit this type of expression under the law, restrictions must still be limited to ensure broad restrictions on expression are avoided. At the international level, the Rabat Plan of Action (Rabat Plan)—adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR)—provides guidance on what constitutes incitement under Article 20(2) of the ICCPR.⁹

International standards on blasphemy and religious ‘insult’

15. International and regional human rights bodies have repeatedly confirmed that protection of religions or religious beliefs is not a legitimate basis for restrictions of freedom of expression and called for abolition of laws that prohibit defamation of religion or blasphemy laws. For example:
 - The Human Rights Committee unequivocally stated in its General Comment No 34 on the right to freedom of expression that restrictions on free speech cannot be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.¹⁰ Specifically, with regard to blasphemy laws, the Committee noted that any prohibitions of displays of lack of respect for a religion or other belief system are incompatible with the ICCPR, except in the narrow circumstances envisaged under article 20, paragraph 2 of the Covenant (religious hatred that constitutes incitement of violence, discrimination or hostility).¹¹
 - In Resolution 16/18, the HRC called on states to prioritize measures that would promote an “open, constructive and respectful debate of ideas, as well as interfaith and intercultural dialogue” and limited its recommendation on adopting criminal measures to “incitement to imminent violence based on religion or belief.”¹²
 - The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has stated that limitations on the right to freedom of expression were “designed in order to protect individuals against direct violations of their rights” and “are not designed to protect belief systems from external or internal criticism”.¹³ Similarly, the UN Special Rapporteur on freedom of religion and belief echoed this approach and noted in his 2017 report that blasphemy laws, “which prohibit or criminalize the alleged “defamation” of religious beliefs and principles, or those which allegedly insult religious figures, have a disproportionate impact on members of minority religious communities and ‘non-

⁸ See, *inter alia*, the European Court, *Fressoz and Roire v France*, App. No. 29183/95, 21 January 1999; or *Yarar v Turkey*, App. No. 57258/00, 19 December 2006.

⁹ The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012, Annual report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

¹⁰ Human Rights Committee, General comment No. 3, Article 19: Freedoms of opinion and expression, 29 July 2011, para 48.

¹¹ *Ibid.*

¹² Human Rights Council, Resolution 16/18 Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 12 April 2011, A/HRC/RES/16/18, para 5 (f) and (h). See also ARTICLE 19 Briefing, [Implementing UN HRC Res 16/18. A framework for inclusivity, pluralism and diversity](#), 2016.

¹³ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, 28 February 2008 A/HRC/7/14, para 85.

believers.”¹⁴ The Special Rapporteur added that blasphemy is “generally framed as a strict liability offence and based on vague and overly broad criminal statutes” and “is increasingly used against political opponents for their opposition to the Government.”¹⁵

- The Rabat Plan of Action, endorsed by the Office of the UN High Commissioner for Human Rights, explicitly recommended to States to repeal blasphemy laws, “as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”¹⁶ It also pointed out that blasphemy laws result in a de facto censure and impede debate and criticism, which are necessary elements of democratic societies.¹⁷
- The European Court of Human Rights (the European Court) has held that a conviction of “defamation of nation, race and belief”, which the state had sought to justify on the grounds that the speech concerned offended religious believers, was in violation of the European Convention.¹⁸ It stated that the conviction neither corresponded to a pressing social need, nor was proportionate to the legitimate aim pursued, namely, the rights of others whose religious feelings had been offended.¹⁹ In *Aydin Tatlav v. Turkey*, the Court further held that criminal prosecutions under defamation of religion laws dissuade others from expressing non-conformist opinions on religious dogmas and create obstacles for the protection of pluralism which is indispensable in a democratic society.²⁰
- The Parliamentary Assembly of the Council of Europe also recommended decriminalisation of blasphemy and insults to a religion. The Assembly cautioned that, in practice, prosecutions under these laws reinforced the dominant position of a particular religion in individual states and threatened “the democratic principle of the separation of state and religion.”²¹
- The Council of Europe’s Venice Commission recommended that “it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component [and] that the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.”²²
- Moreover, the right to freedom of religion or belief, as understood in international human rights law, does not entail the right to protect one’s beliefs from adverse comment or scrutiny.²³ Neither are States permitted to create laws that privilege one belief system over another. Minority religions or beliefs, including dissenting interpretations of the tenets of faith, as well as atheist views, are protected under the right to freedom of religion. The European Court of Human Rights has stressed that individuals must tolerate denial of their

¹⁴ Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief, Heiner Bielefeldt, to the Human Rights Council, 17 January 2017. A/HRC/34/50, para 40.

¹⁵ *Ibid.*

¹⁶ Rabat Plan, *op.cit.*, para 25.

¹⁷ European Court, *Aydin Tatlav v. Turkey*, App. No. 50692/99, 2 May 2006, paras 28 and 19.

¹⁸ European Court, *Klein v Slovakia*, App. No. 72208/01, 31 October 2006.

¹⁹ *Ibid.*, para 54.

²⁰ European Court, *Aydin Tatlav v. Turkey*, App. No. 50692/99, 2 May 2006, para 30.

²¹ Parliamentary Assembly of the Council of Europe, *Blasphemy, religious insults and hate speech against persons on grounds of their religion*, Recommendation 1805 (2007), paras 10 and 17.2.

²² European Commission for Democracy through Law (the Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, CDL-AD(2008)026, 23 October 2008, para 89.

²³ European Court, *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 20 September 1994, para 47.

religious beliefs and the propagation by others of doctrines hostile to their faith.²⁴ Similar conclusions were made by the UN Special Rapporteur on freedom of religion and belief.²⁵

International human rights standards on ‘virtual patrolling’

16. “Virtual patrolling”—social media monitoring by law enforcement—has a chilling effect on freedom of expression. Unrestrained power to patrol people’s activities online is susceptible to abuse.²⁶ Individuals who suspect or fear that the government is monitoring their messages will be more likely to self-censor and avoid certain topics of political and social nature. This hinders contributions to public debate in a democratic society.²⁷ Moreover, studies show that this practice is ineffective, non-transparent, and prone to discrimination and unjustified intrusion in privacy.²⁸
17. Although international human rights law has not yet specifically addressed this type of intrusion, the incompatibility of such a practice with human rights principles can be deduced from the standards on surveillance and protection of the right to privacy. In particular:
 - The UN General Assembly has recognised that “surveillance of digital communications must be consistent with international human rights obligations and must be conducted on the basis of a legal framework, which must be publicly accessible, clear, precise, comprehensive and non-discriminatory”.²⁹ Surveillance interferes with the right to privacy, which must be guaranteed in all types of environments, including cyberspace.³⁰ The absence of a national law that grants an authorized law enforcement unit the competence to conduct virtual patrolling constitutes the violation of the requirement of legality, which is an element of the three-part test for evaluating permissible restrictions on free speech.
 - The Human Rights Committee in its numerous observations on surveillance practices by States underlined that these practices must be subject to internal, as well as external, independent oversight and authorization and that they should be minimally intrusive so that only pertinent evidence is gathered.³¹
 - Similarly, the EU Law Enforcement Directive, which is part of the European data protection package with a particular focus on investigative activities carried out by the police, mandates that any processing of personal data must be necessary for the performance of a task carried out by a competent authority and based on Union law or Member State law.³²
 - Finally, the International Principles on the Application of Human Rights to Communications Surveillance,³³ developed by civil society, stipulate that any legitimate surveillance must

²⁴ *Ibid.*

²⁵ Report of the Special Rapporteur on freedom of religion or belief, “two closely related rights: freedom of religion or belief and freedom of opinion and expression”, 23 December 2015, A/HRC31/18, para 61.

²⁶ *United States v. Jones*, 565 U.S. 400 (2012) (Sotomayor, J., concurring).

²⁷ Citizen Lab, [Internet surveillance, regulation, and chilling effects online: a comparative case study](#), 26 May 2017.

²⁸ Brennan Center for Justice, [Social Media Monitoring](#), 11 March 2020.

²⁹ See e.g. UN General Assembly Resolution on the Right to Privacy in the Digital Age, U.N. Doc. A/RES/71/199, 19 Dec. 2016; or UN Human Rights Council Resolution on the Right to Privacy in the Digital Age, U.N. Doc. A/HRC/34/7, 23 Mar. 2017.

³⁰ General Assembly resolution 68/167, The right to privacy in the digital age, A/RES/68/167, 21 January 2014, point 3.

³¹ See Human Rights Committee, concluding observations: Sweden, CCPR/C/SWE/CO/6, para 18; USA, CCPR/C/USA/CO/3, para 21; Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, para 12; Netherlands, CCPR/C/NLD/CO/4, para 14.

³² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016, article 8.

³³ Electronic Frontier Foundation, [International Principles on the Application of Human Rights to Communications Surveillance](#), 10 July 2013.

comply with 13 principles, including the “only way to achieve a legitimate aim” and that any surveillance must be “proportionate to achieve a legitimate aim”.

18. Any social media monitoring practices by law enforcement should at minimum meet the aforementioned standards.

Application of the relevant international human rights standards to the present case

19. In the present case, the defendant is under prosecution for the non-conformist commentary on the tenets of Islam and his opinion on the dogmatic interpretation of the prohibition of alcohol in Islam. Although in his tweet, the defendant expressed a certain degree of mockery and ridicule in relation to the official interpretation of the relevant dogma, his statement contains no element of incitement to violence, discrimination or hostility. Nor did he express any hatred towards individuals of a particular faith or belief. The language used is sarcastic and informal.
20. ARTICLE 19 submits that the legality of the defendant’s speech in his tweet must be assessed under the international standards detailed above. Any interference with the defendant’s right to freedom of expression must strictly adhere to the requirements of legality, necessity and proportionality (the three-part test). When assessed under the requirements of the three-part test for restrictions of freedom of expression, ARTICLE 19 makes the following submissions.

The restrictions do not meet the requirement of legality

21. Article 216 para 3 of the Penal Code, under which the defendant is prosecuted, prohibits “publicly degrading the religious values of a section of the public”. These provisions do not correspond to the requirements of legality which mandates that the law in question is precisely formulated and foreseeable. The vagueness of the term “degrading” was pointed out by the Venice Commission in its commentary on Article 216 para 3. The Venice Commission stated that the term “may be given a very broad meaning, while expressions of opinions that offend, shock, or disturb are in principle protected by Article 10 [of the European Convention], and recommended that the provision be formulated “much more restrictively”. Further, the Commission noted that the legal constructions of Article 216 para 3 of the relevant article is not qualified by the condition that it needs to create an “explicit and imminent danger to public security” and has no link to “hatred and hostility”.³⁴ It concluded that the provision cannot be applied “to punish blasphemy, but [should be] limited to cases of religious insult that intentionally and severely disturbs public order and calls for public violence”. It added that “it would be important that this approach also be adopted not only by the first instance courts, but also by the prosecutors, since investigations and prosecutions themselves, even if ultimately unsuccessful, may discourage the legitimate exercise of free speech in particular in controversial areas”.³⁵
22. Additionally, the provision at hand only penalises conduct which is “capable of disturbing public peace.” Without the establishment of this element of the crime, “degrading the religious values” is not prosecutable under domestic law. The onus of establishing every requisite element of the crime and presenting sufficient and admissible evidence in its support lies on the prosecution. The failure to do so renders the interference with the defendant’s right to freedom of expression to be without a legal basis.

³⁴ This is in contrast with Article 216 para 1; see Venice Commission, [Opinion](#) on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, 15 March 2016, para 39.

³⁵ *Ibid.*, paras 47-48.

23. As a matter of principle, ARTICLE 19 notes that Article 216 para 3 of the Penal Code should be repealed entirely. Only instances of religious hatred that constitute incitement to violence, discrimination or hostility against individuals should be prohibited.

The restrictions do not pursue a legitimate aim

24. The legal construction of Article 216 para 3 of the Penal Code seems to establish that prosecutions under this provision are necessary for the protection of the religious rights of others. However, as noted above, the protection of rights of others under international and European human rights standards only applies to the rights of individual persons and, in some instances, of groups and persons. It does not extend to abstract entities such as religions, beliefs, ideas, or symbols.
25. Furthermore, the right to freedom of religion does not grant protection from being subjected to ridicule or expressions that might be deemed blasphemous or offensive.³⁶ Thus, the allegation, even if proven, that the defendant's tweet shocked, offended, or disturbed a part of the Muslim population in Turkey does not present a legitimate aim for interference with free expression. Nor can the tweet reasonably be deemed to constitute a threat to public order in the country.
26. Here, ARTICLE 19 highlights that the European Court addressed a similar issue in *Aydin Tatlav v Turkey*, where it found that a comment on a tenet of Islam cannot be subject to prosecution. In that case, the defendant was prosecuted for questioning the dogmatic principle that "God's will" explains social injustices. The European Court concluded that there was no pressing social need to interfere with the impugned expression and found a violation of Article 10 of the European Convention (the right to freedom of expression).³⁷
27. Additionally, the tweet cannot be considered to reach the threshold of incitement to violence, discrimination or hostility that the states must prohibit (as per Article 20 para 2 of the ICCPR). Nothing in the case suggests that the tweet reached this threshold. An insult to the religious feelings of a person or group does not automatically constitute incitement.
28. Hence, the prosecution of the defendant and restrictions of his expression do not pursue a "legitimate aim" for restrictions.

Criminal prosecution would not be necessary and proportionate

29. Even if the court concluded that the restrictions met the test of legality and pursued a legitimate aim, which ARTICLE 19 vehemently disputes, we suggest that it would be wholly disproportionate to the aim pursued. Specifically, criminal prosecution of the defendant as such—and in particular the risk of imprisonment—is not proportionate to the alleged legitimate aims of protecting the rights of others or public order. The prosecution failed to demonstrate the social harm and the high level of severity of the offense that would justify such a harsh punishment. The imposition of criminal sanctions on a well-known investigative journalist would also produce a chilling effect on the media environment in Turkey and would discourage others from participating in debate on issues of public interest.
30. Moreover, it is important to analyse the larger context around the defendant's prosecution. He is a journalist and, as such, carries a particularly important role as a contributor to the debate on

³⁶ European Court, *Aydin Tatlav v. Turkey*, App. No. 50692/99, 2 May 2006, para 28.

³⁷ *Ibid.*, para 31.

issues of public interest in a democratic society.³⁸ This role is just as important in the debate on religious or dogmatic issues.

31. On his social media, the defendant expressed critical opinions about senior government figures. He was also actively reporting on high-level corruption allegations. Additionally, he previously investigated the suspicious death of another journalist, Yeldana Kaharman. The defence lawyer claims that it is because of his journalistic activities that the law enforcement was monitoring his social media and looking for an opportunity to bring a case against him. ARTICLE 19 notes that the European Court, in its previous jurisprudence involving violations of rights against journalists in Turkey, attributed significant weight to the highly concerning trend of prosecuting media professionals for their contributions to the debate on issues of public interest.³⁹ The current charges against the defendant are clearly instrumentalised to stifle his dissenting opinions and retaliate for his legitimate journalistic work. His conviction would also discourage others from engaging in vigorous public debate and would contribute to the shrinking of civil space.
32. In any event, the risk of the imposition of a custodial punishment—six months to one year of imprisonment—is impermissible from the point of view of the proportionality test. In *Aydın Tatlav v. Turkey*, the punishment of 12 months of imprisonment that was subsequently replaced by a “modest fine” was found by the European Court to be disproportionate and sufficient to discourage others from publishing non-conformist opinions about religion.⁴⁰ Similarly, the criminal conviction of the defendant would constitute a manifestly disproportionate restriction on his free expression.

Criminal prosecution is based on illegally obtained evidence

33. Last but not least, the prosecution of the defendant arose from an illegal abuse of authority by law enforcement. It is ARTICLE 19’s understanding that the Constitutional Court of Turkey⁴¹ has annulled the provision of the Law No. 2559 on the Duties and Authority of Law Enforcement⁴² which previously granted the authority to law enforcement to, *inter alia*, conduct proactive monitoring to detect crimes committed in the virtual environment.
34. ARTICLE 19 notes that it is a well-established principle of law that unlawfully obtained evidence is inadmissible and cannot form the basis for prosecution. Surveillance powers must be authorized by a clearly formulated law, which has to be in force at the time of the application of these powers.⁴³ The absence of the legal basis defies the principle of legality, violates the defendant’s right to privacy, and renders interference with his expression unlawful. Judicial oversight over unchecked surveillance power of law enforcement is key to preventing arbitrary interference of this kind.⁴⁴

³⁸ See, most recently, European Court, *Khadija Ismayilova v. Azerbaijan*, App. No. 65286/13 and 57270/14, 10 January 2019, para 161.

³⁹ See, e.g., *Mehmet Hasan Altan v. Turkey*, App. No. 12337/17, 20 March 2018, para 210.

⁴⁰ *Aydın Tatlav v. Turkey*, *op.cit.*, para 30.

⁴¹ Constitutional Court of the Republic of Türkiye, Judgement dated 19.02.2020, E. 2018/91, K. 2020/10, RG 30/4/2020 No. 31114 para 101.

⁴² Additional article 6/18 of the Law No. 2559 on the Duties and Authority of Law Enforcement.

⁴³ See e.g. European Court, *Malone v. The United Kingdom*, App. No. 8691/79, 2 August 1984, para 70, where the Court held that the provisions need to be laid down “with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.”

⁴⁴ See Human Rights Committee, concluding observations, USA, CCPR/C/USA/CO/3, para 21.

35. Further, any interference with the rights to privacy and freedom of expression should be based on a reasonable suspicion that an offence has been committed.⁴⁵ In addition, the arbitrary admission of evidence by the court risks jeopardising the defendant's right to a fair trial.⁴⁶

Conclusions

36. In light of the foregoing assessment, ARTICLE 19 submits that the prosecution of the defendant in this case constitutes a violation of his right to freedom of expression, as guaranteed by Article 10 of the European Convention and Article 19 of the ICCPR. The charges at hand fail to satisfy the test of legality, necessity and proportionality. In particular, the "degrading of religious values" is not a legitimate aim for permissible restrictions on freedom of expression under the aforementioned provision. Thus, it cannot form the basis for prosecution of individuals for expressing their opinions on the tenets of faith. Additionally, the criminal conviction of the defendant would constitute a manifestly disproportionate restriction on his free expression.
37. Additionally, the law enforcement unit in the present case lacked the competence to conduct virtual patrolling of the defendant's social media pages that formed the basis for prosecution. This renders the investigation to be without the requisite legal basis. Regardless of its formal legality under domestic law, virtual patrolling of expressions on social media by law enforcement carries the risk of discouraging individuals from expressing their opinions freely online and adversely affects the right to freedom of expression.
38. The conviction of the defendant, who is an investigative journalist, would also produce a chilling effect on engaging in the public debate and conducting media work on issues of public interest. The charges against the defendant should be dismissed in their entirety.

JUDr. Barbora Bukovska
Senior Director for Law and Policy
On behalf of ARTICLE 19

⁴⁵ See, by analogy, European Court, *Ernst and Others v. Belgium*, App. No. 33400/96, 15 July 2003; *Buck v. Germany*, App. No. 41604/98, 28 April 2005; *André and Another v. France*, App. No. 18603/03, 24 July 2008; *Zubal v. Slovakia*, App. No. 44065/06, 9 November 2010; or *Misan v. Russia*, App. No. 4261/04, 2 October 2014.

⁴⁶ See Human Rights Committee, Communication No. 1089/2002, *Rouse v The Philippines*, Views adopted on 25 July 2005, para 7.2, where the Committee stated that while it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, an arbitrary decision on the admissibility of evidence can constitute a violation of the right to a fair trial.