ANKARA 30. CRIMINAL COURT OF FIRST INSTANCE

Case no: 2022/424
Indictment no: 2022/15791

Between:

Republic of Turkey
Chief Public Prosecutor's Office in Ankara

Prosecution

– and –

Veli Saçılık

Defendant

EXPERT OPINION BY ARTICLE 19

London

06 November 2023

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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 promoting and protecting the right to freedom of expression globally, in accordance with Article 67/6 of the Turkish Code of Criminal Procedure (Law No. 5271). We have been asked by Senem Doğanoğlu, the lawyer representing Veli Saçılık (the Defendant) to advise on the compatibility of the charges brought against him with international and European standards on freedom of expression. We understand that this opinion will be relied upon by the defendant in the case currently pending before the Ankara 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 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 right 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. We have previously submitted expert opinions before Turkish courts in cases that raise the questions about compatibility of Turkish law and prosecutions under Turkish law with international freedom of expression standards.

3. In this expert opinion, we address:
   - The facts of the case relevant for the subsequent analysis;[1]
   - Overview of the international and European standards on freedom of expression applicable to the present case, with a particular focus on the jurisprudence of the European Court of Human Rights;
   - Our assessment of the present case in the light of these international and European freedom of expression standards.

4. ARTICLE 19 concludes that Article 125 of the Criminal Code titled "Insult", under which the defendant, Veli Saçılık, is being prosecuted, fails to comply with international and European freedom of expression standards. Hence, the provision in question should be abolished and no charges should be brought against the defendant. However, even if this Court considers these provisions to be sufficient bases for the prosecution of the Defendant, we submit that the application of these provisions violates his right to freedom of expression. The charges should be therefore dropped immediately.

[1] These are based on an unofficial translation of the indictment against the Defendant and the court documents of hearings that have previously taken place, in addition to information provided by the Defendant's lawyer.

The facts of the case

5. Veli Saçılık, the defendant, is a sociologist, activist and author. On 14 April 2022, he was charged under the provisions of Article 125 of the Turkish Criminal Code for committing the crime of insult based on his social media activity; namely, for two tweets he posted on X (Twitter at that time) on 12 and 15 June 2020:

    - The first tweet, from 12 June 2020, referred to a news article about Süleyman Soylu, the former Minister of Interior having commented on the theatre play, "Devran." The play was written by Selahattin Demirtaş (previous co-head of HDP, pro-Kurdish political party, currently imprisoned) saying "You cannot clean the blood off your hands with a theatre play." The Defendant tweeted in response to the news article: "The fantasy of showering in blood, tracking ISIS suicide bombers moment by moment and failing to stop them, killing Berkin and making people boo his mother, arresting people's representatives (members of parliament) in a peaceful environment because your votes are decreasing, saying 'are we going to reopen the parliament just because two Mehmets died?' I mean, you have a lot of 'work' to do."

    - The second tweet, from 15 June, was about Devlet Bahçeli, the head of the Nationalist Movement Party (MHP) who said he would not allow people to see the theatre play, "Devran." The Defendant tweeted "Bahçeli bellows, the world turns."

6. The Chief Public Prosecutor found that with these tweets, the Defendant committed the crime of insult against Süleyman Soylu and Devlet Bahçeli. In his defence, the Defendant argues that in his first tweet, he was merely expressing general criticism against the political discourse and political commentary and had no intention of insulting Süleyman Soylu. As for the second tweet, he argues that he criticised Devlet Bahçeli's manner of political dialogue that involves a rather aggressive shouting; and with the word "bellow," he did not compare him to any animals. As such, both tweets were within the limits of legitimate criticism of public figures.

Applicable international and regional standards on freedom of expression

7. Turkey is a party to and has ratified both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (European Convention) which guarantee the right to freedom of expression in Article 19 and Article 10 respectively. Pursuant to Article 90 of the Constitution of Turkey, these provisions are part of Turkish law and the Turkish courts are required to consider them when deciding this case.
8. Freedom of expression may be legitimately restricted by the State in certain circumstances; however, under the so-called three-part test any restriction must:

    - **Be provided by law:** Any restriction must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable individuals to

regulate their conduct accordingly.[2] In this respect, the European Court of Human Rights (European Court) has consistently emphasised that a rule is foreseeable when it affords a measure of protection against arbitrary interferences by public authorities and against the extensive application of a restriction to any party's detriment.[3]

- **Pursue a legitimate aim,** exhaustively enumerated in Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR. These include the protection of the rights and reputation of others.

- **Be necessary in a democratic society and proportionate to the aim sought:** This demands an assessment of, first, whether the proposed limitation satisfies a "pressing social need";[4] and, second, it must be established whether the measures at issue are the least restrictive to achieve the aim. Assessing the proportionality of an impugned measure requires careful consideration of the particular facts of the case. The assessment should always take as a starting point that it is incumbent upon the State to justify any restriction on freedom of expression.[5]

International and regional freedom of expression standards and insult

9. At the outset, ARTICLE 19 notes that protection of reputation and rights of others serve as a legitimate purpose for restricting the right to freedom of expression under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention. However, broadly worded laws on insult often represent unnecessarily and unjustifiably broad restrictions on freedom of expression. An important distinction can be drawn between laws whose purpose is genuinely to protect **reputation** (defined as the esteem in which other members of society hold the person), and those that aim to prevent harm to someone's **feelings**, regardless of whether the person's social standing has been diminished. Insult laws typically protect the latter (feelings rather than reputation) and can be interpreted flexibly to suit the authorities' needs, including in order to prevent criticism.

10. Second, ARTICLE 19 points out that international and regional human rights authorities have frequently noted protection of reputation should be provided in civil law. Insult laws and protection of reputation in criminal law should be repealed. In particular:

    - The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, expressed concerns about the possibility of custodial sanctions for defamation laws that include insult.[6] In its General Comment No. 34, it calls on states to consider decriminalising defamation and notes that imprisonment is never an appropriate penalty.[7]

[2] European Court, *The Sunday Times v UK*, App. No. 6538/74, 26 April 1979, para 49.
[3] See, *inter alia*, European Court, Centro Europa 7 S.R.L. and Di Stefano v. Italy, App. No. 38433/09, 7 June 2012, para 143.
[4] European Court, *The Observer & Guardian v the UK*, App. No. 13585/88, 26 November 1991, para 59.
[5] European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para 41.
[6] For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).
[7] Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, para 47.

- The UN Special Rapporteur on Freedom of Opinion and Expression has called on States to repeal all criminal defamation laws in favour of civil defamation laws.[8] Together with other regional free speech mandates, the rapporteur also has been calling on states to repeal their criminal defamation laws in their joint declarations since 1999.[9]

- The European Court of Human Rights (European Court) has recognised that there are serious problems with criminalisation of insult (and defamation). It has held that prison sentences must not be awarded, nor must there be any other suspension or restriction of the right to freedom of expression. More specifically, the European Court has consistently held that any prison sentence in a defamation case will constitute a violation of the right to freedom of expression under Article 10 of the European Convention on Human Rights, irrespective of whether the finding of liability was justified.[10] Furthermore, if criminal defamation is applied, the criminal standard of proof (i.e. beyond a reasonable doubt) must be fully satisfied.

11. ARTICLE 19 also notes that an increasing number of states have either decriminalised defamation or significantly curtailed its use with a movement towards decriminalisation, including Argentina, Mexico, Georgia, Ghana, UK, Ireland, the Maldives, Sri Lanka, and Togo, and most recently Burkina-Faso,[11] South Africa,[12] and Zimbabwe.[13] As demonstrated by the successful repeal of criminal defamation laws in an increasing number of countries, it is unnecessary to rely upon criminal law to protect reputation.

12. The assessment of the restrictions to freedom of expression in criminal law should therefore start from the premise that the existence of criminal liability *per se* in the domestic legislation is not justified. All instances of criminal penalties constitute disproportionate punishments for insult and should be abolished.

Proportionality of criminal sanctions for "insult"

13. ARTICLE 19 notes that even in cases where criminal liability can in principle amount to a justified restriction on the right to freedom of expression, criminal sanctions must still be assessed under the test of necessity and proportionality, in particular in the following circumstances:

[8] See Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2001/64, 26 January 2001.

[9] See in particular Joint Declaration of 10 December 2002: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."

[10] See e.g. European Court, *Belpietro v Italy*, App. No. 43612/10, 24 September 2013.

[11] In Burkina Faso, the 2015 Press Code abolished imprisonment as a sanction for defamation or the dissemination of false news; see BBC, Burkina: The New Criminal Code, 5 September 2015.

[12] In September 2015, the ANC has taken a stance against criminal defamation, which should be followed by legislative action; see D. Milo, The Case Against Criminal Defamation, 29 September 2015.

[13] The Constitutional Court of Zimbabwe, *Madanhire and Another v The Attorney General*, Judgment No CCZ 2/14.

- The subject matter of the impugned speech concerns an **expression of opinion**: Both regional and national courts typically distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. No one should be liable for a statement of opinion, defined as a statement which cannot be shown to be true or false or which cannot reasonably be interpreted as stating a fact (for example because it is rhetoric, satire or jest).[14] Opinions are by definition subjective in nature and courts should not judge whether or not it is appropriate to articulate them. Furthermore, no one should be required to prove the truth of a statement of opinion or value judgement.[15] At a minimum, such statements should benefit from enhanced protection. Last but not least, courts have interpreted the term "opinion" very liberally and allowed the defence of opinion to be defeated only where it is clear that the Defendant did not actually hold the views expressed.[16]

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- The subject matter of the impugned statement concerns an institutional process, hence concerning **matters of public interest**: In matters of public interest and public controversy, strong words and harsh criticism are to be tolerated and perhaps even expected.[17] Courts around the world, international and national, are assiduous in protecting statements on the matters of public concern. Although the protection is afforded to the speaker, the reason why considerable latitude should be afforded to public debate on issues of public importance is because *the public is entitled to receive such information*.[18]

- When politicians and public figures are targeted by expression: International and regional courts have reiterated that **public officials**, especially leaders of states, ministers, leaders of political parties and politicians in general should tolerate a **higher level of scrutiny** than ordinary citizens. The UN Human Rights Committee in General Comment No. 34 has observed that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. 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, albeit public figures may also benefit from the provisions of the Covenant."[19] The European Court has followed on such standards by holding that the limits of acceptable criticism are wider as regards the politician than 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

[14] ARTICLE 19, Defining Defamation, *op.cit.,* Principle 10.

[15] 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. The Special Rapporteur stated that permissible limitations in Article 19(3) of the ICCPR "are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements."

[16] See e.g. European Court, *Sokolowski v. Poland*, App. No. 75955/01, 29 March 2005, para 48.

[17] See e.g. Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, 18 January 2000, E/CN.4/2000/63, para 52.

[18] See e.g. European Court, *Dichand and Others v. Austria*, App. No. 29271/95, 26 February 2002, para 39; *Steel and Morris v. United Kingdom*, App. No. 68416/01, 2005, para 88.

[19] General Comment No. 34, *op.cit.*, para 38.

tolerance."[20]

14. ARTICLE 19 invites this Court to apply these standards in the present case.

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

15. In the light of Turkey's obligations under international freedom of expression standards, restrictions on the applicant's 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

16. Article 125 para 1 of the Penal Code, under which the Defendant is prosecuted, punishes "any person who attributes an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacks someone's honour, dignity or prestige by swearing." ARTICLE 19 submits that these provisions do not correspond to the requirements of legality which mandates that the law in question is precisely formulated and foreseeable. In fact, they are formulated very vaguely and broadly. Terms such as "dignity," "honour," or "prestige" are too vague as legal concepts to justify a specific restriction to freedom of expression.

17. As a matter of principle, ARTICLE 19 notes that Article 125 para 1 of the Penal Code should be repealed entirely.

The restrictions do not pursue a legitimate aim

18. Article 125 para 1 is formulated in a way that protects against harm to someone's feelings rather than reputation. As noted earlier, the protection of feelings is not a legitimate aim for restrictions of the right to freedom of expression. ARTICLE 19 reiterates that the protection of reputation under international and European human rights standards only applies to statements that cause actual harm to individual persons' reputations. It does not extend to protection of someone's feelings.

19. Furthermore, the protection of someone's reputation does not include protection from words and language that simply shock, offend or disturb.[21] We note that the European Court has warned that insult cases related to prosecutions for statements without any factual basis can constitute an abuse by those seeking to avoid criticism.[22]

20. ARTICLE 19 also notes that when criticising public officials and expressing opinions about them, strong words and harsh criticism are perhaps even to be expected, especially in

[20] European Court, *Lingens v Austria*, *op.cit, para* 42; *Incal v. Turkey*, App. No. 22678/93, para. 54;
[21] European Court, *Handyside v. United Kingdom*, 7 December 1976, App. No. 5493/72, para 49.
[22] European Court, *Unabhängige Initiative Informationsvielfalt v. Austria*, App. No. 28525/95, para 46.

matters of public controversy or public interest. The European Court recognised this in a number of cases; for instance:

- In *Lingens v. Austria*, the European Court overturned a defamation case against a journalist who criticised the Austrian Chancellor for agreeing to collaborate with a political party headed by former Nazis. The journalist used expressions such as "basest opportunism," "immoral" and "undignified."[23]

- In *Renaud v. France*, a chairman of a local association of residents opposing a construction project and the webmaster of the Internet site of the association criticised public officials and politicians. The European Court found that when a debate relates to an emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism and they have to accept oral or written outbursts. [24]

- Similarly, in *Thorgeirson v Iceland*, a journalist characterised police officers as "beasts in uniform", described incidents where "individuals [were] reduced to a mental age of a new-born child as a result of strangleholds that policemen and bouncers learn and use with brutal spontaneity", and criticised the police for "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude." The European Court found that such language was permissible given that it was situated in a broader debate about police reform.[25]

21. ARTICLE 19 also submits that the short and informal style of criticism is particularly relevant to expression on social media. As the European Court emphasised in *Tamiz v. the United Kingdom*

> [An] attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life … This threshold test is important: as...the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation.[26]

In this case, the European Court found that although the applicant's statements were "undoubtedly offensive, for the large part they were little more than "vulgar abuse" of a kind – albeit belonging to a low register of style – which is common in communication on many Internet portals" and allegations levied "would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously."[27]

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[23] *Lingens v. Austria*, *op.cit*., para 21.
[24] European Court, *Renaud v. France*, App. No. 13290/07, 25 February 2010, para 40.
[25] European Court, *Thorgeirson v. Iceland*, App. No. 13778/88, 25 June 1992, paras 14-15.
[26] European Court, *Tamiz v UK*, App. No. 3877/14, 19 September 2017, para 80.
[27] *Ibid*., para 81.

22. Based on the foregoing, we submit that 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

23. Even if this Court concluded that the restrictions met the requirement of legality and pursued a legitimate aim, which ARTICLE 19 vehemently disputes, we suggest that the criminal punishment of the Defendant would be wholly disproportionate to the aim pursued. The imposition of a criminal sanctions for Defendant's opinions expressed on Twitter would also produce a chilling effect on freedom of expression in Turkey and would discourage other individuals from participating in a debate on issues of public interest.

24. Moreover, ARTICLE 19 notes that the Court should consider that in his tweets, the Defendant expressed criticism of public officials, one of whom was a former minister. We recall that as public figures, they should tolerate a greater degree of tolerance as they inevitably and knowingly lay themselves open to scrutiny and criticism from the public.[28] Moreover, the European Court has established that offensive speech becomes particularly relevant in the context of an on-going political debate[29] and that an individual "is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements."[30] The European Court concluded that "there is little scope under Article 10 para 2 of the Convention for restrictions on political speech or on debate on questions of public interest."[31]

Conclusions

25. 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 para 3 of the ICCPR. The charges are brought under provisions of the Penal Code that fail to satisfy the test of legality, necessity and proportionality mandated by international freedom of expressions standards. Thus, they should not form the basis for prosecution. The criminal conviction of the Defendant would constitute a manifestly disproportionate restriction on his right to freedom of expression. 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

[28] European Court, *Lingens v Austria*, *op.cit.*, para 42; *Incal v. Turkey*, *op.cit.*, para. 54.
[29] European Court, *Brosa v. Germany*, App. No. 5709/09, para 51.
[30] European Court, *Kuliś v. Poland*, App. No. 15601/02, para 47.
[31] European Court, *Surek v Turkey* (No.1), App. No. 26682/95, para 61.