

Legal report on indictment:

Bülent Şık

PEN Norway Turkey Indictment Project

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Published: 23 September 2021

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At PEN Norway, we are studying journalist and civil society-related cases from the last six years in Turkey by examining the foundation document of the case: the indictment.

Since January 2020, with an international team of judges, lawyers and scholars we have been examining indictments in prominent media and civil society cases, including Cumhuriyet, Büyükkada and the Gezi Park trials.

Each report focuses on one indictment. A group of legal and human rights experts from six different countries will have assessed 22 indictments' compliance with local regulations and international standards by the end of 2021.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards and put in place training in indictment-writing for Turkey's prosecutors and judges. You can find all published reports and articles (including our final report of 2020) on our website: norskpen.no.

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The Turkey Indictment Project is funded by the Norwegian Ministry of Foreign Affairs and the Consulate General of Sweden in Istanbul.

1.) Introduction

The case against Bülent Şık was based on his publication of important information on dangerous environmental pollution. After losing his position as a researcher, he found out that the Ministry of Health did not inform the public about the research results that he was working on. He was of the opinion that the public should be aware of the dangers, so he published parts of the information himself in his articles.

Thus, the core of the case is his exercise of freedom of expression and academic freedom. The essence of the indictment is also a description of these acts.

2.) Summary of case background information

Bülent Şık was an academic and Technical Assistant Director of the Food Safety and Agricultural Research Center at Akdeniz University. The research centre is a centre established to work with toxic chemical substances in foods, water and the environment and to support scientific studies on this subject. Bülent Şık worked at the center from 2010 onwards. From 2011 to 2016 the center worked on a project titled *"The Evaluation of Environmental Factors and Their Impacts on Health in Kocaeli, Antalya, Tekirdağ, Edirne and Kırklareli Provinces"*, led by the Ministry of Health. An aim of the project was to determine whether there had been conditions posing a threat to public health. The project consisted of 16 sub-projects, such as preliminary diagnosis of cancer, exposure to heavy metals and trace elements, environmental pollutants, pollutants in certain waterways, soil, food and air, and preventive healthcare. Bülent Şık took part in the project from the beginning. Throughout 2015, he worked on the assessment of data and project results, and also participated in a general evaluation meeting in December 2015.

Bülent Şık was also a signatory of the 2016 Academics for Peace petition "We will not be party to this crime". His assignment at the center was not extended in January 2016, and soon after he was dismissed from all the research projects in which he participated as an executive and as a researcher, including the project mentioned above. His employment as an academic was terminated pursuant to an emergency decree on November 22, 2016.

The results from the project were not published by the Ministry of Health after the evaluation at the end of 2015. As he had participated in the project and also the evaluation, Bülent Şık had knowledge about the information. He had also made a copy of the analysis reports from his office computer, just to have as a backup.

One month after he had been fired, his younger brother, investigative journalist Ahmet Şık, was taken into custody, along with 17 other colleagues and executives of the newspaper Cumhuriyet.

After Bülent Şık understood that the results of the research were not going to be shared with the public, he started to analyse the material he had downloaded from his office computer. He shared the research results in a series of articles in the daily newspaper

Cumhuriyet and on Bianet (an online media platform with a focus on human rights). The articles were published in Cumhuriyet newspaper from 16 to 19 April 2018.

Already on 17 April 2018, the Ministry of Health made a criminal complaint, and on 16 July 2018 the indictment against Bülent Şık was issued.

The first hearing was held on 7 February 2018. For this hearing, he had prepared a written defence statement, focusing on the reasons why he as an academic and researcher had an obligation to publish the important information that the Ministry did not publish.¹

After the first hearing, the Court asked the Ministry of Health to clarify any legal basis for a ban on publishing the information. The files of the case were also handed to an expert, to inspect whether the report was published by anyone other than Bülent Şık.

The second hearing was held on 30 May 2019. In this hearing the Ministry of Health answered the question from the first hearing, and stated that there was no specific legislation on keeping the information secret. His duties were in line with his contract as a researcher. Bülent Şık was given time to prepare his final statements.

The third hearing was held on 26 September 2019. Bülent Şık was acquitted of securing prohibited information (TPC 334) and of disclosing prohibited information (TPC 336). He was however sentenced for violation of the disclosure of confidential information in respect of a duty (TPC 258), and was sentenced to one year and three months in prison. The execution of the prison sentence was not suspended, as he had not shown any remorse about the crime he had allegedly committed.

He appealed this sentence to Istanbul Regional Court of Appeal, and on 29 April 2021 Bülent Şık was acquitted also for this remaining part of the case. The Court stated that his research could not be classified a confidential document or secret. And according to the Court, the Ministry of Health should have revealed the information for the benefit of the public themselves.² The prosecutor of the Istanbul Regional Court of Appeal objected to the verdict of the Istanbul Regional Court of Appeal and applied to the Supreme Court. The prosecutor's claimed that the allegation that the acquittal was unlawful. Additionally the Ministry of Health objected to the decision too. The case file will be examined by the Supreme Court and it is still open.

3.) Analysis of the indictment

¹ <http://www.dunyamizzehirlenmesin.org/bulent-sik-mahkeme-savunmasi>

² <https://www.duvarenglish.com/istanbul-appeals-court-acquits-academic-bulent-sik-over-article-series-on-cancer-study-news-57300>

The alleged crimes and legal basis.

The indictment issued on 16 July 2018 specified three alleged crimes, all related to the obtaining and dissemination of the information in the published articles, and based on the following three Articles;

Disclosure of Confidential Information in Respect of a Duty, according to Turkish Penal Code Article 258:

- (1) Any public officer who publishes or discloses any confidential document, decision, order or other official notification under his control, or within his knowledge, by virtue of his office, or who facilitates, by any means, the access to such information by another shall be sentenced to a penalty of imprisonment for a term of one to four years.
- (2) The same penalty shall be applicable where a public officer commits such an offence after the expiry of his status as a public officer.

Securing Prohibited Information, according to Turkish Penal Code 334;

- (1) Any person who secures information that, due to its nature, must be kept confidential and the disclosure of such has been prohibited by a regulatory act of a competent authority in accordance with the law shall be sentenced to a penalty of imprisonment for a term of one to three years.
- (2) Where this act jeopardizes the State's preparations for war, its effectiveness in war or its military movements, the offender shall be sentenced to a penalty of imprisonment for a term of five to ten years.

Disclosure of Prohibited Information according to Turkish Penal Code 336;

- (1) Any person who discloses information which, due to its nature, must be kept confidential and the disclosure of which is also prohibited by a regulatory act of a competent authority in accordance with the law shall be sentenced to a penalty of imprisonment for a term of three to five years.
- (2) Where the act has been committed during wartime or has jeopardized the State's preparations for war, its effectiveness in war or its military movements, the offender shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.
- (3) Where the act has been the result of recklessness on the part of the offender, the offender shall be sentenced to a penalty of imprisonment for a term of six months to two years in circumstances described in paragraph one and for a term of three to eight years in the circumstances described in paragraph two.

Deprivation of rights

The indictment also invoked Article 53 of the TPC. According to Article 53, a person sentenced to a penalty of imprisonment for an intentional offence shall also be prohibited from becoming a member of the Turkish Grand National Assembly and is deprived of rights such as being employed in administrative positions.

The indictment – factual description and application of law.

The part of the indictment describing the factual basis of the alleged crimes is quite short.

Evidence

The indictment refers to the "Investigation report", but the only specified documents are the complaint from the Ministry, a copy of the Cumhuriyet Newspaper dated 16/04/2018, a statement by Bülent Şık, and his criminal record.

It is hard to see that any investigation was carried out, other than reading the mentioned documents. In particular, there is no examination of the importance or significance of the published information, or Bülent Şık's role, duties or rights. Thus, after the first hearing, the Court asked for clarification of the legal basis for the alleged secrecy.

Factual description

The indictment simply refers to the Ministry's complaint, to the articles and Bülent Şık's statement, and then concludes that the above-mentioned articles have been violated;

"...an article published in Cumhuriyet Newspaper on 16/04/2018 under the headline "The Hidden Report - Here's How Turkey Is Being Poisoned" and with subtitles "Here's How We Are Being Poisoned - The Study the Ministry Kept Secret - Poison in the Food - Chemicals Everywhere". [The article] published confidential information in a manner so as to lead to public indignation,

Although the suspect, in his written statement presented to the Chief Public Prosecutor's Office, declared that he was 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 the media.

The suspect, Bülent ŞIK, whose ID information is written above, has disclosed or publicized the confidential documents, decisions and orders and other notifications delivered to him by virtue of office or facilitated access to such information and documents by third parties. [Bülent ŞIK] secured information that, due to its nature, must be kept confidential and that the disclosure of such has been prohibited by a regulatory act of a competent authority in accordance with the law and [the suspect] published this information in Cumhuriyet newspaper and therefore, in line with the explanations above and based on the scope of the file, it is understood that the suspect committed the alleged offence.

It is requested on behalf of public that the suspect be tried by the court and be sentenced under the articles written above that are applicable to the act."

Initial observations – omission of crucial considerations

From a general legal point of view, there are some striking omissions in the description of the alleged crimes.

The basis for any duty of confidentiality is not established specifically.

While Bülent Şık's statement mentioning freedom of expression is referred to, there is no reasoning as to *why* the indictment is *not* an interference in or breach of freedom of expression, beyond stating that the information could lead to "public indignation".

Bülent Şık's role as a researcher and an academic is not mentioned.

These omissions are even more striking, because the referred titles of the articles clearly indicate that the public interest of the information should be considered. Faced with an article titled "*Here's How We Are Being Poisoned - The Study the Ministry Kept Secret - Poison in the Food - Chemicals Everywhere*", it is not sufficient to state that publication could lead to public indignation. It should also be considered whether the publication is protected by freedom of expression and thus not punishable at all.

The indictment in light of domestic law

Article 170 of the Turkish Criminal Procedure Code (TCPC) outlines basic regulations concerning the issuing and content of indictments.

Most of these regulations serve to identify the actions that are considered to be unlawful, and the rules applied, in order for the accused to build a defence against the indictment. The actions and the applied national law are clearly identified, and as such most of the criteria in Article 170 are met.

The indictment is also relatively short, and written in a clear language.

According to TCPC Article 170/6, the conclusion of the indictment shall clearly state which punishment and measure of security is requested to be inflicted. The indictment does however not specify the requested punishment, only that he should be "*tried by the court and be sentenced under the Articles*".

The major problem with the indictment, is that the actual facts do not seem to constitute a crime at all, when the Articles of the Turkish Penal Code are understood in conjunction with the principles of freedom of expression.

Article 170/2 states that an indictment can only be issued if it is likely that a "crime has been committed", and according to 170/3-h the "applicable" rules shall be specified. If the rules are not applicable, there is no crime. The Prosecutor must obviously have a duty to consider whether the actions fall outside the scope of penal code.

According to Article 10 of the European Convention on Human Rights, any interference in Freedom of Expression must be "necessary in a democratic society", for the specific reasons mentioned in the article. If the state cannot justify an interference according to the strict proportionality test, the interference will also be a violation of the freedom. If the prosecutor finds that an interference in freedom of expression actually is "necessary in a democratic society", the reasons for this should be mentioned in the indictment. In a case involving freedom of expression, the validity of any such reasons will be the crucial points for the outcome of the case. If the reasons for interference in freedom of expression are not given, the accused is not given a fair opportunity of defence.

According to TCPC Article 170/4, the crime shall be explained in relation to the facts at hand, and according to Article 170/5 the indictment shall include issues in favour of the accused. In a case such as this, the aim of these criteria can hardly be met if the indictment does not clarify the reasons for an obvious interference in freedom of expression.

International law; Freedom of Expression and Academic Freedom

The indictment is clearly an interference in the freedom of expression, protected by Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Academic freedom is a part of this protection.

According to the case law of the European Court of Human Rights (ECtHR), the right to publish the results of academic research is at the core of this protection. One example is the case *Hertel v. Switzerland*.³ Mr. Hertel had published reports on the effects of microwave ovens, concluding that the ovens were very dangerous to human health. Even if the research seemed to lack merit, and led to a drop in the sales of such ovens, the ECtHR stated that it was his right to publish, regardless of this;

"The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."

The protection of academic freedom was also underlined in ECtHR case *Sorguç v. Turkey*.⁴ Mr. Sorguç, a professor of construction management at Istanbul Technical

³ Judgement 25 August 1998, application 59/1997/843/1049

⁴ Judgement 23 June 2009, application 17089/09

University, had been sentenced to pay 3,455,215,000-TL for remarks made in a speech and a paper at a conference. ECtHR held this to be a breach of ECHR Article 10, and the reasoning is valid also in the case of Bülent Şık:

"In its Recommendation 1762 (2006), the Parliamentary Assembly of the Council of Europe adopted the following declaration for the protection of academic freedom of expression:

"...

4. In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:

4.1. academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction;...

4.3. history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation;..."

Article 10 of ECHR seems to be the basis of Article 3 of The Turkish Press Law, Law Number 5187. Thus, the same principles follow from both domestic and international law.

Any sanctions against Bülent Şık for writing the articles of major public concern would quite clearly undermine the very core of academic freedom. As stated by ECtHR; An academic should have the freedom to "*distribute knowledge and truth without restriction*".

The role of the Prosecutor

Bülent Şık was finally acquitted. Not only did the National Court find that no crime was committed. The Court also stated that the Ministry should have revealed the information themselves. However, following an appeal by the Prosecutor of the decision of the Regional Appeal court, the case now continues and it is going on before Turkey's Supreme Court of Cassation.

The fact that an indictment does not lead to a conviction, does not in itself imply a failure on part of the prosecutor. In this case, however, the issuing of the indictment seems to be based on a lack of adherence to fundamental principles.

The basis for this assertion, is the fact that the indictment is an obvious and prima facie interference in freedom of expression and academic freedom.

When this is the case, the prosecutor must consider whether there are any valid reasons for the interference, so that the interference is "necessary in a democratic society". It is for the state to come up with convincing arguments for such overriding arguments. If

not, the interference will also imply a breach of human rights. There are, however, no signs that this has been considered in a prudent way, which is also evidenced by the fact that the national regional appeal court did not find any convincing arguments for convicting him.

These duties follow from both domestic law and international principles.

It follows from Article 1 of ECHR that the Contracting Parties shall "secure" to everyone the rights and freedoms defined in the Convention. The main elements in the indictment is a description of exercising freedom of expression. In *Kavala v. Turkey*⁵, the ECtHR stated that;

"The very fact that such acts were included in the bill of indictment as the constituent elements of an offence in itself diminishes the reasonableness of the suspicions in question."

According to the UN Guidelines on the Role of Prosecutors⁶ Principle 12;

"Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."

Issuing indictments for exercising human rights, without sufficient explanation, is clearly not fulfilling these obligations.

According to the TCPC Article 170/2, an indictment shall only be issued where;

...at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed..."

In this case, the description in the indictment itself indicates that there is no crime, and the evidence part of the indictment shows no sign of investigation into or consideration of reasons for interference in Bülent Şik's Academic Freedom or Freedom of Expression.

4.) Conclusion and recommendations

It is evident from the facts mentioned in the indictment, that the alleged crime is based on Bülent Şik's exercise of freedom of expression and academic freedom.

Despite this, the indictment does not contain any facts that could justify an interference in these rights, based on the "necessary in a democratic society" test in ECHR Article 10 and the Turkish Press Law Article 3.

⁵ Judgement 10 December 2019, application 11/05/2020

⁶ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

The information given in the indictment gives a strong indication that any sanctions based on the articles would be a breach of these fundamental rights. This is confirmed by further information about the facts, and also the actual outcome of the case.

While the indictment fulfils most of the criteria in TCPC Article 170, related to clarifying the alleged crime and its time and place, the Prosecutor has failed in the duty to prudently consider if a crime has been committed at all.

As a representative of the State, a prosecutor is obliged to "secure" the exercise of human rights. The duty to protect human rights also follows from the UN Guidelines on the Role of Prosecutors.

Both the guidelines and the TCPC Article 170/2 contain the basic principle that both law and facts should be considered in a prudent way before issuing an indictment. An indictment should only be issued when "sufficient suspicion" exists.

The case gives a basis for at least three recommendations;

First, if the alleged crime involves a reference to an underlying duty (here a duty of confidentiality), the *source* of this duty should be identified in the indictment.

Second, it should always be considered if the indictment represents an *interference* in a human right. In cases directed against authors and academics, there will often be an interference with Freedom of Expression (ECHR Article 10.1).

Third, if the indictment represents an interference, the Prosecutor must consider if there are any reasons that can *justify* the interference according to the criteria in Article 10.2 (prescribed by law, specific reasons and proportionality). The indictment should mention the alleged reasons. Without such reasons, the interference will be a *breach* of the freedom in question.

About the author

With a varied background, Vidar Strømme was believed to be one of the few successful generalists in the big law firms. Admitted to the Supreme Court since almost 30 years, Strømme is currently the Director of the Norwegian National Institution for Human Rights. Former lawyer for Norway's General Counsel, Civil Affairs and former District Attorney. He has represented Edward Snowden in a case on extradition against the Norwegian state, and litigated the "Rolfesen" case that was awarded Columbia's prize for the best ruling on Freedom of Speech in 2016.