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Third Party Intervention

In the Case of Atakan Akbaba v. Turkey (no. 57344/19)

by

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Introduction

1. İFÖD will address in its intervention in the case of Atakan AKBABA v. Turkey (**No. 57344/19**) the issue of freedom of expression on the social media platforms and religious insult. In this case, the applicant was convicted of publicly degrading a section of the public on the ground of religion (subject to article 216/2 of the Turkish Criminal Code) on account of certain publications on the Facebook platform. The applicant was sentenced to **six months and 17 days imprisonment and the court postponed pronouncement of its verdict**. The applicant complained of infringement of his freedom of expression for his conviction **invoking article 10 of the Convention**.
2. It is understood from the Court's communication that the applicant published following messages which were considered by the national authorities as constituting the crime of publicly insulting religious values of a section of the population:
    a. "The Almighty God has taken power" (cenabı allah yönetime el koydu)
    b. "Currently a salat (a special prayer recited by the imams of mosques on certain occasions) is recited at Kazan/Ankara, he blesses Tayyip, the religionists, that your religion is sinking, it's not worth five cents", (şuan Ankara kazanda sela okunuyor tayyibi kutsuyor dinciler dininiz batsın 5 kuruş etmez dininiz dinciler) and
    c. "The imam abuses, what is it, it's the third salat, come on, you fuck, do we have to listen" (imam suyunu çıkardı bu nedir ya 3. Sela s2tirin ya dinlemek durumundamıyız).
3. The European Court asked to the parties whether there has been an interference with the applicant's freedom of expression within the meaning of Article 10(1) of the Convention on account of the criminal proceedings brought against the applicant and his conviction. The Court also asked whether this interference was foreseen by law and necessary, within the meaning of Article 10(2) (Gündüz v. Turkey, no 35071/97, 04.12.2003) In particular, having regard to the content of the applicant's publications on Facebook, the Court asked to comment, on the context in which these publications took place and their capacity to cause harm and whether the national courts carried out in their decisions sufficient examination and balancing between the interests at stake in the light of the criteria set out and implemented by it in cases relating to freedom of expression (Gözel and Özer v. Turkey, nos 43453/04 and 31098/05, § 64, 06.07.2010).
4. The İFÖD submission will address the issues of limitation of freedom of expression for the protection of religion or religious values and religious groups. The international and European standards on the relationship between freedom of expression and blasphemy, religious insult and incitement to religious hatred (religious hate speech) will be provided. The submission will also discuss the compliance of domestic law and practice with these standards. Subsequently, an overview of legal issues surrounding social media postings and an assessment of the impact of such publications will be provided. İFÖD will therefore assess the important issue of whether the majority of comments published on social media platforms are likely to be too trivial in character, and/or the reach of their publication is likely to be too limited in semi closed social media platforms such as Facebook. İFÖD will argue that **content published to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website or news portal**. At the end, İFÖD will provide a procedural review

model discussing the 'general principles' to be taken into account in the decision-making process of the European Court with regards to allegations of violation of freedom of expression protected by Article 10 of the Convention in criminal cases.

International Human Rights Standards on the Relationship between Freedom of Expression and Blasphemy, Religious Insult and Religious Hate Speech

5. The right to freedom of expression is a fundamental right and protected by international human rights law such as Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (ECHR). The right to freedom of expression is not an absolute right and it can be limited by the states, under Article 19(3) of the ICCPR and Article 10/2 of the ECHR, provided that the limitation is provided for by law, in pursuit of a legitimate aim, (listed exhaustively as: respect of the rights or reputations of others or the protection of national security or of public order, or of public health or morals) and necessary in a democratic society.
6. It is not a legitimate aim under Article 19(3) of the ICCPR or Article 10/2 of the ECHR to limit freedom of expression to protect religions or belief from criticism, or to shield followers of a religion or belief from offence. The Human Rights Committee ("HRC") stated in General Comment no 34 that:

   > "48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."[1]

7. Article 20(2) of ICCPR also provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. The HRC stated that Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, paragraph 3. As such, a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3.
8. According to a Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation,[2] the concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own. Moreover, restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to

[1] https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

[2] Joint declaration on defamation of religions, and anti-terrorism and anti-extremism legislation adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information in Athens on 9 December 2008. https://www.article19.org/resources/joint-declaration-defamation-religions-anti-terrorism-anti-extremism-legislation/

protect particular institutions, or abstract notions, concepts or beliefs, including religious ones. Finally, restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

9. The joint declaration emphasized that there is an important difference between criticism of a religion, belief or school of thought and attacks on individuals because of their adherence to that religion or belief.
10. Therefore, it is necessary to make a distinction among three concepts: blasphemy, religious insult and incitement to religious hatred. Although there is no general definition of these concepts, ***blasphemy*** can be defined as the offence of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred.[3] Similarly, ***religious insult*** can be defined as insult based on belonging to a particular religion or insult to religious feelings. On the other hand, ***religious hatred*** can be defined as hatred against a group of persons defined by reference to religious belief or lack of religious belief. Moreover, ***hatred*** is defined in the *Oxford English Dictionary* as 'the emotion or feeling of hate, active dislike, detestation, enmity, ill will, malevolence' and ***hate*** is defined as 'to hold in very strong dislike, to detest, to bear malice to, the opposite of "to love"'. These definitions should all be taken into account while trying to define what constitutes as ***religious hate speech***.
11. It must also be stated immediately that there is no universally accepted definition of the term "**hate speech**" under international law. As the UN Special Rapporteur on freedom of expression pointed out in his 2019 report to the UN General Assembly, "hate speech", a shorthand phrase that conventional international law does not define, has a double ambiguity. Its vagueness and the lack of consensus around its meaning can be abused to enable infringements on a wide range of lawful expression."[4]
12. The UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence[5] defined "hatred" and "hostility" as referring to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group and the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.[6]
13. According to the preamble to European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 15, hate speech may be defined as

> "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual

[3] This definition belongs to the Committee on Culture, Science and Education, Report on blasphemy, religious insults and hate speech against persons on grounds of their religion (Doc. 11296), 8 June 2007.

[4] UN Special Rapporteur on freedom of expression, Annual report, UN Doc. A/HRC/22/17/Add.4, para. 1.

[5] Rabat Plan of Action is the result of a discussion by a high-level group of human rights experts, convened under the auspices of the United Nations High Commissioner for Human Rights in 2013. https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx

[6] A/HRC/22/17/Add.4, appendix, footnote 5

orientation and other personal characteristics or status; may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes".[7]

14. Considering all these various definitions, religious hate speech can be defined as denigration of the reputation of a social group, stereotyped by some religious characteristics, accompanied by incitement to hostility, violence and discrimination against that group.[8]
15. According to general tendency in international law blasphemy laws which incriminates insulting God or sacred or religious insult laws that incriminate insulting religious beliefs, values or feelings cannot be accepted as legitimate. Having said that, laws incriminating religious hatred may not contravene international human rights norms.
16. Article 10(2) of the European Convention provides for the possibility of imposing formalities, conditions, restrictions or penalties on freedom of expression, as are prescribed by law and are necessary in a democratic society in pursuit of specifically listed legitimate interests.
17. The Parliamentary Assembly of the Council of Europe, in its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, considers that "national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence".[9]
18. The Venice Commission adopted an extensive 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 in 2008. [10] The Commission emphasized that, in a true democracy, imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate should be the primary means of protecting inalienable fundamental values like freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas that are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.[11]
19. According to the Commission, the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based mean that the responsibility that is implied in the right to freedom of expression does not, as such, mean that an individual is to be protected from exposure to a religious view simply because it is not his or her own. **The purpose of any restriction on freedom of expression must be to protect individuals**

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[7] ECRI General Policy Recommendation no. 15 on Combating Hate Speech, adopted on 8 December 2015, https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

[8] Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU-wide Study and National Assessments, PRISM, p.11.

[9] Assembly debate on 29 June 2007, recommendation adopted by the Assembly on 29 June 2007. See also Res(2006)1510 on Freedom of expression and respect for religious beliefs, adopted by the Assembly on 28 June 2006.

[10] European Commission for Democracy through Law (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, 17-18 October 2008, Doc. No. CDL-AD(2008)026 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e

[11] Ibid, para. 46.

holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be allowed to scrutinise, openly debate and criticise, even harshly and unreasonably, belief systems, opinions and institutions, as long as this does not amount to advocating hatred against an individual or groups.[12]

20. Therefore, the Commission recommended, (a) that incitement to hatred, including religious hatred, should be the object of criminal sanctions, (b) 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 (c) that the offence of blasphemy should be abolished and should not be reintroduced.[13]
21. The Commission stated that criminal sanctions related to unlawful forms of expression which impinge on the right to respect for one's beliefs should be seen as last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest. The Commission also emphasized that hate speech towards members of other groups including religious groups "is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination" and it may not benefit from the protection afforded by Article 10 of the Convention. Hate speech thus justifies criminal sanctions.[14]
22. Nevertheless, the Commission warned that the application of hate legislation must be measured in order to **avoid an outcome where restrictions, which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities and reinforcing the dominant political, social and moral discourse and ideology**.
23. As regards with the boundaries between insult to religious feelings (even blasphemy) and hate speech the Commission accepted that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem, however, should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the punishment of insult to religious feelings.[15]
24. The UN Special Rapporteur on freedom of expression has also stressed that "[a] critical point is that the individual whose expression is to be prohibited under Article 20 (2) of the Covenant is the advocate whose advocacy constitutes incitement. A person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, for example, a person advocating a minority or even offensive interpretation of a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under Article 20 (or any other provision of human rights law). Such expression is to be protected by the State, even if the State disagrees with or is offended by the expression."[16]
25. The Venice Commission proposed some elements to be taken into account to decide whether a given statement constitutes an insult or amounts to hate speech: the *context* in which it is made; the *public* to which it is addressed; whether the statement was made by a

[12] Ibid, para. 49.
[13] Ibid, para. 89.
[14] Ibid, paras. 55-56.
[15] Ibid, para. 64.
[16] UN Special Rapporteur on freedom of expression, Annual report, UN Doc. A/HRC/22/17/Add.4, para. 10.

person in his or her official capacity, in particular if this person carries out particular functions.[17]

26. Based on such a range, international human rights standards and jurisprudence, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence has set a set of six criteria to assess the severity of the "hatred" such to reach the threshold of prohibition under Article 20.2 ICCPR:

> "(a) ***Context*** of the statement: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
> (b) ***Speaker***'s position or status: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;
> (c) ***Intent*** to incite audience against target group: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under Article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
> (d) ***Content*** and form of the statement: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
> (e) ***Extent*** of its dissemination: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;
> (f) ***Likelihood*** of harm, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."[18]

27. In a number of cases the ECtHR decided that the acts or statements of the applicants constituted religious hatred and found the applications inadmissible. In the *Norwood v. United Kingdom* (no.23131/03, 16.11.2004) case in which the applicant had displayed in his window a poster supplied by the British National Party, of which he was a member,

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[17] Venice Commission Report CDL-AA(2008)026, opcit 10, para. 69.

[18] UN Rabat Plan of Action, para. 29, endorsed by UN Special Rapporteur on freedom of expression. https://undocs.org/A/HRC/22/17/Add.4.

representing the Twin Towers in flame. The picture was accompanied by the words "Islam out of Britain – Protect the British People". As a result, he was convicted of aggravated hostility towards a religious group. The applicant argued, among other things, that his right to freedom of expression had been breached. The Court declared the application inadmissible (incompatible *ratione materiae*). It found in particular that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The Court therefore held that the applicant's display of the poster in his window had constituted an act within the meaning of Article 17 (prohibition of abuse of rights) of the Convention, and that the applicant could thus not claim the protection of Article 10 (freedom of expression) of the Convention.

28. In *Belkacem v. Belgium* (no. 34367/14, 27.06.2017) the case concerned the conviction of the leader and spokesperson of the organisation "Sharia4Belgium", which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia. The applicant argued that he had never intended to incite others to hatred, violence or discrimination but had simply sought to propagate his ideas and opinions. He maintained that his remarks had merely been a manifestation of his freedom of expression and religion and had not been apt to constitute a threat to public order. The Court declared the application inadmissible (incompatible *ratione materiae*). It noted in particular that in his remarks the applicant had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court considered that the remarks in question had a markedly hateful content and that he applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court's view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the European Convention on Human Rights. With reference to the applicant's remarks concerning Sharia, the Court further observed that it had previously ruled that defending Sharia while calling for violence to establish it, could be regarded as hate speech, and that each Contracting State was entitled to oppose political movements based on religious fundamentalism. Therefore, in *Belkacem v. Belgium*, the Court considered that the applicant had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which were manifestly contrary to the spirit of the Convention. Accordingly, the Court held that, in accordance with Article 17 of the Convention, the applicant could not claim the protection of Article 10.
29. However, in a number of cases, the Court found violation of freedom of expression of the applicants on account of their conviction for inciting religious hatred. For example, in the most recent case of Tagiyev and Huseynov v. Azerbaijan (no. 13274/08, 05.12.2019) which concerned the conviction of the applicants – a well-known writer and columnist and an editor – for inciting religious hatred and hostility with their remarks on Islam in an article they had published in 2006. The Court held that there had been a violation of Article 10 of the Convention, finding that the applicants' conviction had been excessive and had breached their freedom of expression. The Court noted in particular that the national courts had not justified why the applicants' conviction had been necessary when the article clearly compared Western and Eastern values and therefore had contributed to a

debate on a matter of public interest, namely the role of religion in society. Indeed, the courts had simply endorsed a report finding that certain remarks had amounted to incitement to religious hatred and hostility, without putting them in context or even trying to balance the applicants' right to impart to the public their views on religion against the right of religious people to respect for their beliefs.

30. Moreover, although the Court did not find violation of freedom of expression of the applicant on account of his conviction for blasphemous statements against Islam and Prophet Mohammed by four votes to three in the case of *İ.A. v. Turkey* (no. 42571/98, 13.09.2005), it found violation of freedom of expression of the applicant in the *Aydın Tatlav v. Turkey* (no. 50692/99, 02.05.2006) case for similar statements in a book criticising the Koran published by the applicant.
31. The European Court therefore has not clearly stated that blasphemy laws categorically contravenes with the Convention neither it rejected categorically religious insult laws but it stated, reminding that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society", that those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith *(İ.A. v. Turkey,* no. 42571/98, para. 28, 13.09.2005).
32. İFÖD is of the opinion that **Rabat Plan of Action threshold test on hate speech is compatible with the caselaw of the European Court of Human Rights** on balancing between right to freedom of expression and right to religion. The ECtHR takes into account the social and political context of the statement, position and status of the speaker, content and form of the speech, extent of its dissemination, intent to incite the audience against a target group and likelihood of harm including imminence. Within this context, **İFÖD would like to bring to the attention of the Court that** social media postings should be assessed in terms of status of its publisher, nature of the social media platform it is published on, the extent of dissemination and impact of the posting as well as its content and context.
33. **Firstly**, the Court should take into consideration whether the applicant was a public, well-known or influential figure at the time he shared postings on Facebook or when he was prosecuted (*Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131) or whether he was a **well-known blogger or YouTuber** (*Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25) **or a popular user of social media** (*Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016), **let alone a public or influential figure** (contrast, *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11.10.2001; *Féret v. Belgium*, no. 15615/07, §§ 75 and 76), **which could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements** (*Savva Terentyev*, § 81).
34. **Secondly**, there are substantial differences between the social media platforms and how the users choose to use such platforms. While, for example, Twitter is regarded as largely an open microblogging platform, Facebook is often regarded as a semi closed platform. Therefore, the European Court should be mindful that **the applicant shared a number of postings of a political nature on a semi closed social media platform, namely Facebook**. The users of the Facebook platform themselves decide whether to have their

accounts and profiles are publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, the Facebook activities of the applicant did not take place on a completely publicly accessible Internet platform, website or blog (compare *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 79).

35. **Thirdly**, the Court established that the **potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference** (*Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts)). According to the Court's jurisprudence, "**it is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages"** (*Savva Terentyev*, § 79). It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public. Similarly, in the admissibility decision of *Tamiz v. The United Kingdom* (no. 3877/14, 19.09.2017), the Court established 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**" (§80-81) to another person's reputation or to state institutions to require criminal prosecutions or sanctions such as dismissal.
36. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in his Report submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 7 September 2012 also stated that "*a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website"* (§ 46).
37. **Fourthly**, the Court should take into the account the content of the postings and whether they include political criticism of some religious practices and whether they can be considered as a contribution to a public debate about political utilisation of the religion and mosques by the ruling political party. The Court should also consider whether the applicant targeted a certain section of the society on the ground of their religion, whether his postings included a call for violence, hatred or discrimination against a specific target group.
38. **Fifthly**, the Court should evaluate whether the statements that the applicant published attracted any public attention. It is important to establish the extent of the dissemination and public attention attracted by the postings in order to assess likelihood of harm they may cause.
39. **Finally**, the Court should also consider whether the applicant had intention to incite people to hatred, violence or discrimination against a targeted group.

The Turkish Legal Context

40. Turkey is party to the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR).

41. Under Article 90 of the Constitution, "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail". Therefore, any decision that is in conflict with international human rights law treaties to which Turkey is a party also violates the Constitution.
42. It is similarly a fundamental principle of international law, also reflected in Article 27 of the Vienna Convention on the Law of Treaties, that a State may not invoke provisions of its internal law for its failure to perform a treaty obligation.
43. Therefore, the national judicial authorities are under the obligation of interpreting and applying article 216/2 of the Turkish Criminal Code which provides that: "*A person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year."* in compliance with the international human rights law. So, the Turkish courts should interpret and implement this provision in accordance with the international principles explained above. Accordingly, a statement can only be punished under this provision if it includes the element of incitement to violence, hatred, or discrimination.

Procedural Obligations of Article 10

44. The Court established that Article 10 imposes procedural obligations to the Contracting parties and the Court's task is to assess the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts. The Court emphasized that **the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account** when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (*Baka v. Hungary* [GC], no. 20261/12, § 161, 23.06.2016; *Kula v. Turkey*, no. 20233/06, §§ 45 and 46, 19.06.2018).
45. Within this context, the Court established that the **obligation to provide reasons for a decision is an essential procedural safeguard under Article 6 § 1 of the Convention,** as it demonstrates to the parties that their arguments have been heard, affords them the possibility of objecting to or appealing against the decision, and also serves to justify the reasons for a judicial decision to the public. This general rule, moreover, **translates into specific obligations under Articles 10 and 11** of the Convention, by **requiring domestic courts to provide "relevant" and "sufficient" reasons for an interference**. This obligation enables individuals, amongst other things, to learn about and contest the reasons behind a court decision that limits their freedom of expression or freedom of assembly, and thus offers an important procedural safeguard against arbitrary interference with the rights protected under Articles 10 and 11 of the Convention (*Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Obukhova v. Russia*, no. 34736/03, § 25, 08.01.2009; *Sapan v. Turkey*, no. 44102/04, §§ 40-42, 08.06.2010; *Cumhuriyet Vakfı and Others v. Turkey, no.* 28255/07, §§ 67-68, 08.10.2013; *Gülcü v. Turkey*, no.17526/10, § 114, 19.01.2016).

46. İFÖD is in the opinion that failure of domestic courts **including that of the Constitutional Court** to evaluate an impugned social media post in the light of principles developed by the European Court and failure in providing relevant and sufficient reasons constitutes in itself violation of procedural obligation of the State under Article 10. So, the Court should evaluate whether domestic courts provided relevant and sufficient explanation why the applicant's Facebook postings constituted incitement to religious hatred according to above mentioned six-part threshold test.

Conclusion

47. İFÖD would like to emphasize that international human rights law protects rights of people and not abstract religions or belief systems. As explained above, most of international human rights bodies categorically rejects blasphemy and religious insult laws. Even the Venice Commission recommended repeal of blasphemy laws and found neither necessary nor desirable the religious insult laws. In any case, imposing criminal sanction for religious insult contravenes international human rights law.
48. İFÖD is in the opinion that article 216/2 of the Turkish Criminal Code may only be compatible with international human rights law if it is interpreted and applied in accordance with the six-part threshold text adopted by the Rabat Plan of Action. Otherwise, it would be in contradiction with international human rights treaties, especially with Article 19 of the ICCPR and according to Article 90 of the Turkish Constitution, Turkish judiciary should ignore Article 216/2 of the Turkish Criminal Code and directly apply the international human rights treaties to which Turkey is party. The Court should take into account this aspect of the case when evaluating the legality of interference with the freedom of expression of the applicant.

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.