Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Friday, August 22, 2014

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Dear President Erdoğan and Foreign Minister Davutoglu:
Re: Prosecution of lawyer Ramazan Demir

TURKEY VIOLATES INTERNATONAL HUMAN RIGHTS OBLIGATIONS

Lawyers' Rights Watch Canada ("LRWC") is a committee of lawyers that promotes human rights and the rule of law internationally through education, legal research and advocacy for lawyers and other human rights defenders in danger because of their advocacy. LRWC has special consultative status with the Economic and Social Council of the United Nations. More information about the work of LRWC is available at http://www.lrwc.org.

LRWC is again writing to express grave concern that the prosecution of Ramazan Demir under Article 125 of the Criminal Code violates Turkey's international law duties to protect and ensure:

a. the right of all persons criminally charged to be represented by a lawyer empowered to effectively protect rights and achieve justice;
b. the right and duty of lawyers to perform their professional functions without intimidation, harassment or improper interference; and
c. the right of lawyers to be immune from civil or criminal suit for words spoken in the course of presenting or challenging evidence, submissions or legal argument before a court or other tribunal.

BACKGROUND

Mr. Ramazan Demir is a human rights lawyer who has represented journalists prosecuted within the framework of a broad-ranging operation intended to dismantle the Koma Civakên Kurdistan/ Group of Communities in Kurdistan (KCK).

On 16 July 2013, Ramazan Demir was charged with criminal defamation, "insulting or … offending the dignity of a public authority in the performance of his duties", pursuant to Section 125 of the Criminal Code, which provides for up to two years of imprisonment. According to Articles 58 and 59 of the Law on Attorneyship (Law No. 1136 adopted on March 19, 1966), a lawyer may be charged under this section only upon the authorization of the Criminal Affairs Department of the Justice Ministry.

The charges were laid in response to a complaint filed on 13 May 2013 by the Special Prosecutor of the 15th Heavy Criminal Court. The complaint relates to statements allegedly made by Ramazan Demir on 16 November 2012 during the trial of his journalist client on charges of being a member of the banned KCK/PKK organization and attending meetings and demonstrations in contravention of the law regulating such meetings and demonstrations. The Public Prosecutor alleges that Ramazan Demir challenged the legitimacy of the wording of the indictment, questioned the capacity of the Prosecutor to determine what activities constitute the normal professional activities of journalists and called on the court to hear evidence from a professor of communications. The Silivri Prosecutor, on 9 September 2013, obtained authorization from the Justice Ministry to file the indictment.

On 7 November 2013, the Istanbul Bar Association, following receipt of a complaint filed by the Special Prosecutor of the 15th Heavy Criminal Court, initiated a disciplinary investigation against Mr. Ramazan Demir in relation to the same incident pursuant to Article 141 of the Internal Rules on Attorneyship.

To the knowledge of LRWC, neither the Minister of Justice nor the Istanbul Bar Association considered the international law principle granting lawyers civil and criminal immunity for statements made in court or Turkey's international law obligations to protect the professional activities of lawyers from interference by and reprisals from state or other actors.

INTERNATIONAL LAW OBLIGATIONS

Turkey has international law obligations to ensure the equal enjoyment by all people within its territory of the rights articulated by the *Universal Declaration of Human Rights* (UDHR) and guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR).[1]

To discharge these obligations Turkey must ensure the right of all individuals to legal representation. Article 14(3) (d) of the ICCPR guarantees the right of a person "to…defend himself in person or through legal assistance of his own choosing." It is widely accepted that states must adopt and maintain effective measures to ensure the safety and independence of lawyers and ensure their freedom to engage in vigorous and effective advocacy without reprisal or interference from any sector, including state agents.

Specific state duties identified as necessary to ensuring the right to legal representation guaranteed by the ICCPR are identified by the United Nations *Basic Principles on the Role of Lawyers* (Basic Principles).[2] Compliance with the Basic Principles is a fundamental pre-condition to fulfilment of the requirement of every state to ensure effective access both to enforcement of rights and to the

[1] Turkey signed the ICCPR on 15 August 2000 and ratified the ICCPR on 23 September 2003 with one reservation concerning Article 27 on the right of minorities.[1] Turkey ratified the *Optional Protocol to the International Covenant on Civil and Political Rights* on 24 November 2006 and the *Second Optional Protocol to the International Covenant on Civil and Political Rights* on 2 March 2006. Both Optional Protocols entered into force on 24 February 2007. Turkey is also a signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).

[2] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

legal representation required for the effective enforcement of rights and remediation of violations. Principle 20 requires states to ensure that "lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleading or in their professional appearances before a court, tribunal or other legal or administrative authority." Statements protected include all statements however obnoxious or intemperate. The test is not offence to the listener but rather whether the statement was made in course of representing the client(s).

By seeking to impose criminal punishment and professional restrictions on Mr. Demir for exercising his rights and carrying out his duty as a lawyer, Turkey is contravening the international law obligations it has assumed as a member of the United Nations and as a member of the European Community.

LRWC calls on the Court and the Ministry of Justice to consider the aforementioned international law obligations and to ensure that individual and advocacy rights of Mr. Demir are protected and that he is not wrongfully deprived of his liberty or his licence to practice law. LRWC calls for withdrawal of the charges against Ramazan Demir.

There are four bases upon which the indictment of Mr. Demir contravenes international law:

a. The indictment contravenes Turkey's international law duty to ensure the right of all individuals to legal representation in cases involving determination of rights, as well as the right and duty of lawyers to vigorously represent clients free from interference from state or other actors;
b. Defamation laws should be written and enforced as narrowly as possible in order that freedom of expression, which is vital to democracy, not be eroded. Turkey's defamation laws do not fulfill that requirement;
c. An independent judicial system provides protection, in the form of legal privilege, for statements made in court by lawyers in the defense of their clients. In the absence of such protection, lawyers will be unable to fully and vigorously defend their clients in criminal cases. This is particularly true in cases involving charges of a political nature; and
d. Laws against criminal defamation are considered to be an anachronism, universally condemned by many countries (particularly in Europe), and should not carry with them the threat of incarceration.

APPLICABLE LAWS

Defamation is prohibited under Turkish criminal law. There are also civil laws in Turkey dealing with defamation, but those civil laws are not the subject of this letter. Turkey's Penal Code, Article 125, entitled ''Defamation,'' contains the following provisions:

1. Any person who acts with the intention to harm the honor, reputation or dignity of another person through concrete performance or giving impression of intent, is sentenced to imprisonment from three months to two years or imposed punitive fine.
2. The offender is subject to above stipulated punishment in case of commission of offense in writing or by use of audio or visual means directed to the aggrieved party.
3. In case of commission of offense with defamatory intent:
    a. Against a public officer,
    b. Due to disclosure, change or attempt to spread religious, social, philosophical belief, opinion and convictions and to obey the orders and restriction of the one's religion,
    c. By mentioning sacred values in view of the religion with which a person is connected, the minimum limit of punishment may not be less than one year.

4. The punishment is increased by one sixth in case of performance of defamation act openly; if the offense is committed through press and use of any one of publication organs, then the punishment is increased up to one third.

The Constitution of the Republic of Turkey (Constitution) protects freedom of expression:

Article 26: Freedom of Expression and Dissemination of Thought

c1. (As amended on October 17, 2001) Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.

c2. The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

c3. The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

Provisions of the Constitution that must be used to interpret domestic law include:

Part one, Articles 2 and 5:

ARTICLE 2. The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the Preamble.

ARTICLE 5. The fundamental aims and duties of the State are; to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence. [Emphasis added]

DEFAMATION LAWS AND FREEDOM OF EXPRESSION

Freedom of expression is enshrined in the Constitution.

The importance of the state's duty to ensure the right of all individuals—including political opponents—to freedom of expression was clearly and succinctly expressed in the Canadian case of *Halton Hills et al. v. Kerouac*:

> Without free speech, there is no free press. Without a free press, there is no free political debate. Without free political debate, there cannot be true democracy. Freedom of speech, writ large, is a pillar of democracy.[3]

It is now universally recognized in countries governed by the rule of law that limits on freedom of expression (including free speech) are to be very narrow, and must not restrict the ability of citizens to criticize their own government or government officials.

Regarding the criticism by a citizen of his government, the only restrictions that are tolerable in a democratic society governed by the rule of law are restrictions that prevent a citizen from advocating the use of violence to overthrow the government.

Clearly, defamation laws create a restriction on freedom of expression. However, that restriction must be kept as minimal as possible so as not to infringe, any more than necessary, upon fundamental individual freedoms including freedom of expression. This point was made in the case of *Halton Hills et al. v. Kerouac,* as summarized in the head note of the case:

> Expression about public affairs in general, and government in particular, lies at the core of freedom of expression. Any legal restriction on freedom of expression about public affairs has a chilling effect on freedom of expression generally, and infringes s. 2(b) of the Canadian Charter of Rights and Freedoms. Infringements of s. 2(b) may be justified under s. 1 of the Charter. Laws against sedition, for example, may be justified, since society must guard against its own violent overthrow. Laws against hate speech may be justified to protect the victims of hate speech. The common law tort of defamation may be justified on the basis that private persons (including public servants) are entitled to protect their personal reputations. There is no countervailing justification to permit governments to sue in defamation. Governments have other, better, ways to protect their reputations. Any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature. The common law position, in the absence of such legislation, is that absolute privilege attaches to statements made about government.

These principles have been applied consistently in common-law jurisdictions. For example, the House of Lords in 1993, in the case of *Derbyshire County Council v. Times Newspapers Ltd*., stated:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech. [4]

The governments of New South Wales and South Africa adhere to the same principles. The Supreme Court of New South Wales, in the case of Council of the *Shire of Ballina v. Ringland*,[5] noted that allowing actions such as the one against Ramazan Demir would "open the way to oppression of the most serious kind". In South Africa, the court in *Die Spoorbond and Another v. South Africa Railways* held that claims of defamation (which include both libel and slander) by a public authority should no longer be recognized.[6]

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[3] 2006 CanLII 12970 (ON SC) at para 25.
[4] [1993] AC 534 at 547, [1993] 1 All ER 1011 (HL).
[5] (1994), 33 NWSLR 680, [1994] NSW LEXIS 14010 (CA) at 76-77.
[6] [1946] AD 999 at 1014.

One way in which governments and courts have narrowed the restrictions that defamation laws create to freedom of expression is through the creation of a legal privilege that attaches to various categories of statements. These categories include statements made in court, and statements made about the government or government agents that are of a political nature.

An explanation of the privilege attaching to statements made in court is found in the textbook entitled, *The Law of Defamation in Canada*:

> Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. The true doctrine of absolute immunity is that, in the public interest, it is not desirable to inquire whether utterances on certain occasions are malicious or not. It is not that there is privilege to be malicious, but that, so far as it is a privilege of the individual, the privilege is to be exempt from all inquiry as to malice; the reason being that it is desirable that persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are malicious. The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously: it is not a desire to prevent actions from being brought in cases where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in the discharge of duty. [Emphasis added][7]

According to the common law in England and the Commonwealth, absolute privilege attaches to any statements made by judges, witnesses and advocates during the course of judicial or quasi-judicial proceedings. The principle and the immunity it provides from both civil and criminal proceedings has been a principle of primary importance to the integrity of common-law legal systems for over three hundred years. The parameters of the doctrine of absolute privilege, which have remained constant, were enunciated in l772 by Lord Mansfield in *R. v. Skinner*: "Neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office."[8]

The only exceptions to absolute privilege are with respect to perjury, contempt of court and perverting the course of justice. In 1892, the English Court of Appeal affirmed the ambit of absolute privilege and its purpose as an essential requirement for the proper administration of justice:

> The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies whether against judges, counsel, witnesses, or parties for words spoken in the course of any proceeding before any court recognized by law and this

[7] Raymond E Brown, *The Law of Defamation in Canada,* 2nd Ed, loose-leaf (Toronto: Carswell, 1999) at 12-27.
[8] (1772), 98 ER 529 at 530.

> although the words were written or spoken maliciously, without any justification or excuse, and from personal ill-will or anger against the party defamed. This 'absolute privilege' has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech exist.[9]

The doctrine of absolute privilege is based on public policy considerations. It is in the public interest that all participants in the legal system should be independent and encouraged to speak freely, so that the true facts may be ascertained, so that the credibility of witnesses may be accurately assessed, and so that the evidence and law may be frankly and candidly discussed to ensure that a correct and just result is obtained in the litigation.

It has been stated that "[f]reedom of speech without fear of consequences is … indispensable for the proper and effective administration of justice."[10]

These public policy considerations are especially critical for lawyers. In a democratic society, which Turkey's Constitution would suggest it is, there is an essential need for freedom of speech for lawyers while defending and advocating for their clients' interests. As stated by Brett, M.R. in *Munster v. Lamb*:

> …counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a judge or a witness If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.[11]

A lawyer has a duty to his or her client to "fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case".[12]

This principle is even more important in cases involving unpopular defendants, or defendants involved in political causes. Without such protection, it would be difficult to find any lawyer willing to accept the responsibility of defending such a client.

The doctrine of absolute privilege is essential to allow a lawyer to effectively and zealously perform the duties he or she owes to clients. Subjecting lawyers to actions for defamation or sedition fetters and restrains them in discharging their duty. Turkish lawyers cannot perform their duty to their clients, nor fully protect clients' rights, if they are not free to make certain statements for fear of prosecution.

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[9] *Royal Aquarium v Parkinson* (1892), 1 QB 431, 40 WR 450.
[10] JG Fleming*, The Law of Torts*, 8th end (Sydney: Law Book, 1992) at 559; See VV Veeder, "Absolute Immunity in Defamation: Judicial Proceedings" (1909) 9 Col L Rev 463 at 469.
[11] (1883), 11 QBD 588 (CA) at 603-04.
[12] *Rondel v Worsley* (1969), 1 AC 191 at 227 per Lord Reid.

CRIMINAL DEFAMATION AND SEDITIOUS LIBEL

Libel is a subspecies of defamation. Seditious libel is a category of libel targeted at statements relating to the State or its agents.

Many countries have abolished the crimes of seditious libel and criminal defamation. For example, the Supreme Court of Canada, in *Boucher v. The King* held that the crime of seditious libel was founded in legal and social beliefs no longer held:

> The crime of seditious libel is well known to the Common Law. Its history has been thoroughly examined and traced by Stephen, Holdsworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to the end of the 18th century it was, in essence, a contempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive.[13]

Many human rights institutions, including the Council of Europe and the UN Special Rapporteur on freedom of opinion and expression, have called for the decriminalization of defamation. On 4 October 2007, the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 entitled, *Towards Decriminalization of Defamation*, in which it exhorted the member states to "abolish prison sentences for defamation without delay" and stressed that "[e]very case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that ... journalists have a sword of Damocles hanging over them."

The UN Human Rights Committee (HR Committee) has determined that while contempt of court may be used in some instances to restrict freedom of expression in accordance with Article 19(3), "[s]uch proceedings should not in any way be used to restrict the legitimate exercise of defence rights."

In addition the HR Committee has stressed that "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."[14]

According to the Committee to Protect Journalists, "the Inter-American Court of Human Rights has ruled that a criminal defamation conviction in Paraguay violated international law. The court found that the criminal proceedings themselves violated the American Convention on Human Rights because they were an 'excessive limitation in a democratic society'."[15]

The UN Special Rapporteur on freedom of opinion and expression, the Representative on Freedom of the Media of the OSCE (Organization for Security and Cooperation in Europe) and the Organization of American States Special Rapporteur made a joint declaration in 2002, stating,

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[13] *Boucher v The King*, [1951] SCR 265 at 285-86.
[14] United Nations Human Rights Committee General Comment No. 34, CCPR/C/GC/34, 12 September 2011, paragraphs 20 and 38.
[15] Committee to Protect Journalists, "Inter-American Court condemns criminal defamation conviction" (28 September 2004), online: <http://cpj.org/2004/09/interamerican-court-condemns-criminal-defamation-c.php>.

"[c]riminal 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." (United Nations, 2002).[16]

The same position was publicly taken by the Special Rapporteur for freedom of expression for the African Commission on Human and Peoples' Rights (ACHPR), the Inter-American Court of Human Rights (IACtHR), and the Organisation of American States (OAS) counterpart, in a 2005 Joint Declaration[17] stating, "[i]n democratic societies, the activities of public officials must be open to public scrutiny. Criminal defamation laws intimidate individuals from exposing wrongdoing by public officials and such laws are therefore incompatible with freedom of expression."

CONCLUSION

The prosecution of Ramazan Demir contravenes Turkey's domestic and international law obligations to ensure the rights of all individuals to freedom of opinion and expression, the right to be fully represented by a lawyer and the right of lawyers to perform their professional duty to vigorously defend and protect the rights of clients and the integrity of the judicial system.

LRWC respectfully calls on the authorities involved to consider the above-noted international law obligations and to ensure that Mr. Demir is not deprived of his liberty, or his licence to practice law, as a result of these illegitimate criminal charges. LRWC calls for the withdrawal of the charges against Ramazan Demir.

All of which is respectfully submitted:

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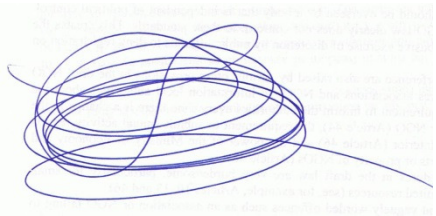

Gail Davidson, LRWC Executive Director

[16] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, online: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1>.

[17] JOINT DECLARATION by the ACHPR Special Rapporteur for Freedom of Expression and the IACHR-OAS Special Rapporteur on Freedom of Expression, 25 February 2005, online: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=394&lID=1>.

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