

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, October 10, 2014

Shaikh Hamad bin 'Issa Al Khalifa
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P.O. Box 555, Rifa'a Palace,
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Prince Khalifa bin Salman al-Khalifa
Prime Minister
Kingdom of Bahrain
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Dear Excellency, Prime Minister and Attorney General;

Re: Arbitrary Detention of Nabeel Rajab

We write on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers who promote human rights and the rule of law internationally. LRWC also provides support to lawyers and other human rights defenders in danger because of their advocacy.

LRWC views the detention of Nabeel Rajab as arbitrary and in contravention of the *International Covenant on Civil and Political Rights* (ICCPR) and urges the Government of Bahrain to ensure his immediate release.

Furthermore, LRWC is gravely concerned that the current proceedings are a continuation of the judicial harassment that Nabeel Rajab has faced since 2012. In December 2012, after months of criminal proceedings, Nabeel Rajab was convicted by the Appeals Court to two years' imprisonment for exercising his freedom of expression. In 2013, the United Nations Working Group on Arbitrary Detention (WGAD) after reviewing the applicable facts and law and consulting with the Government of Bahrain, concluded that the conviction and detention were arbitrary and that "it is clear that Mr. Rajab was detained and convicted under domestic laws of Bahrain which seem to deny persons the basic right to freedom of opinion, expression."¹ The WGAD concluded that Mr. Rajab's conviction was arbitrary having resulted from violations of his internationally protected rights to expression, association and assembly.

The Government of Bahrain ignored the WGAD recommendations to immediately release Mr. Rajab and provide access to the compensation to which he was entitled. He was released in June 2014. He was also prosecuted for having criticised the government on Twitter but was eventually acquitted by the Higher Appeal Court.

Only four months after release, Nabeel Rajab again faces a Public Prosecution investigation. On 1 October, the General Directorate of Anti-corruption and Economic and Electronic Security summoned him for a two-hour questioning regarding a number of tweets that the Government of Bahrain alleges criminally offend the Ministry of the Interior contrary to Article 216 of the Bahraini Penal Code which states that

¹ Opinions adopted by the WGAD at its sixty-sixth session, 29 April–3 May 2013 - No. 12/2013 (Bahrain), A/HRC/WGAD/2013/12 at paras 42 flg.
Arbitrary Detention of Nabeel Rajab

[a] person shall be liable for imprisonment or payment of a fine if he offends by any method of expression the National Assembly, or other constitutional institutions, the army, law courts, authorities or government agencies.

Nabeel Rajab was initially arrested and detained for seven days. On 9 October he was informed that the Ministry of Defence had filed a complaint regarding the tweet, and that an order had been made without a hearing extending his detention to 19 October, the date fixed for determination of the charges. No reasons for his detention have been provided, as required by the ICCPR. LRWC is also concerned about Article 147 of the Legislative decree no. (46) of 2002 which purports to authorize detention of an accused for a period of up to 45 days in contravention of the provisions of both the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR).

The WGAD considers arbitrary any detention that contravenes the rights protected by the UDHR and the ICCPR. Detention resulting from **the exercise of freedoms of expression, assembly, association or participation in public affairs** is arbitrary under Category II; detention resulting from a failure by the state to observe and fully allow **fair trial rights**, including the right to pre-trial release,² is arbitrary under Category III.

Criminal defamation laws should be abolished

Criminal defamation laws should not be used to punish the exercise of freedoms protected by the UDHR and ICCPR including freedom of expression. Regarding freedom of expression, the UN Special Rapporteur on freedom of expression, the OSCE Representative on freedom of the media and the OAS Special Rapporteur made a joint declaration in which they endorse the document *Defining defamation – Principles on Freedom of Expression and Protection of Reputation* established by ARTICLE 19.³

This document contains a number of recommendations⁴ that apply to the Bahraini legislation:

(a) **All criminal defamation laws should be abolished and replaced**, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

(b) As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to **ensure that any criminal defamation laws still in force conform fully to the following conditions**:

i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;

ii. the offence of criminal defamation shall not be made out unless it has been **proven that the impugned statements are false**, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

² Fact Sheet No. 26, The Working Group on Arbitrary Detention available at <http://www.ohchr.org/documents/publications/FactSheet26en.pdf>

³ United Nations, Economic and Social Council, Commission on Human Rights, 57th session, Civil and political rights, including the question of freedom of expression – Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 2000/38, *Joint Declaration by the UN Special Rapporteur on freedom of expression, the OSCE Representative on freedom of the media and the OAS Special Rapporteur*, Annex V.

⁴ ARTICLE 19, *Defining Defamation – Principles on Freedom of Expression and Protection of Reputation*, July 2000, Section 2, Principle 4. Available at: <http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>

iii. **public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases**, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;

iv. **prison sentences**, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, **excessive fines and other harsh criminal penalties should never be available as a sanction** for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

(emphasis added)

ARTICLE 19 further commented on these affirmations that

[i]n many countries, criminal defamation laws are abused by the powerful **to limit criticism and to stifle public debate**. The threat of harsh criminal sanctions, especially imprisonment, exerts a **profound chilling effect on freedom of expression**. Such sanctions clearly cannot be justified, particularly in light of the **adequacy of non-criminal sanctions in redressing any harm to individuals' reputations**.⁵ (emphasis added)

Criminal Defamation laws violate freedom of expression

The United Nations Human Rights Committee (HR Committee) has determined that harassing a person for holding an opinion through the use of legal proceedings constitute a violation of freedom of expression.⁶ The HR Committee also affirmed that restrictions on freedom of expression, allowed by Article 19(3) of the ICCPR, “may never be invoked as a justification for the muzzling of advocacy of [...] human rights”.⁷

LRWC urges Bahrain to stop all the use of penal sanctions to punish the exercise of freedom of expression, to repeal Article 216 of the Penal Code and to ensure that defamation allegations will be subject, if proven to civil remedies. LRWC calls for the withdrawal of charges against Nabeel Rajab.

Arbitrary detention violates rights to pre-trial release and a fair trial.

The ICCPR obliges states to ensure the liberty of people arrested or detained on criminal charges through regular independent judicial oversight and compliance with international standards. Article 9(3) of the ICCPR guarantees,

[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.

Pre-trial detention is to be used only when strictly necessary and as a last resort. There is a presumption in favour of pre-trial release, based on rights protected by the ICCPR:

- the right to be presumed innocent;
- the right to liberty and security of the person;
- the right to a fair trial; and
- the right to full equality before the law.

The HR Committee has determined that pre-trial detention is arbitrary unless detention is necessary to prevent proven risks of flight, interference with evidence or reoccurrence and only detention will prevent occurrence of the proven risk(s).

‘[A]rbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of

⁵ Ibid.

⁶ Human Rights Committee, General Comment No 34, *Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 21 July 2011, para 9.

⁷ Ibid at para 23.

law...this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances.⁸

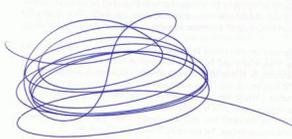
LRWC urges Bahrain to review its legislation allowing pre-trial detention during investigation for up to 45 days. We also urge Bahrain to release Nabeel Rajab and ensure that he remains free prior to trial, with unrestricted and confidential access to counsel and with access to the materials necessary to properly prepare for trial.

LRWC remains concerned by the systematic use of the criminal law system against prominent human rights defenders in Bahrain. Nabeel Rajab has been wrongly targeted by criminal proceedings as a direct consequence of his lawful exercise of internationally protected rights and human rights advocacy, as have others including, Abdulhadi Al-Khawaja, his daughters Maryam Al-Khawaja and Zaynab Al-Khawaja and Najj Fateel.

LRWC calls on Bahrain to:

1. Immediately release Nabeel Rajab;
2. Repeal Article 216 of the Bahraini Penal Code;
3. Withdraw charges against Nabeel Rajab;
4. Review and amend its legislation to remove the use of penal sanctions to punish the peaceful exercise of internationally protected rights including rights to expression, association, assembly and participation in the conduct of public affairs and ensure compliance with the ICCPR and UDHR;
5. Review laws and practices regarding pre-trial release and make the amendments and changes necessary to ensure rights to liberty, the presumption of innocence, pre-trial release and fair trial and compliance with the UDHR and ICCPR.

Sincerely,



Gail Davidson, Executive Director, LRWC



Marion Caussanel, Bahrain Monitor, LRWC

Copied to:

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⁸ HR Committee in *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, at para. 9.8 as discussed in *Pre-trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release*, Lois Leslie, LRWC, March 2013 available at <http://www.lrwc.org/handbook-pre-trial-release-and-the-right-to-be-presumed-innocent/>

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