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

www.lrwc.org – lrwc@portal.ca – Tel: +1 604 738 0338 – Fax: +1 604 736 1175
3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

December 10, 2019

Mr. Abdulhamit Gül
Minister of Justice
06659 Kizilay
Ankara, Turkey
Tel: +90 (0312) 417 77 70
Fax: +90 (0312) 419 33 70
Email: info@adelet.gov.tr

Re: International law obligations regarding lawyer Özgür Urfa

Dear Mr. Gül,

We write on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers and human rights defenders who promote international human rights, the independence and security of human rights defenders, the integrity of legal systems and the rule of law through advocacy, education and legal research. LRWC has Special Consultative Status with the Economic and Social Council of the United Nations.

LRWC has written in the past with respect to various Turkish lawyers and human rights defenders who have been detained, arrested, charged and/or imprisoned in violation of Turkey's international human rights law obligations and Turkey's own Constitution. Communications to the Government of Turkey have been made by LRWC regarding the cases of: Selçuk Kozağaçlı, Şebnem Korur Fincancı, Ramazan Demir, Erin Keskin, Mustafa Aydin, Can Tombul, Taner Kilic and numerous other Turkish lawyers. LRWC has also made oral and written statements to the UN Human Rights Council and submissions to the UN Human Rights Council and Special Procedures regarding widespread persecution of lawyers, journalists and other human rights defenders through wrongful prosecutions and convictions, arbitrary detention and other grave rights violations.

In this instance, we are writing with respect to lawyer Özgür Urfa, who has been charged with "insulting the President". The charges against Mr. Urfa are unfounded, illegitimate, and contrary to Turkey's Constitution and Turkey's obligations under international human rights laws to which Turkey is either bound or signatory. We urge you to take whatever steps are required to have these charges dismissed immediately.

The "Crime" of Insulting the President
According to § 299(1) of the Penal Code of Turkey, it is a crime to insult the President:

> Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years.

As of December 2016, more than 1,800 individuals have been charged with this crime, including schoolchildren, cartoonists, and a former Miss Turkey winner. In September 2019, the 2nd Penal Court of First Instance ruled that Burhan Borak, a Turkish citizen, be sentenced to 12 years and 3 months in prison for "insulting the President".

As explained below, this provision of the Penal Code of Turkey is constitutionally invalid and contrary to Turkey's human rights obligations. It contravenes freedom of expression under both international human rights law and Turkey's Constitution. Furthermore, the law is too vague to constitute an enforceable offense.

In addition, applying this law to statements made before President Erdoğan became the President of Turkey offends the principle against retroactive application of criminal law.

Legal Analysis

1. Retroactivity

The principle against retroactive application of criminal law is enshrined in Turkey's Constitution:

> **ARTICLE 38** - No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.

This same principle is found in Article 7 of the European Convention on Human Rights ("ECHR"), Article 11 of the Universal Declaration of Human Rights ("UDHR"), and Article 15 of the International Covenant on Civil and Political Rights ("ICCPR"), which are almost identical to the above referenced Article 38 of Turkey's Constitution:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Furthermore, to the extent that any provision of the Penal Code of Turkey is contrary to Turkey's Constitution, the Constitution governs, and the provision of the Penal Code is of no force or effect. For that reason, a criminal offense described in the Penal Code cannot be applied retroactively.

We understand that the charges against Mr. Urfa are based on statements that were contained in a petition that he submitted to the Kırklareli 3rd Penal Court of Peace on October 2, 2014, at a time when Recep Tayyip Erdoğan was not the President, but was in fact the prime minister. Even if one were to assume that § 299(1) of the Penal Code of Turkey constituted a valid criminal law provision (which would be an incorrect assumption), insulting a person who, at the time the alleged insult was made, was not the President, would not contravene that law.

2. Privilege for Statements Made During Legal Proceedings

Principles of international law found in the UDHR, the United Nations Basic Principles of the Role of Lawyers ("Basic Principles"), and the United Nations Declaration on Human Rights Defenders support the proposition that lawyers must not be hampered in their conduct of judicial

proceedings by limitations on their speech and must enjoy immunity for statements made during such proceedings.

Directly relevant to this case is paragraph 20 of the Basic Principles, which states that lawyers have immunity for in-court statements:

> 20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

We understand that Turkey is committed to maintaining a properly functioning and independent legal and judicial system, the independence of which is also enshrined in Turkey's Constitution. In order to allow the system to function properly, governments must ensure that lawyers are allowed to provide a robust representation of their clients and to perform all of their professional functions without intimidation, hindrance, harassment or improper interference (this statement is taken from paragraph 16 of the Basic Principles). Charging a lawyer with an offense for a statement contained in a petition to the court, as in this case, can only serve to intimidate, hinder and interfere with the constitutionally protected right of every client to a proper defence, and the right of every lawyer to provide such a defence.

This same principle is fully supported by the law in almost all countries. For example, according to English and Commonwealth common law, absolute privilege attaches to any statements made by judges, witnesses and advocates during the course of judicial or quasi-judicial proceedings.[1] 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.[2]

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 proceeding.

It has been stated that "[f]reedom of speech without fear of consequences is … indispensable for the proper and effective administration of justice."[3] 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".[4] This principle is even more important in cases involving unpopular defendants and defendants involved in political causes. Without such

---

[1] P. Milmo & W.V.H. Rogers, eds., *Gatley on Libel and Slander,* 9th ed. (London: Sweet & Maxwell, l998) at 281 [hereinafter Gatley]; P.R. Carter-Ruck, R. Walker & H.N.A. Starte, *Carter-Ruck on Libel and Slander,* 4th ed. (London: Butterworths, l992) at 119; R.E. Brown, *The Law of Defamation in Canada,* 2nd ed., vol. 1 (Toronto: Carswell, l994) at 554.

[2] *R v. Skinner,* (1772) Lofft 55 at 56, 98 E.R. 529 at 530 [cited to E.R.].

[3] J.G. Fleming, The Law of Torts, 8th ed., (Sydney: Law Book, 1992) at 559; see V.V. Veeder, "Absolute Immunity in Defamation: Judicial Proceedings" (1909), 9 Col. L. Rev. 463 at 469.

[4] *Rondel v. Worsley* (1969), 1 A.C. 191 at 227 per Lord Reid.

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, or in this case, "insulting the President", fetters and restrains them in discharging their duty. Turkish lawyers cannot perform their duty towards clients, nor fully protect clients' rights, if they are not free to make certain statements for fear of prosecution.

The concept of immunity and privilege for statements made in the course of judicial proceedings is closely tied to the rights of all people to freedom of expression, which is discussed below. The relationship between these two concepts is further explained below.

We respectfully ask that you take whatever steps are necessary to enforce the principle of absolute immunity for lawyers, judges and witnesses with respect to all statements made in the course of legal proceedings in Turkey.

3. Freedom of Expression, Defamation, and the "Crime" of Insulting the President

Freedom of expression is enshrined in Turkey's Constitution, as well as in human rights conventions and declarations to which Turkey is signatory.

It is universally recognized in countries that are considered to be governed by the rule of law, and which adhere to the principles of democracy and free speech, 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.

The offense set out in § 299(1) of the Penal Code of Turkey, which makes it a crime to insult the President, is a subcategory of defamation. Defamation laws targeted at criticism of the government have been the subject of extensive legal analysis, all of which arrive at the same conclusion: such defamation laws are contrary to basic principles of human rights, particularly the right of free expression.

Regarding the criticism by a citizen of his government, or in this particular case, of the President, the only restrictions that are tolerable in a democratic society governed by the rule of law are those that are provided by law and are truly necessary for the limited purposes enumerated under Article 19 of the ICCPR, such as those that prevent a citizen from advocating the use of violence to overthrow the government.

Clearly, defamation laws create a restriction on freedom of expression. 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*., [1993] A.C. 534, [1993] 1 All E.R. 1011, at p. 547 A.C. (H.L.) 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.

As another example, 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.[5]

One way in which governments and courts have found to narrow the restrictions that defamation laws create to freedom of expression is by 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 by Raymond E. Brown entitled *The Law of Defamation in Canada,* 2nd ed., looseleaf (Toronto: Carswell, 1999) at 12-27:

> 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]

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 October 4, 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".

The European Court of Human Rights has on several occasions rejected attempts by different countries to impose criminal sanctions for defamation. The United Nations Human Rights Committee's General Comment No. 34 recognizes that penal defamation laws must not serve in practice to stifle freedom of expression. The Committee has expressed concerns over the exact

[5] *Die Spoorbond and Another v. South Africa Railways*, [1946] A.D. 999, at p. 1014.

laws at issue here, particularly given the high level of protection provided regarding expression directed at political figures.

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 "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws" (United Nations, 2002). 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 (IACHR), and the Organisation of American States (OAS) counterpart, in a 2005 Joint Declaration. They stated:

> In 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.

In summary, § 299(1) of the Penal Code of Turkey is a subspecies of criminal defamation, and as such is contrary to the basic human right of freedom of expression and contrary to Turkey's Constitution. We respectfully request that the government of Turkey cease and desist from charging people under § 299(1) of the Penal Code of Turkey, vacate all charges against all individuals who have been charged under this section - including Mr. Urfa, and release from prison all individuals who were convicted under this section.

4. Legality and Vagueness

The charges against Mr. Urfa violate the principle of legality. The principle of legality includes the requirement of certainty. A person must be able to know in advance what is unlawful so that s/he can inform their actions. Where ambiguity exists in the definition of an offense, it must be interpreted in the interest of the defendant. According to the European Court of Human Rights, in order for an offence to be knowable to an offender, and thus based in law, the provisions must be both "foreseeable" and "accessible."

The Penal Code in Turkey does not define what constitutes an "insult" and, absent any definition, it therefore can be, and has been, arbitrarily used to criminalize a wide range of statements. This law is illegitimate by any international standard.

In a 2017 opinion concerning Turkey, the WGAD warned that

> Vaguely and broadly worded laws have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality as codified in article 11 (2) of the [UDHR] and [ICCPR] article 15 (1)….[6]

While the above statement was made with respect to anti-terrorism laws, the same principle applies equally to the crime of "insulting the President".

[6] HRC, Working Group on Arbitrary Detention, Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), 26 July 2017, A/HRC/WGAD/2017/41, paras. 98-99. See also, HRC Working Group on Arbitrary Detention, Opinion No. 20/2017 concerning Musallam Mohamed Hamad al-Barrak (Kuwait), 19-28 April 2017, A/HRC/WGAD/2017/20, paras. 50-51.

The use of the term "insult" in the criminal charge could, in the minds of various prosecutors, be given various different meanings. The term itself is too vague to constitute a valid charge. Given the vague and overly broad nature of the charge that is the subject of this letter, the charge against of Mr. Urfa violates the principle of legality, including the principles of certainty and notice, because the law itself is unenforceable under international law.

It should be noted that Turkey is a State Party to the ICCPR and the ECHR and is therefore bound to ensure freedom from punishment for criminal charges that do not strictly comply with the principle of legality. These treaties also impose on Turkey the duty to ensure effective remedies for violation of guaranteed rights.

Turkey is obliged to ensure for Mr. Urfa and others' freedom from prosecution for charges that fail to comply with international requirements of certainty and legality. Detention based on such charges is arbitrary and unlawful. The vague formulation and broad interpretation of the law by the Turkish prosecutors and courts puts all lawyers and other human rights defenders at risk of arbitrary detention.

5. The Role of Lawyers

This persecution and harassment of Mr. Urfa demonstrates a failure by Turkey to comply with its obligations under international human rights laws, including the Basic Principles. Articles 16, 18, 20 and 23 of the Basic Principles are designed to ensure that governments guarantee the protection of lawyers to perform all of their professional functions without intimidation, hindrance, harassment or improper interference and not be subject to threats, prosecution or administrative, economics or other sanctions for performance of their recognized professional duties, standards and ethics, and to further ensure that lawyers are not identified with their clients or their clients' causes as a result of discharging their functions.

The charges against Mr. Urfa which stem from his advocacy in his role as a lawyer are a clear violation of these principles, as well as a violation of Turkey's international legal obligations and Turkey's own Constitution. It is your obligation to uphold the independence of Turkey's judicial system, which independence is also enshrined in Turkey's constitution.

6. Lack of an Independent Judiciary

LRWC has repeatedly noted the lack of an independent judiciary and the declining state of the rule of law in Turkey, as well as the continued persecution of lawyers since the attempted coup in 2016.

We reiterate that because judges are now intimidated into acting in accordance with the political wishes of the President, there is no longer an independent judiciary in Turkey. This too is contrary to Turkey's constitution. It has *de facto* eliminated the right to a fair trial. Because Mr. Urfa is unable to receive a fair trial under the current system, particularly given the nature of his alleged "offence", charges against him should be dismissed forthwith.

Conclusion

LRWC urges the Government of Turkey to:

a. immediately and unconditionally withdraw all charges against Mr. Özgür Urfa and all other persons charged with insulting the President;

b. immediately vacate any and all convictions of Mr. Özgür Urfa and others who have been charged with insulting the President;

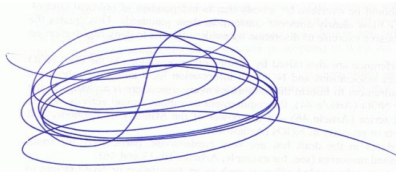
c. put an end to all acts of harassment against lawyers and other human rights defenders in Turkey;

d. ensure that all lawyers, journalists and other human rights defenders in Turkey can carry out their professional duties and activities without fear of reprisals, physical violence or other human rights violations; and

e. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments, including the ICCPR and the ECHR.

Thank you for your prompt attention to this important matter.

All of which is respectfully submitted:



Brian M. Samuels, QC,
Barrister and Solicitor (BC, Canada)

Gail Davidson, LRWC Executive Director

Copied to:

His Excellency Mr. Ali Naci Koru
Ambassador Extraordinary and Plenipotentiary
Permanent Representative
Chemin du Petit-Saconnex 28B
1211 Geneva 19
Tel: +41 22 918 50 80
Email: turkey.unog@mfa.gov.tr

Selçuk Ünal
Ambassador of Turkey to Canada
197 Wurtemburg Street
Ottawa, Ontario K1N 8L9
Canada
Tel: +1 (613) 244 24 70
Email: embassy.ottawa@mfa.gov.tr

Chris Cooter
Ambassador of Canada to Turkey, Georgia, Azerbaijan and Turkmenistan
Consulate General of Canada
209 Buyukdere Caddesi
Tekfen Tower
Levent 4, Istanbul
34394 Turkey

Tel: 90-212-385-9700
Email: ISTBL-CS@international.gc.ca

Special Rapporteur on the situation of human rights defenders
Mr. Michel Forst
defenders@ohchr.org

Special Rapporteur on the independence of the judges and lawyers
Mr. Diego Garcia-Sayan
SRindependenceJL@ohchr.org

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Mr. David Kaye
freedex@ohchr.org

Working Group on Arbitrary Detention
Mr. José Guevara
Ms. Leigh Toomey
Ms. Elina Steinerte
Mr. Sètondji Adjovi
Mr. Seong-Phil Hong
wgad@ohchr.org