



**LAWYERS  
IN EXILE**

PLATFORM &  
LEGAL ASSISTANCE



Joint Report on

## **RESTRICTION OF THE RIGHT TO DEFENSE**

for the United Nations' Universal Periodic Review of

**TURKEY**

January 2020, 35<sup>th</sup> Session

**Lawyers in Exile** is a platform established in 2019 and run by Turkish lawyers who have had to go in to exile to escape Turkey's current brutal and oppressive regime.

The platform, amongst other things, aims to further solidarity between fellow Turkish lawyers, provide assistance and fight the injustices suffered by the victims of the regime.

Lawyers in Exile, being established by lawyers determined to strive for the supremacy of the law and the human rights, also aims to reach out to like-minded lawyers and human rights activists both in Turkey and in the countries where they now live in exile and form a strong and effective network for co-operation.

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**Universal Rights Association (URA)** is a South Africa based association founded in 2018 and operates to remove, repair and resolve injustice, inequity, ill-treatment and oppression.

URA organizes activities in local and global scale to establish and maintain peace and universal unity.

URA builds its philosophy on common denominator of being human and targets, service to humanity, as an ultimate goal.

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# **Lawyers in Exile Platform & Universal Rights Association (URA)**

## **Turkey UPR Submission**

### **TABLE OF CONTENTS**

Introduction

Evaluation of the Previous Revision

Violation of the Right to Legal Assistance

Violations and Restrictions Within the Process of Detention

Violations and Restrictions Within the Process of Investigation

Restriction to the Right of the Lawyer to Examine the File Content

Violations and Restrictions Within the Process of Judgement

Opening the Way to Proceed the Trial Without Lawyer

Restricting from the Duty of Advocacy

Restricting the Right to Legal Advice in Prison

Restricting the Right to Legal Advice with Lawyer for Sufficient Time

The Lawyers Who Are Assigned Ex-officio

Arresting and Judging the Lawyers

Suggestions

## **Introduction and the Summary of the Report**

1. It is obligatory to provide and protect the right to fair trial and the right to defense for fair trial which are the fundamental elements of a lawful state. It is not possible to claim that a person who is deprived of his right to defense, who is not being judged in an independent and neutral court has the fundamental rights in a lawful state.
2. The right to defense has a special importance for *the mechanisms which will inspect the suitability of the state to the norms* to be able to operate objectively and healthily. The defendant is the person who will inspect the suitability of the state to the norms in criminal procedure. The defense should be able to express the innocence of the accused in a complete equal way especially in the process of criminal process so that a healthy, *just decision* can be made. If there will be no possibility to defense, the claim will become a decision.
3. In the report, the right to defense which was de facto removed by the decree-laws within the state of emergency after 15 July 2016 and the violations are examined.

## **Evaluation of the Previous Revision**

4. In the previous evaluation made by Turkey in 2015, it was indicated that the fair trial is strengthened, legal arrangements were made in accordance with the international standards regarding the protection of human rights, legal arrangements were made in accordance with the principle of equality of arms, evaluations were made that the special courts were removed which prevented fair trial and legal arrangements were made in accordance with the international standards regarding the right to defense
5. In this report however, the fact that the use of the right to defense was and is prevented by legal arrangements and interventions will be explained.

## **Violation of the Right to Legal Assistance**

6. Everyone who is detained within a criminal investigation has the right to actively benefit from the help of a lawyer of his choice from the beginning of the first moment of his detention. The reasons why the right to actively benefit from the help of a lawyer of his choice from the beginning of the first moment of the detention are to respect *the freedom from self-incrimination*, organizing his defense, investigating the evidence on behalf of the suspect, preparing for interrogation and statement and checking the conditions of detention house to actively apply the restriction of torture and inhumane treatment.

## **Violations and Restrictions Within the Process of Detention**

7. With the arrangement made by the decree-law after 15 July coup attempt, seeing the lawyer within the first 5 days of detention is restricted and then, seeing the lawyer is de facto prevented. Within this process, the actions of the lawyers sent from the Association for protecting the rights of the suspect were prevented with pressures and threats.<sup>1</sup>
8. Some of the Provincial Associations did not send lawyers to the suspects during the police phase.<sup>2</sup> This way, it is understood that the requirements of the right to benefit from legal counsel which is one of the fundamental rights of the accused were not fulfilled by some of the Associations which are autonomous.
9. It is completely prohibited for the detainees who were detained by the decree-law no 668 with the date 25 July 2016 to meet with their lawyers in the first 5 days. This prohibition lasted 6 months until the 23 January 2017 when decree-law no. 684 was put into action.<sup>3</sup> The suspects who were detained after the coup attempt stayed under custody without using this fundamental right. Despite the restriction on taking statements within the first 5 days, the suspects were interrogated *under interviews*<sup>4</sup> and their statements were taken. The suspects were forced within this time to be confessors, give names and sign the prepared statements in torture rooms. Within this context, the number of applications to the commission for the coup victims (40.000) which was established by CHP shows the severity of the situation.<sup>5</sup> Within those 6 months, there were thousands of cases of torture during detention. The victims of torture were threatened to rape their wives and harm their loved ones if they told about the tortures.

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<sup>1</sup> <https://www.hrw.org/tr/news/2017/10/12/310055>

<sup>2</sup> Although it is an absolute obligation in case the ones that are legally underage are detained, the Konya Association did not send a lawyer for the daughter of Anadolu Atayün of 17 years, the former Chief of Police who was handcuffed and detained with the claim of using Bylock in 18 August 2017.

<sup>3</sup> Decree-law no. 676 regulated the right to meet with the lawyer again. Decree-law 668 regulated before that in case of the crimes within the anti-terrorism law, some of the crimes regulated in Turkish Penal Code and the crimes of producing and selling drugs, the detainee's right to see his lawyer can be restricted for 5 days upon the decision of the judge. The art. 3 of decree-law no. 676 decided that this duration is limited with 24 hours and the statement of the suspect shall not be taken within this duration. Although the restriction is minimized with this change, the danger caused by the restriction continues because the right of the suspect to see his lawyer at once is a very important assurance against obtaining unlawful and unrecorded declarations from the suspect by force.

<sup>4</sup> Taking statements by "interviews" is not written in any articles of law, therefore this method is completely illegal.

<sup>5</sup> <http://www.birgun.net/haber-detay/gazetecilere-ohal-iskencesi-124009.html>  
<http://www.gazeteduvar.com.tr/gundem/2016/10/27/darbe-magdurlari-icin-olusturulan-komisyona-40-bin-basvuru/>

<http://www.tr724.com/siseyle-komalik-edilen-ogretmen-yazi-dizisi-1/>  
<https://www.youtube.com/watch?v=Racum9mZZx8>

## Lawyers in Exile Platform & Universal Rights Association (URA)

### Turkey UPR Submission

10. Despite all these threats, complaints were made about some of the torturers but the decision of non-prosecution could be made about them by using the art. 9 of decree-law no. 667 as justification which is completely unlawful.<sup>6</sup> According to the report of Human Rights Watch, even the lawyers could not raise their voices against torture during the state of emergency.<sup>7</sup>

### Violations and Restrictions Within the Process of Investigation

#### Restriction to the Right of the Lawyer to Examine the File Content

11. With the art. 3/1-1 of the decree-law no. 668, it is regulated that “*If the authority to examine the file content of the defendant or taking examples from the documents can endanger the purpose of the investigation, it can be restricted by the decision of the Public Prosecutor.*” This way, the right of the lawyers to actively defend their clients and appeal against their imprisonment are taken away from them and the rights of the suspects which are protected by international law<sup>8</sup> are removed with a general legal arrangement.

### Violations and Restrictions Within the Process of Judgement

#### Restriction on Representation with Lawyer During the Trial

12. With the addition to the art. 149 of Code of Criminal Procedure made by the art. 1 of the decree-law no. 676, it is decided that “**3 lawyers at most can be present in the trials within the prosecution regarding the crimes committed within the organizational activities.**” Therefore, while the restriction of 3 lawyers was applied only during when the statement of the suspects is taken, it is widened to involve the process of prosecution. In this case, the accused who is prosecuted for the crimes within the organization can only be represented with 3 lawyers. Therefore, the presence and defense of multiple lawyers in political cases is restricted.

### Opening the Way to Proceed the Trial Without Lawyer

13. Code of Criminal Procedure set the obligation to provide legal assistance to the suspect or accused by a lawyer within all the phases of the investigation and prosecution in case of the crimes which need more than 5 years of imprisonment as punishment in its minimum. In the judgements of those crimes, the inability to continue the trial without

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<sup>6</sup> The decision of the Public Prosecutor in Trabzon with the investigation no. 2016/15056, decision no. 2017/123  
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[http://www.cumhuriyet.com.tr/haber/turkiye/620855/Avukattan\\_aci\\_itiraf\\_\\_Korktum\\_\\_iskenceye\\_sessiz\\_kaldim.html](http://www.cumhuriyet.com.tr/haber/turkiye/620855/Avukattan_aci_itiraf__Korktum__iskenceye_sessiz_kaldim.html)

<sup>8</sup> ECHR, art. 5/4

## **Lawyers in Exile Platform & Universal Rights Association (URA)**

### **Turkey UPR Submission**

the defendant's presence constitutes an important assurance for the rights and benefit of the accused.

14. With the addition of the art. 5 of decree-law no. 676 to the CCP, in case the law accepted obligatory defense, it is regulated that "*in case the defendant leaves the trial without an excuse, the trial can continue*". With this sentence added to the decision, it is aimed to prevent the lawyers' protests and leave the trial. With the decree-law no. 696, the term "*if he did not come to the trial*" was added after the term "*without an excuse*". Therefore, it is made possible to continue the trial not only when the defendant leaves the trial without an excuse but also when the lawyer does not show up

### **Restricting from the Duty of Advocacy**

15. With the decree-law no. 676, the limits of restriction from the duty of defense regulated in CCP is widened. In the previous version of the law, it was regulated that in case the lawyers who defend the arrested or convicted with the crimes of terror and establishing and managing armed terrorist organizations are prosecuted for the same crimes, they can be restricted from duty for one year and this duration can be extended for 2 times for 6 months each. The art. 2 of decree-law no. 676 made the lawyer to be able to be restricted from duty when there is a criminal investigation against them. The organic connection between the accused crime to the defendant and accused will not even be necessary for this restriction. The people whose lawyers can be restricted from duty were arrested and convicted persons in the previous version of the law but the decree-law no. 676 changed it and made it "suspects, arrested or convicted" and regulated this way that the lawyer can be restricted from duty while the criminal investigation continues against his client. The arrangement ignores the presumption of innocence by regulating the possibility to restrict even when there is only investigation against the accused regarding the crimes mentioned. As a result of wide use of this decision, many lawyers were restricted from defense and the suspects and accused started to have problems to find lawyers in political cases.

### **Restricting the Right to Legal Advice in Prison**

16. Suspect or accused should be able to see his lawyer without any restrictions. The suspect or accused should be able to communicate with his lawyer in person without the eye and ears of a third party. The presence of a police during the meeting with lawyer clearly violates this right. If a lawyer cannot meet with his client without third parties accompanying or observing and cannot get classified instructions from his client, the legal assistance of the lawyer to the accused mostly loses its effect.
17. But with the art. 6/1-d of decree-law no. 667, the meetings of the arrested with their lawyers are limited. According to this regulations, "*In the meeting of the arrested with*

## Lawyers in Exile Platform & Universal Rights Association (URA)

### Turkey UPR Submission

*their lawyers, in case the society and institution is endangered, the terrorist organization or other criminal organizations are directed, orders and instructions are given to them or there is the possibility to send open or secret messages to them, with the decision of Public Prosecutor, the meetings can be recorded with technical equipment, the authorized persons can be present to watch the meeting, the documents given to the lawyer by arrested or vice versa and all the records regarding their meeting can be confiscated or the dates and hours of the meetings can be limited. In case it is understood that the arrested makes the meetings for the specified purposes, the meeting is concluded at once and reported officially along with its justification. The parties are warned before the meeting is started. In case an official report is prepared against the arrested, his meetings with lawyers can be prohibited upon the decision of the court of peace. The decision of prohibition is delivered to the Association at once for assigning a new lawyer. The change of the lawyer specified by the Association can be requested by the Public Prosecutor. The assigned lawyer is paid in accordance with the art. 13 of the Law 5320 of CCP with the date 23/3/2005.”*

18. According to this verdict, the meetings of the accused, suspects and arrested who were accused of terrorist organization with their lawyers were systematically recorded by cameras during the state of emergency and the arrested could meet with their lawyers with the supervision of at least one official of the prison.<sup>9</sup> Also, it became possible to confiscate the documents, files or samples given to the arrested or to lawyer and the records of meeting kept by the lawyer. The date and hours of meeting are limited and the prohibition of meetings is foreseen in case some conditions are met. The Association's responsibility to assign a new lawyer in this case is regulated. The Public Prosecutor can request to change the assigned lawyer during the state of emergency. With this regulation, the representation of the accused with the lawyer of his choice is limited and it became impossible for the lawyers to fulfill their duties without any restrictions and freely. Also, in addition to the provisions of decree-laws, there were extra arbitrary restrictions in some of the prisons and therefore, the meetings between the lawyer and the arrested cannot be made properly.<sup>10</sup> Except some of the prisons, the lawyers cannot meet with their clients during weekends.<sup>11</sup>

19. The decree-law no. 676 brought serious restrictions to the right to meet with the lawyers in prison. With the addition of the art. 6 of the decree-law, it is decided that the meetings of the arrested who are arrested for some of the crimes in Turkish Penal Code and Anti-

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<sup>9</sup> Decision of the Office of Public Prosecutor in Bakırköy with the date 25.07.2016

<sup>10</sup> For example, the meeting duration of a lawyer in Keskin T Type Prison is 30 minutes no matter how many clients he has. The time necessary to bring the clients from their jails is also included in these 30 minutes. 30 minutes are not even enough for one meeting, therefore it is impossible for the lawyer to meet with multiple clients and defend them effectively.

<sup>11</sup> For example, in the Kırıkkale, Kastamonu, Keskin, Çorum, Kırşehir, Kütahya and Bilecik prisons, the meetings are prohibited during weekends.

## **Lawyers in Exile Platform & Universal Rights Association (URA)**

### **Turkey UPR Submission**

terror law the meetings can be recorded with technical equipment, the authorized persons can be present to watch the meeting, the documents given to the lawyer by arrested or vice versa and all the records regarding their meeting can be confiscated or the dates and hours of the meetings can be limited. This duration can be extended for multiple times, not exceeding 3 months each time. The additional regulation to the law did not limit the authority to extend the duration. In case data, documents and information is found that the convict directs terrorist or other criminal organizations, sending orders, instructions or other open or secret messages, the meetings are concluded at once and the meetings can be prohibited for six months. The decree-law regulated that these can be applied to the arrested as well.

20. The decree-law no. 667 brought similar regulations for arrested. The decree-law 676 made these restrictions legalized and added it to the Law.

### **Restricting the Right to Legal Advice with Lawyer for Sufficient Time**

21. The lawyer should be provided sufficient time to be able to prepare his defense. The material inabilities in the prison in terms of sufficient instances and time for meetings cannot be used as justification to the lawyer and accused, if the material inabilities do not let the lawyer meet with his client sufficiently, it is considered a violation to this right. As it is described above with examples, the number and duration of meetings of lawyers with their clients are arbitrarily restricted both during detention and imprisonment.

### **The Lawyers Who Are Assigned Ex-officio**

22. Especially in the judgements which has the possibility of a punishment that restricts freedom, there is the obligation to assign a lawyer to the accused if he doesn't have the possibility. As the relationship between the lawyer and the accused is based on trust, the national authorities should consider the requests of the accused for selecting the lawyer. Within this frame, the lawyers that are assigned ex-officio by the Association must defend the accused or suspect effectively and concretely. If it is understood that there was no active defense, the lawyer's duty should be cancelled and a new lawyer should be assigned. The state is responsible to assure that this right is actively guaranteed.
23. Many Associations specifically determined a limited number of lawyers as lawyers to be assigned ex-officio for the detentions after the coup attempt. It was claimed on the social media that those determined lawyers are informed about how they should behave. In many provinces, many lawyers told their clients to become confessors and acted as a government spy which violated the right of the most fundamental client rights and which is completely opposite of the requirements of being a lawyer. There was many news on

## Lawyers in Exile Platform & Universal Rights Association (URA)

### Turkey UPR Submission

social media with specific names but there were no legal proceedings against those lawyers.

24. On the contrary, the rights of some suspects and clients to be represented by the lawyer of their choice and benefit from the legal council are violated as well. For example, although the lawyers of many suspects who will represent them during detention were ready, the investigation prgans did not accept the lawyers of the suspects' choice, accepted the lawyers assigned by the Association and made him sign the interrogation report.<sup>12</sup>

### Arresting and Judging the Lawyers

25. The decision of detention was made regarding the lawyers who provided attorneyship to the cases opened for "claimed FETÖ/PDY" before the coup attempt and those lawyers were arrested. By 15 July 2017 within a year, 1078 lawyers were detained and 523 of them were arrested who provided attorneyship. For example, 189 lawyers that were registered to the Association in Istanbul and provided attorneyship to the cases related to FETÖ/PDY were decided to be detained. 50 among the 80 detained lawyers were arrested.<sup>13</sup> After the declaration of State of Emergency, investigations were started about 1546 lawyers, 598 lawyers were arrested and 274 lawyers were punished with imprisonment within anti-terror law.<sup>14</sup> There are more than 14 Association Managers as well among the arrested. This way, the lawyers which will be chosen by the accused to be defended effectively were removed. The other lawyers who witnessed that more than a thousand of his coworkers and half of them being arrested became reluctant to defend and even provide attorneyship to the accused who are accused of political crimes. There are pressures against the lawyers even during the investigation and they are prevented to defend their clients effectively.<sup>15</sup> The violations within the right to defense are indicated in the report prepared by Human Rights Watch which was shared with the public in 10 April 2019.<sup>16</sup>

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<sup>12</sup> According to the provision 6/3c of ECHR, the right of the individual to benefit from the legal counsel of the lawyer of his choice and to be represented by the lawyer he chooses is among the most fundamental rights of the accused

<sup>13</sup> <http://www.sabah.com.tr/gundem/2017/06/14/istanbulda-fetopy-operasyonu-gozaltilar-var>

<sup>14</sup> <https://arrestedlawyers.org/2019/04/01/new-report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2019/>

<sup>15</sup> Lawyer Burak Çolak, who is the defendant of Önder Asak who was claimed to be lost on purpose and detained after 41 days by being delivered to the officials from security, is detained and kept in detention for some time by making up a Bylock case while he was defending his client and upon his request to record the declarations to the report and after he refused to sign the document which was prepared by the police before. <http://www.shaber3.com/kacirilan-onder-asanin-avukati-onceden-hazirlanmis-ifadeyi-imzalamayinca-gozaltina-alindi-haberi/1285725/>

<sup>16</sup> <http://www.shaber3.com/kacirilan-onder-asanin-avukati-onceden-hazirlanmis-ifadeyi-imzalamayinca-gozaltina-alindi-haberi/1285725/>

## **Lawyers in Exile Platform & Universal Rights Association (URA)**

### **Turkey UPR Submission**

#### **Suggestions**

26. The necessary arrangements to be made to remove all de-facto restrictions and problems encountered in public institutions, courts, prisons and police centers for the lawyers who are the defenders of the right to defense to fulfill their duties effectively
27. To end the practice of detention, arrests and opening investigations and prosecution against the lawyers to prevent them to make their defenses
28. To act in order to release the lawyers who are kept in prisons by removing the accusations against the lawyers which are unclear such as being related and connected to some groups
29. To end the practice of opening investigations and prosecution against lawyers for acting within their duties or by using their clients as justification and to make the necessary arrangements to end the opened investigations and prosecution
30. Making necessary legal acts to remove all regulations which prevents the right to defense to be used and the changes which are brought by decree-laws and legalized afterwards regarding the right of lawyers to fulfill their duties, the right of suspects to hire lawyers, the right of lawyers and their clients to make special and secret meetings and the right to examine the files.
31. Making the necessary arrangements to end the application of prohibition of the defense of the lawyers on specific cases against whom there is an investigation regarding one of the crimes within anti-terror law in a way to restrict the right to defense.
32. Making the necessary legal arrangements to end the use of accusations within anti-terrorism and the crime of “membership to terrorist organizations” which is regulated in the art. 314 of Turkish Penal Code arbitrarily and harrasingly
33. Repeating the judgement process by removing the acts made against the accused and suspects in the files within the restriction of the right to defense and the verdicts made in accordance with this.

## **Lawyers in Exile Platform & Universal Rights Association (URA)**