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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

TURKEY

DRAFT OPINION
ON THE SUSPENSION OF THE SECOND PARAGRAPH
OF ARTICLE 83 OF THE CONSTITUTION
(PARLIAMENTARY INVIOABILITY)

On the basis of comments by

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Mr Dan Meridor (Member, Israel)
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I. Introduction

1. On the basis of Resolution 2127 (2016)¹ of the Parliamentary Assembly of the Council of Europe on “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”, the President of the Assembly, Mr Pedro Agramunt, requested by letter of 1 July 2016 an opinion of the Venice Commission on the suspension, by a provisional clause, of Article 83 of the Constitution of Turkey, which guarantees parliamentary inviolability of members of the Grand National Assembly (hereinafter “the National Assembly” or Parliament).
2. The Commission invited Mr Michael Frendo, Mr Dan Meridor, Ms Jasna Omejec, Mr Jean-Claude Scholsem and Mr Kaarlo Tuori to act as rapporteurs for this opinion.
3. A delegation of the Venice Commission composed of Mr Meridor and Ms Omejec, accompanied by Mr Markert and Mr Dürr from the Secretariat, visited Ankara on 19 September 2016 and had meetings with (in chronological order) the Ministry of Justice, the Constitutional Court and the four parties represented in the Grand National Assembly of Turkey. The Venice Commission is grateful to the Ministry of Justice for the organisation of this visit.
4. The rapporteurs prepared their comments on the basis of the English translations of the Amendment made available by the Turkish authorities and the results of the visit to Ankara. The translation may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.
5. *The present opinion was adopted by the Venice Commission at its ... plenary session (Venice, ...).*

II. General

6. This opinion is the first to be adopted after the failed coup d'état on 15 July 2015. The Venice Commission vigorously condemns this coup² and expresses its condolences for to the numerous victims and their bereaved families. Removing democratic institutions by military force is the absolute negation of the values of the Council of Europe: democracy, the protection of human rights and the rule of law.
7. This opinion relates to the Constitutional Amendment of 12 April 2016 (hereinafter “the Amendment”), which provides that the principle of parliamentary inviolability is not applicable to files against Members of Parliament, which were pending at the moment when the amendment was adopted. More details are provided below in section V. While the Amendment was adopted before the coup, the situation in Turkey after the coup is also relevant to this opinion.
8. On 20 July 2016, the Government of Turkey declared the State of Emergency for a duration of three months, on the basis of Article 120 of the Constitution and the Law No. 2935 on the State of Emergency (Article 3/1b). The decision was published in the Official Gazette and approved by the National Assembly on 21 July 2016. Thus, the State of Emergency took effect from 21 July 2016.
9. On 21 July 2016 the Secretary General of the Council of Europe received a letter from the Permanent Representative of Turkey of the same day, containing a declaration on derogation

¹ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22971&lang=en>.

² The President of the Venice Commission had strongly condemned the coup in a statement on 18 July 2016. <http://www.venice.coe.int/webforms/events/?id=2266>.

from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"), under Article 15 of the Convention.

III. Report on the Scope and Lifting of Parliamentary Immunities

10. In its Judgment *Kart v. Turkey*,³ the European Court of Human Rights stated that "[t]he Court reiterates in this regard that inviolability is not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status, which is why it cannot be waived by the beneficiary". In its Report on the Scope and Lifting of Parliamentary Immunities (CDL-AD(2014)011, hereinafter "the Report") the Venice Commission sets out that parliamentary immunity is not a personal privilege for individual Members of Parliament but protects the institution of parliament. Paragraph 35 of the Report explains that "*the existence of rules on parliamentary immunity is first and foremost based on the need to protect the principle of representative democracy. Such immunity can be justified to the extent that it is suitable and necessary in order to ensure that the elected representatives of the people are effectively able to fulfil their democratic functions, without fear of harassment or undue interference from the executive, the courts and political opponents. This is particularly important with regard to the parliamentary opposition and political minorities.*"

11. In its Report, the Venice Commission distinguishes between the non-liability and inviolability of Members of Parliament.⁴ 'Non-liability' refers to "*immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens*". In turn, 'inviolability' means "*special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong*". In any case, inviolability is only temporary and justice can proceed after the end of the mandate of the Member of Parliament.

12. The precise scope of non-liability varies from country to country. Paragraph 64 of the Report explains: "*[a]s a general rule non-liability will apply only to opinions and statements expressed in the exercise of the parliamentary mandate, but the precise scope of this limitation varies. In many countries, the place in which the contested statements were made is not relevant and it is sufficient that the expression takes place within the context of parliamentary activity. The privilege of special freedom of speech is therefore not limited in space, and applies to all remarks made by the member of parliament that are in some way related to the exercise of the parliamentary mandate, whether inside or outside of parliament, including appearances in the media or in public meetings and debates. On the contrary, in other countries, opinions must actually be expressed in Parliament, including in committees.*"

13. Non-liability focuses on guaranteeing the freedom of opinion and speech of Members of Parliament, and, thus, facilitating free parliamentary debates. Provisions on non-liability can be found in most constitutions.⁵ The Venice Commission argued that despite general provisions on freedom of speech in national constitutions and international human rights instruments "*national rules on parliamentary non-liability are still a legitimate element of constitutional law, justified by the need to effectively ensure the particular needs for freedom of political debate in a*

³ ECtHR, Case of *Kart v. Turkey*, Application no. 8917/05, par. 97.

⁴ Relevant studies are also Resolution 2127 (2016) on "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly" (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22971&lang=en>), the EU Parliament Study: "Non-labile? Inviolabile? Untouchabile?" (www.agora-parl.org/sites/default/files/parliamentary_immunities_final_web.pdf) and the Inter-Parliamentary Union Study on the Parliamentary Mandate throughout the World of 2000 (www.ipu.org/english/pressdoc/gen94.htm).

⁵ CDL-AD(2014)011, par. 12.

democratically elected representative assembly” and “there is still a need for national rules on parliamentary non-liability even if the substantive scope of protection is today for the most part also covered by Article 10 of the ECHR.”⁶

14. Comparative constitutional analysis, presented in the Report,⁷ shows that parliamentary inviolability is less common than non-liability. In established democracies, possible harassment from the side of the executive power – including prosecutors – has lost part of its former weight as a justification to such an exemption from the principle of equality which inviolability necessarily entails. In any case, inviolability is only temporary and justice can proceed after the end of the mandate of the Member of Parliament.

15. As pointed out in the Report (par. 152) *“[t]he main historical justification for having rules on parliamentary inviolability is to protect the workings of parliament as an institution from undue pressure from the executive (the King), including pressure from the public prosecutor, as a part of the executive power. This justification also extends to protecting the parliamentary opposition, usually in a minority, against undue pressure from the ruling majority. It furthermore protects members of parliament from political harassment from other parties, for example in the form of unsubstantiated criminal complaints from political opponents.”* On this basis *“The Venice Commission notes that in most modern European democracies these justifications for parliamentary inviolability do not appear to be unproblematic.”*

16. If the Venice Commission is thus not convinced of the need for parliamentary inviolability in long-established democracies, where there is trust in the judiciary and the prosecution service, it acknowledges the need for this protection in some countries: *“there might still in some countries be a pressing need of the protection offered by rules on parliamentary inviolability against misuse of the legal system. In some countries that are still in transition towards real democracy, or where democracy is still relatively new and fragile, there are experiences with cases in which the police or prosecutorial powers have been used to discredit, punish or destroy political opponents, including members of parliament. Nor is it always the case that in every state the judicial power can be trusted to act independently and not be unduly influenced by the executive. Members of Parliament, and especially of the opposition, may, in some countries, be vulnerable to political harassment in the form of unfounded legal allegations, in a way that ordinary citizens are not.”* (par. 154).

17. For these reasons, in its Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, adopted in June 2015, the Venice Commission recommended maintaining inviolability in that country.⁸

IV. Standard procedure for the lifting of parliamentary immunity in Turkey

A. Constitutional basis

18. Article 83 of the Turkish Constitution⁹ provides for both types of immunity for members of the National Assembly: non-liability and inviolability as defined in the Report.

⁶ CDL-AD(2014)011, par. 89.

⁷ CDL-AD(2014)011, par. 14.

⁸ CDL-AD(2015)013, par. 31.

⁹ “Parliamentary immunity

ARTICLE 83- Members of the Grand National Assembly of Turkey shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.

A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in *flagrante delicto* requiring heavy penalty and in cases

19. Members of the National Assembly shall not be liable for their votes and statements during parliamentary proceedings and for the views they express before the Assembly. Thus, although the Members of Parliament (or deputies) benefit from an absolute non-liability for the views they express in the Assembly, they may be prosecuted for expressing or repeating those views outside the Assembly if the Assembly so decides (*ex post facto*). Turkey therefore belongs to the group of countries where the scope of non-liability is rather limited.

20. Before the adoption of the Amendment, this limited scope of non-liability was not so important since the Turkish Constitution provides in addition to non-liability also for inviolability. The second paragraph of Article 83 of the Turkish Constitution provides that a deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. The provision provides for two exceptions to the principle of inviolability of the members of the National Assembly: 1) the Member of the Assembly is caught committing a crime in *flagrante delicto*; 2) for the crimes covered by Article 14 of the Constitution, with the condition that the investigation has been initiated before the election of the deputy concerned. The Amendment now temporarily suspends the application of this second paragraph of Art. 83.

21. According to Article 83.3 of the Constitution, the execution of a criminal sentence imposed on a deputy either before or after his or her election shall be suspended until he or she ceases to be a member of the Assembly. Article 76 of the Constitution regulates the eligibility criteria for members of the National Assembly: those “*who are banned from public service, who have been sentenced to a prison term totalling one year or more excluding involuntary offences, or to a heavy imprisonment; those who have been convicted for dishonourable offences such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy; and persons convicted of smuggling, conspiracy in official bidding or purchasing, of offences related to the disclosure of state secrets, of involvement in acts of terrorism, or incitement and encouragement of such activities, shall not be elected as a deputy, even if they have been granted amnesty.*”

22. According to Article 135 of the Rules of Procedure of the Grand National Assembly of Turkey (hereinafter “the Rules of Procedure”),¹⁰ the deputies who have been sentenced for one of the crimes indicated in Article 76 of the Constitution shall be removed from office. It appears that, in this case, the National Assembly does not proceed to a vote for the removal from office, since, according to Article 136 of the Rules, the deputy is automatically removed from office once the final court decision is communicated to the Plenary of the National Assembly.

subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly.

The execution of a criminal sentence imposed on a member of the Grand National Assembly of Turkey either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership.

Investigation and prosecution of a re-elected deputy shall be subject to the Assembly’s lifting the immunity anew.

Political party groups in the Grand National Assembly of Turkey shall not hold debates or take decisions regarding parliamentary immunity.”

¹⁰ https://global.tbmm.gov.tr/docs/rules_of_procedure_en.pdf.

23. Article 85 of the Constitution¹¹ provides for a possibility for the deputy concerned (or for another deputy) to appeal to the Constitutional Court against the decision on lifting of immunity by the Parliament within seven days as from the date of that decision. The Constitutional Court can annul the decision of the Assembly on the grounds that it is contrary to the Constitution, law, or the Rules of Procedure.

24. These provisions show that Turkey belongs to the countries where parliamentary inviolability is guaranteed by the Constitution. As the Amendment did not remove these provisions, it can be concluded that the constituent power in Turkey proceeds from the assumption that this specific guarantee is still pertinent and necessary in the country, having regard to the state of its democracy and the degree of trust in the independence and impartiality of its judiciary.

B. Procedure and guarantees provided in the Rules of Procedure of the National Assembly

25. The procedure to be followed for lifting the parliamentary immunity is based on Articles 83 and 85 of the Constitution. Detailed rules are provided in the Rules of Procedure.

26. When a Member of Parliament is accused of a criminal act, a request for lifting his/her immunity can be filed by prosecutors and courts. The request is forwarded to the Prime Ministry by the Ministry of Justice to be submitted to the Office of the Speaker.

27. The Office of the Speaker forwards the request to a Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice. The Joint Committee is chaired by the chairperson of the Committee on the Constitution. The vice-chairperson, the spokesperson, and the secretary of the Constitutional Commission serve in the same capacity in the Joint Committee (Art. 131 of the Rules of Procedure). The President of the Joint Committee selects five members from among the members of the Committee by drawing lots in order to constitute a preparatory sub-committee.

28. The preparatory committee of five members submits a report to the Joint Committee within a month after beginning its proceedings. The committee may hear the deputy concerned but may not hear witnesses (Article 132 of the Rules of Procedure).

29. The Joint Committee debates the report of the preparatory committee and has to conclude its own report within a month. The Joint Committee may either decide to lift the immunity or to suspend the prosecution until the end of the deputy's term of office (Article 133 of the Rules of Procedure).

30. If the Joint Committee (in its report) requests to suspend the investigation, the decision is read out in the plenary. If no objection (no minimum number of objections is indicated) is raised against that decision within 10 days, the report becomes final (Article 133.3 of the Rules of Procedure). However, if the Committee requests lifting the immunity or if an objection is raised, the report is debated and voted in the plenary.

31. The Member of Parliament concerned has the right to orally defend him/her-self before the preparatory committee, the Joint Committee and before the Plenary of the National Assembly or

¹¹ Article 85

If the parliamentary immunity of a deputy has been waived or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the day of the decision of the Grand National Assembly of Turkey, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the rules or procedure of the Turkish Grand National Assembly. The Constitutional Court shall decide on the appeal within fifteen days.

he/she can decide that another Member of Parliament should defend him/her before the commissions and the Plenary. The last oral intervention before the Plenary belongs to the defence (the deputy concerned).

V. Constitutional amendment of 12 April 2016

32. On 12 April 2016, the National Assembly adopted a constitutional amendment which added a provisional Article 20 to the Constitution. Provisional Article 20 reads: *“On the date when this Article is adopted in the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to the deputies who have files regarding the lifting of the parliamentary immunity which were submitted from the competent authorities authorized to investigate or give investigation or prosecution permit, Chief Public Prosecutor’s Offices and courts to the Ministry of Justice, the Prime Ministry, Office of Speaker of the Grand National Assembly of Turkey and the Presidency of Joint Committee consisting of the members of Constitution and Justice Commissions.*

Within fifteen days as of the entry into force of this Article, the files in the Presidency of the Grand National Assembly of Turkey, Prime Ministry and Ministry of Justice regarding the lifting of parliamentary immunities shall be returned to the competent authority under the presidency of the Joint Commission composed of the members of Constitution and Justice Commissions so as to take the required actions.”

33. Provisional Article 20 of the Constitution entered into force on 20 May 2016 and was entirely “consumed” within 15 days, i.e. on 4 June 2016 when all pending files were returned to the respective competent authority for ‘action’.

34. This means that immunity was lifted for all requests for the lifting of immunity that had been transmitted to the National Assembly by the date of the publication of the Amendment. By contrast, any cases that arrived after that date continue to be treated under the procedure set out in Articles 83 and 85 of the Constitution and the Rules of Procedure of the National Assembly.

35. The delegation of the Venice Commission was informed that the Amendment concerned about 800¹² criminal cases (files) for 139 deputies of the National Assembly:

- 27 out of 317 deputies of the Justice and Development Party (AKP) – majority
- 51 out of 133 deputies of the Republican People’s Party’s (CHP) – opposition
- 51 out of 59 deputies for the Peoples’ Democratic Party (HDP) – opposition
- 9 out of 40 deputies for Nationalist Movement Party (MHP) – opposition
- 1 out of 1 independent deputy.

Some of the interlocutors of the delegation presented slightly different figures, which do not, however, affect the overall picture. In particular, the representatives of HDP indicated that the lifting of immunity concerned 55 of their 59 Members of Parliament.

36. The Amendment was adopted with a high constitutional majority against the votes of HDP, the party which is most affected by the amendments. The Delegation was informed that the main opposition party CHP voted for the amendment to avoid any accusation of wishing to protect persons supporting terrorist activities, although it considers the Amendment unconstitutional.

37. The delegation of the Commission was informed that, following the adoption of the Amendment, most of the Members of Parliament for which immunity had been lifted by the Amendment had been summoned and questioned by prosecutors. The deputies of the

¹² The General Preamble to the Amendment refers to 562 cases pending at the time when the draft amendment was adopted. The number of cases concerned when the Amendment entered into force seems to be much higher but the Commission’s delegation could not obtain a final number of cases concerned.

opposition HDP party refused to follow these summons because they contest the validity of the Amendment. It seems that deputies from the other parties followed these summons. So far, none of the 139 deputies has been arrested but HDP representatives expect that the arrest of deputies of their party is imminent.

VI. Judgment 2016/117 of the Constitutional Court of 3 June 2016

38. In its case 2016/117 of 3 June 2016 the Constitutional Court dealt with a request to consider the constitutional amendment of 12 April 2016 as a parliamentary decision on the lifting of immunity under Article 83 of the Constitution, which can be controlled by the Constitutional Court under Article 85 of the Constitution. On this basis, the petitioners argued that their right of defence was not respected because they had not been heard in the procedure of lifting of immunity as foreseen in Article 83 of the Constitution and the Rules of Procedure of the National Assembly.

39. In a unanimous decision, the Constitutional Court held that the act adopted by the National Assembly on 12 April 2016 could not be reviewed under Article 85 of the Constitution because it had all formal elements of a constitutional amendment (title "Bill of Law related to the amendments to the Constitution of the Republic of Turkey", qualified majority of votes required).

40. The Constitutional Court stated that *"the review of the law which makes amendments in the Constitution, by the Constitutional Court is only possible with an action for annulment brought in accordance with the second paragraph of Article 148 of the Constitution and the mentioned law may not be reviewed within the framework of Article 85 of the Constitution"*.

41. The Constitutional Court further stated that Article 148 of the Constitution¹³ on the review of Constitutional Amendments by the Constitutional Court *"shall be deemed pointless and*

¹³ ARTICLE 148 - (As amended on September 12, 2010; Act No. 5982) The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance.

The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Grand National Assembly of Turkey. Applications for annulment on the grounds of defect in form shall not be made after ten days have elapsed from the date of promulgation of the law; and it shall not be appealed by other courts to the Constitutional Court on the grounds of defect in form.

(Paragraph added on September 12, 2010; Act No. 5982) Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

(Paragraph added on September 12, 2010; Act No. 5982) In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.

(Paragraph added on September 12, 2010; Act No. 5982) Procedures and principles concerning the individual application shall be regulated by law.

(As amended on September 12, 2010; Act No. 5982) The Constitutional Court in its capacity as the Supreme Court shall try, for offences relating to their functions, the President of the Republic, the Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; presidents and members of the Constitutional Court, High Court of Appeals, Council of State, High Military Court of

nonfunctional in cases where the allegation of unconstitutionality which can be reviewed within the context of a remedy clearly provided in the Constitution and is subject to special conditions, is the subject-matter of the individual applications for annulment of the deputies according to Article 85 of the Constitution, by claiming that the provision, the annulment of which is requested, is a parliamentary decision”.

42. Article 148 of the Constitution limits the review of constitutional amendments by the Constitutional Court to consideration whether the requisite majorities were obtained for the proposal and the final vote and whether the prohibition of debates under expedited procedure was observed. A review under Article 148 can be requested only by the President of the Republic or by one-fifth of the members of the National Assembly within ten days after the enactment of the law.

43. The delegation of the Venice Commission learned that there was not sufficient support for a petition to the Constitutional Court under Article 148 of the Constitution. The opposition CHP party is of the opinion that the amendment is unconstitutional but decided to vote for the Amendment for political reasons in order not to be accused of favouring terrorism (see above section V) and, therefore, did not challenge its constitutionality.

44. As a consequence, the constitutionality of the procedure for adopting the Amendment was not reviewed by the Constitutional Court.

VII. Analysis

45. Regarding parliamentary immunity there is a competition between two important values: Equality of all citizens before the law on one hand and special protection for the Members of Parliament on the other. The specific balance between these two values may - and indeed does - differ from state to state and from time to time.

46. As set out above, the Venice Commission favours maintaining the principle of parliamentary non-liability. The Commission therefore welcomes that the Amendment does not affect non-liability.

47. As regards inviolability, as set out above, in the Commission's view it depends on the specific situation in the country concerned whether maintaining this privilege is necessary and justified or not. The Commission will therefore examine whether in the current situation in Turkey it can be justified to abrogate parliamentary inviolability. In addition, the Commission will examine whether the method chosen – to temporarily suspend the application of an Article of the Constitution providing specific guarantees – is in line with the principles of the European constitutional heritage and the rule of law principle.¹⁴

Appeals, High Military Administrative Court, High Council of Judges and Prosecutors, Court of Accounts, and Chief Public Prosecutors and Deputy Public Prosecutors.

(Paragraph added on September 12, 2010; Act No. 5982) The Chief of General Staff, the commanders of the Land, Naval and Air Forces and the General Commander of the Gendarmerie shall be tried in the Supreme Court for offences regarding their duties.

The Chief Public Prosecutor of the High Court of Appeals or Deputy Chief Public Prosecutor of the High Court of Appeals shall act as prosecutor in the Supreme Court. (As amended on September 12, 2010; Act No. 5982) Application for judicial review may be made against the decisions of the Supreme Court. Decisions taken by the General Assembly regarding the application shall be final.

The Constitutional Court shall also perform the other duties given to it by the Constitution.

¹⁴ CDL-AD(2016)007, Rule of Law Checklist, section II.E.

A. Inviolability and freedom of expression in the current situation in Turkey

48. The General Preamble to the Amendment explains that its purpose is to address public indignation about *“statements of certain deputies constituting emotional and moral support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls of violence of certain deputies”*. Statements by Members of Parliament, which may be interpreted as supporting terrorism, may indeed be punishable under criminal law but such statements will normally have a political character and therefore the question whether they should be covered by parliamentary non-liability is particularly relevant.

49. The European Court of Human Rights stated that *“[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.”*¹⁵ As concerns parliamentary immunity, the Court held that *“the inherent characteristics of the system of parliamentary immunity and the resulting derogation from the ordinary law pursue the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions”*.¹⁶

50. In general, while some of the files concern ordinary crimes such as smuggling, embezzlement, most of the files for which inviolability was removed by the Amendment of 12 April 2016 concern offences related to speech, such as insulting the President, insulting a public officer, terror propaganda or incitement to hatred. The particular importance of guaranteeing free speech makes it problematic for Members of Parliament to be subject to sanctions for political speech, including speech outside Parliament, which is by its nature linked to the exercise of their mandate. While there may be reasons to abolish inviolability for ordinary crimes in countries where the judicial system, including prosecution, is sufficiently independent, an extremely cautious approach should be taken with respect to politically motivated acts and in particular political speech. In the present case, it adds to the problem that nearly all Members of Parliament of one opposition party are concerned by the measure.

51. An additional reason for caution is the fact that Turkey belongs to the countries, where the European Court of Human Rights has most often found a violation of the right to freedom of expression. At the moment, 104 cases (Incal group of cases¹⁷) of violation of the freedom of expression with respect mainly to propaganda for terrorism are pending for execution in the Committee of Ministers of the Council of Europe. To these cases further cases on insulting the President and other public officials have to be added.

52. The Venice Commission has also expressed concerns with respect to the wide interpretation of articles of the Turkish Penal Code used to prosecute persons for their statements. In its Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey of March 2016, the Commission examined criminal law provisions relevant for freedom of expression and concluded that these articles *“provide for excessive sanctions and that they had been applied too widely,*

¹⁵ ECtHR, Case of Castells v. Spain, Application no. 11798/85, par. 42.

¹⁶ ECtHR, Case of Kart v. Turkey, Application no. 8917/05, par. 88.

¹⁷ Council of Europe, Committee of Ministers, Supervision of the execution of the European Court's judgments, CM/Notes/1265/H46-29-rev of 13 September 2016 (restricted), 1265 Meeting, 20-22 September 2016, H46-29 Incal and Gözel and Özer groups v. Turkey (Applications Nos. 22678/93, 43453/04), Reference documents: ResDH(2004)38, ResDH(2001)106, CM/Inf(2003)43; CM/Inf/DH(2008)26, DH-DD(2016)842, DH-DD(2015)447-rev, DH-DD(2014)502, CM/Del/Dec(2015)1230/22.

penalising conduct protected under the European Convention on Human Rights, in particular its Article 10 and the related case-law as well as conduct protected under Article 19 ICCPR.”¹⁸

53. Notably, Article 216 of the Penal Code (Provoking the Public to Hatred, Hostility, Degrading) “*should not be used to punish harsh criticism against government policies*” (par. 124). Due to its excessive use, Article 229 (Insulting the President of the Republic) should be completely repealed (par. 126). Article 301 (Degrading the Turkish Nation, the Turkish Republic, the Organs and Institutions of the State) should be amended to avoid the problem of vague wording (par. 127). Article 314 should be interpreted narrowly and in Article 220 (Establishing organisations for the purpose of committing crime) the clause “*although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation*” should be removed. The Opinion also came to the conclusion that the practice of the courts that applied these provisions did not sufficiently mitigate these problems.

54. While such limitations to the freedom of expression are problematic in respect of all persons prosecuted under these provisions, this has a particularly negative effect on the members of the National Assembly who cannot express their political opinions outside Parliament without fear of criminal prosecution. By removing inviolability for the 139 Members of Parliament, the Amendment of 12 April 2016 exposed the deputies to the risk of excessive sanctions for speech related to their activity as Members of Parliament.

B. Functioning of the judiciary

55. Whether parliamentary inviolability is needed in a country ultimately depends on the independence and impartiality of the judicial system, including the prosecution. However, there are serious doubts about the present functioning of the Turkish judiciary.

56. In its Resolution 2121(2016) on “*The functioning of democratic institutions in Turkey*”, the Parliamentary Assembly of the Council of Europe stated that “*Independence of the judiciary is guaranteed by the Constitution. A number of judicial packages have been launched since the constitutional referendum of 2010. They provided for stronger involvement of elected judges and prosecutors in the High Council of Judges and Prosecutors (HCJP), which were positive moves. However, the recent developments and amendments to the HCJP Law in 2014 raised the issue of the lack of independence of the judiciary and undue interference by the executive.*”¹⁹

57. In its Evaluation Report on Turkey of 16 October 2015, the Council of Europe Group of States against Corruption (GRECO) concluded that “*the judiciary in Turkey is not perceived to be sufficiently independent from the executive powers of the country, despite constitutional guarantees to that end. The need to strengthen its independence has been one of the main targets of judicial reform in Turkey for many years. The establishment of the High Council of Judges and Prosecutors (HCJP) as a self-governing body of the judiciary was an element to establish such independence and a constitutional reform in 2010, providing for stronger involvement of judges and prosecutors in that body, was a positive step at the time. However, public criticism in Turkey as well as by international organisations in 2014/2015 in respect of the use of disciplinary proceedings, including the dismissal of a number of members of the judiciary, has further triggered the debate concerning the role and the independence of the HCJP. The report acknowledges that there is a continued need to enhance the independence of the HCJP by reducing the potential influence of the executive power in this body.*”²⁰

¹⁸ CDL-AD(2016)002, par. 123.

¹⁹ Par 29,

<http://website-pace.net/documents/19895/2436341/20160523-TurkishInstitutions-EN.pdf/cc4c76b9-1602-4d77-9038-e79aec4f9484>.

²⁰ Greco Eval IV Rep (2015) 3E, adopted by GRECO at its 69th Plenary Meeting (Strasbourg, 12-16 October 2015),

58. The Council of Europe Commissioner for Human Rights came to the a similar conclusion following his visit to Turkey in March 2016: *“the intolerance of the executive and the judiciary to legitimate criticism had led to a very palpable chilling effect and self-censorship, and reduced the scope of democratic discussion in the country”* and he also *“shared the concerns of other Council of Europe bodies, the Venice Commission and the Group of States against Corruption (GRECO), that the fight against a presumed terrorist organisation within the judiciary may have weakened its independence. ‘The Turkish President’s recent statement about the Constitutional Court, as well as other statements by politicians, have also damaged public trust in the independence of the judiciary.’”*²¹

59. Already at the time of adoption of the Amendment, there were serious doubts whether the judicial system was sufficiently stable to allow for a removal of inviolability for the members of the National Assembly. Judgments in some cases of major political importance (the so-called Ergenekon²² and Balyoz/“Sledgehammer”²³ cases) were annulled by Turkish courts after their adoption when major irregularities were discovered.

60. Since the failed coup d’état the Turkish Judiciary is in even greater difficulty. More than 3000 judges and prosecutors were summarily dismissed, including judges of the highest courts. Even the Constitutional Court was directly affected and took a judgment²⁴ that led to the dismissal of two of its members. A high number of these judges and prosecutors are now under arrest.

61. Finally, the delegation the Venice Commission was informed that a considerable number of the files against the 139 deputies were prepared by prosecutors who have been imprisoned and/or dismissed after the failed coup of 15 July 2016. While it is still unclear whether the arrest or dismissal of these prosecutors is justified, all these events show that the judicial system is not sufficiently stable. As a consequence, the cases investigated by these prosecutors should be closed and investigated anew. If the new prosecutors come to the same conclusion that there is a need for criminal prosecution, the immunity of the deputies concerned should be lifted according to Article 83 of the Constitution.

62. Under the past and even more fragile current state of the Judiciary in Turkey, the deputies of the National Assembly should not be exposed to possibly arbitrary prosecutions without the procedural guarantees offered by Articles 83 and 85 of the Constitution and the Rules of Procedure of the National Assembly. Having regard to the current situation, this seems the worst possible time to lift the immunity of Members of Parliament.

C. Proportionality

63. The Preamble to the Amendment explains the need for recourse to an *ad hoc* constitutional amendment by the length of the procedures required for an individual lifting of immunity. In view of the very high number of immunity files pending before the Parliament, much of the legislative period would have been spent on these procedures only and the Parliament would not have been able to fulfil its legislative agenda.

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep\(2015\)3_Turkey_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep(2015)3_Turkey_EN.pdf).

²¹ <http://www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>.

²² See European Court of Human Rights, cases Mergen and Others v. Turkey (applications nos. 44062/09, 55832/09, 55834/09, 55841/09 and 55844/09) and Ayşe Yüksel and Others v. Turkey (nos. 55835/09, 55836/09 and 55839/09).

²³ <http://aa.com.tr/en/turkey/turkish-court-acquits-hundreds-in-sledgehammer-case/61933>.

²⁴ Constitutional Court of Turkey, Judgment no. 2016/12 of 4 August 2016.

64. In reply to the question whether, as an alternative to the *ad hoc* lifting of immunity, it would not have been possible to simplify the complicated procedure under the Rules of Procedure of Parliament, the delegation was informed by the majority party that that would not be possible because the Constitution determined this procedure and the Rules of Procedure could not contradict the Constitution. The opposition parties CHP and HDP did not share this opinion and affirmed that the National Assembly would have been able to deal with such a number of cases.

65. The Commission is of the opinion that Articles 83 and 85 of the Constitution leave sufficient leeway for simplifying the procedure before the Parliament. In fact, these articles do not impose a detailed procedure. It is the Rules of Procedure of the National Assembly that provide for a preliminary committee that reports to the Joint Committee that in turn reports to the plenary of the Assembly. Such a procedure is certainly immunity-friendly and provides ample guarantees for the deputy concerned but its complexity resulted in the fact that often it was not applied in practice and the National Assembly simply let the mandate of the deputies expire instead. A simplified procedure, where there is only one hearing for the deputy, could be envisaged and would not be unconstitutional as long as the framework of Article 83 is respected.

66. Even assuming that the procedure for lifting the immunity could not be simplified, a complete removal of the guarantees for the deputies concerned was not warranted. At the very least, by way of the same constitutional amendment an appeal to the Constitutional Court against prosecution could easily have been maintained. The workload of the National Assembly cannot justify removing the appeal to the Constitutional Court.

67. Instead of seeking a milder solution, the National Assembly proceeded with the most radical measure of complete removal of immunity for the 139 deputies. The Venice Commission therefore concludes that the total removal of all guarantees for the lifting of parliamentary immunity for 139 Members of Parliament contradicts the principle of proportionality.

D. The temporary character of the abrogation by an *ad hoc* constitutional amendment

68. The fundamental choice in favour of maintaining parliamentary immunity in Turkey is made evident by the fact that, when acting as the Constituent Power on 12 April 2016, the National Assembly kept in force Articles 83 and 85 of the Constitution for all future cases.

69. The provisional aspect of the new provisional Article 20 is evident. This provision has been placed in the “Provisional articles” in Part Six of the Constitution. All files that were not yet ready at the time of entry into force of provisional Article 20 escaped the scope of this article and fell back into the regular system. This means that Article 20 is only temporary, a “one shot” exception. As a consequence, Provisional Article 20 is not so much a general rule (with the necessary abstract element in it) but an *ad hoc* solution.

70. The Commission delegation was informed that already in the past provisional articles had been introduced into the Turkish Constitution by way of constitutional amendment. This concerns notably the Provisional Article 1 of Law 4777 of 27 December 2002.²⁵ According to this article, the last paragraph of Article 67 of the Constitution shall not apply in the first by-elections to be held during the 22nd term of the National Assembly. The last paragraph of Article 67 of the Constitution provides that amendments made in electoral laws shall not be applied to the elections to be held within one year from when the amendments enter into force. This guarantee had been added in 2001, by constitutional amendment of 2 October 2001.²⁶

²⁵ Official Gazette of 31 December 2002.

²⁶ Published in the Official Gazette of 11 October 2001.

71. This means that in the by-elections following the entry into force of Law 4777 of 27 December 2002, changes to electoral laws that were adopted less than a year before the elections could already be applied. This constituted indeed an *ad hoc* exception to a provision of the Constitution. However, it cannot be compared in substance to the Amendment of 12 April 2016 because it does not encroach upon the legal position of individuals and it does not have the same *ad homines* character (see below under E). Apart from that difference in substance, the Amendment of 2002 removed for a single election the newly introduced constitutional guarantee of 2001 that changes to the electoral system should not be introduced shortly before elections. The Provisional Article 1 of Law 4777 therefore can hardly serve as a positive example for the current Amendment.

72. Derogating from the Constitution in an *ad hoc* manner is problematic in particular when constitutional guarantees are reduced or removed, even if this is done in the form of a constitutional amendment.

E. Personal scope – *ad homines* legislation

73. The Amendment under examination can be characterized as a piece of *ad homines* constitutional legislation. While the Amendment is drafted in general terms, in reality it concerns 139 individually identifiable deputies. This constitutes a misuse of the constitutional amendment procedure: its substance amounts to a sum of decisions on the lifting of immunity of identifiable parliamentarians; decisions which, according to the suspended Article 83, should have been taken individually and subject to specific guarantees.

74. This assessment is not contradicted by Judgment 2016/117 of the Constitutional Court. The Court sets out that it was bound to reject the application under Article 85 of the Constitution because it was bound by the form of the act adopted on 12 April 2016 to consider it as a constitutional amendment which could be controlled only under Article 148 of the Constitution. Control under Article 148 of the Constitution did not take place in the absence of a request to the Court.

F. Equality

75. As all *ad homines* legislation, the Amendment is also problematic from the point of view of the principle of equality enshrined in Article 10 of the Constitution. The distinction between the 139 deputies on the one hand, and all earlier cases as well as the cases which arose since adoption of the Amendment on the other hand, cannot be justified with the workload of the Assembly. The Amendment violates therefore the principle of equality.

76. In reply to the question to the majority party whether following the *ad hoc* lifting the normal procedure of lifting of immunity would be employed for new cases, the delegation was informed that new cases would simply not be dealt with and that prosecution had to wait until the end of the mandate of the deputies. This means that the difference of treatment between the deputies, whose immunity was lifted by the force of the Amendment, and those, whose case will be transmitted later, is *de facto* even bigger. While for the 139 deputies, immunity was lifted without an individual procedure and without the guarantees provided by this procedure, for new cases the lifting of immunity will probably not be examined at all and the deputies concerned would thus be completely shielded against prosecution during their mandate.

VIII. Conclusions

77. The Venice Commission welcomes that the Amendment does not touch parliamentary non-liability, which is an essential element of parliamentary immunity.

78. Nevertheless, the amendment should be withdrawn. The Venice Commission is of the opinion that, in the current situation in Turkey, parliamentary inviolability is an essential guarantee for the functioning of parliament. The Turkish Grand National Assembly, acting as the constituent power, confirmed this by maintaining inviolability for future cases. The current situation in the Turkish Judiciary makes this the worst possible moment to abolish inviolability.

79. Moreover, most of the files concerned by this abrogation relate to freedom of expression of Members of Parliament. Freedom of expression of Members of Parliament is an essential part of democracy. Their freedom of speech has to be a wide one and should be protected also when they speak outside Parliament. The non-violent pursuit of non-violent political goals such as regional autonomy cannot be the subject of criminal prosecution. Expression that annoys (speech directed against the President, public officials, the Nation, the Republic etc.) must be tolerated in general but especially when it is uttered by Members of Parliament. Restrictions of the freedom of expression have to be narrowly construed. Only speech that calls for violence or directly supports the perpetrators of violence can lead to criminal prosecution. The case-law of the European Court of Human Rights shows that Turkey has a problem with safeguarding freedom of expression, not least with respect to cases considered as propaganda for terrorism. This is partly due to the fact that, as explained in the Opinion CDL-AD(2016)002 on Articles 216, 299, 301 and 314 of the Penal Code of Turkey of March 2016, the scope of several provisions of the Penal Code is too wide. This endangers freedom of expression in general but notably also freedom of expression of members of the National Assembly.

80. The constitutional amendment of 12 April 2016 was an *ad hoc*, “one shot” *ad homines* measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution for the future but derogated from this regime for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure.

81. The argument that dealing one by one with the cases against these deputies would have taken too long and would have unduly burdened the agenda of the Grand National Assembly is not convincing. Instead of simplifying the procedure of lifting immunity, the complex system was maintained but it was derogated for 139 deputies. The heavy workload of the Grand National Assembly does not justify singling out the cases relating to these deputies from all other cases brought before it before and after the adoption of the Amendment. This violates the principle of equality. In the opinion of the Commission, the system of parliamentary immunity in Turkey should not be weakened, but reinforced, in particular in order to ensure the freedom of speech of Members of Parliament.

82. The Venice Commission remains at the disposal of the Turkish authorities for any further assistance they may require, especially as concerns the on-going current work on reform of the Constitution.