Strasbourg, 21 September 2016 **CDL-REF(2016)055**

Opinion No. 858/2016 Engl.Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TURKEY

INFORMATION NOTE OF THE MINISTRY OF JUSTICE ON THE CONSTITUTIONAL AMENDMENT AS TO LIFTING PARLIAMENTARY IMMUNITY INTRODUCED BY THE LAW NO. 6718

Table of Contents

I. INTRODUCTION

Provisional Article 20 was added to the Constitution by Article 1 of the Law No. 6718 on Amendments to the Constitution of the Republic of Turkey which was published in the Official Gazette dated 08.06.2016 numbered 29736 and entered into force on mentioned date.

The mentioned provisional article 20 provided that an exception shall be constituted to Article 83 of the Constitution concerning the files related to lifting of parliamentary immunity which were sent from the relevant authorities to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of Grand National Assembly of Turkey or the Presidency of Joint Committee.

II. PARLIAMENTARY IMMUNITY

A. General Information

Taking its source from the United Kingdom, parliamentary immunity is a constitutional institution and also has repercussions in the criminal law. Among these, non-accountability refers to not being punished whereas immunity refers to postponing the punishment. From another aspect, non-accountability is related to statements and acts in the legislative function whereas immunity is linked to the actions apart from the legislative function. These privileges were granted to deputies not to provide any personal interest to them but to protect the rights and interests of those who elect them, away from any kind of fear. Otherwise, immunity does not refer to granting a privilege to deputies to commit a crime.

Parliamentary immunity has been important for the functioning of parliaments since the emergence of the latter. However, the principle of the rule of law keeps intensive discussions concerning this principle on the agenda. Parliamentary immunity is important in terms of persons since deputies are subject to some privileged rules under parliamentary immunity as an exception to the principle of equality before the criminal laws.

Unlike parliamentary non-accountability which guarantees the votes, statements and opinions of deputies, parliamentary immunity is an institution of criminal procedure law which is called in doctrine and in practice with different names such as “relative immunity”, “provisional immunity”, “temporary immunity” and “legislative immunity”.

B. Legal Nature of Immunity

“Parliamentary non-accountability”, also mentioned as “chair immunity” or “absolute immunity”, means that criminal proceedings are not initiated against the statements, opinions and votes of members of parliament while performing their legislative duties.

Representatives who come into power through election obtain legal protection thanks to immunity and due to acts related to direct parliamentary function.

Furthermore, parliamentary immunity includes continuity. That is to say, loss of membership does not lift non-accountability to previous terms.

On the other hand, **parliamentary immunity** means that members of parliament are not subject to proceedings of investigation and prosecution, due to allegedly committed offences and without parliamentary permission.

Even though this approach which is complementary to parliamentary non-accountability is not directly related to “vote and statement”, it aims to prevent the arbitrary or disproportionate discharge of a deputy from his/her legislative function due to alleged offence.

While non-accountability is consistent, immunity is limited to term of membership.

Besides, immunity has some exceptions such as *“flagrante delicto”.*

C. The Purpose of Parliamentary Immunity

Immunity guarantees that the Member of Parliament freely performs his/her duty. Except for the Netherlands, almost all democratic systems provide such legal protection to deputies through changing scopes and different procedures.

No country which has adopted the principle of the rule of law aims to ensure impunity for deputies or to release them from the punishment of the committed offence under the shield of immunity. What immunity aims is to protect deputies from the prosecutions which may be launched for political reasons.

Immunity does not provide any privilege to deputies; it only refers to the postponement of investigation and prosecution for a certain period. In this respect, it is not possible to consider and interpret parliamentary immunity as an absolute privilege for deputies and as an immunity which lifts criminal accountability.

III. PARLIAMENTARY IMMUNITY IN THE LEGISLATION

A. Provisions in the Constitution of the Republic of Turkey

Article 83 of the Constitution of the Republic of Turkey is as follows: *"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 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 lapse of time 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."

The exceptions to and lifting procedures for immunity are shown in the mentioned article as well as the existence of such immunity which is accepted as a safeguard for the legislative function. Parliamentary immunity does not lead to "impunity" in any respect and does not lift the obligation to investigate or prosecute the committed offence.

Immunity is granted to persons only during the continuation of the legislative duties and investigation or prosecution process continues from where it has been suspended when the membership of the GNAT ends. Furthermore, suspension of investigation or prosecution does not risk the limitation period since the latter does not apply during the term of immunity.

To summarize, parliamentary immunity which is not of the nature of amnesty or does not result in "impunity" should not be perceived as a personal privilege granted to a deputy.

In the provisions of the Constitution adopted on the basis of the principle of the rule of law, it is clearly understood that the immunity component does not mean a "privilege to commit an offence".

B. Amendment Introduced by Law No. 6718

Provisional Article 20 of the Constitution which was added by Article 1 of the Law No. 6718 on the Amendments to the Constitution of the Republic of Turkey which entered into force through publication in the Official Gazette dated 08.06.2016 and numbered 29736 is as follows: *"On the date when this Article is adopted in the Grand National Assembly of Turkey (GNAT), 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."

The mentioned amendment envisages that, as of the date of adoption of the amendment in the GNAT, the first sentence of the second paragraph of Article 83 of the Constitution shall not apply for the files of the deputies concerning the lifting of parliamentary immunity which are submitted from the authorities empowered to investigate or to allow investigation or prosecution, Chief Public Prosecutor's Offices and courts to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey or the Presidency of the Joint Committee formed by the members of the Constitution and Justice Committees.

Based on this provision of law, the sentence "*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."* provided in the second paragraph of Article 83 of the Constitution shall not apply for the deputies whose files concerning the lifting of parliamentary immunity are submitted to the authorities mentioned in the article, as of 20.5.2016, the date of adoption of the article by the GNAT.

As is seen, it has been stated that the provisions of law on parliamentary immunity in Article 83 of the Constitution which are not of temporary nature shall not apply for investigation and prosecution files related to all kinds of offenses launched against all deputies until a certain time, in accordance with the amendment to Provisional Article 20 which was added through constitutional amendment. In other words, it has been indicated that investigation and prosecution process against these persons may not be interrupted.

With the amendment, it has been made possible that the deputies who have dossiers filed against them and are under suspicion of a crime may be subject to trial before independent and impartial judicial authorities. The future trials do not constitute obstacle for deputies to participate in the parliamentary proceedings. However, for those who receive final judicial sentence of imprisonment due to an offence which affects the eligibility to become a deputy, membership will be lost in cases where this sentence is notified to the Plenary of the Grand National Assembly of Turkey (Article 84/2[1] of the Constitution).

[1] **Article 84/2 of the Constitution** - The loss of membership, through a final judicial sentence or deprivation of legal capacity, shall take effect after the Plenary has been notified of the final court decision on the matter.

The abovementioned constitutional amendment has entered into force with the positive votes of more than 2/3 of the number of members of parliament and the approval of the Office of the Presidency within the scope of a comprehensive consensus and support of the public opinion. A wide range of deputies from different political views have supported the lifting of immunity for every deputy in terms of files prepared until a certain time.

Within the scope of the amendment, parliamentary immunity has been lifted **for all offenses committed until a certain time.** The amendment includes all offenses such as violation of constitutional order, membership in and aid to a terrorist organization, counterfeiting, wounding, insult and no distinction has been made in terms of lifting of immunity for the alleged offenses.
The mentioned provision of law on the amendment of the Constitution is general, abstract and impersonal and does not target a specific political group. Within this context, immunity has been lifted for the files existing until a certain time and pending for the fulfillment of the condition for prosecution and it has been made possible that independent judicial authorities may carry out trials as provided in Article 138 of the Constitution[2]. The mentioned amendment generally encompasses members of the ruling party and opposition parties and independent deputies who enjoy parliamentary immunity and against whom investigation files exist. There is no doubt that the mentioned amendment is appropriate for the law making technique, the Constitution and the fundamental principles of law.

On the other hand, it is seen that a number of dossiers subject to investigation and prosecution exist for a while concerning the members of the Grand National Assembly of Turkey, that this situation brings some objections and requests on the agenda in the public opinion and in the eyes of media organs and non-governmental organizations; that, within this context, a large number of dossiers pending before the GNAT have been put in process and left off the agenda with the amendment in relation to lifting of immunity and this has complied with the principle of equality before the law within the context of Article 10 of the Constitution[3].

The regulations concerning the restriction of the scope of parliamentary immunity may have been invoked in many European countries especially in France. The Constitutional amendment to limit or lift immunity as to time does not embody any prejudice to the Constitution, the fundamental principle of human rights and global judicial values.

IV. REASONS FOR THE AMENDMENT TO LIFT THE PARLIAMENTARY IMMUNITY

Reasons for legislative regulation related to lifting of parliamentary immunity have been clearly stated in the preamble to the Law No. 6718.

As is stated in the preamble to Law, while Turkey is in the biggest and most comprehensive fight against terrorism, the statements of certain deputies constituting emotional and moral

[2] **Article 138 of the Constitution** – Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law.
No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.
No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.
Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

[3] **Equality before the law**
Article 10 of the Constitution – Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds.
Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.
Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.
No privilege shall be granted to any individual, family, group or class.
State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.

support to terrorism, the de facto support and assistance of certain deputies to terrorists and the calls of violence of certain deputies cause public indignation. Turkish public believes that certain deputies who, above all, support terrorism and terrorists, and call for violence exploit the parliamentary immunity and requests that the Assembly allow the prosecution of those who take such actions. The Assembly cannot be considered to remain silent upon such a request. Indeed, several deputies and the leaders of the political parties have requested the examination of the files of immunity and the lifting of immunity.

While the request for the examination of the files of immunity and the lifting of immunity has been brought to the agenda regarding the files related to terrorism and violence, both the politicians who are the subject of such files and some other politicians have requested that “all the current files of immunity be lifted”. The lifting of immunity and the judicial remedy has been deemed as priority within the context of fight against terrorism and it has been considered appropriate to lift all the files of lifting of immunity in order to ensure the support of those who request for the “lifting of the immunity of all the files” and the prevention of a political exploitation through the files, the immunity of which is not lifted.

The Constitution and the Rules of Procedure have regulated the process of lifting of immunity in a detailed manner and provided its conclusion within specific terms. According to this, the Joint Committee shall be assembled, the Drafting Committee shall be formed, the draft report shall be evaluated and concluded in the Committee, each dossiers shall be separately discussed and the status of each person in the dossiers embodying more than one person shall be separately evaluated and voted in the Plenary.

As of the date of proposal of the law, there are five hundred and sixty-two (562) dossiers in the Joint Committee. When calculated according to a minimum of one hour for each dossiers excluding the term of service of the Joint Committee, a total of five hundred and sixty-two plenary hours will be allocated to the deliberations. Even though the entire Agenda is allocated to the deliberations of dossiers, considering the practices of the proceedings of the Plenary, it is understood that approximately six dossiers may be discussed and this will take approximately ninety-four days. Considering that The GNAT works three days per week, this will mean that a term of more than thirty weeks will be allocated to the dossiers and any other proceedings may not be carried out. As a consequence, the lifting of all the files of immunity in accordance with the regular proceedings in the Constitution and the Rules of Procedure will prevent the parliamentary proceedings for an approximate term of eight months.

A provisional article is deemed as a solution to be added to the Constitution, considering the lifting of all the files of immunity, notably those related to terrorism and the disallowance of the blockage of the proceedings in the Grand National Assembly of Turkey. Through a provisional article to be added to the Constitution, both the immunity of the files will be lifted and the parliamentary proceedings will not be blocked due to a long process.

The bill of law related to making amendments in the Constitution has been drafted and submitted with the intention of meeting the intense expectations of the public in terms of fight against terrorism, hindering the speculations and exploitations that will overshadow the realization of this objective and constituting an obstacle before the blockage of the parliamentary proceedings while taking a step in the matter of immunity.

V. CRITICISM CONCERNING THE AMENDMENT TO LIFT THE PARLIAMENTARY IMMUNITY AND ASSESSMENTS

Allegations of Unconstitutionality

The amendment to the abovementioned Law has become the provision of the Constitution with the positive votes of more than 2/3 of the number of members of parliament and the approval of the Office of the President within the scope of a comprehensive consensus and support of the public opinion. Therefore, it is not legally possible to mention about the contradiction or allege the unconstitutionality of the current constitutional amendments. Hierarchy does not exist among the provisions of the Constitution.

Lifting of parliamentary immunity with a constitutional amendment is in the discretion of the law maker and does not constitute any unconstitutionality. It should be known that provisional articles have the same power as the Constitution and result in the same effects. It is not possible to say that the provision of the Constitution is unconstitutional. This is the seizure of legislative power.

In accordance with Article 148 of the Constitution[4], the Constitutional Court may examine the constitutional amendments only as to form. It is not possible to examine them as to substance. The supervision of the Constitution as to form is only 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. Even this provision is of utter importance since it shows that the provisions of the Constitution do not embody hierarchy among them.

The mentioned amendment comprehends, without distinction, the requests for lifting of the files which have come to a specific stage and is abstract and general. Indeed, this amendment involves lifting of the immunities of the pending files of all deputies but not members of a

[4] **Article 148 of the Constitution** - 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.
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.
In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.
Procedures and principles concerning the individual application shall be regulated by law.
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 Appeals, High Military Administrative Court, High Council of Judges and Prosecutors, Court of Accounts, and Chief Public Prosecutors and Deputy Public Prosecutors.
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.
The Constitutional Court shall also perform the other duties given to it by the Constitution.

specific party. Immunity has been lifted in all files, without exception, which exist in a certain term.

The amendment is made by adding a Provisional Article to the Constitution. It is obligatory that these provisions which will apply once due to their nature should be amended ad interim instead of a permanent amendment. It has been decided that the last paragraph added to Article 67 of the Constitution[5] by provisional article of the Law No. 4709 dated 3 October 2001 will not apply in the first general elections and that the last paragraph of Article 67 of the Constitution will not apply in the first by-elections in the 22nd term in accordance with provisional article of the Law No. 4777 dated 27 December 2002. As is seen, similar previous practices exist.

Allegation that the Amendment is prepared to exclude Members of HDP from the Assembly

The constitutional amendment does not change the seat distribution in the Assembly. As a result of the amendment, it has been made possible that independent and impartial judicial authorities may try deputies against whom there is a dossier and who are suspects of an offence. Lifting of immunity does not mean loss of membership of deputies. The proceedings should be finalized with a sentence of imprisonment; these sentences of imprisonment should be notified to the Office of the Speaker of the Grand National Assembly of Turkey and the Office of the Speaker of the Assembly should notify them to the Plenary in order to consider that membership of the Assembly is lost. For these reasons, it is obvious that the amendment aims to design the politics and the allegation that it has been prepared to exclude the members of HDP from the Assembly does not reflect reality.

Allegation that the Principle of Equality is Disrupted

The amendment does not envisage a special regulation concerning any political group or deputy.

According to the amendment, all deputies against whom a file is opened are included and all deputies against whom a file is not opened are excluded. There is no distinction between the deputies against whom a file is opened and who are included in the scope and the deputies against whom a file is not opened and who are excluded from the scope.

While the amendment brings an exception to the implementation of the second paragraph of Article 83 of the Constitution in terms of existing files, it does not disrupt the principle of equality since it does not make a distinction among any political party or view. The amendment is abstract and general and provides equality in contrast to the criticisms.

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[5] **Article 67 of the Constitution** - In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum.
Elections and referenda shall be held under the direction and supervision of the judiciary, in accordance with the principles of free, equal, secret, direct, universal suffrage, and public counting of the votes. However, the law determines applicable measures for Turkish citizens abroad to exercise their right to vote.
All Turkish citizens over eighteen years of age shall have the right to vote in elections and to take part in referenda.
The exercise of these rights shall be regulated by law.
Privates and corporals at arms, cadets, and convicts in penal execution institutions excluding those convicted of negligent offences shall not vote. The necessary measures to be taken to ensure the safety of voting and the counting of the votes in penal execution institutions and prisons shall be determined by the Supreme Board of Election; such voting is held under the on-site direction and supervision of authorized judge.
The electoral laws shall be drawn up so as to reconcile the principles of fair representation and stability of government.
(Paragraph added on 3/10/2001- Act No. 4709/Art. 24) Amendments to the electoral laws shall not apply to the elections to be held within one year from the entry into force date of the amendments.

Allegation that a Vested Right is reclaimed

Parliamentary immunity is a matter that the Constitution deems as a right, more precisely, as a guarantee. In fact, this does not have the nature of absolute and unlimited guarantee. The procedure related to lifting of immunity may not be seen as a vested right.

Furthermore, a deputy gains the duty and title as deputy during his/her term of office in which he/she is elected. However, the parliament can redetermine the duration of legislative term by amending the provisions of law on elections as well as its ability to take a decision on early elections. Indeed, the legislative term has been shortened to 4 years whereas it was 5 years in the past.

Allegation that the Exemption in Criminal Proceedings Granted to Deputies in the Constitution has been Lifted

Parliamentary non-accountability and parliamentary immunity have been amended together in Article 83 of the Constitution.

Parliamentary non-accountability which means that deputies are not held responsible for their votes and statements in parliamentary proceedings and their views in the Assembly has been provided in the first paragraph of the article.

The second paragraph is related to “parliamentary immunity” which means that deputies who are alleged to have committed an offence may not be tried without decision of the Assembly.

The constitutional amendment does not envisage any regulation concerning parliamentary immunity provided in the first paragraph of Article 83. Therefore, it does not restrict the proceedings or discourses that deputies are involved in under the Grand National Assembly of Turkey. It does not threaten the freedom of expression of deputies.

With this amendment, an exception is brought to the provision related to lifting of parliamentary immunity in the second paragraph of Article 83.

An absolute exemption granted for criminal proceedings is not already embodied in the second paragraph of Article 83 which provides parliamentary immunity. What is mentioned here is not an immunity which will result in impunity but a guarantee of absence of trial without decision of the Assembly during the continuity of the title of deputy. An exception is brought by the amendment to this provision which has procedural nature.

Allegation that Prohibition of Retroactivity of Law is Violated

Prohibition of retroactivity in criminal law is related to material criminal law norms. The valid principle in terms of procedural law is the principle of immediate implementation.

The second paragraph of Article 83 of the Constitution regulates the procedure to be followed for the trial of the deputies who are alleged to have committed an offence. This provision which is not relevant to material rules of criminal law has a completely procedural nature. No provision of law exists as alleged concerning the provisions of procedural law as long as it does not affect criminal responsibility. Therefore, it is not possible to mention about the relation of this amendment with prohibition of retroactivity of the criminal law.

Criticism that the Amendment should also include the Ministers

The Supreme Court is authorized to hear the cases filed for the offences that the ministers are alleged to commit owing to their duties. Investigation committees established for these cases in the GNAT undertake the role of the Public prosecutor in the judicial investigations and in fact conduct preliminary investigations. Therewithal, the Committee report which is approved by the Plenary and submitted to the Supreme Court is also deemed as indictment of criminal case.

Differently from the process of lifting of immunity for the personal offences of deputies, Public prosecutors do not have any role or function in terms of the offences committed by ministers owing to their duties. Since public prosecutors may not conduct any investigation proceedings for these offences, it is obligatory to maintain the role of the investigation committees of the Assembly in the process and the relevant ordinary procedure. Otherwise, neither an investigation may be launched or evidence may be collected nor an instrument may be found to be deemed as indictment which may be accepted or rejected by the Constitutional Court under the title of Supreme Court.

Parliamentary immunity and parliamentary investigation regulate different legal situations and are not related to the amendment in any aspect. This amendment related to the general politics of the Council of Ministers or the duties of the Ministers may be made at any time and does not come to the agenda of the Assembly as often as immunities. To say it differently, it is not already possible to lift the immunity by taking actions according to Article 83 of the Constitution for the offences committed owing to the duties of the Ministers. It is obligatory to take actions for these offences in accordance with Article 100 of the Constitution[6].

On the other hand, the ministers also enjoy parliamentary immunity. If it is mentioned that a minister commits a personal offence, there is no hesitation that the procedure to be followed in this case is that of Article 83 of the Constitution. In this sense, the amendment already comprehends the ministers as well.

Allegation that Deputies Who Have a File of Immunity May Not Enjoy the Right to Defense Envisaged in the Rules of Procedure

The right to defense provided in Article 134 of the Rules of Procedure [7] is related to the right of the deputy, whose immunity is requested to be lifted, to speak about this action.

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[6] **Article 100 of the Constitution** - Parliamentary investigation may be requested against the Prime Minister or ministers through a motion tabled by at least one-tenth of the total number of members of the Grand National Assembly of Turkey. The Assembly shall debate and decide on this request through secret ballot within one month at the latest.
If a decision to launch an investigation is made, the investigation shall be conducted by a committee of fifteen members, chosen by lot, for each political party in the Assembly, separately from among three times candidates nominated for each seat reserved to party groups in proportion to their strength. The committee shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the committee shall be granted a further and final period of two months. At the end of this period, the report shall be submitted to the Office of the Speaker of the Grand National Assembly of Turkey.
Following its submission to the Office of the Speaker, the report shall be distributed to the members within ten days and debated within ten days after its distribution and, if deemed necessary, a decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken through a secret ballot only by an absolute majority of the total number of members.
Political party groups in the Assembly shall not hold discussions or take decisions regarding parliamentary investigations.

[7] **Art. 134 of the Rules of Procedure of the GNAT** – The deputy whose immunity is requested to be lifted may defend himself/herself, if he/she wishes, at the preparatory committee, the Joint Committee and the Plenary, or may assign another deputy to do so.
If a deputy who is invited to defend himself/herself ignores the invitation, a decision shall be taken on the basis of the documents.
The last speech belongs to the defendant in any case.
The deputy's own request for his/her immunity to be lifted is not sufficient.

Since the amendment brings exception to this procedure concerning specific files, it is not possible to say that a contradiction occurs with the right to defense protected by the Constitution.

Indeed, different immunity regimes exist in different democratic systems in the world. There is even no parliamentary immunity in the Netherlands.

The Assembly always has the right and power to determine the fundamentals of the legal institution of parliamentary immunity with a constitutional amendment. It cannot be alleged that such amendment restricts the right to defense, one of the fundamental principles of the criminal law.

Like every citizen, deputies who have a file of immunity will continue to enjoy any right and tool of defense provided by the Criminal Procedural Law both in investigation and prosecution processes in ordinary criminal proceedings.

Allegation that the non-implementation of Article 85 of the Constitution[8] is Unconstitutional

It should be primarily indicated that provisional article which is added to the Constitution by this amendment is also a constitutional article.

The right to apply for annulment to the Constitution foreseen in Article 85 is a regulation relation to parliamentary immunities which have been lifted upon the decision of the Assembly. In other words, an application for annulment is in question for the decision of the parliament.

Since lifting of immunity with the amendment directly emerges as a legal result of the constitutional article, there is no parliamentary decision on lifting of immunity. As a natural result of this, it will not be possible to talk about the right to apply for annulment against a non-existing parliamentary decision.

Therefore, it does not seem legally possible to claim that the amendment contradicts or is contrary to Article 85 of the Constitution.

Criticism about the restriction of the rights to defense or abolition of the right to apply for annulment to the Constitutional Court is irrelevant. Neither the files nor the evidence are examined and only the constitutional obstacle before the proceedings is removed.

Such a criticism would be put forward if deputies were assessed guilty or innocent, and while making this assessment, the right to defense was not granted to the deputies and they were not entitled to apply for annulment to the Constitutional Court in accordance with Article 85 of the Constitution. However, such a situation is not in question in this case.

VI. VIEW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON PARLIAMENTARY IMMUNITY

A. General Information

European Court of Human Rights (ECtHR) observes that, most but not all of the signatory states to the Convention provide the members of their legislative organs with a kind of immunity which varies from a country to another as to their methods. Privileges and

[8] **Article 85 of the Constitution** - If the parliamentary immunity of a deputy has been lifted 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 date of the decision of the Plenary, 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 of Procedure. The Constitutional Court shall make the final decision on the appeal within fifteen days.

immunities are also granted to members of the Parliamentary Assembly of the Council of Europe and members of the European Parliament. The ECtHR also agrees that this regime has a legitimate objective in order to ensure that the deputies can freely and peacefully perform their duties. Similarly, according to the ECtHR, exemptions which constitute parliamentary immunity are related to the qualifications of deputies and serve a purpose which protects the duty of the person rather than granting a personal privilege.

According to the court, unlike parliamentary non-accountability, immunity does not «remove» the offense but postpones the prosecutions against the deputy and prohibits the prosecution and arrest of the deputy without permission of the parliamentary group which the deputy is the member of. Turkish constitutional order also recognizes the non-accountability and immunity of a deputy within this context.

According to the court, deputies have been granted with immunity in order to prevent them from having to make concessions to their freedom of expression due to “partisan complaints”. Similarly, national authorities are entitled to provide immunity for the statements in the debates under the legislative organ in order to guarantee the interests of the legislative organ as a whole.

In addition to all these statements, the ECtHR remarks that it is not correct to presume that parliamentary immunity independently conforms to the European Convention of Human Rights without separately considering the conditions of each case. In this context, the ECtHR indicates that it is in the discretion of the state to grant immunity and that, in a specific case, it is not authorized to put its assessment to its place in order to decide whether immunity is necessary or appropriate *(Kart/Turkey, No.8917/05, 8 July 2008).*

Even though the ECtHR states that the discretion is given to the national authorities, it indicates that the immunity granted to members of parliament in Turkey is **more comprehensive** than that of members of the other signatory states, members of the Parliamentary Assembly of the Council of Europe and members of the European Parliament in several terms.

In addition to these matters, the ECtHR indicates that suspension of any criminal prosecution against a member of the parliament during his/her term results in a long process between the commitment of criminal offences and the initiation of relevant criminal investigations, which will render the prosecution indefinite especially in terms of evidence. Within this context, the ECtHR underlines that there are intense debates about the parliamentary immunity in Turkey and this is heavily criticized by the civil society. Furthermore, it also states that the scope of parliamentary immunity and problems within the context of corruption can be considered to be one of the major problems (*Kart/Turkey, No.8917/05, 8 July 2008).*

In conclusion, the ECtHR has indicated several times that its duty is not to abstractly evaluate whether parliamentary immunity conforms to the European Convention on Human Rights (ECHR). In each application, the Court finds it appropriate to examine whether the fair balance which should be maintained between the general interest about the good functioning of the Assembly and the personal interest of the applicant is taken into consideration *(Kart/Turkey, No.8917/05, 8 July 2008).* In the applications, the ECtHR prefers to examine whether a right has been violated within the framework of the articles of the European Convention on Human Rights.

B. Criteria

The criteria that the ECtHR pursues in the applications about the parliamentary immunity of deputies are as follows:

1) Concerning the Nature of Victimization

An applicant should reveal that he/she is “directly affected” by the measure which is the subject of complaint in order to make an application in accordance with Article 34 of the ECHR (Tânase/Moldova [BD], par. 104; Bur den/United Kingdom [BD], par. 33). Even though this criterion should not be strictly, mechanically or inflexibly implemented during the proceedings (Micallef/Malta [BD], par. 45; Karner/Austria, par. 25; Aksu/Turkey [BD], par. 51), it is indispensible for the ECHR to activate its protection mechanism (Hristozov and others/Bulgaria, par. 73).

The Court has also accepted that, in some special cases, an applicant may be a potential victim. However, in such cases, the applicant should present reasonable and convincing evidence about the possibility that a violation which personally affects the applicant has occurred, in order to claim that he/she is the victim. The assumption or suspicion of victimization is not sufficient alone.

The deputies whose immunity is lifted are possibly affected by the results of this situation at any moment. In such a case, it will be accepted that they do not need to wait for an implementation in order to apply to the ECtHR.

2) Concerning Article 6 of the ECHR

A/United Kingdom, No.35373/97, 17 December 2002

It has not been decided that **Article 6 of the European Convention on Human Rights** was not violated in cases where the members of the Parliament of Westminster did not have any immunity *related to the allegedly libelous statements during their speeches.*

This immunity legitimately aims to protect the freedoms of expression of the members of parliament concerning the issues of public interest which are important in democracy and to ensure separation of powers between the legislative and judicial organs Even though it is an absolute immunity and includes all cases both before the civil and criminal courts, this immunity has not outreached the discretion. This immunity which applies only in terms of the speeches in the Parliament has been considered as *a restriction imposed on the right of access to the courts* in order to reach the mentioned legitimate purposes and it has also been found “*appropriate for the provisions that the member states of the Council of Europe and the European Parliament accepted"*.

Cordova/Italy (No. 2), No.4-564-9/99, 30 January 2003

The libelous election speeches of an Italian deputy Vittorio Sgarbi especially about a prosecutor during two different electoral periods constitute the substance of the subject of this application.

Sgarbi has been sentenced to 2-month imprisonment by Italian local authorities due to his mentioned speeches.

The local authority has stated that such speeches of Sgarbi may not be considered within the scope of legislative activities and that he cannot enjoy parliamentary immunity.

It has been decided otherwise in the period of appeal and it has been considered that the mentioned speeches should be accepted as legislative activities. Within this context, the decision of the local court has been reversed.

The applicant prosecutor has made the individual application, claiming that he is deprived of the right of access to the courts.

The ECtHR has accepted that, within the scope of the mentioned application, an intervention

has been made to the applicant's right of access to the courts and has examined whether this intervention is proportionate. Within this framework, the ECtHR has reminded that a disproportionate restriction has not been imposed on the right of access to the courts while granting parliamentary immunity.

The ECtHR examined the speeches of Sgarbi and noted that these resulted from a personal debate but not from legislative activities.

According to the Court, the right of access to the courts should not be restricted only on the grounds that political activities exist.

Within the scope of this decision, the ECtHR indicated that "the statements made outside the Parliament should be subject to close interpretation in terms of the principle of proportionality in cases where these statements are not relevant to the parliamentary proceedings."

To conclude this case, a speech delivered by a member of the parliament on the applicant prosecutor during an election meeting cannot be the subject of the case due to absolute parliamentary immunity and this has been found disproportionate since it is related to a special dispute and has led to the violation of the right of access to the courts of the applicant.

Kart/Turkey (Grand Chamber), No.8917/05, 3 December 2009

The subject of the application is that the applicant deputy cannot lift his parliamentary immunity in order to defend himself in a criminal case filed against him.

The Chamber has primarily reviewed the application. According to the Chamber, the decision process and the methods of entry into force mentioned in the conditions of application made against the rejection to lift the parliamentary immunity of a deputy in order to eliminate the threat of investigation against himself, do not conform to the requirements of the manifestation of justice and deactivate the right of access to the courts of the applicant to the disproportionate extent to the pursued legitimate purpose. The Chamber has considered that the applicant is deprived of the right of access to the courts, this restriction is disproportionate and this right constitutes a violation of the substance of this right, concluding that Article 6/1 of the ECHR is violated.

In the case filed, the Grand Chamber has primarily indicated that the subject of effect of parliamentary immunity on the right of the applicant should be considered within the framework of the requirements of protection of the institutional objective about this immunity. Furthermore, the ECtHR considers that it should supervise whether the procedure of lifting of immunity conforms to the rights provided in the ECHR.

The Grand Chamber has evaluated the features specific to the status of the applicant and those of the procedure of lifting of immunity and considered that the applicant lawyer was informed of the effects of being elected as deputy on the cases filed against him, that is to say, that he would not abandon his immunity and his immunity would not lifted only upon request.

The Grand Chamber has concluded that the immunity did not prejudice the substance of the right of access to the courts even though it accepted that immunity could postpone the exercise of this right. Immunity which is the subject of dispute equipped with special rules such as restriction of time and cease of lapse of time, is a temporary obstacle in the criminal prosecutions and not an obstacle which makes it impossible to examine the case of the concerning person as to substance. As a consequence, continuity of parliamentary immunity **did not constitute a disproportionate intervention** in the right of access to the courts of the concerning person for a legitimate purpose.

3) Concerning Article 10 of the ECHR

Ahmet Sadık/Greece, No.18877/91, 15 November 1996

In this decision, a Greek member of parliament who has published notices stating that "Turks" are **the** Muslim **minority** in Western Thrace has been imprisoned due to deception of voters. The Commission has found such a measure clearly unconscionable since there is no indication that he has been incited to violence. As a result of the criticism of members of the local council about the public authorities, it is sufficient that he is sentenced to a low amount of compensation on the grounds of libel and defamation in order to have an unacceptable deterring effect on the freedom of political expression of a member. It may bring the government a liability to prove that social purposes overpass the statement.

4) Concerning Article 3 of the Additional Protocol No. 1 of the ECHR

Ilıcak/Turkey, No. 15394/02, 5 April 2007 and Kavakçı/Turkey, No.71907/01, 5 April 2007

The applicant, Nazlı Ilıcak (and Merve Kavakçı) alleged that fall in membership and prevention of the re-election after the dissolution of Fazilet Party upon the decision of the Constitutional Court violated her freedom of expression guaranteed under Article 10 of the ECHR and infringed Article 3 of the Additional Protocol No.1. The ECtHR found it appropriate to examine all the complaints under the title of Article 3 of the Additional Protocol No.1.

The ECtHR examined whether grounds compelling the democratic order existed in temporarily depriving the applicant of her political rights in terms of the proportionality of the measures of dissolution of the party, lifting of immunity and prohibition of politics.

The ECtHR especially considered that some party members and notably the party chairman and vice-chairman did not suffer from such sanction as the applicant did..

According to the Court, restriction of political rights is a heavy sanction. The ECtHR concluded that the decision of the Constitutional Court on the applicant could not be considered proportional in line with the envisaged legitimate purposes. In this case, the mentioned intervention violated the essence of the right to be elected of the applicant and hereby infringed Article 3 of the Additional Protocol No.1 to the ECHR.

Lykousezos / Greece, No. 33554/03, 15 September 2006

In the relevant decision of the ECtHR, the subject of application was the loss of membership of a deputy pursuant to a law enforced retroactively despite being adopted following the election of the deputy. In this case, the ECtHR decided that the right to vote and to be elected was violated and it depended on the principle of "legitimate expectation" in the mentioned decision. Accordingly, an elected deputy and his/her voters have a "legitimate expectation" that the deputy will perform his/her duty until the end of term. The enforcement of the law retroactively was acknowledged as a violation of the right to vote and to be elected.

C. Assessment

It should be initially indicated that the ECtHR does not accept lifting the parliamentary immunity as a reason of violation by itself within the scope of the ECHR and the ECtHR even considers the existence of immunity as a violation of the right of access to the courts in some of its decisions. *(See. Cordova/Italy (No. 2), No.45649/99, 30 January 2003)* However, Article 5 of the ECHR on the right to liberty and security in case of arrest of a deputy after the immunity is lifted will be put into practice as well as Article 10 related to freedom of expression in case of punishment for the statements and Article 3 of the

Additional Protocol No.1 related to the right to free elections depending on the duration and grounds of arrest. In this case, lifting of immunity is not a reason of violation alone and the judicial proceedings and grounds of the judicial authorities, potential arrest and its duration and penalties to be imposed are also significant.

On the other hand, within the scope of the positive liabilities of the contracting states, they have obligations to launch an official and effective investigation related to the right to life in Article 2 and the prohibition of torture in Article 3 of the ECHR (*Assenov and others **/** Bulgaria,* 28 October 1998, *Ay **/** Turkey,* No. 30951/96, 22 March 2005 and *Şafak / Turkey,* No. 38879/03). This investigation should enable the identification and punishment of the responsible persons. Unless the investigation can be launched as such *(e.g. for the reasons indicated in the Law No. 4483),* general or legal prohibition of humiliating or inhuman treatment or punishment and torture will not be effective in practice despite its fundamental importance and it will be possible that the State officials largely exempt from criminal liability, will not respect the rights of the persons under their supervision in certain cases. It is considered appropriate to evaluate whether parliamentary immunity will exempt the concerning persons from criminal liability within the scope of the investigations launched against them under Articles 2 and 3 and comparatively Article 8 of the ECHR.

VII. VIEW OF THE CONSTITUTIONAL COURT ON PARLIAMENTARY IMMUNITY

A. Decision of the Constitutional Court, Case No. 2016/54, Decision No. 2016/117

In the application of 70 deputies for annulment and suspension of execution of provisional article 20 added to the Constitution of the Republic of Turkey, it was indicated that actions were taken contrary to the relevant provisions of the Constitution and the Rules of Procedure regulating the procedure of lifting the parliamentary immunity; that the allegations about the concerning deputies were not serious; that the mentioned Law was accepted by acting with political motives; that the alleged actions remained within the framework of parliamentary non-accountability, the freedoms of expression, organization, political activity, assembly and demonstration; that the relevant deputies were not granted with the right to defense; that inequality and discrimination were caused among the deputies since those who committed the same actions after the date of enactment of the Law or the deputies whose membership had not started yet on this date would continue to enjoy parliamentary immunity and that it was prevented to separately discuss and decide on the requests for lifting the immunity. It was also alleged that the Law was contrary to Articles 2, 10, 13, 15, 19, 25, 26, 27, 67 and 83 of the Constitution, Articles 131 to 134 of the Rules of Procedure of the Grand National Assembly of Turkey (GNAT), the European Convention on Human Rights and its additional protocols and the annulment of the Law was requested on those grounds.

As a result of the assessment made by the Constitutional Court, it was decided that the requests for annulment and suspension of execution of provisional article 20 added to the Constitution by the Law no. 6718 which is the subject of application should be rejected in accordance with Article 85 of the Constitution and Article 54[9] of the Law No. 6216, on the grounds that

[9] **Request of annulment in cases of abolition of immunity and foreclosure of membership to the parliament**
Article 54- (1) Against the decisions of the Grand National Assembly of Turkey regarding the abolition of legislative immunity or foreclosure of membership to the parliament, the member of the parliament concerned or the minister who is not a member of the parliament or another member of the parliament can address the Court in seven days starting from the date on which such decision is made for annulment with the claim that such decision is in violation of the Constitution, the code or the Internal Regulation of the Grand National Assembly of Turkey. Such request shall be ruled definitively within fifteen days.
(2) The Court in case of requests for annulment shall get required documents brought in without waiting for submission by the person concerned.

- ✓ The provision of law, the annulment of which was requested was accepted with the signatures of 316 deputies, as a result of the legislative process which started with the "Bill of Law Concerning the Amendments to the Constitution of the Republic of Turkey" presented to the Office of the Speaker of the GNAT on 12.4.2016, in spite of the necessity of a parliamentary decision on lifting the parliamentary immunity so that the examination can be made under Article 85 of the Constitution,

- ✓ The process which started with the "Bill" was a "special" process envisaged under Article 175 of the Constitution[10] with the title of "Amending the Constitution, participation in elections and referenda"; this process had special form conditions in terms of proposal, voting, acceptance and entry into force; special legal results were linked to the will of the Assembly which emerged after this process; that, therefore, it was impossible to supervise the accepted law related to the amendments to the Constitution as to substance and this law could be supervised as to form only within the framework of Article 148; the constitutional amendments were 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,

- ✓ The supervision of the laws related to the amendments to the Constitution as to form could be requested by the President of the Republic or by a minimum of one-fifth of the total number of the members of the Grand National Assembly of Turkey within ten days as of the date of publication of the law related to the amendments to the Constitution in the Official Gazette; these terms did not emerge in concrete requests for annulment,

- ✓ It was possible that the Constitutional Court could supervise a law amending the Constitution only with an action for annulment brought in accordance with Article 148 of the Constitution; the mentioned law could not be supervised within the framework of Article 85 of the Constitution, the procedural unconstitutionality which was alleged to emerge during the acceptance of the law on the amendments to the Constitution could only constitute the subject of an action for annulment brought in accordance with Article 148 of the Constitution,

- ✓ It was suggested that the allegation of unconstitutionality which could be supervised within the scope of a remedy clearly foreseen in the Constitution and which was subject to special conditions had the nature of a parliamentary decision of the provision, the annulment of which was requested and the deputies were the subject of individual requests for annulment under Article 85 of the Constitution, which would lead Article 148 of the Constitution to be pointless and nonfunctional,

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[10] **Article 175 of the Constitution** - Amendment to the Constitution shall be proposed in writing by at least one-third of the total number of members of the Grand National Assembly of Turkey. Bills to amend the Constitution shall be debated twice in the Plenary. The adoption of a bill for an amendment shall require a three-fifths majority of the total number of members of the Assembly by secret ballot.
The consideration and adoption of bills for the amendments to the Constitution shall be subject to the provisions governing the consideration and adoption of laws, with the exception of the conditions set forth in this Article.
The President of the Republic may send back the laws on the amendments to the Constitution to the Grand National Assembly of Turkey for reconsideration. If the Assembly readopts, by a two-thirds majority of the total number of members, the law sent back by the President of the Republic without any amendment, the President of the Republic may submit the law to referendum.
If a law on the amendment to the Constitution is adopted by a three-fifths or less than two-thirds majority of the total number of members of the Assembly and is not sent back by the President of the Republic to the Assembly for reconsideration, it shall be published in the Official Gazette and be submitted to referendum.
A law on the Constitutional amendment adopted by a two thirds majority of the total number of members of the Grand National Assembly of Turkey directly or upon the sending back of the law by the President of the Republic or its articles deemed necessary may be submitted to a referendum by the President of the Republic. A law on the amendment to the Constitution or the related articles that are not submitted to referendum shall be published in the Official Gazette.

B. Consideration whether Individual Applications can be filed within the context of the Investigations Launched after Lifting the Immunity

It was determined, in the decisions of the Constitutional Court of Mustafa Ali Balbay (no. 2012/1272) and Mehmet Haberal (no. 2012/849) dated 4 December 2013, that a reasonable balance was not built between the right to be elected and to representation of the applicant and the public interest in conducting the judicial proceedings while keeping the applicant under arrest in the decisions on the rejection of the requests for release after the applicant was elected as a deputy and that the unreasonable arrest of the applicant prevented him from participating in legislative activities. It was decided that the seventh paragraph[11] of Article 19 of the Constitution was violated related to the first paragraph of Article 67 of the Constitution concerning the allegation that the duration of arrest passed over the reasonable term and the first paragraph of Article 67 was violated related to the seventh of Article 19 of the Constitution, concerning the allegation that the right to be elected was violated since a moderate balance **was not built** between the public interest which was expected from conducting the proceedings under arrest while deciding on the continuity of the arrest period and the applicant's right to be elected and to engage in political activity as a deputy. *(The application made by Mustafa Balbay to the ECtHR on the same grounds after this decision was found inadmissible (Balbay/Turkey, No. 666/11 and 73745/11). The Court determined that the application filed before the Constitutional Court initially allowed the release of the applicant and indicated that he could perform his political duty in the Grand National Assembly of Turkey for the applicant who alleged that he was deprived of performing his duty as deputy due to the continuity of arrest period.)*

Concerning the viewpoint of the Constitutional Court on the subject, it is seen that the individual applications brought before the Constitutional Court directly depending on the provision of law are considered inadmissible due to incompetency about the subject on the grounds that an individual application is directly made against the legislative proceedings.
Considering the abovementioned decisions with respect to Mehmet Haberal and Mustafa Ali Balbay, it is understood that the criterion that the Constitutional Court attaches importance to in such applications is whether there is a reasonable balance between the right to be elected and to representation of the applicant deputies and the public interest in conducting the judicial proceedings while keeping the applicant under arrest.

Within this context, the deputies whose immunity is lifted will be able to make individual applications, claiming that their rights to be elected and to representation are violated in cases where the investigations launched against them are conducted while keeping them under arrest. In case of such an application, the matter that the Constitutional Court should pay regard to is the abovementioned criterion of reasonable balance.

[11] **Article 19/7** of the Constitution - (As amended on October 3, 2001; Act No. 4709) The next of kin shall be notified immediately when a person has been arrested or detained.