



8 November 2016

HDP Brief on the Illegal Arrests of our Co-chairs and Members of Parliament and the Eradication of Rule of Law In Turkey

This brief presents an overview of the **illegality of the entire political and judicial process** leading up to the arrest of our Co-Chairs Mr Selahattin Demirtaş and Mr Figen Yüksekdağ, along with eight other MPs of our party on 4 and 7 November 2016.

In response to domestic and international outcry over the arrests, the Erdoğan-AKP government officials have presented this **a necessary judicial measure** against our Members of the Parliament (MPs) who refused to follow the summons of prosecutors for interrogation in relation to criminal cases filed against them. In his statement to the press on November 4th following the detention of our twelve MPs the night before, Minister of Justice Bekir Bozdağ argued that our MPS had defied the rule of law by this refusal, and left judicial authorities with no other choice than bringing them before the court by force.

This **judicial argument** of the Government rests on the assumption of legality of the political process which has made possible the indictment and arrest of our MPs by the lifting of parliamentary immunities. However, the fact is that this entire process has been a concerted **political effort** by legislative, executive and judicial establishment to bring an end to the HDP's parliamentary representation. This effort has entailed concerted infringements on the **non-violability and non-liability of MPs** guaranteed by Turkey's own Constitution as well as the European Convention on Human Rights –as has been resolved by the Council of Europe's [Venice Commission](#) (Opinion No. 858 / 2016; 14-15 October 2016), and [the Inter-Parliamentary Union Governing Council](#) (27 October 2016).

Moreover, the **police showdown** that marked the detention of our twelve HDP MPs in concerted and simultaneous house raids launched in five different cities in the middle of the night, details of **courtroom interrogations, pre-trial arrests** of ten of them which was followed by their **secretive transfer to prisons**, and the militant **police siege on our party headquarters** since November 4 reveal the ingenuity of the Government's seemingly technical juridical excuse. These practices also point to the expanding **mockery of law** as a characterizing feature of the political *coup d'état* that has been ongoing against our party and deputies as it will be summarized below.

I. Unconstitutionality of the Lifting of Legislative Immunities: The Principle of Inviolability

On 20 May 2016, the Grand National Assembly of Turkey (GNAT) ratified a constitutional amendment to Article 83(2) of the Turkish Constitution that precludes the arrest, detention and prosecution of MPs without a case-by-case vote at the Plenary. This amendment, dated 12 April 2016, temporarily suspended the application of Article 83(2) to those MPs facing judicial requests for the lifting of their parliamentary immunity at the material time.

The provisional “**immunity bill**” seemingly affected a mixed group of 139 similarly situated MPs. However, its real target was the removal HDP deputies from the Parliament. The so-called “immunity debate” had taken momentum in the country after Mr. Erdoğan’s targeting the HDP as “terrorists in the Parliament” in January 2016. Over the following months, the anti-Kurdish nationalist alliance of the AKP and the Nationalist Action Party (MHP) marked the immunity debates at the Parliament. On May 20th, the Republican Peoples Party (CHP) sided with this alliance by voting in favour of the constitutional amendment while simultaneously declaring it to be “**unconstitutional.**” As a result of this orchestrated **political coup d’etat**, which was upheld by the Constitutional Court, **55 of the 59 HDP** deputies were stripped of their immunities toward the elimination of HDP’s parliamentary presence, which, if completed, would also mean removal of the last barrier to formalizing Mr. Erdoğan’s *de facto* executive presidency with a *de jure* presidential system.

In its opinion of 14-15 October 2016, the **Venice Commission called for the restoration of the parliamentary inviolability of all MPs** whose immunities were lifted. The Commission reached its conclusion on the basis of the temporary, *ad hoc* and *ad homines* nature of the constitutional amendment, which it found to contradict the principles of proportionality and equality.¹ In a unanimous decision adopted on 27 October 2016, **the Inter-Parliamentary Union Governing Council also expressed “deep concern”** over the replacement of the ordinary constitutional procedure for the lifting of immunities on a case-by-case basis with a blanket removal of immunity for a total of 139 MPs (para. 1).

II. The Prosecutorial files: The infringement of the principle of non-liability of MPs

It is a well-established principle of the European human rights law that MPs are entitled to a wider freedom of speech than ordinary citizens. It is also essential for representative democracy that MPs are non-liable for the statements and opinions they express during their parliamentary mandate.

While the constitutional amendment of 12 April 2016 does not formally abolish or restrict the non-liability of MPs under Article 83(1) of the Turkish Constitution, virtually all prosecutorial files which led to the lifting of the HDP deputies’ immunities concern protected political speech—an infringement of the constitutional protection of non-liability of MPs.

HDP deputies are being prosecuted **for the statements they made not only in furtherance of their party programme**, but also as part of their mediatory role between the AKP government and the PKK in the framework of the “**democratic resolution**” of the Kurdish question (2013-2015). The HDP had assumed this role upon the formal request, and based on political assurances, of the AKP government and state institutions. Among the grounds for terrorism charges against HDP deputies is their use of the word “**Kurdistan**” or “**autonomy**,” which were used by Mr. Erdoğan and the AKP government during the “resolution process” (for a thematic overview and comprehensive list of charges imputed on HDP MPs, [see HDP Assessment Report](#)).

¹ [Venice Commission](#) noted (Opinion No. 858 / 2016) *inter alia*:

- The Parliament’s removal of all guarantees for the deputies by the complete removal of their parliamentary immunities instead of adopting a less restrictive measure is disproportionate
- Derogating from the constitutional principle of parliamentary inviolability in an *ad hoc* manner is problematic, even if it is done in the form of a constitutional amendment.
- Though drafted in general terms, the amendment concerns individually identifiable deputies and is therefore *ad homines*. Instead of deciding on each case individually and subject to the constitutional guarantees of inviolability, the Parliament lifted the immunities of 139 deputies at once, demonstrating a “misuse of the constitutional amendment procedure.”
- The differential treatment of the 139 deputies whose immunities were lifted with an *ad hoc*, one-shot and *ad homines* measure on the one hand and all earlier and future cases where deputies facing investigation will enjoy the guarantees of constitutional inviolability and face prosecution after the end of their term is an infringement of the principle of equality.

As the Venice Commission noted, **“non-violent pursuit of non-violent political goals such as regional autonomy cannot be the subject of criminal prosecution”** (para. 79). An “extremely cautious approach” is due when what is at stake is the political speech of MPs, particularly when, as in the case of HDP, nearly all MPs of an opposition party are concerned (para. 50). An “additional reason for caution” is the fact that the European Court of Human Rights has a sizeable case law against Turkey where it found the **prosecution of political speech on terrorism grounds to violate freedom of expression** (para. 51).

Nevertheless, Turkey’s Parliament failed to scrutinize criminal files sent by the prosecutors to ensure **“that peaceful and legal activities” by MPs “were not presented as evidence of criminal and terrorist acts”** (Inter-Parliamentary Union Report, para. 6). Not only has the Parliament rubber stamped the prosecutorial files without engaging in such scrutiny, it did not see an issue of legality in the fact that **115 of 798 files against the MPs had not even arrived at the Plenary at the time of voting.**

III. The mid-night *coup d’etat* of November 4

Our MPs declared from the beginning that they would not respond to prosecutors’ summons to testify, and confer any legal legitimacy to this sham that targeted their parliamentary mandates. We also declared our firm suspicion that the micromanaged courts of the Erdoğan-AKP regime were not impartial or fair tribunals for our MPs to represent themselves.

We must note at this point that the degree of judicial lack of seriousness, irresponsibility and arbitrariness that marked the detention and arrests of our MPs on 4 November stretched even our own negative expectations. The case of the Deputy Chair of our Parliamentary Group and MP for Diyarbakır, **İdris Baluken**, by the order of the Public Prosecutor in Bingöl province, is a case in point:

Contrary to the Minister of Justice’s claims that the HDP deputies brought the arrests upon themselves by refusing to respond to summons, **Mr. Baluken was never summoned by the prosecutor. While there were two separate cases pending against Mr. Baluken in Bingöl and Diyarbakır, in neither of these cases has the respective courts issued a detention or arrest order against him.**

Due to the “confidentiality” of the investigation, **neither Mr. Baluken nor his lawyers were given any information by the Bingöl Court of Inquiry regarding the criminal investigation files for which Mr. Baluken was being interrogated or the corpus of evidence held against him.** Although Mr Baluken was told that he was summoned in connection with “his statements in Bingöl,” during his interrogation he was also questioned about a political rally that he attended in Diyarbakır in 2011.

In fact, the interrogation minutes list ten different instances variously dated in Bingöl and Diyarbakır in 2011-2012, wherein Mr. Baluken allegedly “made PKK propaganda.” To the best of Mr. Baluken’s lawyers’ inferences from the dates/places listed, quite a few of these (unrevealed) statements had not been brought before the GNAT bodies for the exemption of Mr. Baluken’s parliamentary immunity. Thus, they cannot be made an issue of legal investigation against Mr. Baluken who still holds his immunity for actions and statements not covered in the criminal proceedings voted at the Parliament. **More significantly, although “making propaganda” is the singular charge imputed in the interrogation minutes, the Court ended up arresting Mr. Baluken on the charge of “being a member of a terrorist organization.”**

Equally disconcerting is that all four of the public prosecutors who prepared criminal proceedings against Mr Baluken over 2011 and 2013 (namely, Ramazan Alptekin, Ahmet Karaca, Uğur Özcan and Hakan Ceran), have since been taken off of active duty, dismissed from the profession and finally imprisoned after the failed *coup* attempt of 15 July 2016 on charges of being a member of the “Fethullah Gülen terror organization.” We would like to

note that the Venice Commission called for cases investigated by such prosecutors to be closed and investigated anew (para. 61).

The arbitrariness that marked Mr. Baluken's so-called judicial interrogation continued following the court's arrest verdict. Mr Baluken was transferred to a prison incommunicado with his lawyers, who were able to find out where their client was being held only after one-day-long search in prisons across the country. Whereas the law requires the Ministry of Justice to notify families on the whereabouts and situation of prisoners within twenty-four hours after the arrest verdict is issued, Mr. Baluken's family has yet not been officially contacted as of November 8th.

The information that we have been able to compile through HDP Legal Office suggests that the case of Mr Baluken is strongly representative of the cases of our Co-Chairs Selahattin Demirtaş and Figen Yüksekdağ, and MPs Nursel Aydoğan, Leyla Birlik, Gülser Yıldırım, Selma Irmak, Abdullah Zeydan and Ferhat Encü who were arrested on November 4th, and of our MP Nihat Akdoğan on November 7th. The trajectory of the November 4th *coup d'état* against our MPs reveal without any doubt the political manipulation of the Government's judicial excuse for their summoning to courts by the police. Their arrests cannot also be explained away in reference to any procedural clause of "reasonable doubt"—which justifies pre-trial detention as a due measure only in situations where the defendant is likely to destroy evidence, escape from prosecution or poses a threat to public safety. Our MPs are prominent political personalities who conduct their parliamentary mandates in the public arena. The only goal of their arrest is to render them physically unable to carry out their mandates by expanding upon them the illegal terror of the judiciary.

IV. HDP's decision to withdraw from legislative activities

Based on its conclusion that political measures warrant political responses, the HDP has adopted a consistent political stance throughout this process. Just as it had publicly declared after the lifting of immunities on May 20th that its deputies would not render legal legitimacy to a political process by responding to prosecutorial summons, **the HDP decided to withdraw from all legislative activities in response to the arrest of its co-chairs and eight other deputies.**

This decision also formalizes a *de facto* situation created by the judicial confiscation of the parliamentary mandate of HDP deputies. Where 55 out of the 59 members of our Parliamentary Group have been unconstitutionally stripped off of their parliamentary immunities and 10 have been rendered completely unable to continue their mandates under arrest, we refuse to extend political legitimacy a totalitarian regime by continuing with 'business as usual.'

We ask the international community, particularly the political and legal institutions of the Council of Europe and the European Union to recognize and respect our political stance, and to be mindful of their shared responsibility in finalizing their own stances. We believe that any failure to confront this targeted political assault on our MPs shall aid the deepening of Erdoğan-AKP regime's totalitarian grip over Turkey that destroys the rule law foundationally.

Hişyar Özsoy
Vice Co-Chair of HDP, Foreign Affairs
Member of Parliament

Aysel Tuğluk
Vice Co-Chair of HDP, Legal Affairs