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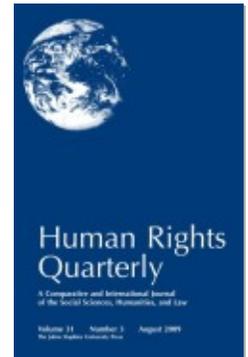
Parliamentary Immunity in Democratizing Countries: The Case  
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# Parliamentary Immunity in Democratizing Countries: The Case of Turkey

*Simon Wigley\**

## ABSTRACT

This article examines the effect that shielding elected representatives from criminal law might have in those countries that are undergoing democratization. Parliamentary immunity helps to compensate for any shortfall in the human rights enjoyed by ordinary citizens and provides elected representatives with the protection necessary to rectify that shortfall. However, the immunity may also protect subversive advocacy, rights violations and political corruption. Turkey provides an illuminating case study of those challenges to parliamentary immunity. Drawing on the Turkish experience, it is argued that methods other than exposing parliamentarians to criminal prosecution should be used to counter those problems.

## I. INTRODUCTION

Historically, parliamentary immunity has been seen as an important democratic right because it protects the ability of elected assemblies to debate and vote without interference by nonelected authorities. However, it is not a right that is intended to protect parliamentarians themselves, but to

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protect their ability to act on behalf of those whom they represent. In other words, it is a right which derives its legitimacy from the fundamental right of individuals to govern themselves. Thus, it is best seen as an extension of the democratic rights that enable individuals to actively participate in the process of democratic decision-making. This article considers the role that parliamentary immunity might play in those political communities where the civil and political liberties of ordinary citizens are not adequately protected. That is to say, this article examines the effect that shielding elected representatives from criminal law might have in those countries that are undergoing democratization.

The problem posed by parliamentary immunity is that it provides the means both to undermine and to promote the process of democratization. On the one hand, the absence of the law may lead to unbridled particularism on the part of elected representatives. On the other hand, exposure to the law may only serve to protect the vestiges of authoritarian rule. The concern in the first case is that in the absence of the threat of punishment, elected representatives may not be able to resist the temptation to pursue their particular interests, even when that pursuit would compromise their public duty (e.g. political corruption), cause a rights violation, or threaten the democratic order (e.g. supporting the installation of nondemocratic rule). The concern in the second case is that there is a greater need for immunity in those countries where democracy is emerging or consolidating because the existing body of law, or those who enforce the law, are typically the product of an authoritarian past. According to that view, authoritarian rule is self-perpetuating if elected representatives can be prosecuted for publicly questioning unelected institutions or attempting to bring those institutions under civilian control through legislation. Parliamentary immunity, then, enables a forum for unfettered communication when the civil and political rights in the polity at large are inadequately protected. Indeed, it makes possible the passage of legislation designed to ensure that those rights become adequately protected.

In what follows, this article examines the problem posed by parliamentary immunity within the context of Turkey, a country that is in the process of consolidating its democratic status. Turkey provides us with a particularly illuminating case study of the problem for two reasons. First, although there have been regular and competitive elections since 1950, there is a *prima facie* case for parliamentary immunity because the military possesses a significant degree of influence over the decision-making of civilians, the judiciary is not sufficiently even-handed in its treatment of cases, and civil and political liberties are inadequately protected. Alternatively, there is a *prima facie* case for abrogating parliamentary immunity, because there is a widespread public perception that political corruption is rampant. Additionally, the military-led establishment is concerned that political parties representing the Kurdish or

Islamic vote will use democratic freedoms, such as parliamentary immunity, in order to secede from the Turkish state or impose an Islamic political order. As a result of these competing concerns, parliamentary immunity has become a prominent issue in a number of cases brought against the Turkish state in the European Court of Human Rights.<sup>1</sup> Drawing on the Turkish experience, this article argues that democratizing countries should use other measures besides narrowing parliamentary immunity to counter problems such as political corruption, rights violations, and subversive advocacy.

## II. THE FORMAL STRUCTURE OF PARLIAMENTARY IMMUNITY

A key issue that informs the structure of parliamentary immunity is how widely it should be interpreted in order to adequately protect the public function of elected representatives. Is it sufficient to immunize the parliamentary speech, debate, and votes of representatives (“legislative agency”)? Or, should all of parliament’s other activities (“nonlegislative agency”) also be immune from legal scrutiny? Historically the world’s representative democracies have produced two ways of protecting the public function of parliamentarians. The first model only immunizes the legislative agency of representatives and is known as parliamentary non-accountability. The second model also immunizes legislative agency, but requires the assembly’s authorization before the nonlegislative agency of representatives can be legally questioned. This second model is known as parliamentary inviolability. The first model originates from Article 9 of the 1689 English Bill of Rights and has typically been adopted by those countries that were subject to British colonization.<sup>2</sup> The rest of the world’s democracies followed the French National Assembly’s coupling of parliamentary non-accountability with parliamentary inviolability in 1789 and have adopted the second model.<sup>3</sup>

According to parliamentary non-accountability, the legislative agency of each representative is unconditionally immune in the sense that it cannot

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1. See, e.g., *Sakik v. Turkey*, App. No. 23878/94, 1997–VII Eur. Ct. H.R.; *Refah Partisi v. Turkey*, App. No. 41340/98, 2003–II Eur. Ct. H.R.; *Pakdemirli v. Turkey*, App. No. 35839/97 (Eur. Ct. H.R. 2005); *Kart v. Turkey*, App. No. 8917/05 (Eur. Ct. H.R. 2008). Cases before the European Court of Human Rights are available at <http://echr.coe.int/echr/en/hudoc>.
  2. JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN BRITISH AND AMERICAN CONSTITUTIONS* (2007).
  3. See MARC VAN DER HULST, *THE PARLIAMENTARY MANDATE: A GLOBAL COMPARATIVE STUDY* 64–65 (2000); Inter-Parliamentary Union, *Parliamentary Immunity: Background Paper 4–5* (Sept. 2006) (draft, available at <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>).

be legally questioned at any time, including after the representative has lost her parliamentary mandate. At a minimum, legislative agency includes each representative's speech and votes made while in the assembly or parliamentary committee. Typically, constituency work, speeches delivered outside parliament, press releases, and other similar activities are nonlegislative and, therefore, accountable to the law.<sup>4</sup> By contrast, the parliamentary inviolability approach makes the representative's nonlegislative agency conditionally immune because it can only be legally questioned if parliament consents. However, parliamentary authorization is typically not required in civil cases, once a representative loses her mandate, or if she is caught *flagrante delicto* ("caught in the act").<sup>5</sup> In order to clarify the distinction between these two different kinds of immunity, consider the example of a person who delivers a speech that she knows will incite a riot. If an elected representative delivered such a speech to the assembly, non-accountability entails that she cannot be prosecuted at any time. Now consider the scenario in which she delivers the same speech to a political rally. If, in accordance with the English model, she is only protected by non-accountability then she can be prosecuted. If, in accordance with the French model, she is also protected by inviolability then she can only be prosecuted if she is caught red handed, parliament consents, or she loses her electoral mandate.

Wesley Hohfeld's classic analysis of the logic of rights provides a useful basis for further clarifying the formal character of parliamentary immunity.<sup>6</sup> If we interpret parliamentary non-accountability in terms of the Hohfeldian schema we can see that it is composed of a liberty-right, a claim-right, and an immunity-right. The representative has a liberty-right because she does not have a duty to refrain from performing a range of actions. In addition, she has a claim-right because others have a duty not to prevent her from performing those actions. This is coupled with the further claim-right that the state uses coercive force to prevent others from interfering in the performance of those actions. Notice also that parliamentary immunity attaches to the representative's public function, not to the representative herself. Thus, the representative does not have a Hohfeldian power to modify her right. A representative typically cannot voluntarily waive her non-accountability

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4. On the historical development of non-accountability (also referred to as non-liability, privilege, or indemnity), see CHAFETZ, *supra* note 2. See also JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE, FIRST REPORT, 1998–9, H.L. 43–I/H.C. 214–I; *United States v. Brewster*, 408 U.S. 501 (1972).
  5. On inviolability see VAN DER HULST, *supra* note 3, at 63–93; Inter-Parliamentary Union, *supra* note 3.
  6. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1978). The analysis in this article is based on George Rainbolt's interpretation of the Hohfeldian framework. GEORGE W. RAINBOLT, *THE CONCEPT OF RIGHTS* (2006).

protection (e.g. so as to clear her name of a false accusation in a court of law). Similarly, parliament or another government institution does not have the power to extinguish the protection afforded to the representative's legislative agency. Therefore, non-accountability also entails an immunity-right in the strict Hohfeldian sense of the term.

A liberty-right is also correlated with the absence of a claim-right on the part of others. That is to say, an individual's liberty-right to perform  $\phi$  means that other individuals do not have a claim that she not perform  $\phi$ . Thus, non-accountability will generate a rights-conflict when the representative's liberty-right to  $\phi$  is at odds with a claim-right of an ordinary citizen that she not  $\phi$ . Thus, for example, a representative's right to express any views before the assembly may conflict with a citizen's right not to have her name as a suspect in a trial made public.<sup>7</sup>

An equivalent rights conflict will not arise in the case of parliamentary inviolability because the state has jurisdiction if the representative is caught in the commission of a crime, parliament consents, or she loses her parliamentary mandate. With regard to her nonlegislative agency, the representative has a duty not to transgress the claim-right of an ordinary citizen (i.e. she lacks a liberty-right to act in way that will cause a transgression). Inviolability only affects *when* that claim-right may be enforced by the state, and not *whether* it may be enforced. A statute of limitations typically does not apply to parliamentarians protected by inviolability and so that form of immunity is compatible with the vindication of the rights of victims.

It is important to note that parliamentary immunity is only designed to shield the actions, words, and votes of representatives. Parliamentary immunity does not protect the legislative decisions that representatives reach as a result of that agency. Parliamentary immunity is fully consistent with the principle of checks and balances, which enables other branches of government to assess the laws passed by parliament. Because it is compatible with constitutional constraints, we can see that parliamentary immunity does not render parliamentarians *de legibus solutus* ("not bound by the law"). Put differently, while a representative's agency may not be subject to law that governs corruption, seditious libel, or other similar crimes without parliamentary authorization, a representative's decisions are subject to judicial review by the constitutional court. The underlying idea is that the courts should only be able to interfere with legislation after it is enacted.

Limitations to parliamentary immunity, such as reducing the range of activities protected by inviolability, imply the expansion of judicial jurisdic-

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7. For a discussion of rights conflicts that may be generated by parliamentary non-accountability see Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 HUM. RTS. Q. 294, 321–25 (2005); Nicholas W. Barber, *Parliamentary Immunity and Human Rights*, 119 LAW Q. REV. 557, 557–60 (2003).

tion over elected representatives from constitutional law into criminal law. By contrast, if an elected representative is immune to criminal proceedings, only parliament has jurisdiction over its members. One shortcoming of the growing literature on the judicialization of politics is that it focuses almost exclusively on the political influence of constitutional courts,<sup>8</sup> and disregards the possibility of political influence via the criminal courts, particularly through charges of political corruption, seditious libel, or subversive advocacy against representatives. In other words, that literature has been primarily concerned with the constitutionalization of politics as opposed to the criminalization of politics. By considering the practice of immunizing elected representatives from criminal law this article hopes to redress that shortcoming.

### III. PARLIAMENTARY IMMUNITY AND HUMAN RIGHTS

Democratic governance is associated with individual rights in at least three ways. First, some have argued that each individual should have a voice in the formation of laws and policies to which they are subject. This right is entrenched in various international human rights instruments<sup>9</sup> and may be defended on the grounds that it accords with the classical republican idea that each individual is free to the extent that she is not subject to another's will.<sup>10</sup> It follows that individuals have a fundamental human right to democratic governance for the same reasons why individuals have a right to be free from slavery or serfdom. A second way that democratic governance is associated with individual rights is through the existence of many rights, including civil and political liberties, which are necessary preconditions for self-government. Finally, democratically elected assemblies may be more likely than non-elected authorities to identify and protect the basic interests of individuals. Thus, democracies may be more likely to protect human rights, such as the right to a fair trial, the right to be free from slavery or serfdom,

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8. See, e.g. MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION*, (2002); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

9. See, e.g. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 25, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, art. 3, Protocol 1, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).

10. For an extended discussion of this conception of liberty, see PHILIP PETITT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

the right to security and subsistence, and the right to freedom of thought and expression, than their more autocratic counterparts.<sup>11</sup>

### A. The Case for Parliamentary Immunity

This article argues that the immunity of elected representatives is justified insofar as it advances the aforementioned connections between democracy and rights. To explain this position, this article firstly highlights the role parliamentary immunity might play in the self-governing process of consolidated democracies, where we assume that the rights enjoyed by ordinary citizens are adequately protected. This article then considers the positive role that parliamentary immunity can play in emerging or consolidating democracies, where the rights of ordinary citizens are not yet adequately protected.

In the case of consolidated democracies there are at least three related reasons why the courts should not have jurisdiction over the agency of elected representatives irrespective of the rights enjoyed by ordinary citizens.<sup>12</sup> In the first place, jurisdiction in these matters may undermine the ability of representatives to perform their public function. That public function involves the formulation of laws and policies that those they represent would also formulate if they were just as competent and were able to spend the same amount of time considering the information and arguments presented to the assembly. According to this reading of the function of representation, elected representatives are independent in the sense that they are not required to follow the explicit instructions of those they represent. However, they are not independent in the sense that they may depart from how an ordinary citizen would participate in the assembly's deliberations. Thus, the need for legal immunity exists because the views representatives express may justifiably depart from popular sentiment or the interests of powerful lobbies and non-elected authorities. As a consequence, immunity protects the informing function of democratic assemblies because it fosters uninhibited speech and debate between representatives so that citizens are well-informed about a variety of legislative proposals and their merits.<sup>13</sup>

The second reason why courts should not have jurisdiction over the agency of elected representatives is that parliamentary immunity ensures a

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11. Amartya Sen, for example, notes that a famine has not occurred in an independent country where there are regular and competitive elections and a moderately free press. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 152–53 (1999).

12. For an extended discussion of these arguments see Simon Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, 11 J. POL. PHIL. 23 (2003).

13. For the classic account of the informing function enabled by free speech, see ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Reprinted ed. 1979).

separation among the different branches of government and a balance of power among those branches. Expanding the jurisdiction of the courts to include the criminality of legislative agency, rather than just the constitutionality of legislative decisions only serves to overstate the influence of the judicial branch. In addition, parliamentary immunity means that members of the legislative branch can criticize or vote against the interests of the executive branch without fear of prosecution.

Finally, exposing elected representatives to prosecution in the courts displaces the supervisory role of the public with oversight by an unelected authority. An important by-product of parliamentary immunity is that the electorate, rather than the courts, is responsible for scrutinizing the words and votes of representatives during parliamentary proceedings and their other activities. Each representative remains vulnerable to public criticism as well as the prospect of being voted out of office. Furthermore, parliament as a whole is also subject to electoral accountability for the way in which it handles each request to waive the inviolability of one of its members.

Unsurprisingly, the protection afforded by parliamentary inviolability has come under the most criticism.<sup>14</sup> However, there are two reasons to protect the nonlegislative agency of elected representatives. First, the primary function of this protection is to prevent indirect intimidation of their legislative agency. An outside authority that is determined to influence parliamentary decision-making can do so by prosecuting or threatening to prosecute the nonlegislative agency of parliamentarians. Therefore, the aim of inviolability is to grant parliament the ability to prevent court proceedings when the charges brought against one of its members are politically motivated. A second reason that supports inviolability is that a subset of each representative's nonlegislative agency (e.g. communications with constituents, television interviews, political rallies, and so on) should be protected because it is integral to their public function.

In the preceding paragraphs, this article addressed the reasons for parliamentary immunity in consolidated democracies. This article now turns to the reasons for parliamentary immunity in countries that are undergoing transition away from authoritarian rule or in the process of consolidating their democratic credentials. There is a stronger case for protecting parliamentarians in emerging or consolidating democracies because the existing body of law, or those who enforce it, are typically the product of an authoritarian past. According to that view, authoritarian rule is self-perpetuating as long as elected representatives may be prosecuted for publicly questioning non-elected authorities or attempting to legislate in order to bring them under civilian control. Parliamentary immunity, on the other hand, enables a forum

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14. See Inter-Parliamentary Union, *supra* note 3, at 19.

in which unfettered communication can take place even when free speech in the polity at large is insufficiently protected. Immunity also facilitates the passage of legislation designed to ensure that free speech, along with other basic rights, such as the right to a fair trial or the right to subsistence, receives adequate protection. Parliamentary immunity, therefore, can compensate for any shortcoming in the set of rights that are preconditions for democratic rule (e.g. civil and political liberties) and protect law-making that is designed to rectify that shortcoming. Equally, it protects legislation that enables the realization of other human rights, such as the right to subsistence. Finally, the greater vulnerability of representatives in democratizing countries to legal intimidation also suggests that there is even more of a reason to expand the immunity so as to include parliamentary inviolability.

The justification for parliamentary immunity derives from the fact that it safeguards the ability of representatives to improve the rights of those they represent. In order to safeguard that ability, it is often necessary to shield the actual representative from becoming the victim of human rights violations.<sup>15</sup> In such cases the immunity will protect the representative's public function and, incidentally, the representative themselves.

## B. THE CASE AGAINST PARLIAMENTARY IMMUNITY

In the previous section this article argued that shielding representatives from criminal law is justified to the extent that it enables protection of those individual rights that are necessary for self-government, compensates for a shortfall in those rights, or protects the passage of pro-rights legislation. However, it is possible that parliamentary immunity may serve to protect a parliamentary majority that aims to restrict individual rights by censoring speech that is interpreted as blasphemous. It is also possible that members of parliament may use their immunity to introduce non-democratic rule by, for example, establishing a theocracy. These possibilities arise in the context of political movements that are intent on using democratic procedures to subvert self-government. The rise to power of Hitler's Nazi party and the electoral success of the anti-democratic Islamic Salvation Front in Algeria in 1992 are examples.<sup>16</sup> A potential problem with parliamentary immunity, therefore, is that it can protect speech and actions that are used to support illiberal and anti-democratic legislation.

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15. See, e.g., Interparliamentary Union, IPU Committee on the Human Rights of Parliamentarians, available at <http://www.ipu.org/hr-e/committee.htm>.

16. For an analysis of those two cases see Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 6–7, 10–12 (1995).

A further challenge to parliamentary immunity is that it can be used to protect rights violations committed by a parliamentarian prior to, or during, their electoral mandate. Some parliamentarians may use the immunity to avoid prosecution for perpetration of human rights abuses. It is important, however, to distinguish parliamentary immunity from the immunity that former authoritarian rulers grant themselves before ceding power. The latter form of retroactive immunity, as seen in the example of former Chilean dictator Augusto Pinochet's status as "senator for life,"<sup>17</sup> may be necessary in order to entice authoritarian rulers to vacate power. Parliamentary immunity, on the other hand, is only meant to protect the public function of elected representatives. As a result, it is not granted *ex post facto* and it only holds while a person retains an electoral mandate. Parliamentary immunity, therefore, only poses a problem for transitional justice if, and for as long as, former members of the regime manage to become elected. However, as we saw in Section II, a rights violation that resulted from a non-legislative act can be prosecuted if the accused is caught in the act, parliament consents, or they are not re-elected. It remains the case however, that a parliamentarian can use the protection afforded by non-accountability to incite others to commit rights violations.

Another argument against parliamentary immunity is that the absence of the threat of punishment will entice elected representatives to act based on corrupt incentives.<sup>18</sup> As a result representatives may fail to consider each policy or legislative proposal based on substantive merit. Thus, the public function of elected representatives will be compromised. In addition, if the corrupt incentives do not encourage reforms, then the process of democratization will be threatened.

A final argument against immunity is that it contravenes the principle that individuals should not be judges in their own cases (*nemo iudex in causa sua*). The effect of parliamentary immunity is that only parliament has jurisdiction over the legislative agency of its members. Moreover, in those countries that have parliamentary inviolability, the authorization of parliament is required before one of its members may be prosecuted in the criminal courts for nonlegislative activity. The concern is that parliament as a whole will protect its individual members or be more willing to expose members from less powerful parties to the jurisdiction of the courts. Thus, the self-jurisdiction created by parliamentary immunity is at odds with the idea that criminal charges should be dealt with by a third party who does not

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17. For a detailed analysis of the Pinochet case, see Rebecca Evans, *Pinochet in London—Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 HUM. RTS. Q. 207 (2006).

18. This challenge is discussed at length in Simon Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, *supra* note 12, at 29–31.

have a vested interest in the outcome of the case. Moreover, parliamentary self-protection can delay the prosecution of those elected representatives who are accused of rights-violations or political corruption.

This article next examines these challenges to parliamentary immunity within the context of Turkey, a country where democratic governance is not yet sufficiently institutionalized. Before discussing each challenge this article first explains why Turkey represents a particularly useful case for examining the issue, and then discusses the scope of parliamentary immunity in Turkey.

#### IV. THE TURKISH CASE

Turkey serves as an illuminating case study of the impact of parliamentary immunity in democratizing countries for two competing reasons. First, the inadequacy of the rights afforded to ordinary citizens and the continued influence of the military-led state elite provides a reason not to criminalize politics. On the other hand, the possibility that Turkish parliamentarians will pursue private gain, advocate Kurdish secessionism, or re-install an Islamic political order provides a reason to criminalize politics.

##### A. Authoritarian Self-protection

Since the creation of the Turkish republic out of the remnants of the Ottoman Empire in 1923, the military, in concert with the secular elite that pervades state institutions, including the judiciary, the presidency, the foreign ministry, and academia, has exerted a considerable degree of influence over the political process. Following in a tradition that dates back to the Ottoman period,<sup>19</sup> the “center” of Turkish politics (“state elite”) has construed its overriding calling to be that of ensuring the well-being of the state in the face of the particularistic and short-term interests of those groups on the “periphery”—namely, the vast majority of the population who are conservative and of rural origin.<sup>20</sup>

The persistence of that state-centered tradition means that: (1) nonelected authorities, such as the military and judiciary, retain a significant degree of influence over politics; and (2) individual rights are not yet adequately pro-

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19. Halil İnalcık, *The Nature of Traditional Society: Turkey*, in *POLITICAL MODERNIZATION IN JAPAN AND TURKEY* 42, 42–43, 55–57, 63 (Robert E. Ward & Dankwart A. Rustow eds., 1964); Şerif Mardin, *Power, Civil Society and Culture in the Ottoman Empire*, 11 *COMP. STUD. SOC'Y & HIST.* 258, 271 (1969).

20. Şerif Mardin, *Centre-Periphery Relations: A Key to Turkish Politics?*, *DAEDALUS*, Winter 1973, at 169.

tected. Consequently, parliamentary immunity may be necessary in Turkey because the protections parliamentary representatives enjoy as ordinary citizens are not sufficient to protect members of a reformist-minded parliament from suppression or intimidation by a military-led establishment that is eager to preserve its guardianship role.

### 1. *The Military as Guardians*

As heirs of the state-centered tradition the military-led state elite has played a preeminent role in defining the guiding principles of the republic and controlling the process of democratic change. Thus, the transition to multiparty politics that took place towards the end of the 1940's was initiated and controlled by the leaders of the pre-existing authoritarian regime. That regime namely consisted of the single-party rule of the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP), which had governed Turkey between 1925 and 1946. Moreover, since the inception of genuinely competitive elections in 1950 there has been a military intervention in 1960, 1971, and 1980. In each case there was a relatively rapid return to civilian rule, suggesting the military was primarily interested in controlling rather than replacing democratic rule.<sup>21</sup> Thus, as is the case with Brazil and Spain, Turkey represents a clear-cut example of democratization initiated and controlled by the authoritarian regime.<sup>22</sup> As a result, Turkey has struggled to establish a stable democratic order because the design of institutions has been a product of top-down political engineering, rather than a compromise between state elites and political representatives of the periphery ("political elites").<sup>23</sup>

In virtue of its proactive role in the democratization process, the military retains a significant degree of autonomy from elected officials as well as various tutelary powers.<sup>24</sup> In particular, by introducing the National Security Council (composed of senior members of the armed forces, the president, the prime minister, and senior members of the cabinet) in the 1961 and 1982 post-coup constitutions, the military granted itself the legal and institutionalized means to influence the formation of law and policy. Until the recent reforms, the cabinet was required to give priority to the decisions of the National Security Council concerning matters of external and internal security. Most notably, the pressure applied by the military during the 28

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21. See ERİK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* Part III (3d ed. 2004), for a historical account of those interventions.
  22. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 124–42 (1991).
  23. ERGUN ÖZBUDUN, *CONTEMPORARY TURKISH POLITICS: CHALLENGES TO DEMOCRATIC CONSOLIDATION* 68–69 (2000).
  24. Ümit Cizre Sakallioğlu, *The Anatomy of the Turkish Military's Political Autonomy*, 29 *COMP. POL.* 151 (1997).

February 1997 meeting of the National Security Council contributed significantly to the military's campaign to oust the coalition government, co-led by the pro-Islamic Welfare Party (*Refah Partisi*, RP) and the center-right True Path Party (*Doğru Yol Partisi*, DYP), from office.<sup>25</sup>

The military's role is paradoxical given that it aspires to bring about a Western-style secular democracy in Turkey, while still retaining the ability to influence the democratic process when it so wishes. The military does so through its tutelary powers, reserve domains, and the credible threat of intervention. Thus, while the military may have helped to facilitate the initial transition to democracy in Turkey, its continued influence over, and independence from, elected civilian authorities is an obstacle to the process of democratic consolidation.<sup>26</sup>

## 2. Rights protection

The overriding concern of the ruling elite during and since the Ottoman period has been to preserve the state, rather than to protect the individual.<sup>27</sup> Consequently, the political elite cannot rely on a tradition of individual rights to challenge legislation made by the center. Thus, the Turkish legal tradition places much greater emphasis on the top-down exertion of power than on the bottom-up protection of rights. Indeed, the European Union's Commission for Enlargement continues to raise concerns about the impartiality of the judiciary and the protection of human rights in Turkey.<sup>28</sup>

Although the judiciary in Turkey is now institutionally independent from the military,<sup>29</sup> it clearly shares the military's statist agenda and concomitant distrust of political representatives. Article 301 of the criminal code is a clear example of the state-entered tradition in Turkey. That provision enables the prosecution of individuals for insulting or deriding "Turkishness," the republic, or the organs and institutions of the state.<sup>30</sup> Based on Article 301

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25. Metin Heper & Aylin Guney, *The Military and the Consolidation of Democracy: The Recent Turkish Experience*, 26 *ARMED FORCES & SOC'Y* 635, 642–47 (2000).

26. See J. Samuel Valenzuela, *Democratic Consolidation in Post-Transitional Settings: Notion, Process, and Facilitating Conditions*, in *ISSUES IN DEMOCRATIC CONSOLIDATION: THE NEW SOUTH AMERICAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE* 57, 58 (Scott Mainwaring, Guillermo O'Donnell, & J. Samuel Valenzuela eds., 1992).

27. URIEL HEYD, *STUDIES IN OLD OTTOMAN CRIMINAL LAW* 201–02 (V. L. Ménage ed., 1973); Şerif Mardin, *Ideology and Religion in the Turkish Revolution*, 2 *INT'L J. MIDDLE EAST STUD.* 197, 202 (1971); İnalçık, *supra* note 19, at 56–57; RUTH A. MILLER, *LEGISLATING AUTHORITY: SIN AND CRIME IN THE OTTOMAN EMPIRE AND TURKEY* 21, 26, 101–02 (2005).

28. EUROPEAN COMMISSION, *TURKEY 2007 PROGRESS REPORT* (2007), available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2007/nov/turkey\\_progress\\_reports\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf).

29. Note, however, that as recently as 1999 the military had one judge on the three person panel of the now defunct State Security Courts. Those courts dealt with overtly political crimes.

30. TÜRK CEZA KANUNU [TURKISH PENAL CODE] art. 301.

(and its predecessor Article 159) a significant number of journalists, academics, publishers, writers, and human rights activists have been prosecuted for, among other things, labeling those who defend secularism as atheists, defaming the military or the judiciary, and expressing an unwelcome opinion about Armenian and Kurdish issues.<sup>31</sup> Article 301 enables the courts to prosecute an individual's speech without considering whether it was intended to incite violence, armed rebellion, or enmity. Nor does Article 301 require the courts to consider the speaker's capacity to influence members of the public to act accordingly.

## B. Unbridled Particularism

What the discussion in the preceding section suggests is that there is a case for not circumscribing parliamentary immunity because, although there have been regular and competitive elections for more than half a century, the military-led state elite retains the means to prosecute reformist-minded parliamentarians. At the same time, the allegation that the political elite are only interested in pursuing their personal and political ends suggests that the immunity should be abrogated. Indeed there is a widespread public perception that political corruption is rife in Turkey.<sup>32</sup> In addition, members of the state elite will argue that parliamentary immunity protects law-making that is designed to bring about Kurdish self-determination or the re-introduction of an Islamic political order.

Absent parliamentary immunity, the state elite is concerned by the former case because pro-Kurdish political parties can use forums such as the assembly and the media to rally public support in favor of autonomy for the predominantly Kurdish southeast of the country. The state establishment has been engaged in an armed conflict with Kurdish secessionists (Workers' Party of Kurdistan, *Partiya Karkaren Kurdistan*, PKK) in the southeast of the country since the early 1980s. It is estimated that over 36,000 people have died during that prolonged conflict.<sup>33</sup> It is by no means clear, however, that

31. See European Commission's Regular Reports on Turkey for the years 2003–2004, available at [http://ec.europa.eu/enlargement/candidate-countries/turkey/key\\_documents\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm); European Commission's Progress Reports on Turkey for the years 2005–2008, available at [http://ec.europa.eu/enlargement/how-does-it-work/progress\\_reports/index\\_en.htm](http://ec.europa.eu/enlargement/how-does-it-work/progress_reports/index_en.htm).

32. See FIKRET ADAMAN, ALI ÇARKOĞLU & BURHAN ŞENATALAR, HOUSEHOLD VIEW ON THE CAUSES OF CORRUPTION IN TURKEY AND SUGGESTED PREVENTIVE MEASURES 36–42, 68–69 (2002), available at [http://www.tesev.org.tr/UD\\_OBJS/PDF/IYIYNTSM/HOUSEHOLD%20VIEW%20ON%20THE%20CAUSES.pdf](http://www.tesev.org.tr/UD_OBJS/PDF/IYIYNTSM/HOUSEHOLD%20VIEW%20ON%20THE%20CAUSES.pdf); GROUP OF STATES AGAINST CORRUPTION (GRECO), EVALUATION REPORT ON TURKEY (JOINT FIRST AND SECOND EVALUATION ROUND) (2006), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2\(2005\)3\\_Turkey\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2005)3_Turkey_EN.pdf).

33. Centre for the Study of Civil War, Data on Armed Conflict: The Battle Deaths Data Set (version 2), available at <http://www.prio.no/CSCW/Datasets/Armed-Conflict/Battle-Deaths/>.

the pursuit of some form of self-determination by purely non-violent means should be prohibited. If that is correct, then the immunity only presents a genuine problem if it is used by representatives to protect the advocacy of violent means to pursue self-determination.

The fear in the case of pro-Islamic political parties is that in an overwhelmingly Muslim country the popular majority may be persuaded that Islam is inconsistent with: (1) democratic government because the basic laws are already preordained in the Koran; and (2) the separation between religion and state because the Prophet Mohammed conflated spiritual and temporal authority.<sup>34</sup> Since the inception of the republic, the state elite in Turkey has endeavored to institutionalize a laicist reading of secularism, whereby religion is relegated to the private sphere and, in keeping with the statist tradition, the state controls religious practice (this includes the appointment of prayer leaders and preachers, the monitoring of sermons and the regulation of the content of religious classes taught in schools, and the banning of some independent religious orders). The underlying concern of the secular establishment in this case is not necessarily that Islam is incompatible with a constitutional democracy,<sup>35</sup> but rather that Islamic political parties may successfully promote the view that a genuinely Islamic society requires theocratic rule.<sup>36</sup> If that were to occur then parliamentary immunity would have protected electoral mobilization and law-making that reduces, rather than expands, democratic rights.

## V. THE TURKISH IMMUNITY AND DEMOCRATIC REFORM

In Turkey it is widely assumed that parliamentary immunity is broader than the immunity that is enjoyed by representatives in other democracies. That

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34. See Ira M. Lapidus, *State and Religion in Islamic Societies*, 151 PAST & PRESENT 3 (1996).
  35. For a rejection of the idea that the principles of Shari'a must be enforced by the state, see ABDULLAH AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2008).
  36. In a 2006 household survey 33 percent of respondents concurred with the claim that a religious fundamentalist movement which aims to establish a radical Islamic society and a state in Turkey has been on the rise over the last ten to fifteen years. Of those, 30 percent claimed that the more prominent role of Islamists in politics was the primary reason for the rise of that movement. However, it is not clear that there has in fact been an increase in radical Islamic tendencies. When the same survey was carried out in 1999, 21 percent of respondents supported the idea of a religious state based on Shari'a law. However, that percentage shrunk by half when respondents were asked whether Shari'a laws on such matters as marriage, divorce and inheritance should replace the Turkish Civil Code. Moreover, when the survey was repeated in 2006, the proportion of respondents that claimed to be in favor of the establishment of a Shari'a state had dropped to 9 percent. ALI ÇARKOĞLU & BINNAZ TOPRAK, *RELIGION, SOCIETY AND POLITICS IN A CHANGING TURKEY* 33, 79–81 (Jenny Sanders ed., Çiğdem A. Fromm trans., 2007), available at [http://www.tesev.org.tr/UD\\_OBJS/PDF/DEMP/RSP%20-%20Turkey.pdf](http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/RSP%20-%20Turkey.pdf).

assumption exists in spite of the fact that Turkey's inclusion of inviolability alongside non-accountability is in line with how parliamentary immunity is practiced by the majority of the world's representative assemblies.<sup>37</sup> In reality, parliamentary immunity in Turkey is narrower than in most countries. For example, it does not encompass those cases where an investigation based on Article 14 of the constitution is initiated against a deputy before their election.<sup>38</sup> In those cases the courts do not require parliamentary authorization to continue proceedings. Article 14 is a notoriously vague catchall that can be used by members of the state elite to prosecute activities that are interpreted as posing a threat to the secular, indivisible, and democratic character of the Turkish state.<sup>39</sup> That qualification of parliamentary immunity is in keeping with the illiberal character of the current constitution. That constitution, which was formulated in the wake of the 1980 coup, guarantees individual civil and political liberties, but only insofar as individual actions do not contravene Article 14.

Another limitation on immunity comes from the authority of the Turkish Constitutional Court (TCC). The TCC can circumvent parliamentary immunity by closing a political party if it is interpreted as a threat to the indivisible, secular and democratic character of the Turkish state.<sup>40</sup> Furthermore, the court may ban from politics those deputies whose words and deeds are interpreted as having caused the dissolution of the party.<sup>41</sup> As a result of losing parliamentary status, the non-legislative agency of those deputies is susceptible to prosecution. Indeed, the TCC has dissolved eighteen political parties since 1980, most of them pro-Kurdish or religiously orientated.<sup>42</sup>

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37. For an extended analysis of the Turkish immunity see Gurcan Koçan & Simon Wigley, *Democracy and the Politics of Parliamentary Immunity in Turkey*, 33 *NEW PERSP. ON TÜRK.* 121 (2005); MURAT SEVİNÇ, *TÜRKİYE'DE MİLLETVEKİLLERİNİN DOKUNULMAZLIKLARI [IMMUNITY OF PARLIAMENTARIANS IN TURKEY]* (2004).

38. *TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF TURKISH REPUBLIC]* art. 14.

39. Ergun Özbudun, *Constitutional Debates on Parliamentary Inviolability in Turkey*, 11 *EUR. CONST. L. REV.* 272, 275 (2005).

40. See *TÜRKİYE CUMHURİYETİ ANAYASASI*, art. 68 para. 4, art. 69 paras. 4–6. As the European Commission for Democracy through Law notes the list of criteria for party closure in Turkey is remarkably broad. "Taken as a whole, it would seem in effect that Article 68 (4) and the supplementary statutory rules can be invoked against almost any party programme that would argue for changes in the constitutional model, regardless of whether this is advocated through the threat of violence or merely through peaceful democratic means." *Venice Commission: Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 78th Sess., para. 78, CDL-AD(2009)006 (2009), available at [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)006-e.asp](http://www.venice.coe.int/docs/2009/CDL-AD(2009)006-e.asp).

41. See *TÜRKİYE CUMHURİYETİ ANAYASASI*, art. 69 para. 8.

42. Indeed, on 16 November of 2007 the TCC agreed to consider another party closure case. In this case the latest pro-Kurdish party (Democratic Society Party, *Demokratik Toplum Partisi*, DTP), which obtained twenty seats in parliament as a result of the 22 July 2007 general elections, is charged with building ties with the PKK and threatening the indivisibility of the state. Moreover, on 30 July of 2008, ten of the eleven members of the TCC concluded that the governing Justice and Development Party (*Adalet ve*

Moreover, the TCC has used the legislative agency of deputies as evidence in support of dissolution. For example, the TCC dissolved the pro-Islamic RP in 1998 on the grounds that it advocated for the installation of an Islamic political order.<sup>43</sup> While the closure may have been warranted, the decision was tarnished by the fact that the TCC relied on three instances of legislative agency in addition to eight instances of non-legislative agency. The TCC argued that non-accountability does not pertain in such cases because it is the party and not the deputy that is being subjected to legal scrutiny. That sleight of hand in effect amounts to an encroachment on parliamentary immunity. Given the prospect of party closure and exposure to criminal prosecution of those members who are banned from politics, deputies will think twice before expressing themselves in parliament.

Because democratization in Turkey has been dominated by non-elected authorities, it is necessary to examine whether the protection afforded by parliamentary immunity might help to correct the marginalization of the political elite from the process of institutional design-making. The reforms implemented by the religiously-orientated Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP), a successor of RP, provide a good example of such a possibility. In the first three years following its landslide electoral victory in November 2002, AKP enacted a number of groundbreaking legal and political reforms aimed at improving Turkey's ability to accede to the European Union (EU). The AKP overhauled the penal code, converted the National Security Council from an executive organ into an advisory body composed primarily of civilians, and increased civilian oversight of military spending.<sup>44</sup> During the first years of AKP's tenure the EU accession process appeared to provide a basis for mutual accommodation between state and political elites. The military would have been cognizant of the fact that the EU would not accept anything approaching an Islamic political order, while, for its part, the AKP would have been cognizant of the fact that the EU would not accept the absence of civilian superiority. Nevertheless, given the number of criminal cases that public prosecutors brought against senior members of AKP before they were elected into office (indeed its leader, Tayyip Erdoğan, was imprisoned for four months in 1999 for inciting religious enmity during a speech that he had delivered two years previously), it is

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*Kalkınma Partisi*, AKP) had become a focal point for anti-secular activities. Six judges voted for the dissolution of the party, only one short of the requisite majority. Instead the court decided to halve the funding that the party was due to receive from the state in 2008.

43. T.C. Anayasa Mahkemesi [Constitutional Court], 1997/1, Political Party Dissolution, Decision No. 1998/1, Decision Date: 16 Jan. 1998, Date of Publication: 22 Feb. 1998 in Gazette No. 23266 (Turk.) [hereinafter Political Party Dissolution].
44. EUROPEAN COMMISSION, REGULAR REPORT ON TURKEY'S PROGRESS TOWARDS ACCESSION (2004).

by no means clear that, albeit unstable, *modus vivendi* between the state and political elites would have emerged without the protection afforded by parliamentary immunity.

## VI. FOUR CHALLENGES TO PARLIAMENTARY IMMUNITY

As noted in Section III, there are four important arguments for criminalizing the legislative or non-legislative agency of elected representatives in those countries that are undergoing democratization: (1) subversive advocacy; (2) rights violations; (3) political corruption; and (4) parliamentary self-protection. This article now specifically evaluates the merits of those arguments for abrogating immunity based on the Turkish case. This article argues that measures other than the criminalizing of politics should be used to address those four problems in democratizing countries.

### A. Subversive Advocacy

The first problem presented by parliamentary immunity is that antidemocratic political parties can use immunity to protect lawmaking that restricts individual rights and subverts the democratic order. In Turkey, for example, the secular establishment fears that Islamic political parties might conceal their fundamentalist intentions until the moment is right to unveil them (*taqiyyah*, or expedient dissimulation). By way of illustration consider the following case. On 13 April 1994, Necmettin Erbakan, the leader of Turkey's pro-Islamic RP, delivered the following speech to a meeting of his party within parliament.

Refah Party will come to power and a just [social] order (*adil düzen*) will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed . . . Today Turkey must take a decision. The Refah Party will establish a just order, that is certain. But will the transition be peaceful or violent; will it be achieved harmoniously or by bloodshed? The 60 million [Turkish citizens] must make up their minds on that point.<sup>45</sup>

Parliamentary immunity protected that speech as well as other provocative statements by fellow members of the party. After the national elections of 1995, RP became the largest party in parliament and a year later it formed a coalition government with the center-right DYP. In 1998 Turkey's pro-establishment constitutional court dissolved the party on the grounds that it

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45. Political Party Dissolution, Gazette No. 23266 at 37.

attempted to replace the democratic political order with a religious political order.<sup>46</sup> The European Court of Human Rights (ECHR) subsequently upheld that decision.<sup>47</sup> The ECHR found that the dissolution of RP was justified on the grounds that democratic freedoms enshrined in the European Convention on Human Rights may not be used to install a nondemocratic order and that RP both advocated a regime based on Shari'a and had the real potential to bring it about.<sup>48</sup>

Some evidence supports the argument that AKP, in keeping with its predecessor RP, is using democratic freedoms, such as parliamentary immunity, to reinstall religion into the public sphere. Indeed, some of AKP's proposed legislation—namely its ongoing attempts to lift the ban on wearing headscarves in public institutions, ensure equal weighting for graduates of prayer leader and preacher schools in the national university entrance exam, and introduce a law against adultery—do have a distinctly religious tinge to them.<sup>49</sup> In addition, the AKP government has used illiberal elements of the state-centered legacy when it suits its own interests. In 2003, for example, the AKP-controlled justice ministry gave permission to investigate Young Party (*Genc Parti*) leader Cem Uzan, who was not an elected member of parliament, based on the Article 159 criminal offense (the predecessor to Article 301) of insulting the office of the prime minister. After the investigation, Uzan was sentenced to eight months in prison.<sup>50</sup> It remains possible, therefore, that AKP's aim is not to dismantle the state-centered tradition by expanding and entrenching the protection of individual rights, but rather to supplant the secular elite as the heirs of that tradition.

As we have seen, however, parliamentary immunity only protects the actions, words, and votes of representatives and not the legislative decisions they reach as a result of that agency. In other words, legislative decisions

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46. *Id.*

47. *Refah Partisi v. Turkey*, App. No. 41340/98, 2003–II Eur. Ct. H.R.

48. *Id.* at ¶¶ 99, 102, 108, 122–123. It is noteworthy, however, that the ECHR did not respond to RP's claim that speech covered by non-accountability should not be used as evidence in a party closure case. See *id.* at ¶ 17. In another case concerning non-accountability the ECHR argued that, "In a democracy, Parliament or such comparable bodies are the essential *fora* for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein." *A. v. United Kingdom*, App. No. 35373/97 at ¶ 79 (Eur. Ct. H.R. 2002). We can only conclude that in the RP closure case the court either (a) agreed with the TCC's claim that non-accountability does not apply to matters of constitutional law, *Refah Partisi*, App. No. 41340/98 at ¶ 23, or (b) deemed that the threat to democracy posed by RP constituted sufficiently weighty reason for disregarding non-accountability.

49. See, e.g., *YOK Delays Amendment of Controversial Coefficient in 2009*, *TURKISH DAILY NEWS*, 16 Feb. 2008.

50. See *Turkish Ministry Allows Inquiry into Party Leader for "insulting" Premier*, *BBC MONITORING*, 19 June 2003; *GP Leader Uzan Sentenced to Prison*, *TURKISH DAILY NEWS*, 12 Oct. 2004.

remain subject to constitutional constraints such as judicial review and presidential veto. Indeed, in the Turkish case, parliament is not supreme insofar as laws are subject to the possibility of presidential veto (although the veto can be circumvented if parliament returns the bill unchanged) and judicial review by the constitutional court. It is not immediately obvious, therefore, that democracies undergoing transition or consolidation need to criminalize the agency of representatives in order to prevent attempts to install a non-democratic order. The case for abrogating immunity, then, arises when subversive legislators garner enough votes to override decision-checks by the other branches. In addition to parliamentary majorities that subvert the system of checks and balances, it is important to acknowledge that political parties can also use parliamentary immunity to protect speech that mobilizes electoral support in favor of illiberal or anti-democratic legislation.

Even if the possibility of over-riding checks and balances is serious, however, it may not be necessary to abrogate parliamentary immunity because the constitutional court has the power to dissolve political parties as a countermajoritarian measure of last resort. Indeed, the international trend is to dissolve anti-democratic political parties when it is necessary to preserve democratic rule.<sup>51</sup> The obvious problem with that proposal is that a conservative constitutional court could shut down reformist parties. The constitutional court in Turkey is a case in point. Insulated from the political branches, the court has zealously used its powers of judicial review and party closure to guard the secular and indivisible character of the state.<sup>52</sup> In order to ensure that the powers of review and closure do not become another means to obstruct democratic reform, it is vital that members of the constitutional court are not recruited solely from within the judiciary, and that parliament has a nontrivial role in deciding appointments to the court.<sup>53</sup>

## B. Rights Violations

The second challenge to parliamentary immunity is that it will shield individual parliamentarians from prosecution for human rights abuses. Perhaps

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51. See Fox & Nolte, *supra* note 16; Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

52. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1847–53 (2004); Dicle Kogacioğlu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 LAW & SOC'Y REV. 433 (2004); Hootan Shambayati, *A Tale of Two Mayors: Courts and Politics in Iran and Turkey*, 36 INT'L J. MIDDLE EAST STUD. 253, 262–63 (2004).

53. For an analysis of those proposals in the Turkish context see Venice Comm'n, *Opinion on the Draft Constitutional Amendments With Regard to the Constitutional Court of Turkey*, 59th Sess., CDL-AD(2004)024, §§15–25 (2004), available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)024-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)024-e.asp).

the clearest example of such a possibility in Turkey is provided by the so-called Susurluk scandal. In 1997 the public prosecutor requested that parliament lift the immunity of Mehmet Ağar and Sedat Bucak for forming a gang with criminal intent and helping a fugitive to evade the law, amongst other charges. The prevailing view is that both parliamentarians used nationalist gang members to assassinate pro-Kurdish activists.<sup>54</sup> However, even when parliament lifted their immunity they regained it by being elected in the subsequent elections. Thus, it was not until they eventually failed to be re-elected (in 2008 and 2002 respectively) that court proceedings against them commenced. The Susurluk case illustrates that parliamentary inviolability does not preclude the possibility of prosecuting rights-violations, but rather that the accused can (if not caught during the commission of a crime)<sup>55</sup> delay court proceedings for as long as they can garner enough assembly or electoral support. This problem is further addressed in section D below.

### C. Political Corruption

A further challenge to parliamentary immunity stems from the view that vulnerability to ordinary law is the only effective way to deter politicians from engaging in corrupt activities.<sup>56</sup> The underlying concern in this case may be that politicians are not sufficiently accountable to the electorate, rather than simply that they are prone to behave corruptly. Party leaders in Turkey, for example, typically select electoral candidates with no grassroots support in order to ensure that his or her control over the party is not threatened.<sup>57</sup> Legal accountability, therefore, may be seen as a way to compensate for a lack of electoral accountability. If this is true, however, the first priority should be to revise the electoral and party system (for example, by improving intra-party democracy), rather than to allow the courts to supplant the supervisory role of the electorate. Moreover, as we have seen, one of the reasons for parliamentary immunity is that the decision-making of elected representatives may on occasion legitimately depart from the express wishes of the electorate.<sup>58</sup>

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54. ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* *supra* note 21, at 322–23.

55. In Turkey inviolability does not protect the representative in those cases they are caught in the act of committing a crime that is punishable by more than ten years imprisonment.

56. For an extended discussion of this problem within the context of established democracies see Simon Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, *supra* note 12.

57. Özbudun, *supra* note 39, at 83–84.

58. See *supra* Section III.A.

The problem with abrogating immunity to combat corruption is that it will expose parliamentarians to the possibility of vexatious charges by the institutional remnants of authoritarianism. This would still be the case even if the immunity was only modified so that inviolability did not cover corruption offenses. A partial judiciary can intimidate the legislative agency of parliamentarians by prosecuting non-legislative behavior that is interpreted as corrupt. Moreover, corrupt representatives do not necessarily threaten democratization. Rather, corruption may help to facilitate that process because the hitherto excluded *nouveau riche* can buy themselves access.<sup>59</sup> Even if political corruption does impede democratization, the overriding need to protect the agency of parliamentarians requires that alternative, and potentially more effective, methods should be used to counter corrupt influences. Examples of these alternatives include reforms to campaign financing, public procurement, and limiting the spoils of office by reducing the size of state sector. A further tactic would be to modify the way parliamentary immunity is implemented, without actually limiting the scope of its protection. The next section discusses how that might be achieved in the case of parliamentary inviolability.

#### D. Parliamentary Self-Protection

The final challenge to parliamentary immunity is that parliamentary self-jurisdiction contravenes the principle that individuals should not judge themselves. Moreover, as described above, parliamentary self-protection may endlessly postpone the prosecution of those parliamentarians who are accused of rights violations or political corruption. That problem is particularly acute in the case of parliamentary inviolability because governing parties will not lift a member's immunity if it threatens their parliamentary majority, or if they can obtain a crucial vote in exchange for not doing so. The extremely low ratio of immunity waivers to prosecution requests in Turkey, for example, suggests that Turkish parliamentarians are too reluctant to expose their colleagues to the law.<sup>60</sup> Between October 1961 and March 1998 parliament received 2,713 written requests from prosecutors for the suspension of parliamentary immunity for 1,151 of its members. Between the first session of the national assembly in 1920 and March 1998, however, only twenty-nine deputies have had their immunity waived.<sup>61</sup> It is difficult to

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59. SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 59–71 (1968).

60. Similar concerns are raised by GRECO, *supra* note 32, para. 96–97.

61. These figures were reported to parliament in 1998 by the head of the Justice-Constitutional Committee. See *Parliament Reluctant to Expose Members to Prosecution*, *TURKISH DAILY NEWS*, 30 Apr. 1998.

discern from these statistics whether prosecutors are overzealous, whether the penal code is overly intrusive, or whether parliament is over-protective of its own members. In other words, the *nemo iudex* principle does not provide sufficient reason for abrogating parliamentary immunity when the effect of doing so would be to expose parliamentarians to a judiciary that has a vested interest in the outcome of political cases.<sup>62</sup>

In those countries where the interests of the judiciary and parliament are historically at odds, the number of waiver requests submitted to parliament will not provide a reliable guide as to the extent of malfeasance amongst politicians.<sup>63</sup> Similarly, the level of parliamentary self-protection—the ratio of waivers to waiver requests—in each country will correlate with the extent to which the law and judiciary retain traces of the authoritarian past. Thus, the incidence of parliamentary self-protection should decrease as steps are taken to remove illiberal laws, improve judicial process, and rectify any residual bias amongst the judiciary. Under those circumstances prosecutors should be less likely to submit a waiver request, and parliament should be less fearful of lifting the parliamentary immunity of one of its members.

Nevertheless, in each country the authorization process to lift the immunity can be revised to mitigate self-protection by the ruling majority. First, to prevent the parliament from deliberately stalling the authorization process, an explicit time limit might be placed on the length of parliament's deliberations for each waiver request. Second, those parliamentarians whose immunity has been waived, should not regain their immunity by virtue of re-election. In those cases, court proceedings should continue uninterrupted unless parliament votes to suspend them. Crucially, these proposals reform the way parliamentary immunity is implemented without actually narrowing the range of activities that fall under its protection.

The reverse problem with authorization is that it may lead to the under-protection of those parliamentarians who are not members of the ruling majority. In 1994, for example, the Turkish parliament lifted the immunity of all seven deputies from the pro-Kurdish Democratic Party (*Demokrasi Partisi*, DEP). Four of them were subsequently sentenced to fifteen years imprisonment on the grounds that they belonged to the PKK.<sup>64</sup> When the European

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62. JEREMY WALDRON, *LAW AND DISAGREEMENT* 296–98 (1999).

63. Compare with Eric Chang, *Electoral Incentives for Political Corruption under Open-List Proportional Representation*, 67 *J. POL.* 716, 720–21 (2005). Chang attempts to control for the possibility of judicial partiality by factoring in whether the accused representative belongs to one of the governing parties. *Id.* at 726–27 & supplementary materials. That, however, only controls for collusion between the judiciary and governing parties and so it does not factor in the possibility that, as is often the case in Turkey, the judiciary is hostile towards elected representatives in general.

64. Nicole F. Watts, *Allies and Enemies: Pro-Kurdish Parties in Turkish Politics, 1990–94*, 31 *INT'L J. MIDDLE EAST STUD.* 631, 639–40, 645–48 (1999).

Court of Human Rights reviewed the case it found that they were not tried by an independent and impartial court and that their rights of defense were inadequately safeguarded.<sup>65</sup>

If anything, such cases only serve to strengthen the argument for protecting the agency of parliamentarians. Aside from reforming the law and judiciary it is difficult to see how the greater vulnerability of representatives from smaller opposition parties can be mitigated. The right of Turkish deputies whose immunity is lifted by parliament to seek review by the constitutional courts—a right which appears to be unique to Turkey and Austria<sup>66</sup>—might counter the problem of under-protection. Clearly, it would not mitigate the problem if the constitutional court is institutionally independent and partial. In the case of the seven DEP deputies, for example, such an appeal was rendered redundant by the fact that the TCC dissolved the party shortly after parliament voted to lift their immunity. The European Court of Human Rights subsequently ruled that the TCC's decision violated their right to be elected and sit in parliament, and also violated the sovereign power of the electorate that voted for them.<sup>67</sup>

## VII. CONCLUSION

This article argued that that parliamentary immunity should not be circumscribed in emerging or consolidating democracies until the vestiges of authoritarianism have been removed from the law and judiciary. Immunity from criminal prosecution enhances the ability of elected representatives to act on behalf of those they represent when the latter are insufficiently protected by civil and political rights. In addition, it means that illiberal elements of the extant body of law cannot be used to hamper efforts by a reformist parliament to improve human rights and bring non-elected authorities under civilian control. Thus, parliamentary immunity helps to compensate for any shortfall in the democratic rights enjoyed by ordinary citizens and provides elected representatives with the protection necessary to rectify that shortfall. Nevertheless, in each democratizing country there will typically be considerable pressure to criminalize politics—say by removing the protection afforded to non-legislative agency by parliamentary inviolability—due to the threat posed by subversive advocacy, the perpetration of rights-violations by parliamentarians, or the perception that political corruption is pervasive.

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65. *Sadak v. Turkey* (no. 1), App. No. 29900/96, 2001–VIII Eur. Ct. H.R. 267.

66. VAN DER HULST, *supra* note 3, at 92.

67. *Sadak v. Turkey* (no. 2), App. No. 25144/94, 2002–IV Eur. Ct. H.R. 295.

Turkey provides a particularly illuminating case study of those challenges to parliamentary immunity. By drawing on the Turkish experience this article argued that it is not necessary to criminalize the actions, words, and votes of parliamentarians in order to tackle those problems.