Parliamentary Immunity in Democratizing Countries: The Case of Turkey*

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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 tackle those problems.

I. INTRODUCTION

Historically parliamentary immunity has been seen 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 rather their ability to act on behalf of those whom they were elected to 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

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democratic decision-making. In this article my aim is to consider 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, I shall examine 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 promote the process of democratization. On the one hand the absence of the law may lead to unbridled particularism, while 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 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 protection in those countries where democracy is emerging or consolidating 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 for as long as elected representatives may be prosecuted for publicly questioning unelected institutions or attempting to legislate in order to bring them under civilian control. Similarly, parliamentary immunity enables a forum in which unfettered communication can take place 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 I set out to examine the problem posed by parliamentary immunity within the context of Turkey, a country that is in the process of consolidating its democratic credentials. Turkey provides us with a particularly illuminating case study of the problem for two reasons. On the one hand there is a *prima facie* case for parliamentary immunity because, although there have been regular and competitive elections since 1950, it remains the case that 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. On the other hand there is a *prima facie* case for abrogating parliamentary immunity, firstly, because of the widespread public perception that political corruption is rampant and, secondly, because of the military-led establishment's concern that political parties representing the Kurdish and Islamic vote will use democratic freedoms such as parliamentary immunity in order to realize,

respectively, secession from the Turkish state and 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.[1]

Drawing on the Turkish experience I shall argue that in democratizing countries measures other than narrowing parliamentary immunity should be used to counter problems such as political corruption, rights violations and subversive advocacy.

II. THE FORMAL STRUCTURE OF PARLIAMENTARY IMMUNITY

A key question is how wide parliamentary immunity should be if it is to adequately protect the public function of elected representatives. Is it sufficient to shield the parliamentary speech, debate and votes of representatives (henceforward, legislative agency), or should all their other activities (henceforward, nonlegislative agency) also be immune to legal scrutiny? Historically two ways of protecting the public function of parliamentarians have emerged amongst the world's representative democracies. The first model only bars legal questioning of the legislative agency of representatives (parliamentary non-accountability). The second model includes non-accountability, but also requires the authorization of the representative assembly before the nonlegislative agency of representatives can be legally questioned (parliamentary inviolability). The first model originates from Article 9 of the 1689 English Bill of Rights and has, therefore, typically been adopted by those countries that were subject to British colonization. The rest of the world's democracies, following the French National Assembly's coupling of parliamentary non-accountability with parliamentary inviolability in 1790, have adopted the second model.

According to parliamentary non-accountability the legislative agency of each representative is unconditionally immune in the sense that it cannot be legally questioned at any time, including after the deputy has lost her parliamentary mandate. At a minimum legislative agency is taken to include each representative's speech and votes whilst in the assembly or parliamentary committee. Typically constituency work, speeches delivered outside parliament, press releases, and so on are deemed to be nonlegislative and, therefore, accountable to the law.[2] By contrast, according to parliamentary inviolability the

[1] See, for example, *Case of Sakik and Others vs. Turkey* . Nov. 26 1997. Applications nos. 87/1996/706/898-903; *Case of Welfare Party and Others vs. Turkey*. Feb 13 2003. Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98; *Case of Pakdemirli vs. Turkey,* Feb. 22, 2005. Application no. 35839/97 and *Case of Kart vs. Turkey* July 8 2008, Application no. 8917/05.

[2] On the historical development of non-accountability (also referred to as non-liability, privilege, or indemnity) see Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in British and American*

representative's nonlegislative agency is only conditionally immune because it can be legally questioned if parliament consents. However, parliamentary authorization is typically not required in civil cases, once a representative loses their mandate or if they are caught *flagrante delicto*.[3] In order to clarify the distinction between these two different kinds of immunity consider the example of a person who delivers a speech which she knows will incite a riot. If an elected representative delivered such a speech to the assembly she cannot be prosecuted at any time. However, if she were to deliver that same speech to a political rally she can 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.[4] 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 use coercive force to prevent others interfering in the performance of those actions. As I have already suggested parliamentary immunity is attached to the representative's public function, rather than the representative themselves. This is demonstrated by the fact that the representative does not have a Hohfeldian power to modify her right. Thus, a representative typically cannot voluntarily waive her non-accountability protection (e.g. so as to clear her name of a false accusation in court of law). Equally parliament or another government institution does not have the power to extinguish the protection afforded to the representative's legislative agency. Thus, 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 to perform φ means that other individuals do not have a claim that she not to perform φ. Thus, non-accountability will generate a rights-conflict when the representative's liberty-right to φ (e.g. express any views before the

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Constitutions. (New Haven: Yale University Press, 2007). See also UK Parliament, *Reports of the Joint Committee on Parliamentary Privilege in Session* HL 43-I/ HC 214-I. London: The Stationary Office Limited, 1999) and the United States Supreme Court's judgment in *U.S. v. Brewster*, 408 US 501, 1972.

[3] On inviolability see Marc Van der Hulst, *The Parliamentary Mandate*. (Geneva: Inter-Parliamentary Union, 2000), chap. IV and Inter-Parliamentary Union, *Parliamentary Immunity: Background Paper*, Draft. (Geneva: Inter-Parliamentary Union, 2006).

[4] Wesley Hohfeld, *Fundamental Legal Conceptions: As Applied to Judicial Reasoning and Other Essays*, W. Cook (ed.), (New Haven: Yale University Press, 1919)

parliamentary assembly) is at odds with a claim-right of an ordinary citizen that she not φ (e.g. claim-right not to have her name as suspect in a trail made public).[5]

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 act, parliament consents or she loses her parliamentary mandate. I take it, therefore, that 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 protect the agency (i.e. actions, words and votes) of representatives and not the legislative decisions (i.e. law and policy) they reach as a result of that agency. What that means is that it is fully consistent with other branches of government checking the laws passed by parliament. Thus, 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 their agency may not be subject to criminal law (e.g. corruption, seditious libel, etc) without parliamentary authorization, their decisions are subject to constitutional law (e.g. judicial review by the constitutional court). The underlying idea here is that the courts should only be able to interfere with legislation after it is enacted.

From this we can see that an abrogation of parliamentary immunity (e.g. shrinking the range of activities protected by inviolability) implies the expansion of the jurisdiction of the courts over elected representatives from constitutional law to criminal law. By contrast, only parliament can have jurisdiction over its own members to the extent that their agency is immune to criminal proceedings. I take it that one shortcoming of the growing literature on the judicialization of politics is that it focuses almost exclusively on the political influence of constitutional courts,[6] and disregards the possibility of political influence via

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[5] 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,' *Human Rights Quarterly* (2005) 27 (1), pp. 294-326 at pp. 321-325 and Nicholas Barber, 'Parliamentary Immunity and Human Rights,' (2003) 119 *Law Quarterly Review* pp. 557-560.

[6] See for example Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization.* (Oxford: Oxford University Press, 2002), Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. (Cambridge: Cambridge University Press, 2003), and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. (Cambridge Mass.: Harvard University Press, 2004).

the criminal courts (in particular by charging representatives with political corruption, seditious libel or subversive advocacy). 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, therefore, this article hopes to go some way to redress that shortcoming.

III. PARLIAMENTARY IMMUNITY AND HUMAN RIGHTS

Democratic governance may be associated with individual rights in at least three ways. Firstly, it may be argued that each individual has a right to have an equal say in the process that determines the laws and policies that they are then subject to. Indeed such a right is entrenched in various international human rights instruments.[7] That right may be defended, for example, on the grounds that it is in keeping with the classical republican idea that each individual is free to the extent that they are not subject to the will of another.[8] It follows that individuals have a fundamental human right to democratic governance for reasons analogous to those that explain why individuals have a right to be free from slavery or serfdom. Secondly, there are a number of rights that are necessary preconditions for self-government (e.g. civil and political liberties). Thirdly, democratically elected assemblies may be more likely than nonelected authorities to identify and protect the basic interests of individuals. Thus, democracies may be more likely to protect human rights (e.g. to a fair trail, to be free from slavery or serfdom, to security and subsistence, to freedom of thought and expression, and so on), than their more autocratic counterparts. 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.[9]

A. The Case for Parliamentary Immunity

I shall argue that the immunity of elected representatives is justified insofar as it advances those three linkages between democracy and rights. To see how that might be the case I shall begin by highlighting how parliamentary immunity might play an important role in the self-governing process even if we assume that the rights enjoyed by ordinary citizens are adequately protected (i.e. consolidated democracies). I shall then consider the positive role

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[7] See, for example, Article 25 of International Covenant on Civil and Political Rights and Article 3 of the First Protocol for the European Convention on Human Rights.

[8] For an extended discussion of this conception of liberty see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997)

[9] Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999), pp. 152-153.

that parliamentary immunity can play when the rights of ordinary citizens are not as yet adequately protected (i.e. emerging or consolidating democracies).

There are at least three related reasons why the courts should not have jurisdiction over the agency of elected representatives irrespective of the right enjoyed by ordinary citizens.[10] In the first place it may undermine the ability of representatives to perform their public function. We may define that function as authoring laws and policies that the represented would author if they were just as competent and had spent the same time considering on the information and arguments presented to the assembly. According to this reading 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 what an ordinary citizen would do if they were to participate in the assembly's deliberations. Thus, the need for immunity from the law arises because the views they express may justifiably depart from popular sentiment, let alone the vested interests of powerful interest groups and nonelected authorities. As a consequence it also protects the informing function of democratic assemblies. That is to say, it helps to ensure unhindered speech and debate between representatives such that citizens are well-informed about a plurality of proposals and their merits.[11]

In the second place parliamentary immunity helps to ensure that the separation between the different branches of government and, therefore, an appropriate balance of power between those branches. Expanding the jurisdiction of the courts from the constitutionality of legislative decisions to the criminality of the agency of legislators may only serve to overstate the influence of the judicial branch. In addition, the immunity will protect the ability of the legislative branch to criticize or vote against the interests of the executive branch.

Finally, exposing representative to prosecution in the courts may only serve to displace the supervisory role of citizenry and replace it with oversight by an unelected authority. An important implication of parliamentary immunity is that the electorate rather than the courts are, in effect, delegated responsibility for scrutinizing the words and votes of representatives during parliamentary proceedings and their other activities whilst they are protected by inviolability. Furthermore, parliament is subject to electoral accountability for

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[10] For an extended discussion of these arguments see Simon Wigley, 'Parliamentary Immunity: Protecting Democracy or Protecting Corruption?' *Journal of Political Philosophy*, 11(1), pp. 23-40.

[11] For the classic account of the informing function enabled by free speech see Alexander Meiklejohn, *Political Freedom*. (New York: Harper and Row, 1965)

the way in which it handles each request for the waiving the inviolability of one of its members.

Unsurprisingly, it is typically the protection afforded by parliamentary inviolability that has come under the most criticism. There are two reasons why it may be necessary to protect the nonlegislative agency of elected representatives. Firstly, even though inviolability applies to the nonlegislative agency of representatives its primary function is to prevent indirect intimidation of their legislative agency. An outside authority that is determined to influence parliamentary decision-making is unlikely to be dissuaded from interfering simply because the legislative agency of each parliamentarian is itself beyond the law. In effect, therefore, the aim of inviolability is to grant parliament the ability to halt court proceedings when the charges brought against one of its members are politically motivated or vexatious. Secondly, a subset of each representative's nonlegislative agency is clearly integral to their public function (e.g. communications with constituents, television interviews, political rallies and so on) and, therefore, should in itself be protected in some way. There is, therefore, at least a *prima facie* case for the view that inviolability is necessary in order to protect the public function of representatives.

I now turn to consider the reasons for parliamentary immunity in those countries that are in transition away from authoritarian rule or in the process of consolidating their democratic credentials. It would seem that there is an even 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 for as long as elected representatives may be prosecuted for publicly questioning nonelected authorities or attempting to legislate in order to bring them under civilian control. Parliamentary immunity enables a forum in which unfettered communication can take place when free speech in the polity at large is insufficiently protected. Indeed, it makes possible the passage of legislation designed to ensure that free speech, along with other basic rights (e.g. right to a fair trail, right to subsistence etc), becomes adequately protected. 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 that shortcoming. Equally, it protects legislation that enables the realization of other human rights (e.g. right to subsistence). Finally, the greater vulnerability of representatives in democratizing countries to legal intimidation also suggests that there is a even more reason to expand the immunity so as to include parliamentary inviolability.

I have argued the justification of parliamentary immunity derives from the fact that it safeguards the ability of representatives to improve the rights of those they represent. However, in order to safeguard that ability it will often be necessary to shield the actual individual who is the representative from human rights violations.[12] 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 I argued that shielding representatives from criminal law is justified to the extent that it augments 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, we must consider the possibility that parliamentary immunity may serve to protect a parliamentary majority that aims to abridge individual rights (e.g. censor speech that is interpreted as blasphemous) or introduce nondemocratic rule (e.g. a theocracy). That is to say, we must take account of the problem posed by political movements that are intent on using democratic procedures to subvert self-government. This possibility is exampled by the rise to power of Hitler's Nazi party and the electoral success of the anti-democratic Islamic Salvation Front in Algeria in 1992.[13] A potential problem with parliamentary immunity, therefore, is that it can be used to protect speech intended to mobilize electoral support for illiberal and anti-democratic legislation, as well as parliamentary speech and votes in favor of such legislation.

A further challenge to parliamentary immunity is that is may protect rights violations committed by a parliamentarian prior to, or during, their electoral mandate. Rather than advocating legislation that reduces rights protection, particular parliamentarians may use the immunity to avoid prosecution for having perpetrated or organized human rights abuses. We should, however, be careful to distinguish parliamentary immunity from the immunity that former authoritarian rulers grant themselves as an exit strategy (e.g. Augusto Pinochet's self-anointed status as 'senator for life'). Such retroactive immunities may be necessary in order to entice authoritarian rulers to stand down. However, because parliamentary immunity is only intended to protect the public function of elected representatives it is not granted *ex post facto* and it only holds whilst a person retains an

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[12] See, for example, the work of the Inter-Parliamentary Union's *Committee on Human Rights*. Retrieved from http://www.ipu.org/hr-e/committee.htm.

[13] For an analysis of those two cases see Gregory H. Fox and Georg Nolte, 'Intolerant Democracies,' *Harvard International Law Journal*, 1995, 36(1): 1-70 at pp. 6-7, 10-12.

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 was caused by a non-legislative act can be prosecuted if the accused is caught in the act, parliament consents or they are elected out of office. It remains the case however, that a parliamentarian can use the protection afforded by non-accountability to incite others to commit rights-violations.

In addition, it may be argued that the absence of the threat of punishment will only serve to entice elected representatives to act based on corrupt incentives. If corruption means that each policy or legislative proposal is not considered based on substantive merit, then it will undermine the ability of representatives to act on behalf of those they represent. Equally, if corrupt incentives do not encourage reforms, then they will undermine the process of democratization.

Finally, it may be argued that immunity 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 representatives. Moreover, in those countries that have parliamentary inviolability, the authorization of parliament is required before the nonlegislative agency of one of its members may be prosecuted in the criminal courts. The concern is, therefore, that parliament will protect its own or be more willing to expose members from smaller opposition parties to the jurisdiction of the courts. Thus, the self-jurisdiction created by parliamentary immunity would seem to be at odds with the idea that criminal charges should be dealt with by a third party who does not have a vested interest in the outcome of the case. Moreover, parliamentary self-protection will delay the prosecution of those elected representatives who are accused of rights-violations or political corruption.

In what follows I will examine these challenges to parliamentary immunity within the context of Turkey, a country where democratic governance has yet to be sufficiently institutionalized. Before discussing each challenge I will explain, firstly, why Turkey represents a particularly useful case for examining the issue and, secondly, the scope of parliamentary immunity in Turkey.

IV. THE TURKISH CASE

Turkey provides us with an illuminating case study of the issue for two reasons. Firstly, the inadequacy of the rights protection afforded to ordinary citizens and the continued influence of the military-led state elite means there is reason not to criminalize politics.

Secondly, the possibility that Turkish deputies will pursue private gain, or advocate Kurdish secessionism or the re-installation of an Islamic political order means that there is 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, foreign ministry and academia), have exerted a considerable degree of influence over the political process. Following in a tradition that dates back to the Ottoman period,[14] the 'centre' of Turkish politics (henceforward, state elite) has construed its overriding vocation as ensuring the well-being of the state in the face of the particularistic and short-term interests of those groupings that characterize the 'periphery' – namely, the heterogeneity that characterizes the vast majority of the population who are conservative and of rural origin.[15]

As a result of the persistence of that state-centered tradition (1) nonelected authorities such as the military and judiciary retain a significant degree of influence over politics and (2) individual rights are not as yet adequately protected Thus, parliamentary immunity may be necessary in Turkey because the rights extended to ordinary citizens is 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 have played a pre-eminent 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 set in motion and controlled by the leaders of the pre-existing authoritarian regime; namely the single-party rulership of the Republican Peoples Party (*Cumhuriyet Halk Partisi*, CHP), which had governed Turkey between 1925 and 1946.

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[14] Halil İnalcık, 'The Nature of Traditional Society' in R. E. Ward and D.A. Rustow (eds) *Political Modernization in Japan and Turkey*. (Princeton, N.J.: Princeton University Press, 1964), pp. 42-63, at 42-43, 55-57, 63 and Şerif Mardin, 'Power, Civil Society and Culture in the Ottoman Empire', *Comparative Studies in Society and History*, (1969) 11 (3), 258-281 at p. 202.

[15] Şerif Mardin, 'Centre-Periphery Relations: A Key to Turkish Politics?' in E. D. Akarli and G. Ben-Dor (eds), *Political Participation in Turkey: Historical Background and Present Problems*. (Istanbul: Bosporus University, 1975), pp. 7-32.

Moreover, since the inception of genuinely competitive elections in 1950 there has been a military intervention in 1960, 1971 and 1980.

Thus, as is the case in Brazil and Spain, Turkey is a clear cut an example of democratization initiated and controlled by the authoritarian regime.[16] 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 (henceforward, political elites).[17]

In virtue of its proactive role in the democratization process the military has been able to retain a significant degree of autonomy from elected officials as well as various tutelary powers.[18] 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) via the 1961 and 1982 post-coup constitutions, the military granted itself the legal and institutionalized means of influencing the making of law and policy. Until the recent reforms, cabinet was required to give priority consideration 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 February 28, 1997 meeting of the National Security Council contributed significantly to its campaign to oust from office the coalition government co-led by the pro-Islamic Welfare Party (*Refah Partisi*, RP).[19]

The military's role appears to be paradoxical given that it aspires to help bring about a western-style secular democracy in Turkey and yet the fact that it retains the ability to influence that process when it so wishes - in virtue of its tutelary powers, reserve domains and the credible threat of intervention - is itself decidedly undemocratic. 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 stands in the way of democratic consolidation.[20]

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[16] Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press, 1991), pp.124-142.

[17] Ergun Özbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation*. (London: Lynne Rienner, 2000), pp. 68-69.

[18] Ümit Cizre-Sakallioğlu, 'The Anatomy of the Turkish Military's Political Autonomy', C*omparative Politics*, (1997) 29 (2), 151-166.

[19] Metin Heper, and Aylin Guney, 'The Military and the Consolidation of Democracy: The Recent Turkish Experience,' *Armed Forces and Society*, (2000) 26 (4), 635-657 at pp. 642-647.

[20] Samuel Valenzuela, 'Democratic Consolidation in Post-Transitional Settings: Notion, Process, and Facilitating Conditions,' in S. Mainwaring, G. O'Donnell and J.S. Valenzuela (eds.) *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (Notre Dame: University of Notre Dame Press, 1992), pp. 57-104 at p. 58.

2. *Rights protection*

As we have seen 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.[21] Consequently, there is not a tradition of individual rights that can be appealed to by the periphery in order to challenge legislation by the centre. 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.[22] Although the judiciary in Turkey is now institutionally independent from the military,[23] it clearly shares the military's statist agenda and concomitant distrust of political representatives. Perhaps the clearest statutory example of the persistence of the state-entered tradition in Turkey is provided by Article 301 of the criminal code, whereby individuals may be prosecuted for insulting or deriding "Turkishness", the republic, or the organs and institutions of the state. Based on Article 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.[24] Article 301 enables the courts to prosecute an individual's speech without considering whether it was intended to incite violence, armed rebellion or enmity and their capacity to influence the public to act accordingly.

B. Unbridled Particularism

As we have just seen 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 there is a case for abrogating parliamentary immunity

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[21] Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V.L. Menage (Oxford: Oxford University Press, 1973), pp.201-202, Şerif Mardin, 'Ideology and Religion in the Turkish Revolution', *International Journal of Middle East Studies*, (1971) 2 (3), 197-211 at p. 202, İnalcık 1964, pp. 56-57 and Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey*, (New York: Routledge, 2005), pp. 21, 26, 101-102.

[22] European Commission, *Turkey 2007 Progress Report* (Brussels: European Commission, 2007). Retrieved from http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf.

[23] 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.

[24] See the European Commission's *Regular/ Progress Reports* on Turkey for the years 2003-2007. Retrieved from http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm.

because of the widespread public perception that political corruption is rife.[25] In addition, the state elite will argue that parliamentary immunity protects lawmaking that is intended to bring about Kurdish self-determination or the re-introduction of an Islamic political order.

The concern in the former case is that pro-Kurdish political parties can use forums such as the assembly and the media to rally public support in favor of some form of autonomy in the predominantly Kurdish southeast of the country. Since the 1980's the state establishment has found itself in a bitter conflict with Kurdish secessionists (Workers' Party of Kurdistan, *Partiya Karkaren Kurdistan*, PKK) in the south east of the country in which an estimated 37,000 people have died. It is by no means clear, however, that 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 second case is that in an overwhelmingly Muslim country the popular majority may be swayed by elected political parties towards the view that Islam is inconsistent with (a) democratic government because the basic laws are already preordained in the Koran and (b) the separation between religion and state because the Prophet Mohammed conflated spiritual and temporal authority. Since the inception of the republic the state elite in Turkey have endeavored to institutionalize a laicist account 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 in schools and the banning of some independent religious orders). The underlying concern being expressed here is not necessarily that Islam is incompatible with a constitutional democracy,[26] but rather that Islamic political parties may successfully promote the view that Islam must be realized by way of a theocracy. If that were to occur then parliamentary immunity would have served to protect electoral mobilization and law-making that aims to reduce, rather than expand, democratic rights.

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[25] Ercis Kurtuluş, *Country Reports on Political Corruption and Party Financing – Turkey*. (Berlin: Transparency International, 2004)

[26] According to Abdullahi Ahmed An-Na'im, for example, the pre-Medina teachings of Muhammad support the equality of men and women and the freedom to choose one's religion. Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1996).

V. THE TURKISH IMMUNITY AND DEMOCRATIC REFORM

In Turkey it is often assumed that parliamentary immunity is broader than is the case in other representative democracies. That is in spite of the fact that Turkey's inclusion of inviolability alongside non-accountability is in keeping with how parliamentary immunity is practiced by the majority of the world's representative assemblies.[27] If anything parliamentary immunity in Turkey is narrower than the norm. For, in those cases where an investigation based on article 14 of the constitution has been initiated against a deputy before their election, the courts do not require parliamentary authorization in order to continue proceedings. Article 14 is a notoriously vague catchall article that is used against activities that are deemed to threaten the secular, indivisible and democratic character of the Turkish state.[28] That qualification of parliamentary immunity is in keeping with the illiberal character of the current constitution. That constitution, formulated in the wake of the 1980 coup, guarantees the individual the standard set of civil and political liberties, but only insofar as his or her actions are deemed not to contravene article 14.

In addition, the Turkish Constitutional Court (TCC) has the ability to circumvent parliamentary immunity by closing a political party and banning from politics those deputies who are interpreted as responsible for the closure. As a result of losing their parliamentary status, the nonlegislative agency of those deputies is then left vulnerable to prosecution. Indeed, eighteen political parties, most of them pro-Kurdish or religiously orientated, have been dissolved by the TCC since 1980.[29] Moreover, the TCC has used the legislative agency of deputies as evidence in support of dissolution. Take for example, the TCC's dissolution of the pro-Islamic RP in 1998 on the grounds that it was advocating the installation of an Islamic political order.[30] While the closure may on balance have been merited the case was tarnished by the fact that it relied on three instances of legislative

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[27] For an extended analysis of the Turkish immunity see Gurcan Koçan and Simon Wigley, 'Democracy and the Politics of Parliamentary Immunity in Turkey,' *New Perspectives on Turkey*, no. 33, (2005), pp, 121-143 and Murat Sevinç, *Türkiye'de Milletvekillerinin Dokunulmazlıkları* [Immunity of Parliamentarians in Turkey] (Ankara: Kırlangıç Yayınevi, 2004).

[28] Ergun Özbudun, 'Constitutional Debates on Parliamentary Inviolability in Turkey', *European Constitutional Law Review*, (2005) 11 (2), 272-280 at p. 275.

[29] Indeed in 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 20 seats in parliament as a result of the 22 July 2007 general elections, has been is charged with building ties with the PKK and threatening the indivisibility of the state. Moreover, in July of 2008, 10 of the 11 members of the TCC concluded that the governing Justice and Development Party (*Adalet ve Kalkınma Partısı*, AKP) had become a focal point for anti-secular activities. 6 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 receives from the state.

[30] Turkish Constitutional Court (TCC), Case No.: 1997/1 [Political Party Dissolution], Decision No. 1998/1, Decision Date: January 16, 1998, Date of publication in the Official Gazette: February 22, 1998, Gazette No.: 23266

agency in addition to eight instances of nonlegislative 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. For, 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.

We have seen how the process of democratization in Turkey has been dominated by nonelected authorities. The question is whether the protection afforded by parliamentary immunity might help to correct the hitherto 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 Partısı*, AKP), a successor of RP, provide a good example of such a possibility. After its landslide electoral victory in November 2002, AKP used its substantial parliamentary majority to enact a number of groundbreaking legal and political reforms aimed at improving Turkey's chances of acceding to the European Union (EU). In addition to the overhaul of the penal code, steps were taken to convert the National Security Council from an executive organ into an advisory body composed of a majority of civilians and to enhance civilian oversight of military spending.[31] During the first years of AKP's tenure the EU accession process appeared to be providing a basis for mutual accommodation between state and political elites—for 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 by no means clear that 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 I noted in Section III there are four important arguments for criminalizing the legislative or nonlegislative agency of elected representatives in those countries that are undergoing

[31] European Commission, *Regular Report*, 2004

democratization – namely, (A) subversive advocacy, (B) rights violations (C) political corruption and (D) parliamentary self-protection. I now consider the merits of those arguments for abrogating the immunity (e.g. removing the protection afforded to nonlegislative agency by inviolability) based on the Turkish case. I shall argue that in democratizing countries, measures other than the criminalizing politics should be used to tackle those four problems.

A. Subversive Advocacy

The first problem is that antidemocratic political parties can use parliamentary immunity to protect lawmaking that abridges individual rights and subverts the democratic order. In Turkey, for example, the fear of the secular establishment is that political parties of an Islamic persuasion might be concealing their fundamentalist intentions until the moment is right to unveil them (*taqiyyah*). By way of illustration consider the following case. On 13th April 1994 Necmettin Erbakan, 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.[32]

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 was able to form a coalition government. In 1998 the party was dissolved by Turkey's pro-establishment constitutional court on the grounds that it was attempting to replace the democratic political order with a religious political order.[33] That decision was subsequently upheld by the European Court of Human Rights.[34] The ECtHR found that the dissolution of RP was justified on the grounds that democratic

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[32] TCC, 1998, p. 37.
[33] TCC, 1998
[34] European Court of Human Rights, *Case of Welfare Party and Others vs. Turkey*. Feb 13 2003. Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98

freedoms enshrined in the European Convention on Human Rights may not be used as a means to install a nondemocratic order (§99, 102) and that RP both advocated a regime based on *shari'a* (§122-123) and had the real potential to bring it about (§108).[35]

There is some evidence in support of the thesis that AKP, in keeping with its predecessor RP, is using democratic freedoms such as parliamentary immunity in order 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. In addition, the AKP government has not been averse to using illiberal elements of the state-centered legacy when it suits its own interests. In 2003, for example, the AKP controlled justice ministry gave permission for an investigation against Young Party (*Genc Partt*) leader Cem Uzan (who was not an elected member of parliament) based on the Article 301 criminal offense of insulting the office of the prime minister. Uzan was subsequently sentenced to eight months in prison. It remains possible, therefore, that AKP's real 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. That is to say, legislative decisions remain open 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 doing so only gathers strength once we consider the possibility of subversive legislators garnering enough votes to

[35] It is noteworthy, however, that the ECtHR did not respond to RP's claim that speech covered by non-accountability should not be used as evidence in a party closure case (ECtHR, 2003, §17). In another case concerning non-accountability the ECtHR 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." ECtHR. *The Case of A. vs. United Kingdom* 17 December 2002. Application no. 35373/97, §79. 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 (ECtHR, 2003, §23) or (b) deemed that the threat to democracy posed by RP constituted sufficiently weighty reason for disregarding non-accountability.

override decision-checks by the other branches. Although, it should be acknowledged that parliamentary immunity can also be used by political parties to protect speech that is intended to mobilize electoral support in favor of illiberal or anti-democratic legislation.

Even if we take such a possibility seriously, however, it may not be necessary to abrogate parliamentary immunity. For, as a counter-majoritarian measure of last resort, the constitutional court may be granted the power to dissolve political parties. Indeed the trend internationally is to permit the dissoution of anti-democratic political parties when doing is necessary to preserve democratic rule.[36] The obvious problem with that proposal is that a conservative constitutional court would then be in a position to close reformist parties. The constitutional court in Turkey is a case in point. Insulated from the political branches, it has zealously used its powers of judicial review and party closure in order to guard the secular and indivisible character of the state.[37] Hence, in order to ensure that the powers of review and closure do not become another means to obstruct liberal and democratic reform, it would seem vital that members of the constitutional court are not recruited solely from within the judiciary and that parliament has a nontrivial role in deciding who is appointed.[38]

B. Rights violations

The second challenge to parliamentary immunity is that it will shield individual parliamentarians from prosecution for carrying out, organizing or inciting human rights abuses. Perhaps 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, amongst other charges, forming a gang with criminal intent and helping a fugitive evade the law. The received view is that both parliamentarians were involved in using nationalist gang members to assassinate pro-Kurdish activists.[39] Even when parliament finally did lift their immunity they were able to regain 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

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[36] See Fox and Nolte, 'Intolerant Democracies,' and Samuel Issacharoff, 'Fragile Democracies,' *Harvard Law Review* 2007 120 (6): 1405-1467.

[37] Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review*, (2004). 82(7), pp. 1819-1860 at 1847-1853, Dicle Kogacioğlu, 'Progress, Unity, and Democracy: Dissolving Political Parties in Turkey', *Law and Society Review*, (2004) 38 (3), 433-462, and Hootan Shambayati, 'A Tale of Two Mayors: Courts and Politics in Iran and Turkey,' *International Journal of Middle Eastern Studies*, (2004) 36 (2), 253-275 at pp. 262-263.

[38] For an analysis of those proposals in the Turkish context see Venice Commission, *Opinion on the Draft Constitutional Amendments With Regard to the Constitutional Court of Turkey*, CDL-AD(2004)024, (Strasbourg: Council of Europe, 2004), §§15-25.

[39] Erik J. Zürcher, *Turkey: A Modern History* 3rd edition (London: I.B. Tauris, 2004), pp. 322-323

could commence. What the Susurluk case illustrates is that the problem with parliamentary inviolability is not that it precludes the possibility of prosecuting rights-violations, but rather that the accused can (if not caught red handed) delay court proceedings for as long as they can garner enough assembly or electoral support. I shall return to discuss that problem 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 of deterring politicians from acting corruptly.[40] Note that the underlying concern being expressed here may in fact be that politicians are insufficiently 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.[41] Legal accountability, therefore, may be seen as a way to compensate for the apparent lack of electoral accountability. Clearly, however, the first priority should be to revise the electoral and party system (by, for example, 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 (Section III.A).

The problem with abrogating the immunity so as to combat corruption is that it will expose parliamentarians to the possibility of vexatious charges by the institutional remnants of authoritarianism. That would remain 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 nonlegislative behavior that is interpreted as corrupt.

What is more, the process of democratization is not necessarily threatened when representatives are corruptly influenced, and it may in fact help to facilitate that process—say because the hitherto excluded *nouveau riche* can buy themselves access.[42] Even if political corruption is impeding that process, the overriding need to protect the agency of

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[40] For an extended discussion of this problem within the context of established democracies see Simon Wigley, 'Parliamentary Immunity: Protecting Democracy or Protecting Corruption?'

[41] Özbudun 2000, pp. 83-84.

[42] Samuel P. Huntington, *Political Order in Changing Societies*. (New Haven: Yale University Press, 1968) pp. 59-71.

parliamentarians means that alternative, and potentially more effective ways, should be found to counter corrupt agency—reforms to campaign financing, public procurement, limiting the spoils of office by reducing the size of state sector, and so on. A further tactic would be to modify the way parliamentary immunity is implemented, without actually limiting the scope of its protection. I now turn to discuss how that might be achieved in the case of parliamentary inviolability.

D. Parliamentary Self-protection

The final challenge to parliamentary immunity is that the realm of parliamentary self-jurisdiction that is created by it contravenes the principle that individuals should not be judges in their own cases. Moreover, as we have just seen, parliamentary self-protection may endlessly postpone the prosecution of those parliamentarians who are accused of rights violations or political corruption. That problem appears to be particularly acute in the case of parliamentary inviolability because governing parties will not be inclined to lift a member's immunity if it will threaten 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, gives the impression that Turkish parliamentarians have been over-reluctant to expose their colleagues to the law. Between October 1961 and March 1998 parliament received 2,713 written requests from prosecutors for the suspension of parliamentary immunity of a total 1,151 of its members. And yet, between the first session of the national assembly in 1920 and March 1998, only 29 deputies have had their immunity waived.[43] However, it is difficult to discern to what extent that is the product of overzealous prosecutors backed by an overly intrusive penal code, and to what extent it is a product of parliament looking after its own. 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 which itself has a vested interest in the outcome of political cases.[44]

What we can infer is that 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 us with a reliable guide as to the extent of malfeasance amongst

[43] These figures were reported to parliament in 1998 by the head of the Justice-Constitutional Committee. See *Turkish Daily News*, 30 April 1998.
[44] Jeremy Waldron, *Law as Disagreement* (Oxford: Oxford University Press, 1999), pp. 296-298.

politicians.[45] Similarly, the level of parliamentary self-protection - the ratio of waivers to waiver requests - in each country will be correlated with the extent to which the law and judiciary retain traces of the authoritarian past. Thus, we would expect a decrease in the incidence of parliamentary self-protection as steps are taken to remove illiberal laws, improve judicial process and to rectify any residual bias amongst the judiciary. For, under those circumstances we would expect both that prosecutors will be less likely to submit a waiver request and that parliament will be less fearful of lifting the parliamentary immunity of one of its members.

Nevertheless, in each country the authorization process might be revised in order to mitigate self-protection by the ruling majority. Firstly, to prevent the authorization process from being deliberately stalled an explicit time limit might be placed on how long parliament can take to deliberate over each waiver request. Secondly, it might be stipulated that those parliamentarians who have already had their immunity waived, should not regain their immunity in virtue of being re-elected in the subsequent elections. Rather than requiring that their immunity be waived anew, court proceedings should continue uninterrupted unless parliament votes to suspend them. Crucially, notice how both of these proposals entail reforms to 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 15 years imprisonment on the grounds that they belonged to the PKK.[46] When the European 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.[47]

If anything, however, such cases only serve to strengthen the case for protecting the agency of parliamentarians. Aside from reforming the law and judiciary it is difficult to see

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[45] Compare with Eric Chang, 'Electoral Incentives for Political Corruption under Open-List Proportional Representation', *The Journal of Politics*, (2005) 67 (3), pp. 716-730, at pp. 720-721. Chang attempts to control for the possibility of judicial partiality by factoring in whether the accused representative belongs to one of the governing parties. Chang, 2005, pp. 726-727 & 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.

[46] Nicola F. Watts, 'Allies and Enemies: Pro-Kurdish Parties in Turkish Politics, 1990-94', *International Journal of Middle East Studies* (1999) 31 (4), 631-656 at pp. 639-640, 645-648.

[47] ECtHR, *Case of Sadak and Others vs. Turkey* (no. 1) 17 July 2001. Applications nos. 29900/96, 29901/96, 29902/96 and 29903/96

how the greater vulnerability of representatives from smaller opposition parties can be mitigated. The right of Turkish deputies to have the lifting of their immunity by parliament reviewed by the constitutional court - a right which appears to be unique to Turkey and Austria[48] – might provide a way to counter the problem of under-protection. Clearly that would not be the case 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 the sovereign power of the electorate that voted for them.[49]

VII. CONCLUSION

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

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[48] Van der Hulst, 2000, p. 92

[49] ECtHR, *Case of Sadak and Others vs. Turkey* (no. 2) 11 June 2002. Applications nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/9