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Democracy and the politics of parliamentary immunity in Turkey

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In Turkey there is currently a widespread public desire to narrow the extent to which parliamentarians are immune from the law. That desire is largely motivated by the perception that political corruption is widespread and that parliamentary immunity only serves to obstruct the fight against it.¹ As a result, a number of political parties have based their electoral platforms on the promise to limit the scope of parliamentary immunity once in office. As of yet, none have carried through their promise and this has only served to reinforce the public view that parliamentarians see their immunity as a personal privilege. Irrespective of the merits of that charge, there is a genuine concern that confronts Turkish deputies, which means that they will be less likely to limit the immunity once elected. Their concern is that current law does not adequately protect civil and political liberties and that the judiciary is not yet sufficiently evenhanded in its treatment of political cases. In effect, the fight against political corruption has been frustrated in part because of the risk to free speech that exposure to the law might entail. The almost contradictory position of the European Union well illustrates the problem. On the one hand, it is exerting pressure on the Turkish government to narrow parliamentary immunity so as to combat political corruption,² while on the other hand it continues to raise concerns about the prosecution of non-violent expression and the partiality of the judiciary in Turkey.³

1 Ericis Kurtuluş, *Country Reports on Political Corruption and Party Financing – Turkey* (Transparency International, 2004); available from www.transparency.org.

2 European-Commission, *Turkey: 2005 Progress Report* (Brussels: European Commission, 2005), 1, 107, OECD/EU, *Turkey: Anti-Corruption and Integrity Framework Assessment* (SIGMA, 2004); available from <http://www.sigmaweb.org/>.

3 European Commission, *2005 Progress Report*, 25-26. Moreover, as we shall see in sections 2 and 3

The predicament of the incumbent and Islam-rooted government is a case in point. Elected by a landslide in November 2002, the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) government has thus far failed to carry out its promise to pass legislation to circumscribe parliamentary immunity in spite of ongoing pressure from the opposition and pro-establishment Republic People's Party (*Cumhuriyet Halk Partisi*, CHP). Given the closure of its predecessor conservative parties, the Welfare Party (*Refah Partisi*, RP) in 1998 and the Virtue Party (*Fazilet Partisi*, FP) in 2001, and the four-month imprisonment of its leader Tayyip Erdoğan in 1999 for an allegedly seditious speech, AKP will argue that it has good reason to fear the consequences of narrowing the immunity, even if that appears to contradict its anti-corruption stance. From their point of view, curtailing immunity based on public concerns over corruption might only serve to play into the hands of the secular establishment.

For its part, the military-led establishment (which includes senior judges and public prosecutors, the president and the foreign service) will be concerned that parliamentary immunity may be used by political parties in order to advocate Kurdish secessionism or the re-introduction of Islam into the public domain. The fear 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. Throughout the 1990s, the state establishment found itself in a bitter conflict with Kurdish secessionists in the southeast of the country, during which an estimated 30,000 people died. In the latter case, the concern of the establishment is that an Islam-rooted political party might be concealing its fundamentalist intentions until the moment is right to unveil them (*taqiyye*). Thus, the secular elite fears that political parties of an Islamic persuasion are merely utilizing democratic freedoms, such as parliamentary immunity, in order to help bring about an Islamic political order. They contend that judicial oversight is necessary because the popular will in an overwhelmingly Muslim population might be swayed in support of an Islamic state based on the *Shari' a*.⁴ We take it that the basic concern being expressed here is not so much that Islam is

below, the Turkish immunity is no broader in scope than the immunity afforded to parliamentarians in most of the member states of the European Union, including the European Parliament. If anything, it is narrower, because it is qualified by article 14 of the Turkish constitution.

4 A 1999 survey found that 21 percent of respondents support the idea of a religious state based on the *Shari' a*. However, that figure shrunk to 10 percent when they were asked whether they supported Islamic laws on marriage, divorce and inheritance. Thus, only half of those who advocate the *Shari' a* appear to support the full extent of what its implementation would entail, Ali Çarkoğlu and Binnaz Toprak, *Türkiye'de Din, Toplum ve Siyaset* (İstanbul: TESEV Yayınları, 2000), 16, 72-73.

incompatible with a constitutional democracy,⁵ but rather that there are historical examples, such as Iran, where Islam has been deployed in a profoundly undemocratic and illiberal way.

From these introductory remarks we can see that there is vertical pressure from the electorate and horizontal pressure from the state establishment to narrow the extent to which parliamentarians are shielded from the law. In what follows we set out to investigate those sources of pressure and the predicament that they pose for political parties who espouse values that are at odds with the establishment. The underlying question that is raised by that discussion is the extent to which parliament should be subject to the jurisdiction of the courts. Is it necessary for the criminal courts to be able to legally question the words, actions and votes of representatives, or is it sufficient that the constitutional court be in a position to review the legislation enacted by representatives? That is, in order to counter the threats posed by political corruption and subversive advocacy, is it necessary to criminalize politics or is it sufficient simply to constitutionalize politics? We find that the answer that political and state elites give to this question has little to do with impartial reasoning. Rather, both sides of the debate are motivated by their group or institutional interests and the values they ascribe to.

We begin by clarifying the nature of parliamentary immunity and the reasons why it may be an important component of democratic rule (sections 1 and 2). In the following section we explain how parliamentary immunity has emerged in Turkey in spite of a state-centered tradition which is distrustful of political elites (section 3). We then employ Jon Elster's three-way distinction between the motivations of reason, passion and interest to analyze the debate between parliament and the judiciary over the merits of parliamentary immunity (sections 4).⁶ Finally, we use that motivational map to interpret the role of parliament and judiciary during the process to decide whether a parliamentarian's immunity should be lifted (section 5).

The scope of parliamentary immunity

The key question is how wide parliamentary immunity should be defined

5 For the discussion of the pre-Medina teachings of Muhammad, see for example Abdullah Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1996). According to his thesis, those teachings support the equality of men and women and the freedom to choose one's religion.

6 Jon Elster, *Alchemies of the Mind* (Cambridge: Cambridge University Press, 1999), Jon Elster, "Reason, Interest and Passion in the East European Transitions," *Social Science Information/Sur Les Sciences Sociales* 38, no. 4 (1999).

in order to adequately protect the public function of elected representatives. Is it sufficient to shield their parliamentary speech, debate and votes (henceforward, legislative agency), or should all their other activities (henceforward, non-legislative agency) also be immune to legal scrutiny?

Historically, two ways of protecting the public function of parliamentarians has emerged amongst the world's representative democracies. The first model only bars legal questioning of the immediate legislative agency of representatives (parliamentary non-accountability). The second model includes non-accountability, but also requires the consent of the representative assembly before the non-legislative agency of representatives can be legally questioned (parliamentary inviolability). The first model, formally inscribed in the 1689 English Bill of Rights, originates from the struggle between the crown and the English parliament 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.⁷ It is this broader form of immunity that has been adopted by the Turkish republic.⁸

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 loses

7 For analysis of how parliamentary immunity is practiced around the world, see M. Crespo Allen, *Parliamentary Immunity in the Member States of the European Union and the European Parliament* (Brussels: European Parliament, ECPRD, 1999), Simon Magee, *Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union* (Brussels: European Parliament, ECPRD, 2001), Robert Myttenaere, *The Immunities of Members of Parliament* (Geneva: Inter-Parliamentary Union, 1998), Marc Van der Hulst, *The Parliamentary Mandate* (Geneva: Inter-Parliamentary Union, 2000), Venice Commission, *The Regime of Parliamentary Immunity, Draft Report* (CDL-INF(1996)001e-rev-prov-restr, Strasbourg: Council of Europe, 1996), Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption?," *Journal of Political Philosophy* 11, no. 1 (2003). For clarification of non-accountability and, therefore, of the crucial distinction between legislative and non-legislative agency, see Thomas Erskine May, *Parliamentary Practice: The Law, Privileges, Proceedings and Usage of Parliament*, ed. Sir D. Limon and W. R. Mackay (London: Butterworths, 1997), UK Parliament, *Reports of the Joint Committee on Parliamentary Privilege in Session* (HL 43-1/ HC 214-1, London: The Stationary Office Limited, 1999), and the United States Supreme Court decisions in *Tenney v. Brandhove*, 341 US 367 1951, *US v. Johnson*, 383 US 169 1966, and *US v. Brewster* 408 US 501, 1972.

8 On parliamentary immunity in Turkey, see Article 83 of the Turkish Constitution and TGNA (1973). For an extended analysis of the Turkish immunity, see Metin Feyzioğlu, "Yasama Dokunulmazlığı Üzerine Düşünceler," in *Prof. Dr. Çetin Özek Armağanı*, ed. Köksal Bayraktar, et al. (Istanbul: Galatasaray Üniversitesi Yayını, 2004), Ergun Özbudun, "Constitutional Debates on Parliamentary Inviolability in Turkey," *European Constitutional Law Review* 11, no. 2 (2005), and especially Murat Sevinç, *Türkiye'de Milletvekillerinin Dokunulmazlıkları* (Ankara: Kirlangıç Yayınevi, 2004).

her parliamentary mandate. At a minimum, legislative agency is taken to include each representative's speech and voting whilst in assembly or parliamentary committee. Typically, constituency works, speeches delivered outside parliament, press releases, and so on are deemed to be non-legislative and, therefore, are accountable to the law. By contrast, according to parliamentary inviolability, the representative's non-legislative agency is only conditionally immune because it can be legally questioned if parliament consents. However, parliamentary authorization is typically not required in civil cases, if the representative is caught *in flagrante delicto*, or once they lose their mandate. In order to clarify the distinction between these two different forms of immunity, consider John Stuart Mill's example of a person who delivers a speech which he knows will incite a riot.⁹ If an elected representative delivered such a speech to the assembly, he cannot be prosecuted at any time. However, if he were to deliver that same speech to a political rally he can be prosecuted, if he is caught red-handed, if parliament consents, or if he loses his electoral mandate.

An important implication of parliamentary immunity is that, in effect, the electorate, rather than the courts, are delegated the responsibility for scrutinizing the words and votes of representatives during parliamentary proceedings. Moreover, in those countries that include parliamentary inviolability, the courts only have jurisdiction over the non-legislative agency of a representative, if they obtain the authorization of parliament, or if the representative's mandate lapses. As Tocqueville notes, however, the immunity of representatives is consistent with the tyranny of the majority.¹⁰ While immunities may shield an elected assembly against intimidation by non-elected authorities, it will not prevent (it fact it will protect) ill-treatment of the minority by representatives of the majority. However, parliamentary immunity is only designed to protect the *agency* (i.e. the actions, words, and votes) of representatives and not the legislative *decisions* (i.e. law and policy) they reach as a result of that agency. This means that it is fully consistent with other branches of government checking the laws passed by parliament. Indeed, in the Turkish case the parliament is not supreme insofar as laws are subject to the possibility of presidential veto (although the veto can be circumvented if the parliament returns the bill unchanged) and judicial review by the constitutional court. Thus, because it is compatible with constitutional constraints, we can see

9 John Stuart Mill, "On Liberty," in *John Stuart Mill: On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1991), 62.

10 Alex de Tocqueville, *Democracy in America* (London: Penguin, 2001), 309.

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 the authorization of parliament, 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.¹¹ We now turn to clarify the arguments that might be given to support this idea.

Reasons for parliamentary immunity

We have already introduced the main reasons for narrowing parliamentary immunity—namely, that criminalizing the agency of representatives is necessary in order to mitigate the threats posed by subversive advocacy and political corruption. Before moving to discuss the way parliamentary immunity is practiced in Turkey, we now consider the arguments against exposing elected representatives to the law.

There are at least five related reasons that might be offered to explain why the courts should not have jurisdiction over the agency of elected representatives.¹² In the first place, it might only serve to displace the supervisory role of the citizen-body and replace it with oversight by an unelected authority. Secondly, it might undermine the informing function of parliament. Parliamentary immunity helps to ensure unhindered speech and debate between representatives, so that citizens are well-informed about a plurality of proposals and their merits. Thirdly, it might undermine horizontal accountability if representatives are deterred from criticizing or voting against the wishes of the executive (in Turkey the executive includes the cabinet, the president and, until its recent conversion into an advisory body, the national security council). Fourthly, if the jurisdiction of the courts were expanded from the constitutionality of their legislative decisions to the criminality of their agency, the power balance between the legislature and judiciary may inexorably shift in favor of the latter.¹³ This is

11 An important exception to that general rule is entailed by the power of the constitutional court in countries such as Turkey to dissolve a political party. In such cases, the court may rely on the agency of party members as evidence (see the discussion of the RP closure case in section 4 below). As a further exception, inviolability typically does not cover agency that is used in a civil case. Civil suits are not protected by the immunity, because such cases do not involve imprisonment and, therefore, would not significantly hinder a parliamentarian’s ability to perform his or her public duties.

12 For an extended discussion of these arguments, see Wigley, “Parliamentary Immunity.” Also see Robert J. Robertson, “The Effect of Consent Decrees on Local Legislative Immunity,” *University of Chicago Law Review* 56, no. 3 (1989): 1129-31.

13 Indeed, a shortcoming of the recent literature on the judicialization of politics is that it focuses almost exclusively on the political influence of constitutional courts (see, for example, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge:

more likely to occur in a democratizing country where parliament is often confronted by a hostile judiciary (for example, because it remains aligned with the remnants of authoritarianism) and the law retains illiberal elements. Fifthly, criminalizing the agency of representatives may thwart the process of democratization. That is to say, the vestiges of authoritarianism (e.g. military oversight of civilian authorities, or a judiciary and body of law that is a product of the authoritarian past) will be able to preserve itself for as long as elected representatives can be prosecuted for publicly questioning non-elected authorities (e.g. judiciary or military) or attempting to legislate in order to bring them under civilian control.

However, it may be argued that while there is good reason for the non-accountability of legislative agency, the inviolability of non-legislative agency is unnecessary. There are two possible responses to that challenge. Firstly, even though inviolability applies to the non-legislative 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 beyond the law. In effect, therefore, the aim of inviolability is to grant the 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 non-legislative agency is clearly integral to their public function (e.g. correspondence 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.

The emergence of parliamentary immunity in Turkey

In Turkey, the pre-eminent concern of the ruling elite during and since the Ottoman period has been to preserve the state, rather than to protect the individual or groups.¹⁴ Consequently, there is not a tradition of natural

Cambridge University Press, 2003), Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004), Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002).) and disregards the possibility of political influence via the criminal courts (in particular by charging representatives with political corruption, seditious libel, or subversive advocacy).

14 Halil İnalçık, "The Nature of Traditional Society," in *Political Modernization in Japan and Turkey*, ed. Robert E. Ward and Dankwart A. Rustow (Princeton: Princeton University Press, 1964), 56-57, Şerif Mardin, "Ideology and Religion in the Turkish Revolution," *International Journal of Middle East Studies* 2, no. 3 (1971): 202, Şerif Mardin, "Power, Civil Society and Culture in the Ottoman Empire,"

rights that can be appealed to by the “periphery”—that is, the cultural and ethnic heterogeneity that characterizes the vast majority of the population who are conservative and of rural origin—of Turkish society in order to challenge legislation by the “center”.¹⁵ The received view is that the emphasis on countering disintegrative influences and the disregard for the individual during the Ottoman and republican periods has been due the state dominating civil society. Social, economic, and political power coalesced in the center in such a way that the ruling elite were not significantly dependent on civil societal elements (i.e. the merchant class, landowners, the religious class, artisan guilds, and the like).¹⁶ As a result, civil society has not been able to exert sufficient influence to ensure that the law is used as a means to protect individuals and groups, rather than simply as a means to control them.

By contrast, in feudal Europe the monarchy was, in order to garner allegiance, often obliged to grant geographical areas controlled by influential nobles or the church immunities from the law of the land. This, in effect, created pockets of self-jurisdiction within the realm.¹⁷ In the Ottoman Empire, the sultan would have been less compelled to do so, because power was not sufficiently dispersed away from the center.¹⁸ Similarly, the development of parliamentary privilege in England during the sixteenth and seventeenth centuries coincided with an increase in the membership and influence of the House of Commons. Consequently, parliamentary privilege increasingly served to offer protection (in the form of freedom from arrest and freedom of speech) to local landed gentry, rather than just the magnates and higher clergy that comprised the House of Lords.¹⁹

The traditional Ottoman concept of *had*, or “boundary”, might appear to entail a form of immunity. According to this concept, the administrative tasks relevant to each public official should not be

Comparative Studies in Society and History 11, no. 3 (1969): 271.

15 Şerif Mardin, “Centre-Periphery Relations: A Key to Turkish Politics?,” in *Political Participation in Turkey: Historical Background and Present Problems*, ed. Engin Deniz Akarlı and Gabriel Ben-Dor (İstanbul: Boğaziçi University Publications, 1975), Şerif Mardin, “Tabii Hukuk, Batı Toplumuna ve Bizler,” *Hukuk Felsefesi ve Sosyolojisi Arkivi*, no. 9 (2003).

16 Metin Heper, “The Strong State as a Problem for the Consolidation of Democracy: Turkey and Germany Compared,” *Comparative Political Studies* 25, no. 2 (1992), Mardin, “Power, Civil Society and Culture,” 180-81.

17 Barbara H. Rosenwein, *Negotiating Space: Power, Restraint and Privileges of Immunity in Early Medieval Europe* (Ithaca: Cornell University Press, 1999), 7, 15-16, 215-17.

18 Mardin, “Power, Civil Society and Culture,” 261, 64-66, 79.

19 G. R. Elton, *The Tudor Constitution*, 2 ed. (Cambridge: Cambridge University Press, 1982), 248-49, 60-68, John. E. Neale, “The Commons’ Privilege of Free Speech in Parliament,” in *Tudor Studies*, ed. Robert William Seton-Watson (London: Longmans Green, 1924).

investigated by another official. To question or intervene in another official's domain would have led to a loss of status or prestige on the part of the official concerned.²⁰ The first point to note here is that *had* was associated with members of the ruling elite, rather than with civil societal elements. In contrast with medieval Europe, therefore, this concept was not protecting potentially opposing forces within society at large. Moreover, while *had* may have barred scrutiny by other public officials, we can assume that they did not render each official's activities beyond the authority of the sultan. Indeed, Selim III (1789-1807) and Mahmud II (1809-39) established advisory councils which were empowered to investigate matters within the scope of individual officials. At most, the customary idea of *had* would have protected officials, horizontally, from intervention by other officials. It seems, therefore, that the power to formulate bills without fear of punishment or demotion, which was granted to members of the legislative council (*Meclis-i vâlâ-yı Âhkâm-ı Adliye*) by the rescript of Gülhane in 1839, as well the protection of free speech (parliamentary non-accountability) afforded to members of the first parliamentary assemblies in 1876 and 1905, has no clear precedent in the Ottoman period.

Given its distrust of the political elite and the absence of pressure from civil society, it may be asked why the republican state elite included the broader parliamentary immunity entailed by the French tradition—non-accountability coupled with inviolability—in the constitutions of 1924, 1961 and 1982. The likely explanation in case of the 1924 constitution is that, until the end of the single-party rule of CHP in 1946, parliamentary immunity, in effect, served to protect the state elite. The 1924 constitution asserted that the parliament was the supreme organ of the state. However, parliament was envisaged by Atatürk as representing the enlightened, as opposed to popular, will of the Turkish polity.²¹ Since the inception of genuinely multi-party politics in 1950, political parties of the periphery have typically had greater success at the ballot box than their pro-establishment counterparts.²² Why, therefore, did the military-led establishment not narrow the immunity after the 1960 and 1980 coups? Part of the reason must lie in the fact that those constitutions established

20 Stanford Shaw, "The Central Legislative Councils in Nineteenth-Century Ottoman Reform Movement before 1876," *International Journal of Middle East Studies* 1, no. 1 (1970): 52-53, 56, 57, June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: State University of New York Press, 1992), 7-8.

21 Metin Heper, *The State Tradition in Turkey* (Hull: The Eothen Press, 1985), 62-64.

22 Ersin Kalaycıoğlu, "Elections and Party Preferences in Turkey: Changes and Continuities in the 1990s," *Comparative Political Studies* 27, no. 3 (1994).

the executive role of the national security council, judicial review and party closure by the constitutional court, and presidential veto, in order to counterbalance the legislative power of parliament. Consequently, there was less of a need to criminalize the agency of representatives in order to control the political elite. Perhaps the clearest illustration of the establishment's ability to control political representatives is provided by the constitutional court's power to close political parties and to ban from politics those deputies who caused the closure. No less than eighteen political parties, most of them pro-Kurdish or religiously oriented, have been dissolved since 1980. Note also that those deputies who have been banned as a result of this process are no longer protected by parliamentary inviolability.

What is more, the military will be aware that a junta can simply ignore the immunity in the wake of an intervention. In the trial of Democratic Party members after the 1960 coup, for example, their parliamentary speeches given while they were the ruling party were used as evidence against them. As a result of those trials, four members of the party, including its leader Adnan Menderes, were executed. Similarly, after the 1980 coup the immunity of all members of parliament was lifted by the military junta.²³

Finally, the 1982 constitution did in fact introduce a significant qualification to parliamentary inviolability. 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 catch-all article that is used against activities that are deemed to threaten the secular, indivisible and democratic character of the Turkish state.²⁴ Thus, a prosecutor can pursue a case against any candidate for election who is interpreted as posing a threat to the secular and indivisible character of the state. This qualification of parliamentary immunity is in keeping with the illiberal character of the current constitution. The current constitution 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.

Parliament versus judiciary

A useful framework for analyzing the politics of parliamentary immunity is provided by Jon Elster's three-way distinction between reason, passion,

23 See, Erik J. Zürcher, *Turkey: A Modern History*, 3 ed. (London: I. B. Tauris, 2004), 248, 78.

24 Özbudun, "Constitutional Debates on Parliamentary Inviolability," 275.

and interest.²⁵ Actors are motivated by reason when they act impartially for individual rights and the common good; by passion if they act based on ideology, religion, or ethnicity; and by interest if they act to enlarge their own wealth, power, or status, or that of the institution or group they belong to. In analyzing relations between the parliament and the judiciary in Turkey, we have noticed that members of both those institutions are primarily motivated by passion (i.e. political Islam versus secularism, or regional autonomy versus the indivisibility of the state) and the inclination to enlarge the extent of their authority.

While the judiciary in Turkey is institutionally independent from the military, it clearly shares the military's secular and *étatist* agenda as well as its concomitant distrust of the political representatives of the periphery.²⁶ As we have seen, the establishment in Turkey has historically been preoccupied with preserving the state in the face of the potentially disintegrative influence of the periphery of Turkish society.²⁷ By the same token, the Turkish Republic has inherited a legal tradition that is primarily concerned with the top-down exertion of power so as to ensure the cultural-linguistic and territorial unity of the state, rather than the bottom protection of rights.²⁸ Thus, members of the judiciary will find it difficult to accept the legal immunity of the political elite whom they perceive as prioritizing their particularistic aims—by, for example, advocating the encroachment of Islam into the public sphere or supporting the creation of some form of Kurdish autonomy in the southeast of the country. In addition, because of the persistence of a legal tradition that places a premium on control, the judiciary will also find it difficult to reconcile itself with the idea of individuals being immune from prosecution, let alone being protected by ordinary individual rights.

For its part, the political elite have tended to adhere to the view that the parliament is sovereign by virtue of the fact that it embodies the popular will.²⁹ That stance is well illustrated by a 2004 speech by prime minister

25 Elster, *Alchemies of the Mind*, Elster, "Reason, Interest and Passion."

26 Perhaps the clearest expression of the judiciary's pro-establishment bias is found in the judgments of the Turkish Constitutional Court, which led to the closure of religiously-oriented parties, on the one hand, and Kurdish-based parties, on the other. For an analysis of those judgments, see Dicle Koğacioğlu, "Progress, Unity, and Democracy: Dissolving Political Parties in Turkey," *Law and Society Review* 38, no. 3 (2004).

27 İnalçık, "The Nature of Traditional Society," 42-43, 55-57, 63, Halil İnalçık, *Osmanlı İmparatorluğu: Toplum ve Ekonomi* (İstanbul: Eren, 1993), 321, Mardin, "Power, Civil Society and Culture," 259, 71.

28 Esin Örucü, "Turkey: Change under Pressure," in *Studies in Legal Systems: Mixed and Mixing*, ed. Esin Örucü, Elspeth Attwooll, and Sean Coyle (Boston: Kluwer Law International, 1996), Christian Rumpf, "The Importance of Legislative History Materials in the Interpretation of Statutes in Turkey," *North Carolina Journal of International Law* 19, no. 2 (1994).

29 Ergun Özbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation* (London:

and AKP leader Tayyip Erdoğan. In response to the secular establishment's staunch resistance to AKP's controversial proposal to grant graduates of prayer leader and preacher schools (*İmam Hatip Okulları*) equal weighting in the national university exam, he stated:

[T]he will of the people is the supreme factor in all matters. The government and parliament are shaped according to the people's will, and the government responds in an appropriate manner. No one should try to put pressure on the will of the people. If they do they will see parliament's answer. If parliament represents the people's will, then its decisions should be respected by all.³⁰

Notice, however, that institutional conflict can emerge because of and in spite of passion. For even in the absence of a sharp conflict of values between judiciary and parliament, there may be competition between them simply because each institution wishes to enlarge its realm of authority.³¹ Thus, even if the pro-establishment CHP was the dominant party in parliament, institutional competition might still be carried out in terms of the rhetoric of the rule of law, on the one hand, and the rule of the majority, on the other.

The existence of passion and interest-based conflict between the judiciary and parliament is well illustrated by the public debate over the merits of shielding elected representatives from the law. Since the religiously-oriented AKP came to power in 2002, there has been an ongoing war of words between senior members of the judiciary and the AKP-led parliament. Senior jurists have argued both that the judiciary is insufficiently independent from the executive, because the justice ministry has too much influence over the appointment of judges and prosecutors and that the scope of parliamentary immunity is too extensive.³² Starkly put, the judiciary is arguing for greater institutional autonomy for itself and for greater exposure of elected representatives to its jurisdiction. In

Lynne Rienner, 1999), 31-32, 55-56.

30 *Turkish Daily News*, July 16 2004.

31 John Ferejohn and Pasquino Pasquino, "Rule of Democracy and Rule of Law," in *Democracy and the Rule of Law*, ed. Jose Maria Maravall and Adam Przeworski (Cambridge: Cambridge University Press, 2003), 243.

32 See in particular the comments by the then head of the supreme court of appeals, *Milliyet*, November 5, 2002, *Milliyet*, December 12, 2003, *Turkish Daily News*, October 25, 2004. His views on parliamentary immunity are in keeping with other bastions of the secular establishment—namely, president Necdet Sezer, himself a former member of the constitutional court, see *Anatolian News Agency*, October 1, 2003, *Turkish Daily News*, February 16, 2002. The head of the higher education board and noted constitutional scholar Erdoğan Teziç, see *Turkish Daily News*, December 25, 1996, and the opposition *Cumhuriyet Halk Partisi* (CHP).

response, the AKP has argued that there is sufficient independence between the cabinet of ministers and the judiciary and that parliamentary immunity should not be circumscribed, because the judiciary is not sufficiently even-handed in its treatment of cases as of yet.³³ Simply put, AKP is unwilling to relinquish its influence over the careers of members of the judiciary, or to expose itself to the law, because of the concern that the latter is institutionally biased towards the notion that the presence of Islam in the public domain is incompatible with democratic rule. Technically speaking, the judiciary may be right with regard to the question of independence.³⁴ On the other hand, ensuring the autonomy of the judiciary poses a potential challenge to democratic rule, if that institution is aligned with the vestiges of authoritarian rule.³⁵ 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.³⁶

The judiciary's desire to extend its jurisdiction over parliamentary affairs is also evidenced by the way it has interpreted parliamentary immunity. Consider, for example, the constitutional court's dissolution of the pro-Islamic RP in 1998 on the grounds that it was advocating the installation of an Islamic political order,³⁷ a decision that was subsequently upheld by the European Court of Human Rights.³⁸ While the closure may have been justified, the case was tarnished by the fact that it relied on three instances of legislative agency. The constitutional court argued that non-accountability does not apply in such cases, because it is the party, and not

33 *Milliyet*, December 12, 2003.

34 European Commission, *Regular Report on Turkey's Progress Towards Accession, 2004* (Brussels: European Commission, 2004), 27.

35 Jose Maria Maravall, "The Rule of Law as a Political Weapon," in *Democracy and the Rule of Law*, ed. Jose Maria Maravall and Adam Przeworski (Cambridge: Cambridge University Press, 2003), 274-75.

36 Ran Hirschl, "Constitutional Courts Vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82, no. 7 (2004): 1847-53, Koğacıoğlu, "Progress, Unity, and Democracy.," Hootan Shambayati, "A Tale of Two Mayors: Courts and Politics in Iran and Turkey," *International Journal of Middle East Studies* 36, no. 2 (2004): 262-63. At the moment there is an institutional imbalance, because the constitutional court can exercise influence over the parliament by way of judicial review and party dissolution, but the parliament has no influence over the constitutional court. There are currently plans afoot to pluralize the composition of the court and to allow the parliament some input during the appointment process. For an independent analysis of those proposals, 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).

37 Turkish Constitutional Court, "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," *Official Gazette*, No: 23266 1998.

38 European Court of Human Rights (ECtHR), *Case of Refah Partisi (Welfare Party) and Others vs. Turkey Judgment, Grand Chamber* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, February 13, 2003).

the deputy, that is being subject to the law. This slight of hand, in effect, compromises the ideal of parliamentary free speech, because representatives will be aware that their speech during parliamentary proceedings may lead to the dissolution of their party and the exposure of banned deputies to the criminal courts. In another case in 1995, the Ankara civil court concluded that a deputy should pay damages for defaming the then president Süleyman Demirel. The level of compensation was determined based on the criminal offence of defaming the office of a government official, rather than the civil offence of defaming an ordinary member of the public. The court, therefore, ignored the fact that a member of parliament whose immunity has not been lifted can only be asked to pay the lesser amount of damages defined by civil law.³⁹ In both of these cases, the judiciary criminalized the legislative agency of deputies and, therefore, encroached on the protection afforded by parliamentary non-accountability.

Parliamentary inviolability in practice

We now turn to examine in detail the protection afforded to representatives by parliamentary inviolability. According to this form of immunity, the criminal courts can prosecute the non-legislative words and actions of an incumbent representative if parliament consents. Because it protects the extra-parliamentary activities of representatives and because parliament has control over whether a deputy is exposed to the law, this form of immunity has come under the most extensive criticism. Indeed, inviolability is vulnerable to the charge that it compromises the idea that people should not be *nemo iudex in causa sua* (“judges in their own cases”).⁴⁰ The skeptic will argue that political parties will not lift a member’s immunity, if it will threaten their parliamentary majority or coalition, or if they can obtain a crucial vote in exchange for not doing so.

The extremely low proportion of immunity waivers to prosecution requests in Turkey, for example, suggests that parliamentarians have been over-reluctant to expose their colleagues to the law.⁴¹ Between October

39 European Court of Human Rights (ECtHR), *Case of Pakdemirli vs. Turkey* (application no. 35839/97, February 22, 2005).

40 John Locke, *The Second Treatise of Government*, ed. David Wootton, *John Locke: The Political Writings* (Indianapolis: Hackett Publishing, 2003), sec. 13.

41 In Turkey, the authorization procedure of the parliament is as follows (Turkish Grand National Assembly, “TBMM İctüzüğü,” *Official Gazette*, No: 14506, April 13 1973, articles 131-34.): The Joint Justice-Constitutional Committee studies each petition (which includes a summary of the preliminary investigation) submitted by the prosecutor and makes a recommendation to the parliament. A vote by the assembly is required if the committee report recommends a waiver, or if a member of the parliament challenges the committee’s recommendation to defer court proceedings

1961 and March 1998, the parliament received 2,713 written requests from prosecutors for the suspension of the immunity of a total of 1,151 members. Between the first session of the newly formed national assembly in 1920 and March 1998, only 29 deputies have had their immunity waived.⁴² However, it is difficult to determine to what extent this low ratio of waivers to prosecution requests is the product of institutionally biased prosecutors backed by an illiberal penal code, and to what extent it is a product of the parliament looking after its own.⁴³ The strength of the skeptic's argument against inviolability rests on the questionable presumption that prosecutors and judges themselves do not have a vested interest in the outcome of each political case. Clearly, in cases involving political representatives the outcome will impinge upon the values and institutional interests of members of the judiciary. It is difficult to see how, therefore, it can be claimed that they are not judges in their own case.⁴⁴

This suggests that we should analyze the way parliamentary inviolability is put into practice, in the form of submission of waiver requests by prosecutors and in the way parliament responds, based on the assumption that judicial and political actors are motivated by potentially competing passions and interests. We would expect the following outcomes to occur: With regard to the judiciary, we would expect that prosecutors will be inclined to exaggerate the total number of waiver requests it submits to parliament in order to cast members of the political elite in a negative light. In addition, prosecutors will tend to submit more waiver requests against those parliamentarians who are opposed to the values adhered to by the judiciary (e.g. political Islam or regional autonomy). By the same token, those same parliamentarians are more likely to be convicted or subjected to a harsher sentence if their immunity is lifted.

until the end of the deputy's mandate. A simple majority of the assembly is sufficient. However, a quorum of one-third of the total number of deputies must be present at the start of the session, and one-quarter of the total number of deputies must vote. If a deputy's immunity is waived by the assembly, then the deputy in question, or any other deputy, has the right to appeal to the constitutional court within seven days. The court may annul the parliament's decision on the grounds that it is inconsistent with parliamentary procedures, the constitution, or the law. With the exception of the right of review, which appears to be unique to Turkey and Austria, this is broadly in keeping with how the waiver process is implemented elsewhere Van der Hulst, *The Parliamentary Mandate*, 91-92.

42 *Turkish Daily News*, April 30, 1998.

43 Two further points should be kept in mind when interpreting these figures. First, accused deputies would eventually have been exposed to the law when they failed to become re-elected or were banned from politics (the statute of limitations does not apply during a deputy's mandate). Secondly, some of those deputies who had their immunity waived would have regained it by becoming re-elected. In such cases, the parliament must waive their immunity once more before the court case against them can recommence.

44 Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 296-98.

With regard to the parliament, we would expect that it will be averse to waiving the immunity of members from one of the governing parties, or of those members from whom they can extract a key vote in return for a non-waiver. In such cases, the parliament will tend to deploy stalling tactics in order to avoid reaching a decision during the current legislative term. In the face of sustained public pressure to waive a member's immunity, the parliament will attempt to delay the waiver until as near as possible to the national elections. If the accused is re-elected—for instance, because they are deliberately placed high on the party list—then the court case can only recommence if the parliament re-waives their immunity. By the same token, the parliament will be more inclined to lift the immunity of members who are independents or from a minority party. Those members may only be able to evade having their immunity lifted, if the government needs their vote in order to introduce new legislation or to survive a vote of confidence.

In sum, parliamentary inviolability will tend to over-protect members of the ruling majority and under-protect members of the minority. This phenomenon is well illustrated in the Turkish context by the differing treatment during the 1990s of parliamentarians from pro-Kurdish parties, on the one hand, and parliamentarians accused of organizing extra-legal actions against pro-Kurdish activists, on the other.

a. The Susurluk case

In 1996, the public prosecutor sent a number of petitions to parliament regarding Mehmet Açar, a deputy for the center-right True Path Party (*Doğru Yol Partisi*, DYP) and minister of the interior in the Refahiyol (RP and DYP) coalition government. The separate charges included forming a gang with criminal intent, authorizing forged gun licenses and identity papers, and helping a fugitive evade the law. The case came to light as a result of a car crash in the western town of Susurluk in November 1996. A former member of the police's anti-terrorist unit and an ultranationalist gang leader accused of murdering seven students during the 1970s were killed in the accident. In addition, automatic weapons and silencers belonging to the interior ministry and diplomatic passports signed by Açar were found in the car. The prosecutor also requested the lifting of the immunity of the accident's sole survivor, DYP deputy and pro-government Kurdish clan chief, Sedat Bucak. The received view is that Açar and Bucak were involved in using nationalist gang members to assassinate pro-Kurdish activists.⁴⁵ For the remainder of its time in office, the Refahiyol

45 Nicole F. Watts, "Allies and Enemies: Pro-Kurdish Parties in Turkish Politics, 1990-94," *International*

government, desperate to protect its fragile coalition, stonewalled the lifting of Aĝar's immunity.⁴⁶ The following coalition government did lift his immunity on two of the charges. Before court proceedings could commence, however, Aĝar was re-elected in the April 1999 elections and, as a result, the parliament was required to renew his immunity waiver. The parliament has failed to waive Aĝar's parliamentary immunity both before and since his re-election in the subsequent elections in November of 2002. At most, Aĝar and Bucak would have been perceived by the establishment as abusing power in order to achieve state goals. Indeed, at the time of the accident Tansu Çiller, chairperson of the DYP, infamously proclaimed that "[t]hose who shoot bullets or those who take them for the sake of the state are honorable. They are honorable heroes."⁴⁷ Unsurprisingly, therefore, none of the senior figures implicated in the scandal have been prosecuted as of yet. The courts, for example, have not successfully convicted Bucak since he lost his electoral mandate at the end of 2002.

b. DEP case

In another case, similarly related to associations with armed gangs, the outcome was quite different. During Çiller's prime ministership in 1994, the parliament lifted the immunity of all seven deputies of the pro-Kurdish *Demokrasi Partisi* (DEP). This was the first time that the immunity of representatives had been waived since 1968. Four of them (Leyla Zana, Selim Sadak, Orhan Doĝan, and Hatip Dicle) were subsequently sentenced to fifteen years imprisonment on the grounds that they belonged to the separatist Workers' Party of Kurdistan (*Partiya Karkaren Kurdistan*, PKK), the very armed gang that Aĝar and Bucak are accused of trying to neutralize extra-judicially.⁴⁸ When the ECtHR reviewed their case,⁴⁹ it found that they were not tried by an independent and impartial court. The accused were tried by the Ankara State Security Court—*Devlet Güvenlik Mahkemeleri* (DGMs) deal with crimes against the security of the state—which at that time included a military judge on its panel. Furthermore, the ECtHR argued that the defendants did not receive a fair trial, because they were given insufficient time to reshape their defense after the offence was changed on the last day of the trial, and because the court did not take sufficient steps to cross-examine the depositions used as evidence by the

Journal of Middle East Studies 31, no. 4 (1999): 638-39, Zürcher, Turkey, 322-23.

46 *Turkish Daily News*, December 21, 1996, *Turkish Daily News*, May 7, 1997.

47 *Milliyet*, November 28, 1996.

48 Watts, "Allies and Enemies," 639-40, 45-48.

49 European Court of Human Rights (ECtHR), *Sadak and Others vs. Turkey* (No. 1) (Applications nos. 29900/96, 29901/96, 29902/96 and 29903/96, July 17, 2001).

prosecution. Indeed, one of the key prosecution depositions was provided by Sedat Bucak. According to the European Commission,⁵⁰ the re-trial, which ruled to uphold the original conviction, did not comply with the fairness requirements stipulated by the ECtHR, particularly with regard to the rights of defense.⁵¹

These two cases dramatically illustrate that, where judicial and political actors are motivated by interest and passion, parliamentary inviolability may lead to the unequal protection of elected representatives.

c. Overcoming unequal protection

One obvious solution to the problem of over-protection is to circumscribe or remove parliamentary inviolability. There are in fact currently plans afoot to extend, beyond article 14, the range of pre-mandate offences that may be prosecuted without parliamentary authorization, i.e. those entailing a heavy penalty, theft, and political corruption.⁵² While this proposal may prove to be popular amongst voters and members of the state elite, it would still leave representatives subject to the jurisdiction of a partial judiciary. Indeed, the very reason for providing parliamentary immunity in the first place is to protect the words, actions, and votes of representatives from court proceedings that are political motivated. Thus, a superior way to mitigate over-protection is to modify parliamentary procedure by, for example, (1) placing an explicit time limit on how long the parliament can take to deliberate over each waiver request and (2) stipulating that parliament is not required to re-waive a deputy's immunity if he or she is re-elected; instead, court proceedings should automatically continue, unless the parliament votes to suspend them. Crucially, neither of those suggestions entail the narrowing of the scope of the immunity.

The right of Turkish deputies to have their waiver reviewed by the constitutional court appears to provide a way to counter the reverse problem of under-protection. Clearly, this would not counter the problem, however, if the constitutional court is motivated by passion and interest. In the case of the seven DEP deputies, for example, such an appeal was rendered redundant by the fact that the constitutional court dissolved the party shortly after the parliament voted to lift their immunity. The ECtHR subsequently ruled that the constitutional court's decision both violated

50 European Commission, *Regular Report on Turkey's Progress towards Accession, 2003* (Brussels: European Commission, 2003), 25.

51 Subsequently, in June of 2004 the supreme court of appeals allowed their release and ordered a new re-trial, *Turkish Daily News*, July 16, 2004. They will be re-tried by a newly formed criminal court, as the parliament abolished DGMs in May of 2004.

52 *Turkish Daily News*, September 18, 2005.

the right of the deputies to be elected to parliament and undercut the sovereign power of the electorate.⁵³ Judicial review of immunity waivers, therefore, would only help to mitigate under-protection if steps were taken to ensure the impartiality of the constitutional court. That might be achieved by, for example, pluralizing the composition of the court and granting parliament a role in deciding who is appointed.⁵⁴

Finally, if the criminal courts were influenced more by reason than by passion or interest, and steps were taken to improve the rights of defense, we would generally expect that there would be fewer waiver requests and that parliament would be less fearful of exposing deputies to the courts. AKP has appealed to a similar line of argument in order to justify its failure either to authorize court proceedings or narrow parliamentary immunity. According to this argument, parliamentarians should be exposed to the law, but not until the institutional bias of the judiciary has been moderated. To expose parliamentarians to the law prematurely might only serve to enable non-elected authorities to intimidate a reforming parliament. Hence, the policy preference defined by AKP's group interests (avoiding the prosecution of its *own* members) is consistent with the policy preference defined by impartial reasoning (shielding *all* parliamentarians so as to protect a democratic reform process).

However, according to some members of the state elite, AKP is merely trying to disguise its passion- and interest-based motivations.⁵⁵ Indeed, there is some evidence to suggest that AKP is misrepresenting its motivations. Firstly, in spite of its concerns about the partiality of the judiciary it has authorized court proceedings against five former ministers, including the former Prime Minister Mesut Yılmaz. Secondly, AKP has not been afraid to use the law against its political opponents. In 2003, the ministry of justice gave permission for an investigation against Young Party (*Genç Parti*) leader Cem Uzan (who was not an elected member of parliament) for insulting the office of the prime minister, occupied by AKP leader Tayyip Erdoğan. He has subsequently been sentenced to eight months in prison.⁵⁶ This is remarkable given that in 2002, shortly before Erdoğan himself was elected into office, a similar charge was brought against him for insulting the military in a speech he gave in 1992. Thirdly, some of the legislation that has been proposed by AKP raises the specter of Islam in the public domain—for instance, its failed attempts to lift the ban on wearing headscarves in public institutions, to ensure equal weighting

53 European Court of Human Rights (ECtHR), *Sadak and Others vs. Turkey* (No. 1).

54 See Venice Commission, *Opinion on the Draft Constitutional Amendments*.

55 *Milliyet*, December 12, 2003

56 *Dünya*, October 11, 2004.

for graduates of prayer leader and preacher schools in the national university entrance exam, and to introduce a law against adultery.

Conclusion

In this article we have argued that parliamentary immunity in Turkey should be understood in terms of the historical conflict between state elites and political elites and in terms of the motivations of reason, passion, and interest. We have seen how the political elite have acquired a wide immunity in spite of a state-centered tradition fearful of the potentially disintegrative influences of the periphery of Turkish society. As a result, members of the state elite, and in particular senior jurists, have emerged as the most vocal critics of parliamentary immunity. In addition, we have seen how important it is to ensure that the courts are not able to interfere with legislation before it is enacted. Criminalizing the agency of elected representatives may only serve to displace the supervisory role of the electorate, to undermine the informing function of democratic assemblies, and to compromise the power balance between parliament and judiciary. Last but not least, it may prevent democratic reform if the judiciary is aligned with the vestiges of authoritarianism. The conundrum posed by parliamentary immunity is that it may also be used to protect the passage of legislation that undermines the democratic order. Nevertheless, if we accept that judicial, and not only political actors, tend to be motivated by their passions and interests, the appropriate compromise is one in which the jurisdiction of the courts is limited to the legislation enacted by the parliamentary assembly.

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