Italy and France: Immunity for the prime minister of Italy and the president of the French Republic

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Criminal prosecution of incumbent Prime Minister of Italy and incumbent President of France for offenses allegedly committed before taking office—“lex Berlusconi”—decisions of Italian Corte Costituzionale of January 13, 2004 n. 24, and French Cour de Cassation of October 10, 2001, n. 481 (case 01-84922, Affaire Breisacher)

In two recent court decisions, the question arose as to whether high-ranking public officials may be criminally prosecuted for offenses allegedly committed before taking office, and whether criminal proceedings against them may be continued thereafter. Although most constitutions contain provisions granting immunity to members of parliament and the head of state, such immunity is generally functional, that is to say, applicable only to acts committed in the course of their exercise of the functions of that office. Other constitutions merely call for prior parliamentary authorization for the initiation of criminal proceedings against such public officials. Recent criminal proceedings against the Italian prime minister and the French president have reopened discussion on the scope of the immunity that high-ranking officials may enjoy.

1. The Italian case

Italy’s prime minister, Silvio Berlusconi, was confronted with several criminal proceedings that continued after he assumed office. The most important of these was Imi-Sir/Iodo Mondadori/SME, in which, apart from Berlusconi, the former minister of defense, Cesare Previti, and others were indicted for the corruption of judges. The very fact that criminal proceedings were instigated against an acting prime minister is, in light of the significance and prestige of the office, extraordinary. However, Italian law regarding official immunity, and the requirement of parliamentary authorization for criminal proceedings, apply only to members of parliament and the head of state, and not to an incumbent prime minister. The prime minister enjoys immunity only in his or her capacity as a member of parliament—as was seen in the Berlusconi case.1

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1 In most constitutions, the position of minister is compatible with a parliamentary mandate; France, where a member of the government cannot serve as a member of parliament, is the exception; see Art. 23 of the French Constitution.
1.1. Constitutional provisions

Constitutional provisions concerning immunity for public office holders fall into three categories:

Article 68 provides for immunity for members of parliament with regard to opinions expressed and votes cast in the exercise of their functions. Personal or domestic searches, arrests or detention of members of parliament require prior authorization by their chamber, except in cases where the individual is under an unappealable conviction or caught in the act of committing a crime for which arrest is mandatory.

Article 90 of the Constitution concerns the immunity of the president of the Republic, who may not be held criminally responsible for acts committed in the exercise of official functions, apart from high treason or attempts to overthrow the Constitution. In the latter instances, the president must be impeached by parliament in joint session by a majority of its members.

Article 96 of the Constitution concerns the prime minister and ministers. It reads: “The Prime Minister and ministers, even if no longer in office, are subject to ordinary courts for offenses committed in the exercise of their duties only in cases authorized by the Senate or the House of Representatives according to procedures defined by constitutional law.”

Thus, there is no prohibition against the prosecution of the prime minister for offenses committed prior to taking office or against continuing such proceedings while that person is in power. Even if the prime minister is a member of parliament, as in Italy, article 68 is not an obstacle to the continuation of proceedings that commenced prior to that individual’s taking office. The section of Article 68 that required prior parliamentary authorization for instituting criminal proceedings against members of parliament was deleted in 1993 in the context of the *mani pulite* (“dirty hands”) campaign that aimed at combating corruption, particularly among the political class. Only arrest or deprivation of liberty now requires prior authorization by parliament; a criminal proceeding may go forward. Several such proceedings are pending against Berlusconi and others.

1.2. “Lex Berlusconi”

When, in 2002, the *Imi/Sir* case was approaching the judgment phase, the Italian parliament adopted a law, the so-called Legge Cirami, which aimed at referring cases at any stage of a proceeding to another court if there were a “reasonable suspicion” (legittimo sospetto) concerning the independence of “persons involved in the proceedings,” and of the judges in particular. The decision on a request for transfer lies with the Corte di Cassazione, the highest ordinary court. Such a transfer can prolong the proceedings considerably because the case must be recommenced in those circumstances. In the case

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involving Berlusconi, who immediately invoked the new law. The Corte di Cassazione rejected the request for transfer in March 2003.

At that time the presidency of the European Union fell to Italy, which, with the support of other member states, revived the idea of granting immunity to holders of high office. As a revision of the Italian Constitution was clearly out of the question, the parliament, in an unusually brief proceeding, adopted Law n. 140 of June 20, 2003, entitled “Provisions for the adjustment of Article 68 of the Constitution . . . concerning criminal proceedings with regard to high State offices.” Commonly called the “lex Berlusconi”, it applies to five positions in all, but at the time it came into force it was relevant only to Berlusconi because none of the other office holders was under criminal indictment. The most important provision of this law is article 1, according to which the president of the republic (with the exceptions specified in article 90, described earlier), the president of the Senate, the president of the House of Representatives, the prime minister (with the exception of what is set forth in article 96, cited above) and the president of the Constitutional Court are not subject to prosecution for a criminal offense—including an offense committed prior to their assumption of office—until their terms of office have expired. According to paragraph 2 of Article 1, all ongoing proceedings involving holders of those offices (with the exception of proceedings under Arts 90 and 96 of the Constitution, none of which are pending at present) are suspended from the date of the law’s entry into force until the official leaves office. The stage of proceedings or degree of offense is irrelevant in such suspensions, even when the offense was allegedly committed prior to the assumption of office or function. In addition, the statutes of limitation for prosecuting an offense are tolled during the term of office (article 1, paragraph 3). The remaining articles of the statute have no bearing on questions of immunity.

1.3. Constitutionality of “lex Berlusconi”

The suspension of criminal proceedings against a sitting prime minister, especially when he is serving as president of the Council of Ministers of the European Union, serves the purpose of safeguarding the proper functioning and prestige of those offices. It is therefore questionable whether such a law would have raised as much discussion had it not been enacted to shield a particular person. Seen in context, it constituted an Einzelfallgesetz—a law ad personam created for a particular case—even if it had the appearance of a norm of general application.

\[^3^\text{Law 140 of June 20, 2003, GAZZ. UFF. No. 142 (June 21, 2003).}\]

\[^4^\text{This purpose is the rationale of the provision included in most constitutions according to which criminal prosecution of Members of Parliament requires prior authorization of Parliament. As already mentioned, supra note 1, this works only if the offices of member of the executive and member of parliament are compatible.}\]
It has been suggested that this law is constitutionally invalid because of its retroactive effect. However, retroactive provisions are not *per se* illegal. Rather, their illegality hinges on whether they provide for a more favorable treatment of the individual than would have taken place prior to their enactment. A more serious question can be raised with respect to the law’s constitutionality. As the provisions in question are part of the Italian Constitution, it could be argued that any amendment to these rules, or extension of their protection to other public offices (the president of the Constitutional Court, in the case of Law n. 140), would also require parliament to pass a constitutional law. This line of reasoning is all the more persuasive in light of the fact that, with regard to members of parliament, the original article 68 of the Italian Constitution contained a provision requiring prior parliamentary authorization for the initiation of criminal proceedings. As mentioned above, this provision was deleted by a constitutional amendment in 1993.\(^5\) It might seem logical that the reintroduction of an obstacle to prosecution—one that cannot be overcome even by parliament—should be carried out in the same way. Such a constitutional amendment is required if the content of the Constitution is changed. Thus, the question is whether or not Law n. 140 of 2003 effected a substantive change in the Constitution.

1.4. Purpose of immunity provisions

There are two reasons for granting immunity to members of parliament and others: It helps to guarantee the independence of the offices in question and enables them to function without disturbance.\(^6\) It is not the holder of the office who is protected by immunity provisions, but the institution. Therefore, immunity is not synonymous with impunity: criminal proceedings may be initiated against an individual following the termination in office or, with the authorization of parliament, during that term. Immunity from prosecution is, therefore, a procedural immunity that must be distinguished from the immunity that is granted to members of parliament in respect of their opinions and votes.

It has been maintained that procedural immunity is merely an amendment of the rules of criminal procedure, namely, the postponement of proceedings.\(^7\) But a simple amendment of that code does not require a constitutional amendment. Those who argued that procedural immunity could be introduced only by a constitutional amendment claimed that it was not an element of criminal procedure but rather an issue of the status and functions of the persons concerned and, therefore, had an implied constitutional dimension.


Furthermore, it has been held that Law n. 140 violates the right of equality, because not all members of parliament are treated equally. This last argument seems relevant not only to the case at hand but reveals, as well, a peculiar feature of the new legislation: it is hard to understand how the effective functioning of parliament—which is, after all, the rationale for according immunity to its members—is safeguarded if only three persons, namely the presidents of the two chambers and the prime minister, are protected from criminal proceedings. No other members of parliament fall within the ambit of Law n. 140, and proceedings against them may be continued or initiated while they are in office. Once again, this argument suggests that the true motivation for enacting the law was not to guarantee the functioning of parliament, a perception that is reinforced by the fact that the new law applies also to the president of the republic and the president of the Constitutional Court, the latter not having been, until now, privileged by any special immunity provision in the Constitution. Thus, the thrust of the law is clearly constitutional, with the objective of granting procedural immunity to the five highest state officials during their terms of office, clearly a reasonable aim. However, such privileges, linked as they are to offices whose mandates are set forth in the Constitution, can be established only by constitutional amendment.

1.5. The decision of the Corte Costituzionale

The criminal court of Milan, which had to suspend the procedure against Berlusconi, referred the matter to the Italian Constitutional Court, which rendered its decision on January 13, 2004. Surprisingly, the Court did not consider the question of whether the provisions contained in article 1 of Law n. 140 could be effected by an ordinary law. Rather, the Court only examined whether this article was consistent with the Constitution, finding, by ten votes to five, that paragraph 2 of article 1 contravened articles 3 and 24 of the Constitution, which guarantee, respectively, equal treatment for all citizens and due process.

The Court also found a violation of Article 51 arising from the possibility that an indicted office holder could be required to choose between living under indictment or resigning in order to have the courts decide on impunity or punishment. This enforced choice impairs the right of equal access to public office guaranteed in Article 51 of the Constitution. Moreover, the right to equal treatment before the courts is violated with respect to private parties because,

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8 For different opinions, cf. Il Corriere della Sera, 30 May 2003, at 5.

9 It should be mentioned that, according to Law No. 1 Feb. 9, 1948 Gazz. Uff. Art. 3, the immunities granted to members of parliament according to Art. 68, paragraph 2, are extended to the judges of the Constitutional Court.

according to article 75 of the code of criminal procedure, private parties in civil litigation can raise their claims only after the conclusion of the criminal proceeding. Since the right to have judicial proceedings conclude within a reasonable time is a constitutional principle that has been upheld by the Constitutional Court, the suspension of proceedings for an indeterminate period is a constitutional violation. With regard to the violation of article 3, the Constitutional Court found that the privileged status accorded to the holders of the five highest state offices created inequality among members of the same class.

By virtue of this decision, the attempt to grant immunity only to the prime minister has failed. However, the Court should have made clear that provisions concerning immunity of holders of high office can be made only by constitutional amendment. This would have provided helpful guidance to the initiatives already undertaken to achieve a new and comprehensive regulation of immunity. For Berlusconi, the decision means that the case pending before the Milan tribunal may resume.

2. The French case

The case against Jacques Chirac, the president of the French republic, was different. The criminal proceedings in which he was involved (initially only as a witness, although the circumstances suggested that his indictment was imminent) concerned financial transactions during the time when Chirac was mayor of Paris and president of the political party Rassemblement pour la République. The question was whether he could be prosecuted and, if so, by which jurisdiction—the Haute Cour de Justice or the ordinary courts—for offenses allegedly committed prior to his assumption of the office of president.

Article 68 of the French Constitution provides, as do the Italian and other constitutions, that the president of the Republic is liable for prosecution only for acts of high treason. A special court, the Haute Cour de Justice, is competent to adjudicate such a prosecution if both chambers of Parliament have authorized it in open vote and with an absolute majority of their members.

2.1. The decision of the Conseil Constitutionnel

The Conseil Constitutionnel, which functions in France essentially as a constitutional court, had already ruled on the prosecution of the president of the republic in its decision of January 22, 1999.¹¹ That case concerned the constitutionality of the Rome Statute governing the creation of the International Criminal Court. In its decision, the Conseil stated that “under article 68 the

President of the republic enjoys immunity for acts committed in the exercise of his functions with the exception of high treason. Furthermore, during the term of office his criminal responsibility can only be determined by the *Haute Cour de Justice*. This last statement was highly criticized because article 68 had generally been understood as referring exclusively to impeachment for high treason. However, the Conseil Constitutionnel evidently understood the article to be applicable to any criminal indictment occurring while the president was in office. Critics were apprehensive that such an interpretation would place the president beyond the reach of ordinary criminal prosecution. In an exceptional move, the Conseil clarified its decision in a note, stating that the president is not exempt from criminal liability but enjoys a temporal jurisdictional privilege until the end of his term. Accordingly, the ordinary court that had been asked to call the president as a witness found itself incompetent to consider acts allegedly committed by the president. It was likewise incompetent to call him as a witness due to the sanctions attached to the refusal to testify. This decision was appealed to the Cour de Cassation.

### 2.2. The decision of the Cour de Cassation

In its decision of October 10, 2001, the plenary assembly of the Cour de Cassation did not follow the holding of the Conseil Constitutionnel that the Haute Cour de Justice is competent, during a president’s term of office, to hear all cases against the officeholder that involve criminal offenses. The Cour de Cassation found instead that the competence of the Haute Cour de Justice was confined to the offense of high treason and that the ordinary courts remained the appropriate forum for all other criminal prosecutions. However, on the question of whether the president could be called as a witness, the Cour de Cassation came to the same conclusion as the Conseil Constitutionnel—that, as a matter of public policy, to ensure the regular functioning of the state, the president of the republic could not be investigated or called to testify before a criminal court during the term of his mandate. However, applicable statutes of limitations are suspended during this period. The Cour de Cassation also stated that the President was under no obligation to appear before a criminal court as

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12 *Ibid* (author’s translation).


14 The original text reads: “Il [referring to the President of the republic] ne peut être mis en accusation que par les deux assemblées statuant par un vote identique au scrutin public et à la majorité absolue des membres les composant; il est jugé par la Haute Cour de Justice.”

15 This note is contained in the report of the Avril Commission. See *Commission Avril, Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, (Paris, La Documentation Française, 2002), at 72. The report is also available at [http://www.ladocfrancaise.gouv.fr/brp/notices/024000635.shtml](http://www.ladocfrancaise.gouv.fr/brp/notices/024000635.shtml). Hereinafter, the *Commission Avril*. 
a witness.\textsuperscript{17} In finding that prosecution must be suspended until the end of the president’s term of office, the Cour de Cassation did not address the question of the competence of the ordinary courts.

\textbf{2.3. Analysis}

Although the rulings in the Conseil Constitutionnel and the Cour de Cassation had the same effect, the position of the latter court seems more in line with the wording of Article 68. It is questionable whether the Haute Cour de Justice, due to its special status as a “political” court whose composition and convening are determined by votes in parliament,\textsuperscript{18} would be the appropriate forum to judge ordinary criminal offenses—whether, in other words, it would satisfy the requirements of article 6, paragraph 1, of the European Convention on Human Rights concerning fair trial.

Even if the reasons for the decisions of the Conseil Constitutionnel and the Cour de Cassation differ, they both understood Article 68 as preventing ordinary courts from prosecuting the president of the republic during his term of office. This reading corresponds with the purpose of the provision, which promotes respect for the highest office of the French republic.\textsuperscript{19} The discussion reopened by “le cas Chirac” led the president to appoint a commission, chaired by Pierre Avril, to formulate proposals concerning the nature and extent of the criminal responsibility of the president. The commission concluded that the Constitution should be amended to provide explicitly that, during the term of office, the president cannot be called before any court or administrative authority to testify, and that he cannot be subject to investigation, indictment, or prosecution.\textsuperscript{20} The conditions for enacting or continuing such procedures after the end of his office should also be laid down in a \textit{loi organique}, that is, a law implementing the Constitution. If adopted, this proposal would implement the findings of the Conseil Constitutionnel and the Cour de Cassation that the President shall not be submitted to court proceedings while in office. The Commission also presented a draft revision of article 68, which provides that the president of the republic cannot be dismissed from office except for a breach of his obligations that is clearly incompatible with the functions of his office. The dismissal can be pronounced only by the \textit{Haute Cour}, which will be the new organ replacing the current \textit{Haute Cour de Justice}. In contrast to the \textit{Haute Cour de Justice}, which is composed of a limited number of members of

\textsuperscript{16} Ibid., at § 72 et seq.

\textsuperscript{17} Cour de Cassation, Arrêt du 10 octobre 2001 (M. Michel Breisacher). The decision is also available in Annex 4 of the \textit{Commission Avril, supra} note 15, at 72 et seq.

\textsuperscript{18} For details on the \textit{Haute Cour de Justice}, see the \textit{Commission Avril, supra} note 15, at 63 et seq.

\textsuperscript{19} With regard to Italy, it can be said that the same interpretation would be valid for art. 90 of the Constitution because this article also clearly indicates that the function of the office of the president shall only be interfered with in special circumstances laid down in the Constitution so that the reference to the president of the republic in Law n. 140 is only declaratory.

\textsuperscript{20} \textit{Commission Avril, supra} note 15, at 41 et seq.
parliament and resorts at the investigating stage to judges from the judicial branch, the proposed organ would be constituted by the entire Parliament sitting as Haute Cour, underscoring this body’s purely political nature. The proposal remains in draft form as of this writing.

3. Concluding remarks

The steps taken by the French President and by Italy to reconsider the criminal liability of state officials demonstrate that the status under criminal law of holders of the highest offices requires closer scrutiny and, possibly, new regulation. At a time when high state officials are punishable—for certain crimes, at least—under international law, their criminal liability should also be subject to regulation at the national level. A similar inference may be drawn from the statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and that of the International Criminal Court, each of which specifies the irrelevance of the official status of a defendant.

The cases in Italy and France attest to a gap in national law concerning the prosecution of high officials for criminal offenses committed prior to their assumption of office, as well as offenses, unrelated to their official functions, that may be committed during their term of office. The principle that immunity is not synonymous with impunity must be given full legal effect. The procedural immunity that is dictated by the need for continuity of the state should be enacted only by constitutional amendment, in recognition of the fact that high officeholders are being accorded special treatment. In this way, the principle of equality, which demands that such privileges be kept to a minimum, will be advanced.

New Zealand: The Privy Council is replaced with a domestic Supreme Court

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New Zealand—Privy Council replaced—new local Supreme Court—history and context—selection of judges—contrast with U.K.—New Zealand’s autonomy

On January 1, 2004, New Zealand replaced the London-based Privy Council with a new, local Supreme Court as its court of final appeal. The purpose of

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