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'Thou Shalt be Saved'[1] (from Trial)? The Ruling of the Italian Constitutional Court on Berlusconi's Immunity Law in a Comparative Perspective

Sascha Hardt & Mariolina Eliantonio*

Parliamentary and executive immunity – Italian *Corte Costituzionale* – Constitutional versus ordinary lawmaking – Comparative perspective to other EU member states – Italian situation unique

Introduction

The topic of immunity of parliamentarians and holders of high offices of state is a widely debated one,[2] since the immunity regime entails a delicate balance between, on the one hand, the necessity to facilitate the independence and unimpeded execution of the office or mandate and, on the other hand, the need to uphold the rule of law and to safeguard access to legal remedies for all citizens equally, regardless of their status. Both of these needs are central to the functioning of a democratic state. While this is recognised in virtually all democratic systems, the dilemma of immunity becomes manifest in the question for legislators of how to strike a fair balance.

The debate concerning immunity of high state officials became all the more 'urgent' in Italy, when the Italian Parliament passed two laws which would grant special immunity to, amongst others, Prime Minister Silvio Berlusconi.[3] At the time of the enactment of these laws, criminal proceedings against Mr. Berlusconi

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[1] Acts 16:31.

[2] *See* for a good account of the arguments of that debate S. Wigley, 'Parliamentary Immunity: Protecting Democracy or Protecting Corruption?', 11 *J. of Political Philosophy* 1(2003) p. 23-40. It must be noted that legal literature focuses almost exclusively on parliamentary immunity, since the majority of systems do not feature a separate immunity regime for members of government.

[3] Law No. 140 of 20 June 2003, *Gazz. Uff.* No. 142 and Law No. 124 of 23 July 2008, *Gazz. Uff.* No. 173.

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were pending before several Italian courts. Both laws were struck down by the Italian Constitutional Court on grounds of violation of the principle of equality and non-observance of the procedure for constitutional amendment.[4]

The aim of this paper is to discuss the more recent one of these rulings and place the Italian law in a comparative European context. After sketching the facts of the case and the Italian system of immunity a discussion of ruling No. 262/2009 of the Italian Constitutional Court is provided. Then the Italian situation and the ruling will be placed in a broader context, by elaborating on some general principles of immunity law and comparing, in the light thereof, the rejected Italian law to official immunity as it exists in other European states. It will be concluded that the Italian law was a *unicum* in the European landscape in terms both of its scope and its legislative form as ordinary statutory law.

The facts of the case

In 2003, the Italian Parliament passed Law No. 140 of 20 June 2003, containing provisions for the execution of Article 68 of the Constitution and on criminal proceedings against high offices of state. Pursuant to this statute, any criminal proceedings against the President of the Republic, the Presidents of the Senate and of the Chamber of Deputies, the President of the Council of Ministers and the President of the Constitutional Court were to be suspended as of the time of entry into force of the law itself.

With the ruling No. 24 of 13 January 2004, the Italian Constitutional Court struck down this piece of legislation on the grounds of the violation of the principle of equality and the right of defence, enshrined in Articles 3 and 24 of the Constitution.

In 2008, as a response to this ruling of unconstitutionality, the Italian Parliament passed a second law on the same subject matter, Law No. 124 of 23 July 2008, containing provisions ordering the suspension of criminal proceedings against the high offices of state (hereinafter 'Law No. 124/2008'). According to Article 1(1) of this statute,

> […] any criminal proceedings against individuals which occupy the offices of President of the Republic, President of the Senate of the Republic, President of the Chamber of Deputies and President of the Council of Ministers shall be suspended from the time when the office or function is taken up until the end of the term in

[4] *Corte Costituzionale*, rulings No. 24 of 13 Jan. 2004 and No. 262 of 7 Oct. 2009. For an English translation of the latter ruling, *see* <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_%20262_2009_EN.doc>.

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office. The suspension shall also apply to criminal proceedings for conduct prior to taking up the office or function.

As for the temporal scope of the immunity, sub-section 7 of Article 1 provided that the suspension of the criminal proceedings applied 'to criminal proceedings in progress, at every stage, state or instance' at the time when the law would enter into force. Unlike the previous law, sub-section 2 provided for a possibility for the accused to waive the suspension of the proceedings.

At the time of the enactment of this piece of legislation, Mr. Berlusconi, the current Italian Prime Minister, was subject to criminal proceedings before the *Tribunale di Milano* and the *Tribunale di Roma*. Once he tried to rely on the provisions of Law No. 124/2008, both courts suspended proceedings and referred the question of constitutionality of this law to the Constitutional Court, who, according to Article 134 of the Italian Constitution, has jurisdiction to rule upon the constitutional legitimacy of laws and acts having the force of law issued by the State and the Regions.[5]

The Italian system of immunity for the members of the executive

In the Italian legal system, members of the executive are essentially covered by the immunity provided by Article 68 for members of Parliament and that provided by Article 96 for the crimes committed in the exercise of their office.

Article 68 of the Italian Constitution lays down certain substantive and procedural privileges for members of Parliament (and, therefore, also for the presidents of the Houses of Parliament) relating both to offences committed whilst performing official duties (sub-section 1) and to offences committed beyond the ambit of official duties (sub-sections 2 and 3).

In particular, Article 68 renders members of Parliament non-accountable for votes cast and opinions expressed in the performance of their function and prohibits measures of personal or home search, arrest (except for cases of *flagrante delicto*), detention or other forms of deprivation of their personal freedom, unless authorised by their respective House of Parliament or in execution of a final court sentence. Accordingly, Article 68 does not prohibit measures of prosecution other than those mentioned and does not have the effect to suspend criminal trials. The immunity granted by this article can further not be waived by an indi-

[5] Specifically with regard to the procedure of concrete constitutional review, please also note that, according to Law No. 87 of 1953, any judicial authority who must resolve a dispute that requires the application of a legal provision, where it deems the question of constitutionality as essential for the resolution of the dispute and not manifestly ungrounded, has both the power and the duty to refer that question to the Constitutional Court.

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vidual member of Parliament. Article 68 of the Constitution covers thus members of the government as far as they also hold a parliamentary mandate.

For crimes committed in the exercise of their office, Article 96 stipulates that the members of the executive are subject to normal justice, provided that authorisation is given by the Chamber of Deputies or the Senate (the latter also in case the relevant minister is not a member of any of the two Chambers of Parliament).This provision applies explicitly to both ordinary ministers and the President of the Council of Ministers.

For crimes unrelated to the exercise of their official duties, there is no immunity for members of the government other than that which they enjoy by virtue of the parliamentary mandate they usually (but not necessarily) hold.

The legal issues raised before the Constitutional Court

The issues raised by the referring courts are threefold and, with regard to all three points, the Constitutional Court agreed with the arguments brought forward by the lower courts. In the following, these issues are presented, before an analysis of the Constitutional Court's reply is provided.

May immunity be regulated by way of ordinary legislation?

The first issue raised by the referring courts concerns the necessity to regulate immunity for high offices by way of provisions of constitutional nature, rather than with an ordinary law. In this context, reference was made to Article 138 of the Constitution, which governs the procedure for constitutional amendment.[6]

In essence, the referring courts asserted that the contested Law No. 124/2008 amended the substance of Article 68 of the Italian Constitution which regulates the immunity of the members of Parliament, thereby surreptitiously amending the Constitution without following the appropriate procedure.[7] In this context, it was also argued that the legislation governing the status of the occupants of the highest institutional roles of the Republic is in itself a typically constitutional matter, since all provisions which limit or defer in time their responsibility count

[6] According to Art. 138, laws amending the text of the Constitution and other constitutional laws must be adopted by each of the two parliamentary chambers after two successive debates at intervals of no less than three months. In the second reading, such laws must be approved by an absolute majority of the members of each house. The article also provides for the possibility of a subsequent popular referendum (after the publication but before the promulgation of the law) at the request of at least one-fifth of the members of one of the chambers or five hundred thousand voters or five of the Regional Councils, unless both chambers have approved the law by a majority of two-thirds of their respective members.

[7] Referral order No. 397/2008 of the *Tribunale di Milano*.

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as exceptions to the general principle of the equality of all citizens before the law provided for under Article 3 of the Constitution.[8]

In reply to this point, the Constitutional Court started off by mentioning that constitutional privileges may be classified under the category of institutions aimed at protecting the performance of the functions of the constitutional organs by protecting the holders of the offices associated with them, and that they manifest themselves as specific protection for the persons endowed with constitutional status, thereby removing them from the application of the ordinary rules and creating exception from the principle of equality between citizens.

The problem of identifying the quantitative and qualitative limits of the privilege, according to the Court, is connected to that of the necessity of striking a delicate, yet essential, balance between the different branches of state, since the establishment of these limits may have an impact on the political functioning of the various organs. This overall institutional architecture, inspired by the principles of the separation of powers and their equilibrium, means, in the Court's view,

> that the legislation governing the privileges contained in the text of the Constitution must be understood as a specific legislative system, which is the fruit of a particular balancing and structuring of constitutional interests; and, consequently, that Parliament is not permitted to change this system either *in peius* or *in melius* through ordinary legislation.[9]

[8] According to Art. 3, '[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. […]'

[9] The court also responded to some objections on this point which had been raised by the defendant. First, it addressed the point that the privileges can be introduced also through ordinary legislation, as is the case for diplomatic immunity provided for under international conventions. To this objection, the Court replied that these norms have a constitutional coverage in the 'generally recognised norms of international law' provided for by Art.10 of the Constitution. Also the special provisions governing the privileges of the President of the Council of Ministers and of the ministers in relation to offences committed by them whilst performing official duties and by co-defendants, provided for under Law No. 219 of 5 June 1989, No. 219 were not regarded by the Court as evidence for the possibility of legislating by way of an ordinary law in the area of immunity, since these provisions constitute the mere implementation of a constitutional law. Moreover, according to the Court, it is not possible to invoke in support of the argument that ordinary legislation is capable of establishing the privileges of bodies with constitutional significance the Court's case-law, in which the Court upheld the constitutionality of an ordinary law providing that the votes cast and opinions expressed by the members of the Supreme Council of the Judiciary when exercising their functions and regarding matters placed before it for discussion may not be subject to review or challenge. In this judgment, the Court in fact held that ordinary legislation is capable of regulating the immunity in question only in consideration of the fact that the matter was specifically covered under constitutional law, and it was strictly limited only to expressions of opinions pertinent to the exer-

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Is immunity meant to protect the office holder?

The second issue which was raised by the referring courts and which is of relevance for the debate on immunity concerns the very rationale of the existence of immunity, which, according to the referring court of Milan, is meant to protect the office, rather than the office holder.

With regard to this point, reference was made again to Article 3 of the Constitution, containing the principle of equality, in particular with regard to the principle of reasonableness. In particular, it was argued that the right, granted by the contested law to the occupant of the high office, to waive the procedural suspension was in contrast with the protection of the public office, in that it granted a 'merely elective' discretion to the individual who benefits from it.

In relation to this point, the court took as starting point its earlier ruling No. 24 of 13 January 2004. In this judgment, which concerned the earlier law on the immunity regime for the high offices of state, the court had clarified that the suspension of criminal trials for these offices is intended to satisfy some requirements external to the proceedings, namely the 'protection of the untroubled performance of the activities associated with the offices in question.' The corollary of these unequivocal assertions was that the procedural suspension of proceedings for high offices has, in the Court's view, the rationale of protecting the exercise of public functions, guaranteeing to the holders of high offices the untroubled performance of their functions (and, indirectly, of those of the organ to which they belong) through the conferral of a specific protected status. Therefore, according to the Court, the psychological aspect, which is individual and contingent, of the subjective peace of mind of the individual state office holder did not come into consideration. These conclusions were regarded asapplicable also to the suspension provided for by the contested provision, since the Court considered that the two provisions at stake had the same rationale.

The Court rejected the defendant's arguments according to which the rationales of the two laws were different because the contested legislation provided for the right to a waiver (which was not provided in the earlier law),with the result that the said legislation had allegedly the goal of protecting not simply the intrinsic function of the office, but also the right of the accused to a defence guaranteed under the Constitution, and, therefore, of satisfying requirements internal to the trial.

In particular, the Court pointed out that the very report on the draft bill AC 1442 (which then became Law No. 124/2008) expressly identifies the rationale

cise of the rights and duties vested under constitutional law in the members of the Supreme Council of the Judiciary.

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for the suspension as the requirement to protect the principles of 'continuity and regularity in the exercise of the highest public functions,' and not the satisfaction of the requirements of the defence.

Secondly, the Court found that it would be unreasonable to consider that the contested provision had the goal, either prevalent or exclusive, of protecting the right to a defence of accused persons, because in such case, given the general nature of this right, expressly provided for under Article 24 of the Constitution, it should have applied to all accused who, in view of their own activities, have difficulties in participating in criminal trials. Moreover, in the Court's view, it would be inherently unreasonable and disproportionate compared to the goal of guaranteeing to the holders of high offices the untroubled performance of their functions to provide for an absolute legal presumption of a legitimate impediment resulting *from the sole fact* of occupying a public office. This irrebuttable presumption (*iuris et de iure*) would prevent any verification of the actual existence of an impediment to appear in proceedings and would render the procedural suspension operative also in cases in which there is no impediment.

Thirdly, the Court observed that the legitimate impediment to appear in proceedings can already be invoked within criminal trials and the contested provision was not necessary in order to protect the defence of an accused where he or she is prevented from appearing in proceedings for reasons inherently related with the high office occupied by him.

The Court, therefore, concluded that the rationale of the contested provision, as was the case for the provision at issue in ruling No. 24 of 2004, consisted in the protection of the functions of certain constitutional organs, created through the introduction of a special suspension of criminal trials.

Do members of the executive deserve a special immunity regime?

The third point raised by the referring courts and dealt with by the Constitutional Court concerns the position of the offices covered by the challenged immunity provisions and the issue of whether they deserve, because of their features, a special immunity regime. In this context, Article 3 of the Constitution was invoked on the grounds of the unreasonable difference in treatment before the courts, since the contested law brought together 'within one single provision different offices not only by virtue of the appointing body, but also the nature of the functions,' and moreover unreasonably distinguished, 'in relation to the fundamental principles underlying court action, between the Presidents of the Houses of Parliament and the President of the Council of Ministers [...] and the other members of the organs presided by them.'

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Also, the principle of equality had allegedly been violated, due to the difference in treatment between the legislation introduced for offences committed beyond the ambit of official duties and that, with constitutional status, governing offences committed whilst performing the official duties of the four high offices concerned. This difference was claimed to be unreasonable, amongst others, due to the provision of a *ius singulare* for offences committed beyond the ambit of official duties in favour of the President of the Council of Ministers who, by contrast, the Constitution treats as equivalent to other ministers for offences committed whilst performing official duties as a consequence of his position as *primus inter pares*.

With regard to this point, the Court noted that the contested law created a clear difference in treatment of the high offices compared to all other citizens who also carry on activities which the Constitution considers to be equally demanding and essential, such as those associated with public offices or functions or, more generally, those which citizens have the duty to carry out in order to participate in the material or moral progress of society.

Naturally, the Court continued, it may well be true that the principle of equality requires that, whereas equal situations require equal treatment, different situations may require different arrangements. However, according to the Court, there certainly was a violation of the principle of equality with specific reference to the high offices of state contemplated under the contested provision, specifically with regard to the difference in treatment between the presidents and the members of the constitutional organs.

In particular, the Court pointed out that the, albeit significant, differences which exist on a structural and functional level between the presidents and the members of the organs covered by the contested law were not sufficient to transform the overall intentions of the Constituent Assembly,[10] which were to attribute to the Houses of Parliament and to the government, and not to their presidents, the functions of respectively enacting legislation (Article 70 of the Constitution) and pursuing political and administrative policies (Article 95 of the Constitution). In fact, no pre-eminence, in the Court's view, should be seen in the role of the President of the Council of Ministers over the ministers, because he is not the only figure responsible for government policy, but his role is rather limited to maintaining its unity, promoting and coordinating the activity of ministers, and therefore occupies a position traditionally defined as *primus inter pares*.

Also the constitutional regulation of ministerial offences confirms, in the Court's view, that the President of the Council of Ministers and the ministers are placed

[10] The Constituent Assembly was a body elected in 1946 for the purposes of drafting a new constitution for Italy.

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on the same level. The system laid down under Article 96 of the Constitution and Constitutional Law No. 1 of 1989, in fact, provides for the same regime of privileges for these offices, limited to offences committed whilst performing official duties; these arrangements had been modified by the provision for the suspension of trials for offences committed beyond the ambit of official duties only for the President of the Council of Ministers.

Similarly, according to the Court, there is no significant pre-eminence of the presidents of the Houses of Parliament over other members, because all members of Parliament participate in the exercise of legislative functions as representatives of the Nation and, as such, are subject to the uniform provisions laid down in Article 68 of the Constitution.

Berlusconi's immunity law in the context of European immunity regimes

In the following, the above considerations of the Italian Constitutional Court are juxtaposed with the broad lines of immunities and special procedural regimes for parliamentarians and holders of high offices of state[11] as they exist throughout Europe. In particular, the immunities and procedural provisions for members of the government will be compared. No detailed regard will be had, however, for the immunities of heads of state. Despite the role heads of state play also in the executive of various states,[12] most states employ an extensive immunity system for their head of state which is formally and materially distinct from that of the (other) members of the government. The reason for this is that the presidents and monarchs fulfil – contingently in addition to their executive functions – a role as representatives of the nation and symbols of national unity, which sets them apart from the government. In states whose heads of state have little but ceremonial functions in government, they often enjoy wide-ranging inviolability, however, offset by political responsibility for their actions borne by the members of the government.[13]

The comparison of immunities and procedural regimes in Europe serves to illustrate that, while immunity regimes differ greatly between states, a set of common basic principles of immunity legislation can be identified.

[11] Following the notion employed by the *Corte Costituzionale*, these are the offices of prime minister (or otherwise head of the government, e.g., chancellor), minister on a national level as well as president of (either House of) Parliament.

[12] Notably in France and other states which feature a semi-presidential or presidential system of government.

[13] *See*, e.g., Art. 42(2) of the Dutch Constitution: 'The King is inviolable; the ministers are responsible.'

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It will be seen that, in the light of these principles, the immunity regime introduced by Law No. 124/2008 appears highly unusual, and that this irregularity lies, in particular, in three features of the quashed law, namely the fact that (a) the quashed law inserts a distinction, in terms of immunity, between the ordinary members of a constitutional body (i.e., Parliament and the Government) and the head thereof, (b) the *lex Berlusconi* places immunity at the disposal of the person of the office holder, and (c) the non-constitutional nature of the *lex Berlusconi* is unique amongst immunity regimes in Europe.

After a general categorisation of immunity regimes and procedures, followed by a systematic presentation of the systems of 11 European states representing the formal and material variety that exist in European immunity legislation, the core principles which can be identified among immunity regimes will be outlined. The three points which set Berlusconi's quashed immunity law apart will then be shown in the light of these principles.

Immunity regimes in Europe: a categorisation

A discussion of the immunities and special procedural regimes applying to ministers, heads of governments and heads of parliaments should, first of all, take into account the notable distinction between systems in which government office is compatible with a parliamentary mandate, and those where this is not the case. The incompatibility of government office and parliamentary mandate can mainly, but not solely, be found in states whose constitutional order emphasises the (formal) separation of powers, to the effect that a corresponding rule exists in most presidential systems, such as the USA.[14] States employing a parliamentarian system of government often – but, again, not always – allow the combination of a parliamentary mandate with ministerial office. In Europe, examples of states where this combination is prohibited are the Benelux states, France and Portugal. States in which parliamentary mandate and government office are compatible are Austria, Germany, Italy, Poland, Spain and the United Kingdom. It should, however, be noted that, where mandate and office are compatible, a parliamentary mandate is usually not required in order to be eligible for government office. A notable European exception is Malta, where only members of the House of Representatives may be appointed ministers or prime minister.[15]

The question of compatibility of office and mandate is important for the issue of immunity of members of the government, because, in systems which provide

[14] M. van der Hulst, *The Parliamentary Mandate: A Global Comparative Study* (Inter-Parliamentary Union 2000) p. 48-49.

[15] Art. 80 Maltese Constitution.

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for this compatibility, members of the government very frequently do hold a parliamentary mandate in addition to their ministerial office, which allows them to enjoy parliamentary immunity. Thus, even in the absence of a special immunity regime for members of the government, ministers and heads of government enjoy the same set of immunities as other parliamentarians.

Therefore, the primary point of reference for comparison for those states whose systems provide for the compatibility of office and mandate must be the systems of parliamentary immunity which the respective states use. In these states, members of the government who do hold a parliamentary mandate are protected in the same way as other parliamentarians. Those who are not parliamentarians do not enjoy immunity, unless there are special provisions to that effect. This is the reason why states in which government office is compatible with a parliamentary mandate sometimes do provide for a special set of immunities and/or a special procedural regime for members of the government. Such a special procedural regime may, for instance, include the use of the highest court or a special designated court for criminal trials of the office-holders in question, or a requirement that the prosecution of office-holders be authorised by (a Chamber of) Parliament.

Those systems in which membership of Parliament and the government are incompatible require a special immunity regime for government offices if those are to enjoy immunity at all.

Immunity regimes compared

The table below gives an overview of the respective immunity regimes for parliamentarians and holders of government office of 11 European states. These states have been selected on account of their representativeness of the broad lines of immunity legislation in Europe. The table indicates per state whether government office is compatible with a parliamentary mandate. In addition, both the immunity regime applicable to parliamentarians and, as the case may be, that which applies to ministers and heads of government (including special procedural regimes, such as special designated trial courts) are described in brief with a reference to the respective constitutional provision. In describing different forms of immunity for parliamentarians, the table distinguishes between *non-accountability* and other immunities (*inviolability*). Non-accountability refers to the freedom of speech in Parliament and freedom of the parliamentary vote. All further-reaching provisions are subsumed under the category of inviolability, which, therefore, includes procedural obstacles that do not render the office-holder immune, but only impose special requirements for prosecution or trial.

The first point to be noted when comparing the immunity regimes listed below is that all systems do provide for basic non-accountability of parliamentarians. In

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most cases, this non-accountability is absolute, i.e., members can only be held accountable by the respective Parliament or House itself. The only exceptions here are Germany and Poland; the first does not provide for non-accountability for defamatory insults, the latter provides that the *Sejm* may authorise judicial proceedings.

Most of the states compared provide for a certain degree of inviolability, most notably freedom from arrest, except in cases authorised by the relevant Parliament or House, or *flagrante delicto*. The only state where no freedom from arrest can be said to exist is the UK.[16] In Portugal, freedom from arrest only extends to crimes not carrying a prison sentence of more than three years. In the Netherlands, inviolability (in the form of special requirements for prosecution and the use of the Supreme Court as the trial court) is limited to crimes committed in office.[17]

In all those states where the parliamentary mandate is compatible with government office, the heads of government and ministers are protected by parliamentary immunity as far as they do hold a seat in Parliament. It is interesting to note that, while all states where office and mandate are incompatible provide for a special immunity and/or procedural regime for heads of state and ministers, three of the six states where office and mandate are compatible nonetheless do have such an additional system in place. In the UK, Germany and Austria, members of the government who are not parliamentarians do not enjoy any immunity or special procedure, while those who are parliamentarians are protected as such. In those states which have a special regime in place for members of the government despite the compatibility of office and mandate, this can functions as a 'safety net' for members of the government who are not parliamentarians.

The special procedures which apply to ministers and heads of government usually include that they must be tried by the Supreme Court (e.g., Spain, The Netherlands) or a special designated court (e.g., Poland, France) or that charges can only be brought by certain officials or at the behest of Parliament (e.g., Belgium, Luxemburg). Where members of the government enjoy immunity, it usually consists of an authorisation requirement.

[16] Since arrest in civil matters (e.g., for debt) has long been abolished. Exceptions are, e.g., arrest for contempt of court (also in civil matters) or detention under mental health legislation.

[17] So-called *ambtsmisdrijven*. According to Art. 76(2) of the Dutch Act on the Judiciary (*Wet op de rechterlijke organisatie*) a crime committed by a member of the States-General, a minister or a secretary of state qualifies as *ambtsmisdrijf* if one of the aggravating circumstances mentioned in Art. 44 of the Criminal Code is present. These aggravating circumstances are the violation, by commiting the criminal act, of a specific duty of the office, and the making use of the power, opportunity or means afforded by the offfice in commiting the criminal act.

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Compatibility of government office with a parliamentary mandate and special immunity provisions for members of government			
State	**Compatibility Mandate/office**	**System of parliamentary immunity** (enjoyed by members of the government if they hold a parliamentary mandate)	**Special immunity or special procedural regime for members of the government** (as the case may be, this system exists on top of regular parliamentary immunity, if the latter is applicable)
AT	Yes	**Bundesrat** (upper chamber): members enjoy the immunity prescribed by federal state constitutions for members of the state chambers of which they are members. **Nationalrat** (lower chamber): *Non-accountability*: absolute for the parliamentary vote, accountability for utterances in Parliament only to the *Nationalrat*. *Inviolability*: members may not be arrested for a criminal act without prior authorisation by the *Nationalrat*, except *flagrante delicto*. The same applies to searches. Members may only be prosecuted for criminal either with the consent of the *Nationalrat* or if the charge is 'manifestly unconnected to their political work.' However, the consent of the *Nationalrat* must in any event be requested if the member if question so demands. In case of such a demand, prosecution may not commence or must be suspended. (Art. 57(1) and (2) Austrian Constitution)	None
BE	No	For both **Chamber of Representatives** and **Senate:** *Non-accountability*: absolute for votes cast and opinions expressed in Parliament by members of either House. (Art. 58 Belgian Constitution) *Inviolability:* members of either house may not be arrested for a criminal offence – except *flagrante delicto* – while Parliament is in session, exception with the authorisation of the House of which he is a member. While Parliament is in session, coercive measures requiring the intervention of a judge – except *flagrante delicto* – may only be ordered by the President of the Court of Appeal at the request of the competent judge and must be communicated to the President of the relevant House. Either House may, during session and at the request of a member, suspend judicial proceedings against the member by a two-thirds majority. Detention of a member of either House or his prosecution before a court is suspended if the House of which he is a member so requests. (Art. 59 Belgian Constitution)	Yes: for criminal acts both in the execution of their office and outside the scope of the office (if tried while in office), ministers may only be tried before the Court of Appeal, with the possibility of appeal to the united chamber of the Court of Cassation. Prosecution only by the public prosecutor of the competent Court of Appeal. Prosecution and trial only possible if authorised by the Chamber of Deputies, except in case of *flagrante delicto*. (Art. 103 Belgian Constitution)

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FR	No	For both **Senate** and **National Assembly**: *Non-accountability*: absolute for votes and opinions expressed by a member of Parliament in the exercise of his functions. *Inviolability*: members may not be arrested or otherwise be subjected to a criminal or correctional measure depriving him of or restricting him in his liberty, except with the authorisation of the Bureau of the Chamber of which he is a member or *flagrante delicto*. Detention, measures depriving a member of or restricting him in his liberty, as well as prosecution, must be suspended at the demand of the chamber of which he is a member. (Art. 26 French Constitution)	Yes: for crimes and misdemeanours committed in the exercise of the office, ministers are exclusively tried by the Court of Justice of the Republic (consisting of 12 parliamentarians of both chambers and 3judges of the Court of Cassation). The Court of Justice is seized by the procurator-general of the Court of Cassation either on his own motion or on referral by a petitions committee upon petition by an alleged victim of a crime committed by aminister. (Art. 68-1 and 68-2 French Constitution)
DE	Yes	**Bundesrat** (upper chamber): immunity regime of the *Länder* parliaments applies. **Bundestag** (lower chamber): *Non-accountability*: absolute (except to the *Bundestag* itself) for votes or statements made in the *Bundestag* or a committee. This does not apply to defamatory insults. *Inviolability*: members may not be arrested, otherwise restricted in their freedom or prosecuted for a punishable act, except *flagrante delicto* or with prior authorisation by the *Bundestag*. Any criminal procedure, detention, or other measure restricting the liberty of a member must be suspended at the demand of the *Bundestag*. (Art. 46 German Basic Law)	None
IT	Yes	For both **Chamber of Deputies** and **Senate**: *Non-accountability*: absolute for members of Parliament (both Houses) for votes cast or opinions expressed in the performance of their function. *Inviolability*: members of either House may not be searched, arrested or otherwise deprived of their liberty without the prior authorisation by the respective House to which they belong or *flagrante delicto* in case of an offence for which arrest is mandatory. Authorisation is also required for surveillance of communication and correspondence. (Art. 68 Italian Constitution)	Yes: Members of the government are subject to normal justice for crimes committed in the exercise of their office; however, prosecution requires the authorisation of either the Senate or the Chamber of Deputies. No special regime for crimes unconnected to the office. (Art. 96 Italian Constitution)

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LU	No	For **Chamber of Deputies** (unicameral): *Non-accountability*: absolute, civil and criminal for opinions expressed and votes cast in the exercise of the functions of a Deputy. (Art. 68 Lux. Constitution) *Inviolability*: The Constitution explicitly provides that Deputies *may* be prosecuted in criminal matters, also while the Chamber is in session, except where this is prevented by non-accountability. However, while the Chamber is in session, Deputies may not be arrested except with the prior authorisation by the Chamber or *flagrante delicto*. Such authorisation is not required for the execution of a criminal sentence, also where it results in the deprivation of a Deputy's liberty. (Art. 69 Lux. Constitution)	Yes: the Chamber of Deputies has a discretionary power to accuse members of the government; they are tried and sentences by the Supreme Court. 'Cases of responsibility, punishments and procedure, both in cases of accusation by the Chamber and legal recourse by the injured party' to be prescribed by law. (Art. 82 Lux. Constitution). Until such a legal provision has been made, the Supreme Court tries members of the government in united assembly, specifying in its ruling the crime and the punishment. (Art. 116 Lux. Constitution)
NL	No	For 'Members of the **States-General**, thus both **1st** and **2nd Chamber**: *Non-accountability*: members of the States-General, ministers, secretaries of state and other persons participating in deliberations of the States-General are absolutely non-accountable for what they have said or conveyed in writing in the States-General or a committee thereof. (Art. 71 Dutch Constitution) *Inviolability*: for crimes in office: see right column. Inviolability for crimes other than in office: none.	Yes: members of the States-General, ministers and secretaries of state are to be prosecuted before the Supreme Court for crimes committed in the exercise of their office (*ambtsmisdrijven*), also after having left office. Prosecution is instigated by royal decree or by order of the Second Chamber of Parliament. (Art. 119 Dutch Constitution)
PL	Yes However, incompatibility with a variety of other offices, see Art. 103 Polish Constitution	For both **Sejm**(lower chamber)and **Senate**: *Non-accountability*: for activities performed within the scope of a Deputy's or Senator's mandate, except to the *Sejm* or Senate itself, respectively, or, if the rights of a third party are infringed, in proceedings authorised by the *Sejm* or Senate. *Inviolability*: From start (announcement of election results) to expiry of the mandate, criminal proceedings cannot be instigated, except with the prior authorisation by the *Sejm* or Senate. Criminal proceedings instigated before the election must be suspended, at the request of the *Sejm* or Senate, until the end of the mandate. A deputy or senator may choose to waive this immunity. In that case, the above does not apply (except non-accountability). A deputy or senator may not be arrested or detained without the authorisation of the respective House, except *flagrante delicto* or where arrest is necessary to 'secure the proper course of proceedings.' Arrests must be notified to the respective Chamber. (Art. 105 and 108 Polish Constitution, details in the Act on the Performance of the Mandate of a Deputy or Senator of 9 May 1996)	Yes: members of the government are tried by the Tribunal of State for an infringement of the Constitution or statutes, as well as for the commission of an offence connected with the duties of their office. They are brought before the Tribunal by a vote of three-fifth of the members of the Chamber of Deputies (*Sejm*), held upon a motion of the President of the Republic or at least 115 Deputies. (Art. 156 Polish Constitution) The Tribunal of State is a Special Court, composed of the First President of the Supreme Court, two deputy chairpersons and 16 members elected by the *Sejm*. The deputy chairpersons and at least half the members must be qualified for judicial office. (Art. 198 Polish Constitution)

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PT	No	For the **Assembly of the Republic** (unicameral): *Non-accountability*: absolute for votes and opinions expressed in the performance of the mandate of members of the Assembly of the Republic. *Inviolability*: members may not appear in court as 'makers of declarations' or defendants, save with the authorisation of the Assembly. If there is 'strong evidence' that a member has committed a crime for which the maximum punishment is more than three years imprisonment, the Assembly is obliged to give its authorisation. Members may not be detained, arrested or imprisoned without the authorisation of the Assembly, except *flagrante delicto* or for a crime carrying a maximum sentence of more than three years imprisonment. If criminal proceedings are instigated against a member, the Assembly decides whether to suspend him to allow the proceedings to go through. Suspension is obligatory where the alleged crime carries a maximum sentence of more than three years imprisonment. (Art. 157 Port. Constitution)	Yes: members of the government may not be detained, arrested or imprisoned without the authorisation of the Assembly of the Republic, except for crimes punishable by more than three years imprisonment and in cases of *flagrante delicto*. Where criminal proceedings are brought against a member of the government, the Assembly decides whether to suspend him/her from office in order to allow proceedings to take their course (i.e., if immunity is lifted, the member of the government cannot stay in office). Suspension is obligatory if the member of the government is prosecuted for a crime punishable by more than three years imprisonment. (Art. 196 Port. Constitution)
ES	Yes	For **Cortes Generales** (both **Congress and Senate**): *Non-accountability*: absolute for votes and opinions expressed in the exercise of the functions of congressmen and senators. *Inviolability*: During their term of office, senators and congressmen may not be arrested except *flagrante delicto*. They may neither be indicted nor tried without the authorisation of their respective House. In case of a criminal trial against a senator or congressman, the competent court is the criminal section of the Supreme Court. (Art. 71 Spanish Constitution)	Yes: in criminal matters, members of the government are always tried before the Supreme Court. If the charge is treason, proceedings can only be brought upon the motion of one quarter of the members of Congress (lower chamber of Parliament) and with the approval of the majority of its members. (Art. 102 Spanish Constitution)
UK	Yes	For **Parliament**, comprising **House of Commons** and **House of Lords**: *Non-accountability*: absolute, ex Art. 9 of the Bill of Rights 1689: 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' Possibility of waiver (by individual member) in case of defamation proceedings, ex S. 13 Defamation Act 1996. *Inviolability*: Freedom from arrest only in civil matters, however, arrest in civil matters is virtually non-existent. Therefore, virtually no inviolability.	None

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Do basic principles of immunity law exist?

In referral order No. 9/2009, the referring judge of the *Tribunale di Roma* states that the contested Italian law constituted a 'unique case' in the European landscape of immunity. The question is thus whether there is a degree of communality between European immunity regimes which is sufficient to make this 'uniqueness' particularly remarkable, or even to make a doctrinal argument against Berlusconi's law. In other words, is there a core of underlying principles which unites European immunity systems and a deviation from which would be hard to justify for objective reasons?

The similarities between the immunity systems compared above seem to suggest that such a set of principles does exist. There appears to be far-reaching consensus[18] that parliamentarians and members of the government who may (for the sake of a clear separation of powers) not be parliamentarians must be afforded a certain degree of protection from unjustified and contingently politically motivated criminal charges.[19] Therefore, criminal trials against parliamentarians and members of the government may usually proceed once Parliament, after having scrutinised the charged for political motivation, has authorised them. As an extra safeguard, it is frequently only the highest court of a state which may try such cases. However, there also seems to be consensus that, apart from non-accountability which is taken to be a basic requirement for effective parliamentary work,[20] the application of the criminal law must not be barred unconditionally and the immunity must not be absolute – nobody may be saved from trial, unless absolutely necessary in the interest of other constitutional values, such as the proper working of the state.

Another similarity – in a negative sense – is that none of the compared states' constitutions make any further distinctions in immunity provisions than those between the different organs of state; different immunity provisions may exist for (the individual chambers of) Parliament, the Government and the head of state respectively, but in no case is there a further differentiation between different

[18] This basic consensus is near-universal. Only very few states in the world do nothave a system of parliamentary immunity at all, e.g., Cuba, Belarus and North Korea. *See* for reference: *Parliamentary Immunity*, background paper prepared by the Interparliamentary Union (Draft Version), Geneva, September 2006.

[19] In those systems where office and mandate are compatible and which do not explicitly provide for additional safeguards for members of the government, the reasons for such an omission can probably be attributed to the fact that, in reality, members of the government are most likely to be parliamentarians, and to historical reasons: in times when representative democracy and parliamentarianism were more fragile, it was the government which parliamentarians had most to fear from. This is exemplified by the immunity regimes of many young or 'troubled' democracies, where parliamentary immunity is often very rigid, such as Armenia, Russia and Turkey.

[20] Van der Hulst, *supra* n. 14 at p. 63.

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positions *within* one organ, such as between a member of parliament and the president of a chamber, or between a minister and the prime minister or chancellor. This may have practical, historic or systemic reasons, as not all constitutions recognise functional differences between these positions.[21] However, where there is no such *de iure* distinction between functions, a distinction in immunity provisions could easily be at odds with the principle of equality. Even if *de facto* functional differences exist, these must be regarded as a very weak foundation for an instrument as incisive as immunity from criminal trial, as long as they are not substantiated by formal – i.e., constitutional – recognition on which differences in legal status could be based. Also where constitutions do assign different tasks to different positions, but where these differences do not in themselves justify or necessitate a difference treatment as regards immunity, the principle of equality would potentially be violated. The heads of parliamentary chambers and the heads of governments are, therefore, generally treated as *primi inter pares*.

A similarity which carries strong implications as to the underlying principles of immunity law lies in the fact that immunity is not usually at the free disposal of the member of parliament or the government in his or her *personal* capacity: except in Poland, where parliamentarians may waive their immunity to stand criminal trial, and in the UK, where there is the (highly controversial) possibility of a personal waiver in defamation suits, only the respective Parliament (or a body thereof) may lift the immunity, while basic non-accountability can usually not be lifted at all. This fact hints at the existence of a principle according to which immunity is meant to serve primarily the office, not the officeholder personally, even though the latter is of course the eventual beneficiary of its application[22] – when protected by immunity, the office holder acts as a proxy for the office. If immunity provisions were to be interpreted otherwise, this would result in a paradoxical inconsistency with the principles of the rule of law and equality before the law enshrined in most constitutions of democratic states.

[21] This is particularly true for ministers and prime ministers. The Dutch Constitution, for example, merely specifies that the prime minister is the chairman of the Council of Ministers (Art. 45) and assigns him a role in the appointment of the other ministers (Art. 48). The office of prime minister of the UK has evolved gradually and has only gained statutory recognition, rather indirectly, by being assigned a specific salary in the Ministers of the Crown Act 1937.

[22] This argument is aided by the fact that immunity can also have, or be perceived to have, adverse effects on the person subject to it. *See*, e.g., *Kart* v. *Turkey* (I+II), ECHR 8 July 2008 and 2 Dec. 2009 (Grand Chamber), No. 8917/05. In first instance, the European Court of Human Rights found a violation of Art. 6 ECHR in that Mr. Kart, a Member of the Turkish Parliament was, against his will, barred from standing criminal trial by his immunity. However, this judgment was reversed on appeal by the Grand Chamber, which found no violation.

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Lastly, it is particularly noteworthy that in all states compared any immunity which exists is laid down in the state's constitutional document.[23] While this alone does not justify the assertion that immunity legislation *must* necessarily be of constitutional nature, the underlying principle is inherent and deeply rooted in the system of most democratic constitutions: based on the principle, mentioned above, that immunity primarily accrues to the organ or office of state rather than to the person of the office holder, it is clear that immunity legislation pertaining to a constitutional organ regulates the status of that organ *vis-à-vis* other constitutional organs and the citizens. This relationship is inherently a subject for constitutional legislation, as it contributes to defining the functioning of the state. More compellingly, however, the constitutional status of immunity legislation is necessitated by its very nature as an exception to fundamental principles of law. Since most states guarantee in their constitutions for the equality of all citizens before the law and for a right to a legal remedy in court, immunity provisions will inevitably create an exception to these basic constitutional values; for the benefit of the proper working of a state organ, citizens may (temporarily) be denied a legal remedy. The course of justice is obstructed, if not blocked. Immunity would, therefore, generally have to be regarded as unconstitutional, were it not itself justified by a higher purpose also enshrined in the constitutional order. Evidently, this higher purpose is only present, and recognised by most constitutions, where immunity serves the protection of central institutions of the state. Consequently, since immunity creates exceptions to the core constitutional value of equality before the law against which it must always be balanced, immunity legislation must be constitutional legislation by definition. States generally adhere to this line of reasoning. The European Council's Commission for Democracy through Law (Venice Commission) has observed that '[a]s a rule, the legal foundation of immunity is enshrined in the fundamental statutes of states.'[24] This means that immunity legislation cannot usually be introduced, amended or abolished via the avenue of ordinary legislative procedure, and that no immunity exists outside that which is stipulated in constitutional legislation.

The comparison of a variety of immunity regimes from different countries which, however, share certain common elements of constitutionalism (such as the general adherence of the constitution to the rule of law and the principle of equality) thus leads to the conclusion that the existence of a number of core principles

[23] The UK does not have a written constitution in a single document; however, the Bill of Rights 1689 is considered one of several documents in which important parts of the UK Constitution are laid down.

[24] European Commission for Democracy through Law (The Venice Commission), 'Report on the Regime of Parliamentary Immunity', Strasbourg, 1996, document CDL-INF(1996) 007E, para. 17.

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in immunity law can indeed be assumed. The principles are: (1) that the necessity of a certain degree of protection is uncontested and that the existence of immunity in itself is, therefore, justifiable; (2) that the same immunity should apply to different offices within one organ of state, at least where a difference in immunity is not necessitated by an appropriate difference in the tasks connected to the office; (3) that immunity accrues principally to the office, not to the person of the office-holder; and (4) that immunity legislation must be constitutional in nature.

Ruling No. 262/2009 in the light of the principles of immunity

From the discussion of ruling No. 262/2009 and from the description of the otherwise applicable Italian immunity regime, it is readily apparent that Law No. 124/2008 provided for a very substantial addition to the regime prescribed by the Constitution. While Article 96 of the Constitution explicitly places all members of the Italian government within the realm of ordinary criminal justice, however subject to authorisation by either chamber of Parliament, the new law envisaged an extremely broad immunity: first, trials were to be suspended from the moment of taking up office until the moment of leaving office. This must be taken to apply both to trials which relate to criminal acts that had already begun prior to the commencement of the term in office, thus definitely unconnected to the exercise of the office, and to those which might occur after that moment. This provision created thus a protection which is much broader than that granted by Articles 96 and (for the heads of the Houses of Parliament) 68 of the Constitution, which leave any proceedings that are already underway at the moment of taking up office untouched. The law also made no distinction between crimes committed in the exercise of the office and crimes committed in an entirely personal capacity. Second, while the immunity of Article 96 provides for a possibility for either house of Parliament to allow proceedings against a member of government, no such possibility existed under the new law; a suspension of proceedings would, therefore, have taken place by operation of the law.

In addition to the very wide scope of the envisaged immunity, the contested law contained three points which were manifestly at odds with the principles established above.

First of all, it inserted a distinction between offices which, in all other states considered in the above comparison, are treated as equivalent, in terms of immunity, to other offices within the same organ of state. The *Corte Costituzionale* addressed this point in its ruling on Law No. 124/2008. Among others, it ruled that the differences between the tasks of the prime minister and the other ministers, and the presidents of the Houses and their members respectively, did not warrant the envisaged difference in immunity regimes. With this opinion, the Court placed

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itself firmly within the company of other European immunity regimes, none of which provides for the distinctions prescribed by the contested law, and thus reinforced the position that, in the absence of compelling material differences between the tasks of different offices within one organ, they should enjoy equal immunities.

Another point which made Law No. 124/2008 appear squarely at odds with the principles established above was sub-paragraph (2) of Article 1, which provided that '[t]he accused, or his representative endowed with a special power of attorney, may at any time waive the suspension,' thus placing the application of the whole immunity entirely at the disposal of the persons occupying the respective office. The main argument against equipping an office-holder enjoying immunity with such a waiver is that immunity is meant to serve the office itself, and that this function would be undermined it immunity were to be waived by the office-holder in his or her personal interest. The Italian Constitutional Court confirmed that the purpose of Law No. 124/2008 was to protect the respective offices and thereby recognised this principle. It can be concluded that also the possibility of a waiver constituted an unjustified irregularity in the light of the basic principles of immunity which are adhered to across Europe.

The Italian Constitutional Court also agreed with the argument that Law No. 124/2008 was unconstitutional on procedural grounds, since the constitutional nature of the provisions it contained required the use of the special legislative procedure for constitutional amendment. This view is certainly congruent with the constitutional logic inherent in most systems, which demands (as explained above) that immunity must take the form of constitutional legislation.

In its assessment of Law No. 124/2008, the *Corte Costituzionale* has thus illustrated that immunity legislation in Italy is bound by a certain set of basic rules which, by means of comparison, can be distilled from the – albeit very different – immunity regimes of a variety of European states. Although it is not all too surprising that such a set of principles can be identified – since their existence is owed to the common constitutional structure and values which most European states share – the notion of these basic principles of immunity law is nonetheless important, since they dictate the range of legislative options in the inherently controversial sphere of immunity legislation.

Conclusion

Legislation in the controversial field of immunity always needs to strike a delicate balance between different legal and, by extension, societal needs. In comparing the different legislative options at which the constitutional legislators of various European states have arrived, it can be observed that, in terms of positive law, this balance may take on a variety of shapes in which, in particular, the personal and

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material scope of immunity differ greatly. However, ruling No. 262/2009 of the Italian Constitutional Court, seen in the light of a large number of other systems which adhere to similar constitutional structures, illustrates that immunity legislation is bound by rules which apply throughout and which are derived from what may be seen as a common set of fundamental principles to be found at the basis of all European immunity regimes. Hence, immunity is necessarily an exception to equality before the law, against which it must be balanced and justified. Because of its nature,it may only be regulated on a constitutional level. Finally, immunity is an institutional privilege and not a personal one and, in line with the principle of equality, distinctions between different offices within one constitutional organ are not justified unless the *de iure* inequality of these offices merits the application of different immunity regimes.

On all these points, the Constitutional Court found Law No. 124/2008 to have overstretched the tolerance within which most immunity systems are located and which also sets limits to the Italian legislator, through the constitution by which it is bound.

The last word in Italy's ongoing struggle to strike a permanent immunity balance has, however, probably not been spoken yet. While the 'match' with the constitutional court seems to be over for now, the Italian Parliament has passed an ordinary law, pursuant to which the president of the Council of Ministers may invoke a 'legitimate impediment' to appear at a hearing of a criminal proceedings in case of concurring exercise of one or more of the functions essential to the exercise of governmental tasks.[25] This provision is of a transitory nature, in that it will only apply for 18 months, i.e., the time within which Parliament is expected to legislate again, by way of a constitutional law, on the immunity regime of the prime minister and the ministers. At the time of writing, a bill of constitutional rank is being discussed by the government concerning the immunity of the prime minister, the ministers and the President of the Republic. Time will tell whether the constitutional court will be called upon to intervene again and what its response is going to be.

Post scriptum *(added at the time of publication)*

In a recent ruling,[26] the Italian Constitutional Court has declared Law No. 51 of 7 April 2010 partly unconstitutional.

This law provides in Article 1(3) that judges are to adjourn criminal court proceedings against a member of the government if the person concerned can invoke a 'legitimate impediment' to attending court, among which certain types

[25] Law No. 51 of 7 April 2010, *Gazz. Uff.* No. 81.
[26] *Corte Costituzionale*, ruling No. 27 of 13 Jan. 2011.

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of government business. The law also provides, in Article 1(4), that proceedings must be adjourned where the presidency of the Council of Ministers (i.e., the prime minister) states that the impediment is 'continuous and related to the carrying out of [government functions].'

In the view of the *Corte Costituzionale*, Article 1(3) is unconstitutional as far as it is interpreted in a way which does not allow the criminal court a discretionary decision as to the existence of a 'legitimate impediment', whereas Article 1(4) is unconstitutional in any event, since it evidently places the discretion to establish a 'legitimate impediment' with the prime minister, rather than a court. In both cases, the Court sees a conflict with Articles 3 (equality before the law) and 138 (constitutional amendment procedure) of the Constitution, since Article 1(4) of Law No. 51/2010 and the quashed interpretation of Article 1(3) establish an institutional privilege which, on the one hand, is at odds with the principle of equality and, on the other hand, would require a constitutional amendment or a statute of constitutional rank.

Apart from these qualifications, however, the Constitutional Court leaves the remainder of the law on 'legitimate impediment' intact. In doing so, it seems to accept that this the parts of the law which remain valid do not introduce a new element of immunity. Rather, the Court considers them to constitute an addition to ordinary criminal procedure.

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