

## ■ ARTICLES

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# Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe

## ABSTRACT

The constitutions of European states often contain too many categories of officials covered by too broadly defined immunities. At the same time, there is consensus among international organizations that immunities have to be limited to allow effective prosecution of corruption offences. This article examines how public law in European states could limit criminal immunities for officials.

## 1. INTRODUCTION

Surveys show a strong belief that public officials' immunity from prosecution is supporting corruption.<sup>1</sup> Prominent cases, such as that of former Ukrainian Prime Minister Lazarenko, who, from 1996-1997, embezzled more than US\$ 100 million,<sup>2</sup> and numerous less prominent cases all over Europe, involving parliamentarians,<sup>3</sup> judges,<sup>4</sup> and heads of state,<sup>5</sup> support this public perception.

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- 1 See e.g. Transparency International's Bribe Payers Survey 1999, p. 4 (63% of respondents to a survey by Gallup International see 'public official's immunity' as one of the 'main factors that have contributed to an increase in corruption', ranking it the 2<sup>nd</sup> most important factor), <[www.transparency.org/policy\\_research/surveys\\_indices/bpi](http://www.transparency.org/policy_research/surveys_indices/bpi)> accessed 1 March 2011.
  - 2 Todd S. Foglesong, Peter H. Solomon, 'Crime, Criminal Justice, and Criminology in Post-Soviet Ukraine' (National Institute of Justice, July 2001) <[www.ncjrs.gov/pdffiles1/nij/186166.pdf](http://www.ncjrs.gov/pdffiles1/nij/186166.pdf)> accessed 1 March 2011.
  - 3 See e.g. payments by the 'Flick'-Holding to several Members of the German Bundestag in the years 1969 to 1989, Landgericht Bonn, 27 F 7/83, 16 February 1987, ending with an acquittal of one Member of Parliament from the charges of bribery despite 'grave points of suspicion'.
  - 4 See e.g. the complaint of the General Prosecutor of Albania about immunities being a problem of efficiently investigating two corrupt judges in December 2009, 'Albania Judge under Investigation for Corruption', *AlbanianEconomy* (Tirana, 2 December 2009).
  - 5 See e.g. the Italian Prime Minister seeking to get immunity from corruption charges through several immunity laws, among others Law No. 124/2008 of 22 July 2008, 'Disposizioni in materia di sospensione del processo penale nei confronti delle alte cariche dello Stato' [suspending criminal procedures for high state officials]; cf. Sascha Hardt, Mariolina Eliantonio, "'Thou Shalt be Saved" (from Trial)? The Ruling of the Italian Constitutional Court on Berlusconi's Immunity Law in a Comparative Perspective' (2011) 7 *EuConst* 17.

The earliest records of parliamentary and judicial immunity date from the 13<sup>th</sup> century; executive immunity is as old as Kings have been inviolable.<sup>6</sup> In pre-modern political systems, these immunities were necessary to protect one power against abuse from another. In modern states, under the rule of law, this function has become more or less obsolete. This is why there is consensus among international organisations, such as the Council of Europe (CoE),<sup>7</sup> the OECD,<sup>8</sup> the OSCE,<sup>9</sup> or the UN,<sup>10</sup> that criminal immunities have to be limited to allow effective prosecution of corruption offences: '[I]mmunities are afforded to far too many people and in a needlessly wide and general fashion. These are widely exploited by corrupt politicians [...]. There are only very restricted areas in which immunity can be justified.'<sup>11</sup>

The Council of Europe's Group of States against Corruption (GRECO) has been evaluating the legislation of its 47 Member States and has often raised concern over too many categories of officials covered by too broadly defined immunities.<sup>12</sup> Despite this international effort, there is no comparative literature on how the legislation of European states could limit criminal immunities for their officials.

## 2. CRIMINAL INVIOABILITY

There are two forms of immunity. One is inviolability, according to which public officials are criminally liable, but cannot be prosecuted for the duration of their term in office. Almost all of the 47 Council of Europe and 27 European Union Member States grant their parliamentarians criminal<sup>13</sup> inviolability, but only some guarantee such immunity also to their executive or judicial officials:

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- 6 Geoffrey. R. Elton, *The Tudor Constitution* (Cambridge University Press, Cambridge 1982) 265-268; Donald Limon, William R. McKay, *Erskine May: Parliamentary Practice* (LexisNexis, London 1997) 68.
  - 7 20 Guiding Principles for the Fight against Corruption, Principle No. 6: 'to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society' <[www.coe.int/t/dghl/monitoring/greco/documents/Resolution\(97\)24\\_EN\\_.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN_.pdf)> accessed 1 March 2011.
  - 8 OECD's Anti-Corruption Network, Istanbul Action Plan, Recommendation 10: 'Adopt clear, simple and transparent rules for the lifting of immunity and [...] the scope of such immunities to ensure that they [...] cannot be abused for shielding persons from criminal liability for corruption offences.' <[www.oecd.org/dataoecd/47/9/41726212.pdf](http://www.oecd.org/dataoecd/47/9/41726212.pdf)> accessed 1 March 2011.
  - 9 OSCE Resolution on Limiting Immunity for Parliamentarians (2006), p. 33: 'Provide clear, balanced, transparent, and enforceable procedures for waiving parliamentary immunities in cases of criminal acts or ethical violations' <[www.osce.org/pa/19799](http://www.osce.org/pa/19799)> accessed 1 March 2011.
  - 10 United Nations Convention against Corruption (UNCAC) of 31 October 2003, Art. 30 par. 2: 'appropriate balance between any immunities [...] and [...] effectively investigating, prosecuting and adjudicating [corruption] offences'.
  - 11 11<sup>th</sup> International Anti-Corruption Conference (2003), Findings, p. 4, <[www.11iacc.org/download/finish/11IACC\\_Seoul\\_Findings.doc](http://www.11iacc.org/download/finish/11IACC_Seoul_Findings.doc)> accessed 1 March 2011.
  - 12 <[www.coe.int/t/dghl/monitoring/greco/evaluations/round1/reports\(round1\)\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/reports(round1)_en.asp)> accessed 1 March 2011.
  - 13 In the UK, immunity applies only to civil proceedings, covers all offences, but protects deputies only from (civil) arrest and imprisonment (Parliamentary Privilege Act of 1770).

Criminal inviolability <i>in Member States</i>	CoE (47)	EU (27)	EU 1995 (15)
Parliamentarians	43	25	13
Head of state	40	22	11
Prime minister	19	11	6
Ministers	16	10	5
Ombudsperson etc.	10	3	2
High Court Judges	20	8	1
Judges	16	4	0
Chief Prosecutor	5	0	0
Prosecutors	4	0	0
Judicial Council	3	0	0

Statistics show that a wide range of officials covered by immunities, especially in the judicial sector, is a phenomenon of Eastern Member States of the Council of Europe and of the European Union. Italy is the only Western Member State granting immunity in the judicial sector.<sup>14</sup> Limiting inviolability can be done in one of the following ways:

### 2.1. Categories of Officials

Some Member States, such as Serbia, grant immunity for up to seven categories of officials.<sup>15</sup> However, the list of officials covered by inviolability can, in practice, be very short: Bosnia and Herzegovina grants criminal inviolability to none of its office holders. The Netherlands,<sup>16</sup> the UK,<sup>17</sup> and San Marino,<sup>18</sup> foresee inviolability only for their heads of state, the King or Queen, and the *Capitani Reggenti*, respectively. In Germany and Hungary, only parliamentarians and presidents are

14 Constitutional Law on the Independence of the Constitutional Court, Law No. 1 of 9 February 1948, Art. 3 par. 3 (immunity for members).

15 Artt. 103, 119, 134, 138, 151, 153, 162, 164 Constitution of 30 September 2006: Parliamentarians, President, Prime Minister, Judges, Prosecutors, Civil Defender, Members of the Constitutional Court.

16 Art. 42 par. 2 Constitution of 30 March 1814, revised 17 February 1983, last change 22 August 2008.

17 Ministry of Justice, 'The Governance of Britain, Review of the Executive Royal, Prerogative Powers: Final Report' (2009), p. 34.

18 Art. 36 Law No. 21 of 11 March 1981.

inviolable.<sup>19</sup> As both Constitutions allow parliamentarians to keep their mandate when being elected members of government,<sup>20</sup> such members of government enjoy inviolability as well. All other European states have a longer list of office holders covered by inviolability; some include even ombudsmen, members of the court of audit, or members of judicial councils.

## 2.2. Acts In- and Off-Duty

Inviolability can be limited to acts related to an official's duties, as is the case with ministers in Italy and Romania.<sup>21</sup> In Serbia such limitation applies to judicial officials.<sup>22</sup> As for parliamentarians, Art. 57 of the Austrian Constitution<sup>23</sup> points in this direction:

Other legal action [than arrest and searches] on the ground of a criminal offence may be taken against members of the House of Representatives without the House of Representatives' consent only if it is manifestly not connected to the political activity of the member in question.

## 2.3. Scope of Protection

Where public officials are inviolable, they are generally exempt from criminal proceedings in a broad range of issues.<sup>24</sup> There are some exceptions: In Andorra,<sup>25</sup> Montenegro,<sup>26</sup> and Serbia,<sup>27</sup> judicial officials enjoy criminal immunity only from arrest; similarly, under the Irish<sup>28</sup> and Norwegian Constitutions parliamentarians are immune with regard to arrests in parliament or on the way to it:

Representatives on their way to and from the Parliament, as well as during their attendance there, shall be exempt from personal arrest, unless they are apprehended in public crimes [flagrante delicto]...<sup>29</sup>

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19 *Germany*: Artt. 46 par. 2, 60 par. 4 Constitution of 23 May 1949, last change 21 July 2010; *Hungary*: Artt. 20 par. 3, 31/A par. 1 Constitution of 20 August 1949, last change 23 December 2002.

20 *Germany*: Hans D. Jarass, Bodo Pieroth, *Grundgesetz* (Beck, Munich 2011), Art. 38 note 25; *Hungary*: Art. 20 par. 5 Constitution (n 19).

21 *Italy*: Art. 96 Constitution of 27 December 1947, last change 2 October 2007; *Romania*: Art. 109 par. 2 Constitution of 8 December 1991, last change 29 October 2003.

22 Artt. 151 par. 2, 153, 162 par. 2 Constitution of 30 September 2006.

23 Of 10 November 1920, revised 7 December 1929, last change 4 January 2008.

24 E.g. *Czech Republic*: Art. 27 par. 4 and 5 Constitution of 16 December 1992, last change 1 March 2003 (immunity from custody and criminal prosecution).

25 Law on Justice [Llei qualificada de la Justícia] of 3 September 1993: Art. 77 par. 2 (judges), Art. 90 (prosecutors); Law on the Constitutional Court [Llei qualificada del Tribunal Constitucional] of 3 September 1993: Art. 17 (Members of Constitutional Court).

26 Art. 122 par. 2 S. 2 Constitution of 19 October 2007.

27 Art. 162 par. 2 Constitution (n 22).

28 Art. 27 par. 13 Constitution of 1 July 1937, last change 24 June 2004.

29 Art. 66 Constitution of 17 May 1814, last change 20 February 2007.

The French Constitution is somewhat more protective by preventing arrests or detention of parliamentarians in any situation, but still subjects parliamentarians to any other measure of criminal proceeding:

No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the House of which he is a member.<sup>30</sup>

Italy goes one step further, with personal or house search being covered by inviolability in addition to arrest.<sup>31</sup> Inviolability under the German Constitution covers all aspects of criminal proceedings. However, the Bundestag declares general consent for investigations at the beginning of each term.<sup>32</sup> Therefore, individual approval by Parliament is only required for indictments and restrictions of personal freedom, and is always granted. The constitutionality of this general consent for investigations is problematic, because the Constitution only allows decisions on a case-by-case basis<sup>33</sup>: The Bundestag has to be informed of each investigation in advance and can re-invoke immunity at any stage. This information poses a risk, as the confidentiality of the investigation cannot be guaranteed.

#### 2.4. Timeframe

Most constitutions – implicitly or explicitly – include criminal acts or proceedings from before entering office<sup>34</sup>; in Italy, even the time after the term of office is covered for executives.<sup>35</sup> Such wide timeframes can be limited: In a few states, such as Belgium<sup>36</sup>, Iceland<sup>37</sup>, and Luxembourg<sup>38</sup>, parliamentary inviolability covers

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30 Art. 26 par. 2 Constitution of 4 October 1958, last change 23 August 2008.

31 Art. 68 par. 2 Constitution of 27 December 1947, last change 2 October 2007.

32 Annex 6 'Decision of the Bundestag relating to the waiver of immunity of Members of the Bundestag' of the Rules of Procedure of 2 July 1980, last change 16 July 2010.

33 Michael Sachs, *Grundgesetz, Kommentar* (Beck, Munich 2009), Art. 46 no. 20; Council of Europe's Venice Commission, Opinion no. 361/2005 of 20 March 2006 on "The draft decision on the limitation of parliamentary immunity and the conditions for the authorization to initiate investigation in relation with corruption offences and abuse of duty of Albania", <[www.venice.coe.int/docs/2006/CDL-AD\(2006\)005-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)005-e.asp)>.

34 *Poland*: Art. 105 par. 3 Constitution of 2 April 1997; *Turkey*: Art. 83 par. 2 Constitution of 7 November 1982, last change taken into account: 17 October 2001 (last actual change: 12 September 2010).

35 Art. 96 Constitution (n 31).

36 Art. 59 par. 1 Constitution of 17 February 1994, last change 22 December 2008: 'No member of either of the two Houses can, during the duration of a session, be arrested or prosecuted for repression, except with the authorization of the House of which he is a member [...].'

37 Art. 49 par. 1 Constitution of 17 June 1944, last change 24 June 1999: 'No Member of the House of Representatives may be subjected to custody on remand during a session of the House of Representatives without the consent of the House of Representatives, nor may a criminal action be brought against him [...].'

38 Art. 69 sent. 1 Constitution of 17 October 1868, last change 12 March 2009: 'No deputy can be prosecuted or arrested in a repressive matter in the course of a session, without the Chamber's authorization [...].'

only the time when parliament is in session. However, for executive or judicial officials such a limitation does not make sense.

## 2.5. Exemptions for Corruption Offences

A simple way of limiting immunities concerning corruption offences is an explicit exemption in the constitution. European states make exemptions for parliamentarians, executive and judicial officials for certain categories of criminal offences, such as 'grave crimes',<sup>39</sup> however, not specifically for corruption offences. Portugal excludes criminal acts with a maximum imprisonment penalty of more than three years from the freedom from arrest and detention for parliamentarians, and obliges parliament to lift immunity for all other aspects of criminal proceedings.<sup>40</sup> Bribery, which, in Portugal, carries a maximum penalty of five to eight years,<sup>41</sup> falls under this category. In Turkey, prosecution of public employees is subject to permission of the respective authorities,<sup>42</sup> however, corruption cases are exempt from this requirement.<sup>43</sup>

## 2.6. Mode of Application

In most Council of Europe Member States, inviolability applies automatically. Another approach, however, is that parliaments invoke inviolability whenever necessary. The Constitution of one of the sixteen regional parliaments in Germany requires the parliament to evoke inviolability, if it wants one of its members to be exempt from criminal prosecution, while only freedom from detention applies automatically:

On the request of Parliament, each criminal proceeding or investigation against a Deputy or each detention or other restriction of his personal freedom has to be suspended during the time of mandate.<sup>44</sup>

Another German regional parliament goes even further by making immunity in all cases, including arrest, dependent on an active decision by parliament:

Each measure of criminal prosecution against a Deputy, each arrest or other restriction of his personal freedom has to be suspended, if the Parliament so requests and if it disturbs the work of the Parliament.<sup>45</sup>

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39 *Bulgaria*: Art. 70 Constitution of 12 July 1991, last changed 6 February 2007.

40 Art. 157 par. 3 and 4 Constitution of 2 April 1976, last change 12 August 2005.

41 Artt. 372 to 374 Criminal Code as amended by Law No. 32/2010, of 2 September 2010.

42 Art. 129 par. 5 Constitution (n 34), except in cases prescribed by law.

43 Art. 19 Law No. 3628 of 19 April 1990 Concerning the Declaration of Assets and Combating Bribery and Corruption, see Güne Okuyucu-Ergün, 'Anti-Corruption Legislation In Turkish Law' (2007) 8 *German Law Journal* 903, 907.

44 Art. 15 par. 2 Constitution of Hamburg of 6 June 1952, last change 8 July 2009; according to Art. 15 par. 1, immunity against detention applies by law.

As the above parliaments have to get active, if they want immunity to be applied, they have to take more responsibility than in a system where immunity just 'silently' applies by itself. Furthermore, as parliament only learns about the prosecutorial measure once it is being enforced, confidentiality of the investigation is kept until the very last moment.

### 2.7. Discretion

It is interesting that the parliaments mentioned in the paragraph above cannot decide on the application of immunity at their free discretion, but only if it is necessary for the work of the deputy's office in question or the parliament itself. Such a limitation on discretion – may it be for applying inviolability or for lifting it – limits possibilities of abuse: e.g., the absence of specific and objective criteria is seen as one of the main factors why the Turkish Parliament could deny lifting immunity in all of the 50 corruption cases involving its members between 2002 and 2005.<sup>46</sup>

### 2.8. Publicity of Decisions

If deliberations and decisions for applying or lifting immunity are public, an abuse of this right is much less likely. Whereas in some states, such as Spain,<sup>47</sup> the deliberation and vote on deputies' status are both secret, in other states<sup>48</sup> deliberation and vote are public.

### 2.9. Conflict of Interest in Decisions

One could see a conflict of interest if the cabinet,<sup>49</sup> a court,<sup>50</sup> or the plenary<sup>51</sup> decide over the immunity of one of its members. Some constitutions avoid this conflict by having a different body determining the immunity issue: In Cyprus, the Supreme Court deals with the immunity of parliamentarians.<sup>52</sup> In many

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45 Art. 58 Constitution of Brandenburg of 20 August 1992, last change 16 June 2004; see Hasso Lieber, Erardo Cristoforo Rautenberg, 'Wider das herrschende Immunitätsrecht!', [2003] Deutsche Richterzeitung 56.

46 GRECO Evaluation Report on Turkey of 10 March 2006, Greco Eval I-II Rep (2005) 3E, <[www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2\(2005\)3\\_Turkey\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2005)3_Turkey_EN.pdf)> accessed 1 March 2011.

47 Art. 63.2 Standing Orders of the Congress [Reglamento del Congreso de los Diputados] of 10 February 1982, last changed on 29 October 2009.

48 See e.g. *Austria*: § 80 par. 2 S. 1, § 47 Rules of Procedure [Geschäftsordnungsgesetz] of 4 July 1975, last changed on 11 February 2010.

49 E.g. *Serbia*: Art. 134 par. 2 S. 2 Constitution (n 22).

50 E.g. *Armenia*: Art. 97 S. 1 Constitution of 5 July 1995, revised 27 November 2005, concerning Members of the Constitutional Court.

51 E.g. *Moldova*: Art. 70 par. 3 Constitution of 29 July 1994.

52 Art. 83 par. 2 Constitution of 6 April 1960, last change 28 December 1996.

states, parliament decides on the immunity of judges<sup>53</sup> or holders of executive office<sup>54</sup>, in some states, this task is up to the president<sup>55</sup>. One could see a certain breach of the separation of powers, if it is not the organ in question itself that decides on the need for immunity for its functioning. On the other hand, the need to avoid a conflict of interest can be generally considered to justify such an exception.

Subjecting decisions about inviolability to judicial review is another way of restricting abuse. This possibility is foreseen under Art. 86 Turkish Constitution<sup>56</sup> and under Art. 134 par. 2 Italian Constitution and has – in the case of Italy – been used quite often to repeal the immunity granted by Parliament.<sup>57</sup>

### 2.10. Constitutional Regulation

Almost all constitutions of Council of Europe Member States regulate the scope and procedure of inviolability conclusively.<sup>58</sup> Only the Swiss Constitution explicitly allows for the law to 'provide for further forms of immunity and extend its scope to include other persons [than parliamentarians and members of government].' On the basis of this constitutional authorization, the Swiss legislator has extended inviolability to civil servants including judges.<sup>59</sup> From the perspective of corruption, such authorization in the constitution to extend immunities by ordinary law is problematic: Ordinary laws generally require a lower quorum than constitutional changes; it is therefore tempting for each government in office to extend immunities by ordinary law. Nonetheless, where constitutions do not foresee an enabling clause for immunities legislation, new forms of immunities created by ordinary law, as in some states<sup>60</sup>, have been found unconstitutional as they were seen to violate the principle of equality.<sup>61</sup>

53 E.g. Art. 126 par. 2 Constitution of Ukraine of 28 June 1996 (last change of 8 December 2004 overturned by the Constitutional Court on 1 October 2010).

54 E.g. *Turkey*: Art. 112 par. 5 S. 1 Constitution (n 34).

55 *Azerbaijan*: Art. 123 par. 4 Constitution of 12 November 1995, last change 24 August 2002 (immunity of Prime Minister); *Estonia*: Art. 153 par. 1 Constitution of 28 June 1992, last change 12 April 2007 (immunity of judges).

56 See Simon Wigley, 'Parliamentary Immunity in Democratizing Countries: The Case of Turkey' (2009) 31 Human Rights Quarterly 567, 591.

57 See e.g. Constitutional Court, 18 November 2008, decision no. 410 (immunity granted by the House of Deputies); 8 July 2008, o. 330 (immunity granted by the Senate); 10 June 2008, no. 279 (immunity invoked by the Regional Council of Piedmont); 15 April 2008, no. 171 (immunity granted by the House of Deputies); 15 April 2008 no. 135 (immunity granted by the Senate); 1 April 2008, no. 134 (immunity granted by the House of Deputies); 11 February 2008, no. 97 (immunity granted by the House of Deputies); 11 December 2007, no. 28 (immunity granted by the House of Deputies).

58 Sometimes in separate texts in the form of constitutional laws, e.g. *Azerbaijan*: Constitutional Law on the Human Rights Commissioner, Law No. 246-II KQ of 28 December 2001, Art. 6 (immunity for the Commissioner); *Italy* (n 14).

59 Art. 14 Responsibility Law [Verantwortlichkeitsgesetz] of 14 March 1958.

60 *Andorra*: Immunity of judicial officials (n 25), or of the Ombudsman [Raonador del Ciutada], Art. 6 par. 2 of the Law of 4 June 1998 on the Creation and Functioning of the Ombudsman; *Greece*: Law No. 3094 of 22 January 2003 on the Ombudsman, Art. 1 par. 2 S. 3: 'not held responsible, prosecuted or subjected to inquiry for any opinion expressed or acts committed in

### 3. CRIMINAL NON-LIABILITY

All Council of Europe Member States grant their parliamentarians non-liability (also known as 'non-accountability'). By this privilege, parliamentarians are not liable for anything they say or any vote they cast in the exercise of their duties. The privilege is absolute – contrary to inviolability there is no mechanism for lifting non-liability. Some states also grant their executive<sup>62</sup> and/or their judicial<sup>63</sup> officials non-liability for what they say or decide on in parliament, in executive councils or in court:

Criminal non-liability <i>in Member States</i>	CoE (47)	EU (27)	EU 1995 (15)
Parliamentarians	46	26	14
Head of state	21	11	6
Prime minister	8	3	3
Ministers	6	1	1
Ombudsperson etc.	7	0	0
High Court Judges	8	5	1
Judges	6	2	0
Chief Prosecutor	2	0	0
Prosecutors	1	0	0
Judicial Council	2	1	1

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the discharge of their duties'; *Italy*: Law on the High Council for the Judiciary [Consiglio Superiore della Magistratura] No. 195 of 24 March 1958: Art. 32bis (non-liability for opinions expressed).

- 61 *France*: Constitutional Court, decision of 7 November 1989, no. 89-262 DC, '§ 6 Loi relative à l'immunité parlementaire' violates constitutional principle of equality; *Italy*: Constitutional Court, decision of 7 October 2009, no. 262, 'Lodo Alfano' (n 5), violates constitutional principle of equality.
- 62 See e. g. *Serbia*: Art. 134 par. 1 Constitution (n 22): 'The Prime Minister and the member of the Government may not be held accountable for opinions expressed at sittings of the Government and sessions of the National Assembly, or for the cast vote at the sittings of the Government.'
- 63 See e. g. *Croatia*: Art. 122 par. 2 Constitution of 22 December 1990, revised 6 July 2010: 'Judges and lay assessors who take part in the administration of justice shall not be called to account for an opinion or a vote given in the process of judicial decision-making unless there exists violation of law on the part of a judge which is criminal offence.'

The UK is the only state where even parliamentarians do not enjoy criminal non-liability.<sup>64</sup> Most European states grant non-liability only to their parliamentarians and often also to their head of states. Only a few states apply non-liability to a wide range of officials, which is the case in Montenegro, Serbia, Switzerland, and Turkey.<sup>65</sup>

### 3.1. Non-liability and Corruption

In some respects, non-liability has a much stronger effect than inviolability: Whereas an act covered by inviolability is punishable, but cannot be prosecuted as long as the official holds office, an act covered by non-liability is not punishable at all. Nonetheless, non-liability has little relevance for corruption offences (bribery, trading in influence, illicit enrichment, embezzlement): Non-liability generally protects votes and decisions, whereas corruption is done through a 'trade' with a third party, such as promising a bribe, or another act outside the exercise of duties.

There is one corruption offence that could be committed by a vote or decision protected by non-liability: abuse of function, i.e., 'the performance of or failure to perform an act, in violation of laws, by a public official, in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.'<sup>66</sup> Where, e.g., a minister allocates public funds to building projects without the necessary decision of cabinet<sup>67</sup>, non-liability and abuse of function could theoretically collide. In practice, however, this is rarely the case: The offence is not mandatory according to Art. 19 UNCAC<sup>68</sup> and is not included in the Council of Europe's Criminal Law Convention against Corruption,<sup>69</sup> therefore, only few states foresee abuse of function in their criminal codes.<sup>70</sup> States that do foresee it often apply it only to administrative civil

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64 See *supra* (n 13).

65 *Montenegro*: Artt. 86, 122, 137 Constitution (n 26), Art. 14 par. 2 Law on the Protector of Human Rights and Freedoms of 8 July 2003; *Serbia*: Artt. 134, 138, 151, 153, 162 Constitution (n 22); *Switzerland*: Art. 162 Constitution of 18. April 1999, last change 25 September 2009, Art. 14 Responsibility Law (n 59); *Turkey*: Artt. 83, 105, 112 Constitution (n 34).

66 Art. 19 UNCAC (n 10).

67 See Court of Bosnia and Herzegovina, Criminal Division II, 8 April 2010, verdict No. X-K-09/702, where the Court eventually denied the immunity invoked by the defendant under former laws; the defendant, a former Prime Minister, was however acquitted, <[www.sudbih.gov.ba/files/docs/presude/2010/702\\_Bicakcic\\_First\\_Verdict\\_8\\_04\\_2010.pdf](http://www.sudbih.gov.ba/files/docs/presude/2010/702_Bicakcic_First_Verdict_8_04_2010.pdf)> accessed 1 March 2011.

68 *Supra* (n 10).

69 Of 27 January 1999, European Treaties Series 173, <<http://conventions.coe.int/treaty/en/treaties/html/173.htm>> accessed 1 March 2011.

70 See e.g. *Austria*: § 302 Criminal Code of 23 January 2004, last change 20 December 2010, 'Abuse of Official Authority [Missbrauch der Amtsgewalt]'; *Bosnia and Herzegovina*: Art. 220 'Abuse of Office or Official Authority' Criminal Code of 24 January 2003, last change 2 February 2010; *Portugal*: Art. 382 Criminal Code of 23 September 1982, revised 4 September 2007, 'Abuse of power [Abuso de poder]'; *Spain*: Art. 439 Criminal Code, Organic Law No. 10/1995, of 23 November 1995.

servants, but not to political or judicial office holders.<sup>71</sup> On the other hand, states which extend the offence of abuse of function to holders of judicial or executive office normally do not grant them non-liability<sup>72</sup> or only for opinions or decisions rendered in office<sup>73</sup>; even if they extend the offence to non-liable parliamentarians, as is done in Bosnia and Herzegovina<sup>74</sup> or Italy<sup>75</sup>, abuse of function cannot be committed by voting for a certain law: Parliamentarians create law and by doing so cannot abuse with it.

One of the very few states where criminal liability from abuse of function and non-liability of executive or judicial official holders could theoretically collide for several categories of officials is Italy. The President<sup>76</sup>, members of the Constitutional Court<sup>77</sup> and of the High Judicial Council<sup>78</sup> are non-liable for exercising their duties. At the same time, abuse of function is punishable<sup>79</sup>. A similar situation exists in Montenegro,<sup>80</sup> Serbia,<sup>81</sup> and Turkey<sup>82</sup>. One might argue that a corrupt act is not an 'exercise of duties', even if it has the form of a verdict (in the case of a judge) or a decree (in the case of a minister). But actual cases show that there could be some practical constellations where an official could claim non-liability for an act of abuse of office.<sup>83</sup>

### 3.2. Limiting Non-Liability

Limiting non-liability follows basically a similar pattern as limiting inviolability. As in most European states, the list of categories of officials covered by non-liability can be reduced to parliamentarians and, if at all, to heads of state. The scope of non-liability could be limited to civil non-liability, as in Moldova<sup>84</sup>. Non-

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71 See e.g. *Austria*: §§ 74, 302 Criminal Code (n 70); *Moldova*: Artt. 123, 327 Criminal Code, Law No. 985-XV of 18.04.2002, 'Abuse of Power'.

72 See e.g. *Bosnia and Herzegovina*: Art. 220 Criminal Code (n 70), and Art. 4 par. 3 lit. j Constitution.

73 *Switzerland*: Artt. 110 par. 3, 312 Criminal Code of 21 December 1937 as amended 21 March 2010 and Art. 162 par. 1 Constitution (n 65).

74 Art. 1 par. 3 'Meaning of Terms' Criminal Code (n 72): 'An official person means: a person elected or appointed to legislative, executive and judicial office [...]'.  
 75 Artt. 323, 357 Criminal Code, Law No. 251 of 19 October 1930, as amended by Art. 13 Law No. 234 of 16 July 1997.

76 Art. 90 Constitution (n 21).

77 Law No. 1 of 9 February 1948 (n 14).

78 *Supra* (n 60).

79 *Supra* (n 75).

80 Artt. 142 par. 3, 416 Criminal Code of 2004 and Artt. 86, 122, 137 Constitution (n 26).

81 Artt. 112 par. 3, 359 Criminal Code of 29 September 2005 and Artt. 134, 138, 151, 153, 162 Constitution (n 22).

82 Artt. 1 par. 1 lit. c, 250 Criminal Code, Law No. 5237 of 26 September 2004 and Artt. 105, 112 Constitution (n 34).

83 Court of Bosnia and Herzegovina, Criminal Division II (n 67); See also the investigation against the Italian Prime Minister for abuse of office, The Telegraph, 14 January 2011, <[www.telegraph.co.uk/news/worldnews/europe/italy/8260230/Silvio-Berlusconi-in-prostitution-investigation.html](http://www.telegraph.co.uk/news/worldnews/europe/italy/8260230/Silvio-Berlusconi-in-prostitution-investigation.html)> accessed 1 March 2011.

84 Art. 81 par. 2 Constitution of (n 51).

liability can also be limited to opinions expressed<sup>85</sup> and votes cast<sup>86</sup>, but not to any other acts in the exercise of duty. As there are sometimes exemptions to non-liability<sup>87</sup>, this could also be possible for corruption offences. Furthermore, as with inviolability, non-liability should be regulated in the constitution and not, as in some cases,<sup>88</sup> by ordinary law.

#### 4. CONCLUSION

Prosecution of corruption offences can only be effective, if immunities are limited to the minimum amount necessary for the functioning of the relevant state institution. Good practices of limiting immunities can be listed in the following order: The simplest way is to grant public officials, at best only parliamentarians, no other immunity but non-liability for their decisions and speeches in duty, as in the Netherlands. If, in addition, one wants to foresee also inviolability, it should only cover arrests as is the case in Ireland and Norway with parliamentarians, or in Andorra with judicial officials. Should inviolability go further and cover criminal proceedings in a broad sense, corruption offences should be excluded from inviolability, as is – among other offences – the case in Portugal. If this is not an option and one wants to include corruption offences in the protection of inviolability, the competent organ should be forced to take responsibility and actively invoke inviolability when necessary (two German regional parliaments); this mechanism would still ensure confidentiality of the investigation as parliament only learns about the prosecutorial measure once it is being enforced. Public transparency of the decision and limited discretion of the deciding body would round up good practice.

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85 See e.g. *Macedonia*: Amendment XXVII to Constitution of 17 November 1991, last change 7 December 2005; *Switzerland*: Art. 162 par. 1 Constitution (n 65).

86 See e.g. *Serbia*: Art. 134 par. 1 Constitution (n 62).

87 See e.g. *Bulgaria*: Art. 106 par. 1 Constitution (n 39), exception for high treason or violation of the Constitution.

88 *Malta*: President's non-liability only in Art. 5 par. 1 Criminal Code of 18 June 1854 (as amended by Act VII of 2010); *Montenegro*: Art. 14 par. 2 Law on the Protector of Human Rights and Freedoms of Montenegro of 8 July 2003 (non-liability for opinions expressed or recommendations given in the exercise of duties).