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STUDENT’S NAME

**ZARINE VOSKANYAN**

SUPERVISOR’S NAME

**PROF. SIRANUSH SAHAKYAN**

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## **INTRODUCTION**

Article 140 of the Constitution of the Republic of Armenia (hereinafter: Constitution or Constitution of RA) states:

*“ The President of the Republic shall be immune. During the term of his or her powers and thereafter, the President of the Republic may not be prosecuted and subjected to liability for actions deriving from his or her status. The President of the Republic may be subjected to liability for actions not related with his or her status only after the expiry of the powers thereof.”*<sup>1</sup>

The above-mentioned provision of the RA Constitution grants immunity right to the President of the Republic of Armenia. In the context of "actions deriving from his or her status" the President is authorized with absolute immunity not only in the period of his tenure but also after the expiration of his tenure of office.

The present Paper will demonstrate main developments in the regulation of the immunity right of the officials standing in the first line of government of the country. It is worth mentioning that the scope of this research topic is quite precise, hence it is mainly focused on the constitutional aspect of the immunity right doctrine accordingly excluding the discussion and examination of the immunity right under public international law.

*The significance of the Paper is the question whether presidential immunities necessarily guarantee impunity?* In order to answer this question, it will be necessary to examine the nature and scope of this legal mechanism. The question is to find out do we necessarily need to secure the first line public official with immunity, if yes, then what are the consequences and risks of this granted right and how to find the exact scope of the right that contains fewer risks for the performed public administration.

Within Chapter 1, the doctrinal review of the immunity right will be demonstrated. Besides different kinds of definitions also different types of immunity right are going to be discussed based on distinctive criteria. The present Paper will also analyze the correlation of immunity right with other legal concepts such as equality before the law and impeachment. For this reason, the main

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<sup>1</sup> R.A. Const. Art. 140, § 5.

Available at <https://www.president.am/en/constitution-2015>

issues connected with interactions of them will be compared. The analysis of the domestic regulations will be demonstrated in Chapter 2 of the Paper. A vital issue to be discussed in Chapter 2 is the development of the Constitutional regulations taking into account two Constitutional reforms third Republic of Armenia passed through. In this regard, the possible issues of making the immunity right as an impunity instrument with every single component are also discussed from the Armenian regulation perspective. The concept was discussed more specifically from the side of President and PM. Chapter 3 will address the comparative legal analysis of the existence and practice of immunity right worldwide. Additionally, the possibility of applying legal solutions of different states will be discussed. Mainly, A reference will be made to possible cases when former or acting head of States where prosecuted despite having the immunity right.

In the Conclusion of the Paper, the analysis of the international and national regulations and possible solutions for the need of the maintenance of a workable balance between **immunity and impunity**, and its universalist aspirations will be suggested.

## **Chapter 1: Doctrine of the immunity right**

### **1. Definition of the Immunity right: Types of immunity**

"Immunity" is transferred from Latin as "release," "independence," "not susceptibility"; in a legal sense, it is treated as the exclusive right not to submit to some general laws, the provided persons holding a special position in the state.

Immunity is a special type of privileges, which in turn a specific kind of privileges, legal withdrawals. Section 19 of Article V of the Convention on privileges and immunities of the United Nations of February 13, 1946 privileges and immunities are qualified as "the *withdrawals and privileges*"<sup>2</sup>. When the common word privilege is mostly associated with a positive credit, the legal immunity in its overall substance is provided in order to escape from some kind of negative obligations and consequences.

The doctrine of legal immunity and the privilege is to be granted to a person is not connected with his/her personal needs and activities but as a guarantee for the public function they have and perform. stated in the same act "*Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.*"<sup>3</sup> This provision definitely emphasizes the roots and the main aim of this legal tool.

Immunity confers a status on a person or body that places them above the law and makes that person or body free from otherwise legal obligations such as, for example, liability for torts or damages, or prosecution under criminal law for criminal acts.<sup>4</sup>

This exemption from an obligation or being penalized was formed for instances wherein the gravity of finding the perpetrators or the elements of a crime or situation far out-weighed the penalty for the individual who was being considered for immunity. Societal benefits play an essential role in

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<sup>2</sup>Convention on privileges and immunities of the United Nations, Article 5, Section 19 February 13, 1946,

Available at <http://www.un.org/en/ethics/pdf/convention.pdf>

<sup>3</sup> Footnote 2

<sup>4</sup> New world encyclopedia, 26.02.18

Available at [http://web.newworldencyclopedia.org/entry/Immunity\\_\(legal\)](http://web.newworldencyclopedia.org/entry/Immunity_(legal)) last visit (01.04.19)

decisions in the attempts to solve certain matters, and a balancing act is created in favor of the development of other individuals, families, and communities towards a lasting peace.<sup>5</sup>

The legal immunity should not have an absolute character. It can be canceled, limited in some cases or owners of immunity can refuse him. It is connected generally with the fact that the immunity from lawful and effective legal remedy turns into the interfering factor. The subject not only has the right, but also is obliged to refuse immunity of the representative in each case when the immunity interferes with the administration of law, and this refusal can be made without prejudice to the purpose with which the immunity was provided.

One of the most concerning questions that is more likely to give rise to the controversy is the possible contradiction between concepts of legal privilege, i.e., immunity right and legal equality. As it is noted in legal literature, investment of separate subjects with advantages puts immunity ratio problem with the constitutional principle of legal equality.<sup>6</sup> Opinions on this question were shared on two opposite approach. Some authors believe that immunities fix inequality, which is shown, in particular, at the solution of a question of attraction of such persons to legal responsibility that is socially harmful. Other authors consider that immunities do not break this principle as legal equality characterizes the general status of the citizen and not examines differences in legal situation subjects of legal relationship. The position of the last is represented more consecutive and reflecting the real situation. As insisting on full equality, scholars forget about that stimulating and compensating role which is carried out by immunities, creating some balance between the degree of increased requirements (professional, ethical and others), responsibility and restrictions to which have to correspond and which are undergone by the persons holding the certain positions accompanied legal immunities. As fairly notes in this regard M.V. Bagley, *“the content of equality assumes lack of illegitimate privileges, this the principle does not mean at all that the right cannot establish privileges at all.”*<sup>7</sup> In the resolutions Constitutional Court of Russian Federation notes that *“the Constitution of Russian Federation directly does not provide inviolability of any other persons. It, however, does not mean the impossibility of establishment in the law for separate categories of the*

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<sup>5</sup> Footnote 4

<sup>6</sup> Терехин В.А. Судейский иммунитет: проблемы теории, законодательства и практики // Российская юстиция. – М.: Юрист, 2011. – № 5. – С. 34-39.

<sup>7</sup> Баглай М.В. Конституционное право Российской Федерации: учеб. для вузов / М.В. Баглай. – 6-е изд., изм. и доп. – М.: Норма, 2007. – 784 с.

*persons which are carrying out public functions, additional personal the guarantees of inviolability caused them special status.”*<sup>8</sup> It is evident that, being allocated with a certain status and proceeding from features of the concrete status (deputy, judges, human rights defender), caused by the nature of carried out such state public officials activity, the qualification and other increased requirements shown to them, the legislative restrictions connected with replacement of certain state positions, the legislator has the right within special legal regulation to establish for them certain guarantees of independence of implementation the state functions assigned to them, in that number legal immunities.

Actually, scientific research shows that legal immunities are very diverse. They can be classified by various criteria. Consequently, depending on the nature of the functions realized by them legal immunities are divided into international, state and public; depending on the sphere of their implementation — on interstate and international; depending on their character — on substantive and procedurally ; depending on what objects are provided by immunity — on security of person, inviolability office and premises, security of property, office correspondence, archives and other documents, judicial and procedural and witness immunity, etc. In substance, there are various types of immunity, such as that given to sovereigns, parliament officials, diplomats, prosecutors, or witnesses to crimes.

There are many different classifications of the immunity right the European commission for democracy through law (hereinafter Venice Commission) in its resolution of Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly distinguished by character two implications of the immunity right: inviolability and non- liability.

*“The Assembly reiterates that the primary purpose of parliamentary immunity, in its two forms – non-liability and inviolability – lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is*

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<sup>8</sup> Постановление Конституционного Суда РФ По делу о проверке конституционности положений статей 13 и 14 Федерального закона «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» в связи с жалобой гражданина А.П. Быкова от 12 апреля 2002 г. № 9-П // Вестник Конституционного Суда РФ. – 2002. – № 5.

*necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary.*

*4. The system of non-liability is generally extremely stable in the member States. In theory and as a matter of principle, non-liability is absolute, permanent and perpetual in nature. It exempts members of parliament from legal proceedings for acts carried out, statements made, votes cast or opinions expressed in parliamentary debates or in the discharge of their parliamentary duties.*

*5. Inviolability is a special form of legal protection enjoyed by members of parliament, whereby certain legal measures, such as arrest, detention or prosecution, may not be taken against them for acts unrelated to their parliamentary duties without the consent of the parliament of which they are members, except where they have been caught committing an offence or have been handed a final conviction. It is temporary in nature and applies only for the duration of the term of office, and it can always be waived. There are significant differences regarding the nature and degree of this protection granted to members of parliaments in member States. ”<sup>9</sup>*

In theory, there are two main types of immunity: absolute and qualified. [T]he doctrines of absolute and qualified immunity protect public officials from tort suits for discretionary acts committed within the scope of their authority.<sup>10</sup>

Absolute immunity is a form of legal immunity which is unconditional in nature. Absolute immunity is in contrast to qualified immunity. Qualified immunity, by its very nature, carries with it a set of conditions that must be fulfilled in order for the immunity to be available. Judicial immunity and prosecutorial immunity are examples for absolute immunity.<sup>11</sup>

Absolute immunity immunizes officials from suit for all official acts without regard to motive while Qualified immunity immunizes official acts only when undertaken in good faith.

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<sup>9</sup> Venice Commission, Resolution 2127, (2016) paragraph 3,4,5.

Available at:

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22971&lang=en>

<sup>10</sup> *Smith v. Stafford*, 189 P. 3d 1065 (Supreme Court of Alaska, 2008)

Available at <https://casetext.com/case/smith-v-stafford-1>

<sup>11</sup> US legal dictionary

Available at <https://definitions.uslegal.com/a/absolute-immunity/> (last visit 01.04.2019)



Both forms of immunity seek to balance the protection of private citizens' rights and the *substantial social costs* of imposing liability on public officials.

A two-step inquiry is generally used to determine the existence and scope of official immunity. First, does the doctrine of official immunity apply to the state official's conduct? Second, if it does apply, is the immunity absolute or qualified?

Absolute immunity is the right to be free from the consequences of a suit's results, and from the burden of defending oneself altogether. Qualified immunity only shields an administrative officer from liability if the officer's activities are: within the scope of his/her office; are in objective good faith, and do not violate clearly established statutory or constitutional rights of which a reasonable person would be aware.<sup>12</sup>

Qualified immunity does not protect the plainly incompetent or those who knowingly violate the law. Overall, determining whether an official protected by qualified immunity may be held personally liable is based on the legal reasonableness of the allegedly not legal action.

Shifting to the more narrow classification of the immunity right mainly the scope of the public officials that are granted with legal immunity are the president, members of parliament, judges, prosecutors, ombudsmen and so on... The circle of people to which the immunity is extended has to be accurately defined in the main domestic legal act with the highest legal force. Such an example of a legal act can be Constitutions. As correctly marks out N.S. Sopol'tsev, "*disputes around immunities have to be postponed from the plane of discussion of the admissibility of their establishment in the legislation in the plane of discussion of concrete categories of persons which have to be allocated with legal immunities.*"<sup>13</sup> It is necessary to add to the development of this thought that in the present is the extremely necessary legislative fixing of the concept "immunity" and such it making as "inviolability," "indemnity," "witness immunity," designation their signs and also distribution limits in the relation of concrete persons of category. Master Paper will mainly be focused on the legal analysis and examination of presidential immunity.

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<https://administrativelaw.uslegal.com/liability-of-administrative-agencies/absolute-or-qualified-immunity/>

<sup>13</sup> Сопельцева Н.С. Понятие правового иммунитета в российском законодательстве // Изд-во ЧелГУ, Вестник Челябинского государственного университета. – № 2. – 2003. – С. 22-28.

A president enjoys immunity during his or her tenure, which insulates him or her from criminal prosecution. Presidential immunity is a doctrine in constitutional theory recognized in most democracies with a presidential form of government.<sup>14</sup>

The responsibilities and obligations vested on the president as the sole repository of official power are tremendous. Given the enormous and demanding nature of these obligations, most constitutions have allowed him immunity in the absolute or qualified form to empower him to release his obligations with as many opportunities as could reasonably be expected. The question is that court procedures are probably going to divert his consideration or humiliate and hamper him from focusing on his duties. Even a little chance of being sued could pose a serious distraction of the president's consideration to his public duties. This is especially essential since public administration is typically vested only in him or in those circumstances where he is required to utilize his watchfulness. The danger of liability may make him hesitant to practice his attentiveness inspired by a paranoid fear of drawing in the risk of being prosecuted. Another guarantee is that the president in acting ought to be as free as conceivable from fears of any unfavorable outcomes of his activities. The danger of obligation could considerably restrain successful organization of government arrangements. The immunity is also intended to protect the dignity of the office of the president and not him personally. Presidents settle on choices on issues that are far-reaching, sensitive, and in some cases prone to excite extraordinary sentiments. It is in public interest for the president to act in a certain, skillful, and definitive way without the dread that a citizen may sue him.

Historically, presidents were given absolute immunity. The principle of "the King can't take the blame no matter what," was gotten in numerous countries. Nowadays, absolute immunity is hard to legitimize. Regardless of whether the immunity succeeds to accomplish the primary role of empowering the president to release his obligations without the fear of potential prosecution and without putting him exempt from the laws that apply to everyone else will rely upon the nature and extent of the immunity itself.

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<sup>14</sup> Presidential immunity, Frank E Lobrigo, 01.03.2017  
Available at <https://opinion.inquirer.net/102067/presidential-immunity-catch-22> (last visit 01.04.2019)

## **2. Correlation of Immunity and Impeachment**

In defining the scope to which presidents are immunized from civil and criminal proceedings, most of the immunity provisions in constitutions specify the limits of their liability for acts and omissions committed either before or during their tenure. Nature and extent vary from country to country. The most significant general feature is that while many Constitutions have separate provisions dealing with immunities and impeachment, others usually deal only with the issue of impeachment. One may construe from this that beyond the conditions of risk of liability indicated in the impeachment regulations, there is no other basis of liability, yet this is not very clear from the general scheme of things. For the convenience of analysis more than anything else, it is important to examine the nature and implications of the immunity regulations before looking at the impeachment provisions. From first glance, impeachment is the only mechanism that provides the checks and balances system for the immunity right, but it is not certain to come up with this kind of conclusion. For the comprehensive discussion, it is going to be analyzed the nature and implications of the immunity, and the impeachment provisions are going to be discussed in the 3rd Chapter.

Impeachment proceedings conceivably give the most compelling technique of punishing misuse of office under current worldwide Constitutional regulations. Without regard to this, relies

upon the nature and extent of wrongdoings covered and how the procedures are conducted. This is the main and sole method of bringing to the responsibility field the Presidents for violations submitted in the office.

Under the vast majority of the Constitutions, the main ground for impeaching the president is treason. Various factors have substantially decreased the impeachment regulations into formal adjustment. A noteworthy issue is that the impeachment procedure overall in most countries worldwide is more political than a legal mechanism. Taking into account that in most cases the authorized body of applying the impeachment is the majority of the Parliament it is very debatable the efficiency of the mechanism provided under the impeachment instrument which in our opinion is one of the main milestones of the separation of the legal immunity from becoming impunity. It is burdensome to predetermine the outcomes when it is mainly based on the political will of one party. In the second place beside the politic will of dominant parties even the term limits which should have ensured a variation of power have speedily been removed and opened the way for a lifelong tenure of presidents and accordingly their impunity.

It has also been the case that, even when it's believed that a President could be indicted and prosecuted for a crime, law endorsement has usually given way to the political indictment and trial of Impeachment. For one, most of the time there's a Presidential crime of some kind, it's going to involve political crimes, perhaps breaking one's Constitutional Oath, abuse of power, etc., something that's only a crime because an elected official did it. The first line against this is impeachment.

That's also the preferred course for a case against a sitting official because a Governor's or President's pardoning power in common does not apply to Impeachment. And as well, it's one co-equal branch of the legislative making the Presidents accountable. If an official is Impeached and then found "guilty enough" — being political, it's not a trial as strict as a criminal trial — and removed from office, there's ample time to press regular criminal charges against a regular private citizen.

In order to be impeached, there must be a legal basis. International practice shows that in most cases the majority of Parliament having proofs of the alleged basis of wrongdoing by the President for starting an Impeachment process apply to Constitutional Court for conclusion on that matter. Based on that decision, the members of Parliament vote and impeach the acting President.

Nevertheless, this whole process is mainly enacted for the public official to be removed from his position. For example, article of the US Constitution stipulates:

*Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law.*<sup>15</sup>

The question that comes up with the discussion of the impeachment institute is the issue of how is the basis of the starting of the impeachment process approved to be existing. The procedural part of Armenian regulation will be discussed in chapter 2. Although this is not the main issue of this Paper and the clarifications are given in order to completely get acquainted with the abovementioned legal concepts.

In any case, the arguable question is that even when the term limits survive, they can not guarantee that the new candidate brought to that position by the same political party will not continue alleged unlawful behavior of its predecessor. Moreover, it is unlikely not only that they will be acting in a lawful manner but also that the ex-president is going to be held liable for the unlawful acts committed. The principle of "scratch my back, I scratch your back" is profoundly installed for the justice to occur. Disregarding these gloomy prospects, it is contended that the present accountability measures need to be strengthened, but more importantly, the possibility of impunity must be reached to the minor level.

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<sup>15</sup> US Const, Section 3 Paragraph 7  
Available at: <https://www.usconstitution.net/const.pdf>

## **CHAPTER 2: Armenian domestic regulation**

### **1. Development of the immunity right under Armenian Constitutional law**

In order to fully understand the importance, necessity and possible issues of the immunity right in Armenia, first of all, we have to examine the domestic regulatory framework from the light of its development history.

Third Armenian Republic's Constitutions was adopted through a referendum on July 5, 1995. Later, on November 27, 2005, and December 6, 2015, the first and second amendments were

introduced to the RA Constitution through referendums. Accordingly, we can diversify three phases of the constitutional development of the Republic of Armenia.

✓ ***The first version of the RA Constitution (July 5, 1995)***

The first version of the Armenian Constitution had its implications of the immunity right granted to the members of parliament, members of Constitutional Court and members of Judicial Council. What is interesting, the Constitution didn't have any provision devoted to the explicit immunity right of the President of the Republic of Armenia. While being a country with a presidential governmental system, it seems not so logical the lack of an immunity mechanism for the President. This opinion shares the European Commission of democracy through the law (hereinafter Venice Commission) in its first set of proposals for constitutional amendments in Armenia. Article 59 of the first set of proposals suggested adding the exact wording which stipulates the existence of the immunity right of the RA President. It is very important to notice because taking into account the fact that Venice Commission as the Council of Europe's advisory body on constitutional matters, provides legal advice to its member states and, in particular, helps states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management and provides "emergency constitutional aid" to states in transition.<sup>16</sup>

*Article 59. After Article 56 of the Constitution adds a new Article 56.1 with the following wording: "Article 56.1. The President of the Republic shall be immune."<sup>17</sup>*

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<sup>16</sup> Venice Commission of the Council of Europe

Available at [https://www.venice.coe.int/webforms/pages/?p=01\\_presentation](https://www.venice.coe.int/webforms/pages/?p=01_presentation) (last visit 01.04.2019)

<sup>17</sup>FIRST SET OF PROPOSALS FOR CONSTITUTIONAL AMENDMENTS IN ARMENIA OF VENICE COMMISSION

Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2004\)100-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2004)100-e) (last visit 01.04.2019)

Even when the Constitution didn't contain any provision connected with the President's immunity right it had provision comprised of the regulation of RA Presidents removal from the seat with the corresponding procedure.

*Article 57. The President may be removed from office for state treason or other high crimes.*

*In order to request a determination on questions pertaining to the removal of the President of the Republic from office, the National Assembly must appeal to the Constitutional Court by a resolution adopted by the majority of the deputies.*

*A decision to remove the President of the Republic from office must be reached by the National Assembly by a minimum two-thirds majority vote of the total number of deputies, based on the determination of the Constitutional Court.<sup>18</sup>*

Consequently, the Constitution constricted the scope of the actions the President is eligible to take in his tenure in the office by making the “*state treason or other high crime*” as a basis of the removal from the office.

✓ ***First amendment to the RA Constitution (November 27, 2005)***

By the first amendment to RA Constitution besides the Members of parliament, members of Constitutional Court and Judicial Council also Human Rights defender **and the President**.

In contrary with the 1995 Constitution the first amendment introduced on November 27, 2005, already provided immunity right for the President of RA stipulating it in the Article 56.1.

*“The President of the Republic shall be immune. During the term of his or her powers and thereafter, the President of the Republic may not be prosecuted and subjected to liability for actions deriving from his or her status. The President of the Republic may be subjected to liability for actions not related to his or her status after the cessation of his or her powers.”<sup>19</sup>*

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<sup>18</sup> R.A. Const. Art. 57, 05.07.1995.

Available at <http://concourt.am/english/constitutions/const1995.htm>

<sup>19</sup> R.A. Const. Art. 56.1, § 3, 27.11.2005.

Available at [http://concourt.am/armenian/constitutions/RA\\_Constitution\\_en.pdf](http://concourt.am/armenian/constitutions/RA_Constitution_en.pdf)



From the perspective of development, it was already a huge step towards providing more guarantees to the office of the President. Moreover, in contrary with the initial version of the Constitution, it managed not only to provide the exact provision that imposes the immunity right but also precisely defined the scope that right in substance. First of all, it narrowed down the scope of the action that can be protected under immunity right of the President by defining them as follows "*actions deriving from his or her status.*" Also, Constitution specified for the unlawful acts not connected to his status, the President can bare liability only after his/her tenure in the office: "*The President of the Republic may be subjected to liability for actions not related to his or her status after the cessation of his or her powers.*"

Secondly, it narrowed down with providing condition concerning the terms: "*during the term of his or her powers and thereafter.*"

As a side note, the Venice Commission in its final opinion on Constitutional reform in the Republic of Armenia, affirmed the importance and scope of the proclamation of the presidential immunity right in the Constitution.

*"With respect to the presidential immunity, the Commission notes with approval that the revised Article 56.1 § 2 fully reflects both the principle of the President's non-liability in respect of the acts arising from his or her presidential duties during and after the mandate, and the immunity from prosecution, during the mandate, for acts not arising from his or her presidential duties."*<sup>20</sup>

The clause concerning the impeachment of the president there is no significant difference in order to examine.

*"Article 57. The President of the Republic may be removed from office for treason or other grave crime. In order to obtain an opinion on removing the President of the Republic from office, the National Assembly shall apply to the Constitutional Court by a decision adopted by a majority of votes of the total number of deputies. The decision on removing the President of the Republic from office shall be taken by the National Assembly — based on the opinion of the Constitutional Court — by at least two-thirds of votes of the total number of deputies. Where there are no grounds for*

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<sup>20</sup> FINAL OPINION ON CONSTITUTIONAL REFORM IN THE REPUBLIC OF ARMENIA OF VENICE COMMISSION

Available at

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)025-e) (last visit 01.04.2019)

*removing the President of the Republic from office as per the opinion of the Constitutional Court, the issue shall be removed from the discussion of the National Assembly.*"<sup>21</sup>

The only difference is that the mechanism became more clear and more guarantees were granted to the President by stipulating that "*Where there are no grounds for removing the President of the Republic from office as per the opinion of the Constitutional Court, the issue shall be removed from the discussion of the National Assembly*".

✓ ***The second amendment to the RA Constitution (December 27, 2015)***

The latest step towards the improvement of the Constitutional development of RA was the second amendment to the RA Constitution. A related point to consider is the fact that with this amendment Armenia changed its governmental system from semi-presidential to parliamentary system.

After the constitutional reform introduced with a referendum on December 6, 2015, the article of president's immunity wasn't changed, and now the Article 140 of the RA constitution stipulates.

- " 1. The President of the Republic shall be immune.*
- 2. During the term of his or her powers and thereafter, the President of the Republic may not be prosecuted and subjected to liability for actions deriving from his or her status.*
- 3. The President of the Republic may be subjected to liability for actions not related with his or her status only after the expiry of the powers thereof. "*<sup>22</sup>

As` it can be noticed there is no single difference in substance between the last update of the Constitution. Correspondingly, we can assume that the provision fully met the expectations.

From the aspect of the President's removal from the office, Second Amendment went further by widening the range of the legal **bases for** that starting an impeachment procedure: besides the treason and grave crimes, a gross violation of constitution was added.

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<sup>21</sup> R.A. Const. Art. 57, § 3, 27.11.2005.

Available at [http://concourt.am/armenian/constitutions/RA\\_Constitution\\_en.pdf](http://concourt.am/armenian/constitutions/RA_Constitution_en.pdf)

<sup>22</sup> R.A. Const. Art. 140, § 5.

Available at <https://www.president.am/en/constitution-2015>

*“Article 141. Removal of the President of the Republic from Office*

- 1. The President of the Republic may be removed from office for treason, another grave crime, or gross violation of the Constitution.*
- 2. For the purpose of obtaining an opinion on the existence of grounds for removing the President of the Republic from office, the National Assembly shall apply to the Constitutional Court, upon a decision adopted by the majority of votes of the total number of Deputies.*
- 3. The decision to remove the President of the Republic from office shall be adopted by the National Assembly, on the basis of the opinion of the Constitutional Court, by at least two thirds of votes of the total number of Deputies.”<sup>23</sup>*

Unlike the lack of procedural regulations of application or waiver of the immunity right in RA Constitution and other legal acts, the law of RA on the Constitutional Court provides the procedural part of the consideration of the issue on the existence of grounds for the removal of the President of RA from his position.

*“1. In cases determined by this Article the National assembly in its decision adopted in the correspondence of Paragraph 2 of Article 57 of the Constitution has to refer to the decision, action or inaction of the President of RA that includes attributes of state treason or other hard crime stipulated in the criminal code.*

*2. The burden of proof in cases determined by this Article is on the applicant.*

*3. As a party of a trial, for the cases determined by this Article, the President of RA shall be involved who has the rights of a party of a court proceeding and has also such duties which can not harm his rights and freedoms.*

*[...]*

*5. The review of the cases determined by this Article can not be dismissed in case of resignation of the President or his/her removal on any other grounds.*

*[...]*

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<sup>23</sup>R.A. Const. Art. 141, § 5.

Available at <https://www.president.am/en/constitution-2015>

8. *After the application is submitted it can not be withdrawn before the beginning of the case hearing.*

9. *While preparing the case for review the Constitutional Court can form a body of preliminary investigation, a special committee with powers determined by Law, which includes two Members of the Court of Cassation and the President of one of the Chambers of it as the leader of the committee. The submitted evidence has to be examined by the Constitutional Court by the general procedure prescribed by this Law.*

[...]

14. *In cases determined in this Article the Constitutional Court shall rule one of the following decisions:*

- 1) *on absence of grounds for removal of the President of RA;*
- 2) *on existence of grounds for removal of the President of RA.*

15. *While ruling its decision the Constitutional Court shall have the power to evaluate the constitutionality of the provisions defining the nature of the crime of the Criminal Code defined in Paragraph 1 of this Article. If the court reaches conclusion that those provisions are not in conformity with the Constitution, it rules a decision determined by Subparagraph 1 of Paragraph 14 of this Article.*

16. *In the resolution determined by Subparagraph 2 of Paragraph 14 of this Article the Constitutional Court shall include the following:*

- 1) *Those decisions, actions or inaction of the President of RA that contain features of hard crime and the exact qualifications of those crimes;*
- 2) *The evidence confirming the guilt of the President of RA in committing the crimes described in Paragraph 1 of this Part and the justified standpoint of the Court regarding the examination of those.....*

[...]”<sup>24</sup>

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<sup>24</sup> R.A. The law of the Constitutional Court, Art. 76  
Available at [http://concourt.am/english/law\\_cc/index.htm](http://concourt.am/english/law_cc/index.htm)

## **2. Rethinking of the immunity right legal regulations for President and Prime Minister**

The concept of legal immunity is quite large and full of different elements that can help to find out the issue of the necessity of the latter. One of the main reasons for the occurred question of the necessity of the immunity right of the officials in the first line of state government is the adequacy of the immunity regulations for the President and Prime Minister. The first question that comes around is whether the current legal framework is capable of achieving the objective that legal immunity is aiming for.

The immunity dismisses the ex officio principle. The plausible reasoning for that can be that the scope of the public officials who are granted with immunity is rather fictitious than it would be if ex officio objectives were applied. Moreover, the current regulation is not proportionate in terms of what it is trying to achieve.

Due to the fact that the Republic of Armenia shifted from semi-presidential system of government to a parliamentarian where we have the Prime Minister as the main decision maker (for example he is the highest commander of the armed forces during the war) is granted only a diplomatic immunity. Accordingly, our Constitution gives immunity right to the public official who is provided with fewer authorities while the exact person who bears the highest level of “responsibility” in making the most important decisions is granted only with diplomatic immunity. Is it fair? Does this protection serve completely to its main purpose? This is an issue that needs to be discussed. The comparative legal analysis of different countries with a parliamentarian system of government shows that prime ministers are not always granted with absolute or even functional legal immunity, which in my opinion can be contested. If in such countries the presidential immunity with its wide scope of application is given only to secure the office of the President possibly this can be justified. However, the thorough examination of this legal phenomena indicates that the cornerstone content is the fact of granting freedom of choice to the main decision maker. The main reason is the fact that he is faced with the difficult and delicate task of finding the perfect compromise between ideal and reality, integrity and efficiency, activism and self-survival - if a compromise can ever be perfect, that is.

Regarding the immunity right of the Prime Minister on practice it is unlikely for PM to be prosecuted by investigating bodies who work under his authority. However, the issue of political

persecution still exists, and it is not fully rational to provide the President with immunity while not giving that guarantee to the PM.

Hence presidential immunity should not be granted to every single president, it must be considered the extent of the responsibilities that due to their position are imposed on them. The key point in this dilemma of understanding when the President or Prime Minister needs immunity protection is looking into the system of government the country has by virtue of their Constitutions. The latter thoroughly shows who is the main decision maker and who needs to be protected with the privileged warranties.

Mainly public officials that are entitled to such wide scope of obligations that some kind of guarantees are compulsory to have in order to **fulfill** their obligations properly.

*“There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office .”*<sup>25</sup>

The second problem is that Presidents may use their period in office to demolish different kind of proofs and evidence or threaten witnesses. Even though in many cases, it is usually stipulated by any law exact limit of a time period within which proceedings of any kind may be brought against an ex-president, the tenure in office shall not be considered in calculating any period of time prescribed, thus this may not be sufficient.

In many post-soviet countries, leaders are inclined to prolonging their stay in office, and the progressive removal of the term limits can lead to stably moving towards life presidencies which by their nature guarantee impunity as a result. Even in those cases where the president already retires, after being in position for a long period of time, it might be belated to bring an action. The risk can be seen in the death of the witnesses might have died, or in their testimonies due to the long intervals of time, events may no longer be accurate and reliable.

On the other hand, the issue is more complicated with the cases where the actions or omissions that are suspected to be illegal are done before the tenure in office. The issue is not only the problems arising with the examination of the case but also the fact whether the country needs to

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<sup>25</sup> Joseph Story, Commentaries on the Constitution of the United States, § 1563

have and protect by granting a legal immunity a Head of State who as a guarantee of Constitution has already breached it by himself. The US Court of Appellate in one of its cases commented to the Fitzgerald case which stated that Presidents enjoy legal immunity:

*“Fitzgerald does not protect actions outside the outer perimeter of the President's office and thus Bill Clinton, individually, is subject to trial for actions he allegedly committed before he became president.”*<sup>26</sup>

Once the president's behavior comes within the scope of the immunity, it can be absolute or qualified, the president's motive is irrelevant; the immunity operates as a complete bar to the action. The effect of the immunity is, therefore, to override the president's permanent and fundamental duty as a citizen to act within the law. This certainly cannot be fair for a person who is the chief law enforcer and the protector of the Constitution who is supposed to lead by example. This is related to an outline when the President is, as in this case, acting in his personal capacity and is acting for his personal benefit rather than in the interest of the country. This is arguably an abuse of presidential powers.

Another issue to discuss is the possibility when presidential immunities are used to unfairly neutralize political opponents and violate the spirit of the Constitution, which all presidents take an oath to defend and protect. The lack of legal immunity can end up in having a head of a state that is restrained in making the critical decisions. The scholars believe that this is one of the most important reasons why is immunity being justified. It is merely impossible to imagine a scenario that the one who is granted with wide amount of authorities will be free to make even risky but essential decisions with momentous solutions knowing that there is even a little chance of baring liability.

The abovementioned risk of a breach or threat of breach of the Constitutional provisions in political manners that are possible only without legal immunity is the immunity that ex-presidents are granted. Armenian domestic regulation provides immunity right for the Presidents that are no longer in office for their action done during their tenure. Russian legal system also gives this warranty to ex-presidents. However, many countries with developed legal frameworks such as the USA, Germany, France, so on, refrain from protecting retired presidents. The sole purpose of in this case is the protection of the ex-president from the political persecution.

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<sup>26</sup> Jones v. Clinton, Nos. 95-1050, 95-1167 1996 WL 5658 at \*6 (8th Cir. Ark.). President Clinton's lawyers plan to appeal to the full appeals court whose decision will possibly be reviewed by the United States Supreme Court. See Mimi Hall, Court: Paula Jones' Suit Can Go to Trial, USA TODAY, Jan. 10, 1996, at 4A.

One of the main aims of providing legal immunity to a President is based on the role that the Constitution gives to the office of the President. This is also an issue connected with the rule of law and legal consciousness of that exact society. If the vast majority of the population understands the significance of the office and is supposed that the lack of the immunity protection will not end up in having various groundless actions against the President which will definitely harm the reputation and take time, this issue is no longer substantive.

In conclusion, it is very essential to understand the nature of the protected legal relationship and the scope of the protection that the law provides. There can not be a unified approach because every single country with its own system of government and type of population is unique. Consequently, every single detail of the immunity regulation should be adjusted to the abovementioned factors.



## **CHAPTER 3: The International aspect of the immunity doctrine**

### **1. Comparative legal analysis of the regulations**

To illustrate the international development perspectives of the immunity protection of the public officials in this Chapter, the domestic regulations of diverse countries is going to be discussed.

From a domestic standpoint, heads of state generally enjoy similar - if not enhanced - immunity from prosecution as that conferred upon members of Parliament.<sup>74</sup> Any differences in the scope of immunity for heads of state are likely the result of practical considerations attendant to carrying out official duties. Head of state immunity often finds its basis in a country's constitution, or as in the case of the U.S., from the powers and responsibilities inherent in a constitutional structure. In general, heads of state will likely evade domestic prosecution for crimes committed while in the office except in cases of treason, though the power to decide liability (or to impeach) is often in the hands of the legislature or Parliament.<sup>27</sup> Moreover, practical and political considerations regarding prosecuting a head of state may prevent charges from ever being brought. Despite these broad trends, the past two decades have seen a considerable drawback in the prevailing standard of relative executive immunity.<sup>28</sup> Moreover, the emergent International Criminal Court (ICC) - which was formed for the purpose of prosecuting individuals for genocide, war crimes, and crimes against humanity - has shown a growing global consensus in favor of holding top government officials accountable for certain in-office conduct.<sup>29</sup>

#### **✓ USA**

For example, in the US Constitution, there is no exact provision on the question of presidential immunity, which means that not explicitly shielding the president from a compulsory judicial

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<sup>27</sup> French Constitution's provision on the liability of the President of the French Republic during the office. 1958 LA CONSTITUTION [CONST.] art. 68 (Fr.); see also COST. Arts. 90, 96, (Italy).

<sup>28</sup> Ellen L. Lutz & Caitlin Reiger, Introduction, in PROSECUTING HEADS OF STATE 2 (Ellen L. Lutz & Caitlin Reiger eds., 2009).

<sup>29</sup> Rome Statute. ICC, The States Parties to the Rome Statute, Available at <http://www.icc-cpi.int/Menus/>

process or the contrary. The closer we get to the original understanding of the constitution, however the more likely it seems that a sitting President is not subject to compulsory judicial process, but only to impeachment.<sup>30</sup>

The Supreme Court first recognized presidential immunity formally in *United States v. Nixon* (1973). The Court concluded the privilege was not absolute but presumptive.<sup>31</sup>

In *Nixon v. Fitzgerald* (1982), the Court held 5–4 the President—but not his staff—was absolutely immune from civil actions based on his official actions. The Court explained the "President occupies a unique position in the constitutional scheme. [Because] of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."<sup>32</sup>

The U.S. Department of Justice has interpreted the U.S. Constitution as conferring broad immunity upon the president for reasons of separation of powers and effective execution of presidential duties.

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### ✓ *Philippines*

A similar approach can be noted in the regulations and constitutional law of Philippines. Similarly, there is no exact provision in the Philippine Constitution regulating the immunity right of the President or Prime Minister. In *David v. Macapagal* case the Supreme Court of Philippines explains the applicability of the doctrine despite its textual absence in the Philippine Constitution as follows "*Settled is the doctrine that the President, during his tenure of office or actual incumbency, may not be sued in any civil or criminal case, and there is no need to provide for it in the Constitution or law. It will degrade the dignity of the high office of the President, the Head of State if he can be dragged into court litigations while serving as such. Furthermore, it is important that he*

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<sup>30</sup> Impeachment and Presidential Immunity from Judicial Process, Joseph Isenbergh,  
Available at [https://www.jstor.org/stable/40239516?read-now=1&seq=4#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40239516?read-now=1&seq=4#page_scan_tab_contents)

<sup>31</sup> *Nixon v United States* 506 U.S. 224 (1993)  
Available at <https://supreme.justia.com/cases/federal/us/506/224/case.pdf>

<sup>32</sup> *Nixon v Fitzgerald* 457 U.S. 731 (1982)  
Available at <https://www.law.cornell.edu/supremecourt/text/457/731>

<sup>33</sup> See *A Sitting President's Amenability to Indictment*, supra note 57

*be freed from any form of harassment, hindrance, or distraction to enable him to fully attend to the performance of his official duties and functions. Unlike the legislative and judicial branch, the only one constitutes the executive branch and anything which impairs his usefulness in the discharge of the many great and important duties imposed upon him by the Constitution necessarily impairs the operation of the Government.*"<sup>34</sup>

✓ **France**

French Constitution stipulates the President's immunity, but at the same time, it circumscribes the limits where immunity right can be lifted. Accordingly the article 67 clearly states that "*The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 [recognizing the potential jurisdiction of the International Criminal Court] and 68 [providing the possibility for the Parliament to remove the President for "breach of his duties patently incompatible with his continuing in office"]*".<sup>35</sup>

✓ **Iceland**

An interesting regulation is provided in the Constitution of Iceland. Immunity right is written down under one article, but not only the president is granted with immunity. The second part of the same article states that immunity also has regard to those who exercise *presidential authority*. In my opinion, this formulation widens the concept of presidential immunity, providing it not only by *ex officio* principle but also by the scope of the authorities **over the functions demonstrated**. "*The President of the Republic may not be held accountable for executive acts. The same applies to those who exercise presidential authority. The President may not be prosecuted on a criminal charge except with the consent of Althingi [the Icelandic Parliament]*".<sup>36</sup>

✓ **Russia**

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<sup>34</sup> Davit v Macapagal Arroyo GR 17139,6 03.05.2006, Philippines  
Available at <https://www.scribd.com/document/386599470/David-v-Macapagal>

<sup>35</sup> Constitution du 4 Octobre 1958 [Constitution of October 4, 1958], art. 67  
Available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194>

<sup>36</sup> Const. of Iceland  
Available at <https://www.althingi.is/lagas/146b/1944033.html>

Article 91 of the Constitution of the Republic of Russia provides a simple formulation of the immunity right of the president: *“The President of the Russian Federation shall possess immunity.”*

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Wider regulation of the President’s immunity right after his tenure in the office is stipulated in the law on Guarantees to the Ex-President of the Russian Federation and members of his family. The article 3 of the abovementioned law states:

*“The former President of the Russian Federation enjoys immunity. He cannot be held criminally or administratively liable for acts committed by him during his term of office as the President of the Russian Federation, or be detained, arrested, searched, interrogated, or personally inspected.*

*The immunity of the former President of the Russian Federation extends to his residential and office premises, vehicles used by him, means of communication, his other documents, his luggage, and his correspondence.*

*The former President of the Russian Federation may be stripped of immunity in case a criminal investigation of a grave crime committed by him during his term of office is initiated, and the termination of immunity is approved by both houses of the national legislature.”<sup>38</sup>*

Again, it can be noticed the wide scope of the immunity right that the acting president is granted although after expiration of the presidential term the latter narrows down by the factor that the immunity can be stripped in case of a criminal investigation of a grave crime with preconditions.

### ✓ Italy

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<sup>37</sup> Const. of the Russian Federation, Article 91  
Available at <http://www.constitution.ru/en/10003000-05.htm>

<sup>38</sup> Федеральный закон от 12 февраля 2001 г. N 12-ФЗ "О гарантиях Президенту Российской Федерации, прекратившему исполнение своих полномочий, и членам его семьи" (с изменениями и дополнениями) Available at <http://constitution.garant.ru/act/president/182948/chapter/5ac206a89ea76855804609cd950fcdf7/>

Article 90 of the Italian Constitution states that “ *The President of the Republic is not responsible for the acts performed in the exercise of his duties, except for high treason or plots against the Constitution. In such cases, he is impeached by Parliament in joint session, with an absolute majority of its members.*”<sup>39</sup>

In other words, Article 90 of the Constitution of Italy stipulates that the President of the Republic can be impeached through a majority vote of the Parliament for high treason and for attempting to overthrow the Constitution. If that is the case, the President of the Republic is then tried by the Constitutional Court according to the defined procedure.

Taking into account the fact that Italy is the Parliamentary Republic, similar to Armenia's political system, it is also very essential to discuss the immunity right of the prime minister. “*The prime minister in Italy enjoys only in his or her capacity as a member of parliament*”<sup>40</sup> This was noticed in the Berlusconi case.

#### ✓ **Germany**

There is no exact provision in the German Constitution stipulating the immunity right of the President. While in office, the president enjoys immunity from prosecution and cannot be voted out of office or recalled. The only mechanism for removing the president is impeachment by the Bundestag or Bundesrat for willfully violating German law. Once the Bundestag impeaches the president, the Federal Constitutional Court is charged with determining if they are guilty of the offence. If the charge is sustained, the court has the authority to remove the president from office. Like all heads of government, cabinet ministers and parliamentarians, the president is protected from prosecution during the duration of his term in office. Only the German parliament, the Bundestag, can lift this immunity. The procedure is clearly regulated: the public prosecutor turns in an application to the justice minister, who then forwards the application to the Bundestag.

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<sup>39</sup> Const. of the Republic of Italy, Article 90

Available at

<http://www.jus.unitn.it/dsg/publicazioni/costituzione/costituzione%20genn2008eng.pdf>

<sup>40</sup> Immunity, Italian Style: Silvio Berlusconi versus the Italian Legal System, Brendan Quigley, 2011

Available at

[https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1759&context=hastings\\_international\\_comparative\\_law\\_review](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1759&context=hastings_international_comparative_law_review)

### ✓ *Finland*

Section 47 of the Finland Constitution stipulates “*Should the President, in an official act, proceed in an unlawful manner, then the Chancellor of Justice shall object to this in the manner prescribed above in paragraph 1. If the Chancellor of Justice or the Council of State consider that the President has committed high treason or treason, then the Chancellor of Justice or the Council of State shall notify Parliament of the matter. If Parliament then decides, by a majority of three fourths of the votes cast, that charges are to be brought, then the charges shall be prosecuted by the Chancellor of Justice in the Supreme Court and the President shall refrain from exercising his functions while the matter is pending. In no other case shall charges be brought against the President for an official act. (21 April 1995/579)*”<sup>41</sup>

By providing the exact mechanism how the President can be prosecuted and by the lack of the article is providing the President any kind of immunity it can be presumed that the President in Finland does not necessarily possess immunity guarantees.

### ✓ *Sweden*

In Sweden, article 8 of the Swedish Constitution stipulates that “*The King or Queen who is Head of State cannot be prosecuted for his or her actions. Nor can a Regent be prosecuted for his or her actions as Head of State.*”<sup>42</sup>

The Chancellor of Justice, the Parliamentary Ombudsman or the Council of State deem that the President of the Republic is guilty of treason or high treason, or a crime against humanity, the matter shall be communicated to the parliament. If the parliament, by three-fourths of the votes cast, decides that charges are to be brought, the prosecutor-general prosecute the president in the High Court of Impeachment, and the president abstains from office for the duration of the proceedings.

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<sup>41</sup> Const. of Finland Section 47

Available at [https://www.constituteproject.org/constitution/Finland\\_2011.pdf?lang=en](https://www.constituteproject.org/constitution/Finland_2011.pdf?lang=en) (last visited 01.04.2017)

<sup>42</sup> Const. of Sweden Art. 8

Available at <https://www.wipo.int/edocs/lexdocs/laws/en/se/se122en.pdf> (last visited 01.04.2017)

### ✓ *United Kingdom*

As a person, she cannot be prosecuted in any civil or criminal proceedings, and acts of parliament do not apply to her unless they specifically state that they do. Under the Crown Proceedings Act (1947)<sup>43</sup>, the civil proceeding can be taken against the Crown in its public capacity, which means proceedings against governmental departments and agencies. So you can sue her majesty government, but you cannot sue exactly her.

### ✓ *Netherlands*

There Dutch Constitution lacks exact provision regulating the immunity right of the head of the State (the King) but as a customary law worldwide all monarchs and kings enjoy absolute immunity. Whereas, it is clearly stated the scope of the immunity right of parliament members and a cabinet headed by Prime Minister.

*“ Members of the States General, Ministers, State Secretaries and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the sittings of the States General or its committees or for anything they submit to them in writing.”*<sup>44</sup>

## **2. Applicable case studies and practical illustrations**

The main issue that arises from the topic of the master paper “the immunity of the head of the State that can somehow lead to impunity” has some analytical roots. There were many cases when former or acting Presidents or Prime Ministers were accused moreover punished for crimes and other kind of illegal act which brought to an understanding that a huge amount of authorities can end up with unfavorable consequences.

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<sup>43</sup> Crown Proceedings Act 1947 1947 CHAPTER 44 10 and 11 Geo 6  
Available at <http://www.legislation.gov.uk/ukpga/Geo6/10-11/44/part/1/data.pdf>

<sup>44</sup> Const. of Kingdom of Netherlands Article 71  
Available at <https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf>

No fewer than sixty-seven heads of state have been formally prosecuted for serious human rights violations or economic crimes committed during their administration since 1990.<sup>45</sup>

The creation and expansion of international judicial proceedings against heads of state have coincided with a rise in the displacement of high-level public officials within countries, most often for economic crimes. During the 1990s, Europe, in particular, saw a jump in corruption scandals that aided in unseating several heads of state. Around that time, the Organization for Economic Cooperation and Development (OECD) and most European countries adopted treaties to stem the rise in bribery and inappropriate use of funds that appeared to be permeating the political and corporate classes of the continent. Finally, the United Nations responded in kind with the Convention on Corruption, which entered into force on December 14, 2005, and requires member states to adopt measures to criminally punish national public officials for, inter alia, bribery, misappropriation of public funds, and obstruction of justice.<sup>46</sup> Clearly, international momentum - and an increase in domestic willingness to hold those in power accountable - suggests that holding office no longer creates an impermeable barrier to prosecution.

One of the most distinctive practical examples in the case law is the Republic of Italy's former Prime Minister Silvio Berlusconi's case. The latter not only was charged in illegal acts and omissions while being one of the most important decision makers of the country but also attempted two times to change the legal framework by granting him immunity from prosecution. While his tenure in office Berlusconi was charged in various illegal acts such as tax fraud, abuse of powers, bribery.

In June of 2003, perhaps not coincidentally when the rotating presidency of the European Union fell to Italy, the Italian Senate passed what is referred to as the Schifani Law, named after the Senator that had authored the legislation, Renato Schifani. The law, entitled "Provisions for the adjustment of Article 68 of the Constitution concerning criminal proceedings with regard to high state office," conferred immunity from prosecution while in office upon Italy's five highest-ranking government officials: the president of the republic, the presidents of both houses of Parliament, the

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<sup>45</sup> Ellen L. Lutz & Caitlin Reiger, Introduction, in PROSECUTING HEADS OF STATE 2 (Ellen L. Lutz & Caitlin Reiger eds., 2009).

<sup>46</sup> United Nations Convention Against Corruption, G.A. Res. 58/4, arts. 15, 17, 25, U.N. Doc. A/58/422 (Oct. 31, 2003), available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).



Prime Minister, the President of the Constitutional Court . It exempted the named positions from prosecution for any crime, even those concerning events that took place before assumption of office; suspended any trials that were ongoing; and provided that the statutes of limitation for any pending offense were to run during the term of office

Notably, only one of those covered under the law was facing criminal charges - Prime Minister Berlusconi.<sup>9</sup> As the Schifani Law had the effect of halting criminal proceedings against the sitting Prime Minister - and rotating president of the European Union - it is no surprise that the law was soon thereafter referred to as *lex Berlusconi*.<sup>9</sup> The prime justification for the bill then - that it would enable selected government officials to perform their functions without disturbance while in office - seems, retrospectively, questionable in application.

Due to the law's constitutional shortcomings, however, it would be struck down for reasons other than the questionable basis upon which it was enacted. In January of 2004, the Italian Constitutional Court, after hearing challenges to *lex Berlusconi*, invalidated the law, finding it violative of two central provisions of the Italian Constitution - those that guarantee equality before the law and due process.

It only took him two months to get another immunity law, this time authored by the Minister of Justice, Angelino Alfano." Article 1 of *Lodo Alfano*, as the law became known, suspended criminal proceedings against Italy's four highest officeholders until the end of their terms, covering trials based on alleged offenses that occurred both during and before taking office.<sup>96</sup> Article 1(1) read:

*“Without prejudice to the cases governed by Articles 90 and 96 of the Constitution, any criminal proceedings against individuals which occupy the offices of the President . . . or Prime Minister shall be suspended from the time when the office or function is taken up until the end of the term in office. The suspension shall also apply to criminal proceedings for conduct before taking up the office or function. ”*

Sub-section 7 of Article 1 applied to any proceedings that may be ongoing against the offices covered:

*“[t]he provisions of the present Article shall also apply to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force.”* Interestingly, the text and scope of the law effectively mirrored the flaws that existed in *lex Berlusconi*, although the newest versions froze the statutes of limitations rather than letting them run while in office.

The corruption trial against Berlusconi for the alleged bribing of a British lawyer was coming to a close. Members of the opposition did not hide their skepticism about the stated purposes of the law, calling it an "ad personam" law meant to protect the Prime Minister alone. Though Lodo Alfano would remain in effect for more than twice as long its predecessor; it could not evade review by the Constitutional Court. In its referral order to the Constitutional Court, the Milan tribunal argued that the passage of the law contravened Article 3 because selectively limiting liability creates a tiered system and undermines the principle of equality before the law." Further, the tribunal contended that because the law impacted the privileges of constitutional organs, it could only have been adopted by way of amendment to the Constitution.

The Court held that while the Constitution did confer prosecutorial privilege upon some offices, such exceptions were in regard to official conduct - rather than the blanket immunity of Lodo Alfano - and had a precise basis in the Constitution itself.

Moreover, the privileges promulgated under the contested law undermined specific constitutional provisions by granting greater protection to the Prime Minister than it did to other ministers. As to Article 138, the Court stated that while Parliament is free to enact ordinary legislation that implements procedures which relate to existing constitutional provisions, it was not permitted to enact ordinary legislation governing immunity.

On October 7, 2009, the Constitutional Court declared Law No. 124 of 2008 unconstitutional under Articles 3 and 138. Afterwards, on 26 October 2012, Silvio Berlusconi was convicted of tax fraud in an Italian court and was sentenced to four years' imprisonment. The court also banned Berlusconi for running a public office for a five-year term. He was sentenced by the Court of Appeals in Milan on 8 May 2013.

Another case worth discussion that makes clear rather in the US the President can stand before the court and be prosecuted is the case of the former President Nixon v. analyst of Air forces Fitzgerald.

The issue before the US Supreme Court was the scope of the immunity possessed by the President of the United States and the claim was based on the actions allegedly taken in the former President's official capacity during his tenure in office. In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force.<sup>47</sup> Fitzgerald

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<sup>47</sup> Nixon v Fitzgerald, 457 U.S. at 731.

Available at: <https://www.law.cornell.edu/supremecourt/text/457/731>

believed his dismissal was politically motivated and challenged his termination before the Civil Service Commission. The Commission found Fitzgerald's termination was not in retaliation for his congressional appearance, but that it did involve "personal factors unique to him." The Commission ordered him reinstated in another position equivalent to the one he held plus back pay; Fitzgerald was not satisfied with what he believed was an inadequate ruling. Fitzgerald filed suit against several Nixon White House staff members and eventually, in 1978, amended his complaint to include President Nixon.<sup>47</sup> President Nixon's motion for summary judgment (claiming presidential immunity) was denied, giving him the opportunity to make a collateral appeal which was dismissed summarily. The Supreme Court of the United States heard arguments and eventually ruled that the President enjoys absolute immunity for official actions he commits while President.

*“Applying the principles of our cases to claims of this kind, we hold that the petitioner, as a former President of the United States, is entitled to absolute immunity from damages predicated on his official acts. We consider the immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”*<sup>48</sup>

The Court examined the powers and responsibilities of the President and held that the President's powers are unique as compared to other executive officers because the President has the responsibility to execute the nation's laws as well as shape United States foreign policy.<sup>49</sup>

Thomas Jefferson, the nation's third President, wrote the following to the prosecutors in Aaron Burr's trial: *“The leading principle of our Constitution is the independence of the legislature, executive and judiciary. But would the executive be independent of the judiciary, if he was subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, help him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?”*<sup>50</sup>

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<sup>48</sup> Id...

<sup>49</sup> Harlow v. Fitzgerald, 457 U.S. 800 (1982) 749-50 (holding that executive officials are usually entitled only to qualified immunity).

Available at: <https://www.law.cornell.edu/supremecourt/text/457/800>

<sup>50</sup> Nixon, 457 U.S. at 751 n.31 (1982) (quoting 10 WORKS OF THOMAS JEFFERSON 404 (P. Ford ed. 1905)).

To summarize its position, the Court quoted Joseph Story, a nineteenth century commentator, who observed: *“There are incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them.*

*The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.”*<sup>51</sup>

In order to see the potential result of the lack of the President's legal immunity, the case of the Arab Republic of Egypt former President Hosni Mubarak will be discussed. The Egypt Constitution does not only shortage of this legal guarantee for the President but also with Article 68 prohibits granting any kind of immunity by laws.

*“Any provision in the law stipulating the immunity of any act or administrative decision from judicial control is prohibited.”*<sup>52</sup>

Hosni Mubarak, a politician who served as president of Egypt from October 1981 until February 2011, when popular unrest forced him to step down, was accused in ordering the killing of protesters as well as for corruption and abuse of power. In June 2012 Egyptian court found Mubarak guilty of complicity in the deaths of demonstrators and sentenced him to life in prison.<sup>53</sup> He was acquitted on charges of corruption. In fact, the President was a victim of political persecution headed by the acting President at that time Mohammed Morsi.

In November 2014, conspiracy to kill charges were dismissed by the Cairo Criminal Court on a technicality. The court also cleared Mubarak of corruption charges.<sup>54</sup> On 13 January 2015, Egypt's

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<sup>51</sup> JOSEPH STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 418-19 (last ed. 1833); see Nixon, 457 U.S. at 776-77.

<sup>52</sup>

Available at: <http://constitutionnet.org/sites/default/files/Egypt%20Constitution.pdf>

<sup>53</sup> Al jazeera 16.08.2011

Available at: <https://www.aljazeera.com/news/middleeast/2011/08/201181515749984797.html>

<sup>54</sup> BBC News. 29 November 2014. Retrieved 29 November 2014.

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Court of Cassation overturned Mubarak's and his sons' embezzlement charges, the last remaining conviction against him, and ordered a retrial.<sup>55</sup>

Moreover, In April 2015, the court convicted Morsi, along with 12 other defendants, including former MP Mohamed Beltagy, for the arrest and torture of protesters and incitement to violence. All defendants were acquitted of murder charges. The judge handed down 20-year sentences for Morsi and the others who were convicted.<sup>56</sup> Morsi still faced separate trials for espionage, terrorism, and prison-break charges.<sup>57</sup>

Moshe Katzav, who was president from 2000 until his forced resignation 2007, was sentenced to seven years in prison and released in December 2011. He was recognized guilty of the rape of two aides and sexual harassment, attempting to intimidate witnesses and obstruction of justice.

Jose Socrates, the former prime minister (2005-2011) of Portugal was sentenced to jail for nine months in temporary detention afterward was placed under house arrest in September 2015. The latter was waived on October 16, 2015. However, again he was arrested on November 21, 2014, and accused of money laundering, and tax fraud.

Ivo Sanadar, was a prime minister of Croatia from 2003 until his resignation in 2009. He was convicted of bribery in November 2012 and sentenced to jail for ten years. In March 2014 he was accused and sentenced to nine years in a separate trial over the alleged embezzlement of 10 million euros over public funds. However, in November 2015, the Supreme Court of Croatia overturned that conviction and ordered a retrial and his release on bail.

Adrian Nastase, the prime minister of Romania from 2000 to 2004, was sentenced to four and a half years for corruption in 2012, for bribery. He received a two-year prison term in a separate case

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<sup>55</sup> CNN. CNN. 29 November 2014. Retrieved 29 November 2014

Available at: <https://edition.cnn.com/2014/11/29/world/meast/egypt-mubarak-trial/>

<sup>56</sup> National Public Radio. Retrieved 22 April 2015.

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<sup>57</sup> The Guardian. Retrieved 30 September 2017.

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relating to the improper use of 1.5 million euros of campaign funds. Meanwhile, he was set free in March 2013 but jailed again in 2014 for accepting bribes worth a total of 630,000 euros.

To sum up, the cases where former Presidents or Prime ministers stood before the Courts and were accused in an illegal act are of considerable amount. Which comes to support the argument that still a public official put above the law for a relatively small thing will probably find himself above the law for pretty much everything. Consequently, the necessity of the legal immunity mechanism is a topical issue to examine.

## **CONCLUSION**

Given what has been outlined in the present paper it should be highlighted that there still exists the question whether legal immunity protection is a necessity for the public officials who are standing in the first line of the state governance. What is obvious for now, there is no opportunity for a universal approach to this question. The analysis of the present Paper indicates that though, the main purpose in implementing the presidential (not only) immunity right in domestic Constitutional regulations is to guarantee consistency when carrying out state public officials activity.

First of all, the current Armenian regulation is incomplete in terms of effectiveness and rationale towards those who are granted with immunity. Moreover, legal objectives that are protected under the domestic legal framework are not of the same value than those that can be violated.

The minimum level of legal certainty can be guaranteed if all essential factors will be taken into account: governmental system, legal consciousness of the population. It is important to scale or pros and cons and make the right decision for the country, whether to have immunity protection and if yes to what extent the latter shall be applied.

From the perspective of legal analysis, the regulation is more leaning towards being unnecessary in the rule of law setting. Nevertheless, based on the case law provided in

this Paper as a matter of fact immunity becomes impunity regularly and completely refuting the notion of immunity on the Constitutional level creates a risk of negative consequences vividly showed in the Paper.

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