

IMMUNITY OF HEADS OF STATE AND HEADS OF GOVERNMENT IN EUROPE

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ABSTRACT

This Article examines the evolving regimes of immunity for heads of state (Presidents and Monarchs) and heads of government (Prime Ministers) across Europe. The pre-1990 period established strong protections for largely ceremonial executives in West European constitutional monarchies and parliamentary republics, justified by principles of inviolability and symbolic representation rather than separation of powers. The end of Cold War division brought significant changes as former Communist states adopted semi-presidential systems, while Western European democracies experienced a “desacralization” of executive authority amid declining deference to public officials. While most European states today maintain absolute immunity for official acts and provide sitting Presidents with temporary relief from prosecution for unofficial conduct, 12 countries offer less assurance. This Article also analyzes the role of the Council of Europe and judgments of the European Court of Human Rights in cases concerning defamation, negligence, and use of the pardon power, which have injected greater uncertainty about immunity in order to cool politicians’ ardor and nudge European states toward more civil, circumspect politics.

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I. INTRODUCTION

Immunity of political executives is a live issue in Europe. At the time of this Article’s writing, former presidents were under investigation, on trial, in prison, or under suspended sentence in at least nine European countries: Albania,¹ Armenia,²

1. Ilir Meta (President from 2017 to 2022) was charged in 2025 with corruption, money laundering, tax evasion, and hiding personal income and property. *See* Lllazar Semini, *Albanian Ex-President Ilir Meta Charged with Corruption and Money Laundering*, AP (May 27, 2025, at 11:08 CDT), <https://apnews.com/article/albania-corruption-former-president-ilir-meta-charged-8fb2c1d9ab32d9983c2114d6426bb227> [https://perma.cc/EJ97-R2AE].

2. Robert Kocharyan (President from 1998 to 2008). *See Court Session in Robert Kocharyan Case Turns Tense*, PANARMENIAN.NET (Mar. 14, 2025, at 19:14 AMT), <https://www.panarmenian.net/eng/news/320375/> [https://perma.cc/UMT8-PM59].

Cyprus,³ France,⁴ Georgia,⁵ Moldova,⁶ Romania,⁷ Slovakia,⁸ and Ukraine.⁹ The alleged crimes range from corruption to abuse of power or treason.¹⁰ As in the

3. Nicos Anastasiades (President from 2013 to 2023). See Fanis Makrides, *President Christodoulides Testifies in Anastasiades Corruption Investigation*, PHILENEWS (Apr. 17, 2025), <https://in-cyprus.philenews.com/local/cyprus-president-testifies-anti-corruption-probe-private-jet-allegations/> [https://perma.cc/UMT2-KDD6].

4. Nicolas Sarkozy (President from 2007 to 2012). See FP News Desk, *Chirac to Sarkozy: Former French Presidents and Their Convictions and Scandals*, FIRSTPOST (Sep. 25, 2025, at 20:34 IST), <https://www.firstpost.com/world/chirac-to-sarkozy-former-french-presidents-and-their-convictions-and-scandals-13936963.html> [https://perma.cc/TC54-6MV8].

5. Mikheil Saakashvili (President from 2004 to 2013). See Felix Light, *Georgian Ex-President Saakashvili Gets Nine More Years in Jail on Fraud Charge*, REUTERS (Mar. 12, 2025), <https://www.reuters.com/world/europe/georgian-court-sentences-former-president-saakashvili-9-more-years-prison-2025-03-12/> [https://perma.cc/KU8P-27QP].

6. Igor Dodon (President from 2016 to 2020) was charged in 2022 with corruption, bribery, and organizing and accepting funding for a political party from a criminal group. Madalin Necsutu, *Moldova to Probe Ex-President's 'Unfair Trial' Complaint*, BALKAN INSIGHT (Apr. 9, 2024, at 13:50 CT), <https://balkaninsight.com/2024/04/09/moldova-to-probe-ex-presidents-unfair-trial-complaint/> [https://perma.cc/37QV-29KA]. Dodon, in turn, has complained to the European Court of Human Rights about his treatment. *Id.*

7. Ion Iliescu (President from 1989 to 1996 and from 2000 to 2004) was indicted in 2017 and in 2024 for his violent dispersal of protestors in 1990. See AFP - Agence France Presse, *Romania Indicts Ex-President Again Over 1990 Crackdown*, BARRON'S (Apr. 26, 2024, at 08:36 EDT), <https://www.barrons.com/news/romania-indicts-ex-president-again-over-1990-crackdown746f5df5?reflink=desktopwebshare> [https://perma.cc/G8H6-435W].

8. Andrej Kiska (President from 2014 to 2019) was given a one-year suspended sentence in 2024 for tax evasion and stripped of his presidential pension. See *Andrej Kiska je vinný z daňového podvodu, rozhodol súd. Dostal ročnú podmienku, nemôže sa odvolať* [Andrej Kiska Is Guilty of Tax Fraud, the Court Ruled. He Received a One-Year Probation, He Cannot Appeal], HN ONLINE (Oct. 31, 2024, at 14:22 CT), <https://hnonline.sk/slovensko/96177074-andrej-kiska-je-vinny-z-danoveho-podvodu-rozhodol-sud-dostal-rocnu-podmienku-nemoze-sa-odvolat> [https://perma.cc/3TAX-MDUZ]; *Former Slovak President Andrej Kiska Loses Pension After Fraud Conviction*, AP (Nov. 14, 2024, at 10:27 CDT), <https://apnews.com/article/slovakia-president-kiska-10a9305595d8431be1be318446f326fa> [https://perma.cc/8KMV-9P4G].

9. Viktor Yanukovich (President from 2010 to 2014) was convicted in absentia in 2019 of treason and in 2025 of crossing the border into Russia illegally. See Anna Fratsyvir, *Ukraine's Ex-President Yanukovich Sentenced to Additional 15 Years in Prison in Absentia*, KYIV INDEP. (Apr. 28, 2025, at 10:41 CT), <https://kyivindependent.com/former-ukrainian-president-yanukovich-sentenced-to-15-years-in-prison-in-second-conviction/> [https://perma.cc/KC6A-UM2E]. Petro Poroshenko (President from 2014 to 2019) was also charged in 2025 with treason, for allegedly arranging shipments of coal to Ukrainian firms from Russian-occupied regions. See Roman Romaniuk & Stanislav Pohorilov, *"Coal Case" Investigation Completed, Former Ukrainian President Poroshenko Charged with Treason*,

United States, cases require judges to figure out the nature and limits (if any) of a range of possible immunity guarantees.¹¹ The main arrangements offer protection from prosecution for any crime while in office (sitting immunity, or *ratione personae*) or protection only for acts committed in connection with the executive's powers and duties (functional or official capacity immunity, or *ratione materiae*).¹² Either kind might end when the person leaves the office or it may follow them perpetually.¹³ Unlike in the United States, however, European judges work with constitutions that almost always contain an immunity clause and enumerate the executive's functions in far greater detail than Article II of the U.S. Constitution.¹⁴ This textual footing relieves European judges of the need to wrestle with penumbral concepts of absolute and presumptive immunity, conclusive, preclusive, exclusive and concurrent authority, and the core and outer perimeter of presidential power.¹⁵

Another significant difference is the presence of an international court, the European Court of Human Rights, that can be drawn into disputes regarding executive privileges.¹⁶ Because of this extra layer of scrutiny, European leaders are in a position more akin to that of governors in the United States, whose

UKRAINSKA PRAVDA (May 21, 2025, at 14:20 CT), <https://www.pravda.com.ua/eng/news/2025/05/21/7513333/> [<https://perma.cc/7UAM-NFVA>].

10. See, e.g., Semini, *supra* note 1 (corruption); AFP - Agence France Presse, *supra* note 7 (abuse of power); Fratsyvir, *supra* note 9 (treason).

11. See Jacob Bourgault, Presidents, Power, and Immunity: A Comparative Analysis Post-*Trump v. United States* 7–8 (Nov. 16, 2024) (unpublished note), <https://ssrn.com/abstract=5023568> [<https://perma.cc/LWB6-T9E7>] (explaining the constitutional ambiguity surrounding presidential immunity and the Supreme Court's evolving jurisprudence on presidential liability in civil and criminal proceedings).

12. Mark D. Kielsgard & Ken Gee-kin, IP, *Prioritizing Jurisdiction in the Competing Regimes of the International Criminal Court and the African Court of Justice and Human Rights: A Way Forward*, 35 B.U. INT'L L.J. 285, 299–302 (2017).

13. See, e.g., Bourgault, *supra* note 11, at 29, 33 (explaining that Brazil and South Korea grant sitting presidents immunity from certain criminal proceedings, but those protections generally end once the president leaves office).

14. See, e.g., 1994 CONST. (Belg.) arts. 58–59. Unless otherwise noted, translated sections of national constitutions in this Article are drawn from the Constitute Project's website. See CONSTITUTE, <https://www.constituteproject.org/> [<https://perma.cc/RU8V-QPTL>].

15. See *Trump v. United States*, 603 U.S. 593, 691 (2024) (Jackson, J., dissenting).

16. See Johan Karlsson Schaffer, *Why Incorporate the ECHR? The Domestic Incentives of Human Rights Commitment*, INT'L STUD. Q., June 2024, at 1, 2–4, 7 (discussing the role of the European Court of Human Rights in reviewing state conduct and issuing judgments against member states).

immunity has been woefully under-researched in comparison to that of the President.¹⁷

Part II of this Article provides explanations of the title's reference to "Europe," "heads of state," and "heads of government." Part III reviews the immunity situation in Western Europe in the four decades after the Second World War, when liberal democracy was consolidated in mostly parliamentary form. Part IV identifies major changes that took place after the end of Communist Party rule in Central and Eastern Europe in 1989–1991, with new democracies leaning toward hybrid constitutions that fused presidential and parliamentary elements. Part V summarizes the situation at present across Europe. Part VI brings in the input of institutions of the Council of Europe, an international organization created in 1949 to promote democracy and human rights through a Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the European Convention) and the European Court of Human Rights.¹⁸

II. DEFINING "EUROPE," "HEADS OF STATE," AND "HEADS OF GOVERNMENT"

For the purpose of this Article, the countries belonging to Europe will not be limited to the members of the European Union (currently, 27 states) but of the Council of Europe, which now has 46 member states.¹⁹ The Council will be treated

17. See generally Nick Jones, Note, *Mansion or Fortress? The Legal Merits of Temporary Immunity from Criminal Prosecution for Kentucky's Chief Executive*, 96 KY. L.J. 669 (2007-2008) (providing an example of a study addressing gubernatorial immunity).

18. All decisions of the European Court of Human Rights cited in this Article can be found on its HUDOC website. See *HUDOC Database*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/hudoc-database> [<https://perma.cc/K8BY-C9GR>].

19. *Our Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/our-member-states> [<https://perma.cc/6GQK-25N9>]; *EU Countries*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/eu-countries_en [<https://perma.cc/P2QW-X47L>]. Even this set could be said not to contain the entirety of Europe culturally and geographically, because it currently excludes Russia (a member from 1996 to 2022, whereupon it was expelled in response to its invasion of Ukraine) and Belarus, while Kosovo's application remains stalled at the time of writing. *Exclusion of the Russian Federation from the Council of Europe and Suspension of All Relations with Belarus*, COUNCIL OF EUR.: CONSULTATIVE COUNCIL OF EUR. PROSECUTORS (CCPE) (Mar. 17, 2022), <https://www.coe.int/en/web/ccpe/-/the-russian-federation-is-excluded-from-the-council-of-europe> [<https://perma.cc/8RG4-TH6D>]; Dusica Radeka Djordjevic, *Kosovo's EU Membership Application Stuck in a Drawer for Three Years: In an Indefinite Waiting Room*, KOS. ONLINE (Dec. 15, 2025, at 17:59 CT), <https://www.kosovo-online.com/en/news/analysis/kosovos-eu-membership-application-stuck-drawer-three-years-indefinite-waiting-room-15> [<https://perma.cc/66DB-EMNH>]. Council members include Turkey and Azerbaijan, both of which were rated "not free" by Freedom House in 2025, and Azerbaijan's score (7 out of 100 possible points) was even lower than Russia's (12 out of 100). *Freedom in the World 2025: Turkey*, FREEDOM HOUSE, <https://freedomhouse.org/country/>

as both a set of countries and also an organization that has taken its own position on issues of immunity and impunity in an effort to steer the members toward a consensus position.

Heads of state include presidents but also various kinds of monarch: kings (there are currently no reigning queens),²⁰ dukes, and princes. Of the forty-six states of the Council of Europe, seven are kingdoms,²¹ three are principalities,²² and one (Luxembourg) is a grand duchy.²³ European presidents serve fixed terms, most commonly of five years, with the longest term being seven years (Armenia, Azerbaijan, Ireland, Italy).²⁴ Like the U.S. President, they are usually limited to two terms; unlike the U.S. President, a European President (or Monarch) often needs the Prime Minister or another minister to countersign a bill or decree for it to take effect.²⁵ Another regional feature to keep in mind is the absence of a modern

turkey/freedom-world/2025 [https://perma.cc/MV29-EDVQ]; *Freedom in the World 2025: Azerbaijan*, FREEDOM HOUSE, https://freedomhouse.org/country/azerbaijan/freedom-world/2025 [https://perma.cc/Y7WW-P5KR]; *Freedom in the World 2025: Russia*, FREEDOM HOUSE, https://freedomhouse.org/country/russia/freedom-world/2025 [https://perma.cc/D5LM-C9AS]. In January 2024, Azerbaijan's parliamentary delegation to the Council was denied recognition, a de facto suspension of voting rights. *Facing Expulsion, Azerbaijan Quits European Parliamentary Body*, EURASIANET (Jan. 25, 2024), https://eurasianet.org/facing-expulsion-azerbaijan-quits-european-parliamentary-body [https://perma.cc/U55U-4NGD].

20. See Jacqueline Howard & Oliver Slow, *Queen Margrethe II: Danish Monarch Announces Abdication Live on TV*, BBC (Dec. 31, 2023), https://www.bbc.com/news/world-europe-67854395 [https://perma.cc/E8ZH-DRBL].

21. NORMAN BAKER, THE CONST. SOC'Y, EUROPE'S LAST IMPERIAL MONARCHY: AN ANALYSIS OF THE BRITISH ROYAL FAMILY 6 (2023), https://consoc.org.uk/wp-content/uploads/2023/04/Europes-last-imperial-monarchy.pdf [https://perma.cc/3MWV-BVUH].

22. *Id.* The sovereign princes of Liechtenstein and Monaco are hereditary, while Andorra is a diarchy with the Bishop of Urgell and the President of France as co-princes ex officio. *Monarchy Today*, PRINCELY HOUSE LIECH., https://fuerstenhaus.li/en/the-monarchy/ [https://perma.cc/RQ5Y-9YXV]; *Monaco*, COUNCIL OF EUR.: HEREIN SYS., https://www.coe.int/en/web/herein-system/monaco [https://perma.cc/Y5PR-SDT3]; Yudex Hasbún, *Why is the President of France Co-Prince of Andorra?*, ROYAL CENT. (Dec. 23, 2020), https://royalcentral.co.uk/features/why-is-the-president-of-france-co-prince-of-andorra-130690/ [https://perma.cc/QL55-W54B].

23. *The Grand Duke*, LUXEMBOURG.LU: SOC'Y & CULTURE (Oct. 2, 2025), https://luxembourg.public.lu/en/society-and-culture/political-system/grand-duke.html [https://perma.cc/RGK8-96RT].

24. See *Political Term Limits by Country 2026*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/political-term-limits-by-country [https://perma.cc/E6KP-XFZK].

25. See, e.g., 2019 SYNTAGMA [SYN.] [CONSTITUTION] art. 35 (Greece) ("No act of the President of the Republic shall be valid nor be executed unless it has been countersigned by the

presidential tradition in most Central and East European countries that were part of the Soviet bloc in 1945–1991, since real power lay with the leader of the Communist Party (known as the General or First Secretary).²⁶ Instead, those countries had a collective state council, sometimes chaired by the party leader, or the party leader would double as head of state for long stretches (e.g., Josip Broz Tito in Yugoslavia, Nicolae Ceaușescu in Romania, and Gustáv Husák in Czechoslovakia).²⁷ The transition to democracy after 1989 thus required the creation or restoration of a presidency with meaningful authority as a national figure who, ideally, transcends parties while avoiding the autocratic tendencies of the interwar years.²⁸

Heads of government (often known as Prime Ministers, although formal titles vary) are responsible for the direction and daily operation of the executive branch and the national bureaucracy through a cabinet of departments or ministries.²⁹ Though appointed by the head of state, appointees still almost always need the confidence or tolerance of the legislature as well, so ultimately they are usually drawn from the party or coalition that did best in the most recent legislative elections.³⁰ In a few countries (e.g., Ireland, Malta, United Kingdom), the head of government must retain a seat in the legislature.³¹ In most European countries, heads of government have greater power (and the potential to misuse it) than the

competent Minister[.]”); 1994 CONST. (Belg.) art. 106 (“No act of the King can take effect without the countersignature of a minister, who, in doing so, assumes responsibility for it.”).

26. See Grigore Pop-Eleches, *Transition to What? Legacies and Reform Trajectories After Communism*, in WORLD ORDER AFTER LENINISM 47, 52, 55–56 (Vladimir Tismaneanu, Marc Morjé Howard & Rudra Sil eds., 2006).

27. See, e.g., Ivo Banac, *Josip Broz Tito*, BRITANNICA (Mar. 13, 2026), <https://www.britannica.com/biography/Josip-Broz-Tito> [https://perma.cc/F9N9-H4GH]; *Nicolae Ceaușescu*, BRITANNICA (Mar. 3, 2026), <https://www.britannica.com/biography/Nicolae-Ceausescu> [https://perma.cc/TC8G-MK6X]; *Gustav Husak*, BRITANNICA, <https://www.britannica.com/biography/Gustav-Husak> [https://perma.cc/WX64-EZQH].

28. Vít Hloušek, *Heads of State in Parliamentary Democracies: The Temptation to Accrue Personal Power*, in PRESIDENTS ABOVE PARTIES? PRESIDENTS IN CENTRAL AND EASTERN EUROPE, THEIR FORMAL COMPETENCIES AND INFORMAL POWER 19, 20–21 (2013).

29. Florian Grotz, Corinna Kroeber & Marko Kukec, *Cabinet Reshuffles and Prime-Ministerial Performance in Central and Eastern Europe*, 59 GOV'T & OPPOSITION 1252, 1254 (2024).

30. Cristina Bucur & José Antonio Cheibub, *Presidential Partisanship in Government Formation: Do Presidents Favor Their Parties When They Appoint the Prime Minister?*, 70 POL. RSCH. Q. 803, 803 (2017).

31. CONSTITUTION OF IRELAND 1937 art. 28.7.1°; CONSTITUTION OF MALTA Sep. 21, 1964, art. 81(2)(b); CABINET OFFICE, U.K. GOV'T, THE CABINET MANUAL: A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT 21 (2011), <https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf> [https://perma.cc/VN9N-AB4E].

head of state and they often represent the country at international gatherings, but unlike the head of state they have no fixed term of office and can be ousted by votes of no confidence in the legislature (very rarely, in practice) or pressed to resign by their own parties and the media.³² On average, a Prime Minister survives in office for two and a half years.³³

III. THE PRE-1990 FOUNDATIONS

During its first 40 years (1949–1989), the main purpose of the Council of Europe was to use the European Convention as follows:

to contribute to the prevention of another war between western European states, to provide a statement of common values contrasting sharply with Soviet-style communism (and nazism/fascism) capable of serving as a Cold War totem, to re-enforce a sense of common identity and purpose should the Cold War turn ‘hot’, and to establish an early warning device by which a drift toward authoritarianism in any member state could be addressed by an independent trans-national tribunal through complaints brought by states against each other.³⁴

At the outset, the European Convention was “a symbolic statement of the identity signatory states had of themselves”—an “abstract constitutional identity[.]” with limits on the exercise of public power under the rule of law.³⁵ The drivers behind the adoption of an enforceable convention in 1949–1950 were newly reestablished or fragile democracies such as Austria, France, Italy and West Germany, which saw in it, along with national institutions and a vigilant civil society, a guarantee that any backsliding by future governments would be checked.³⁶ The Convention backstop still left a lot of room for national-level

32. See Laron K. Williams, *Unsuccessful Success? Failed No-Confidence Motions, Competence Signals, and Electoral Support*, 44 COMPAR. POL. STUD. 1474, 1475 (2011).

33. José Antonio Cheibub & Bjørn Erik Rasch, *Constitutional Parliamentarism in Europe, 1800–2019*, 45 W. EUR. POL. 470, 477 (2022). At the time of writing, the government of Italy, led by Giorgia Meloni, was pushing for a constitutional change to make the Prime Minister directly elected for five-year terms. See Nicola Lupo, *The Constitutional Reform Providing for Direct Election of the Prime Minister: The So-Called ‘Premierato’*, 17 CONTEMP. ITALIAN POL. 192, 197 (2025).

34. STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 20 (2006).

35. *Id.* at 56.

36. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 228 (2000).

variation (the “margin of appreciation”), and the Council of Europe, unlike the European Union, has no legislative power.³⁷

In this context, head of state immunity was seldom an issue during the first decades of the Council of Europe’s existence, because most of the original 23 member states were constitutional monarchies or parliamentary republics with largely ceremonial presidents (as in Austria, Greece, Ireland, Italy, and West Germany).³⁸ These offices had little formal power that could be abused, while their occupants physically embodied the nation or state on a symbolic level that warranted respect and protection.³⁹ Constitutions in modern European monarchies codify the longstanding principle that a royal head of state cannot be accused or held answerable for their actions, and their person is inviolable or sacrosanct.⁴⁰ In Sweden, for example, Article 8 of Chapter 5 stipulates, “The King or Queen who is Head of State cannot be prosecuted for his or her actions.”⁴¹ In Belgium, Article 88 makes clear: “The King’s person is inviolable; his ministers are accountable.”⁴² In the Netherlands, Article 42 likewise specifies, “The Ministers, and not the King, shall be responsible for acts of government.”⁴³ These generous provisions have been justified as inherent in the hereditary nature of the throne, seeing as the

37. CLIFFORD CHANCE, THE EU LEGISLATIVE PROCESS EXPLAINED 5 (2024), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/06/the-eu-legislative-process-explained.pdf> [https://perma.cc/SY6J-PW6E].

38. See Simon Davidsson, *How Parliamentarism Developed in Western Europe*, BRIT. J. POL. SCI., 2025, at 1, 2 (providing basic detail on the Council of Europe’s development). Greek democracy broke down in 1967 and after it was restored in 1974, the President linked to the military junta, Georgios Papadopoulos, was tried and sentenced to life in prison. See Ellen L. Lutz, *Prosecutions of Heads of State in Europe*, in PROSECUTING HEADS OF STATE 25, 29 (Ellen L. Lutz & Caitlin Reiger eds., 2009). Greece had withdrawn from the Council of Europe in 1969 and returned in 1974. *Greece Withdraws*, 70 COUNCIL OF EUR., <https://70.coe.int/1969-greece-withdraws-en.html> [https://perma.cc/N3ML-ERA9]. Although Turkey, a founding member of the Council, experienced several military interruptions of its democracy (in 1960, 1971, and 1980), its delegation to the Council’s Parliamentary Assembly was denied recognition only in 1981–1984. See Kanstantsin Dzehtsiarou & Donal K. Coffey, *Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times*, 68 INT’L & COMPAR. L. Q. 443, 455–56 (2019).

39. See Davidsson, *supra* note 38, at 2 (explaining that parliamentarism requires government responsibility to parliament rather than to the head of state).

40. Robert Hazell, *Monarchy in the Constitutional Texts*, in THE ROLE OF MONARCHY IN MODERN DEMOCRACY: EUROPEAN MONARCHIES COMPARED 9, 15 (Robert Hazell & Bob Morris eds., 2020) (giving the examples of Denmark, Norway, and Spain).

41. REGERINGSFORMEN [RF] [CONSTITUTION] 5:8.

42. 1994 CONST. (Belg.) art. 88.

43. Gw. [CONSTITUTION] art. 42, sub. 2.

occupant holds the office by accident of birth, not by choice, and thus should never have to worry about being taken to a court or prison or scaffold.⁴⁴

This immunity was not intended to ensure that European heads of state could perform their office energetically with fearless ardor *within* a system of separation of powers, as has been argued in the United States,⁴⁵ but so that they could stand with dignity *above* the fray.⁴⁶ Real power and responsibility in most of these original member states rest with prime ministers as heads of government, who tend not to enjoy immunity beyond the protections of members of the legislature, from whose ranks they are often drawn.⁴⁷ In some countries, ministers (like legislators) enjoy the privileges that the legislature must first vote to allow or initiate their prosecution and then they are tried by a specified high court, such as a court of appeal (Belgium),⁴⁸ the supreme court (Netherlands, Spain, and Sweden),⁴⁹ or a court of special jurisdiction.⁵⁰

In three of the pre-1990 member states—Finland, France, and Portugal—the President exercised meaningful power in tandem with a Prime Minister. These hybrid “semi-presidential” dual-executive constitutions varied in their immunity provisions. In Portugal, with its memory of authoritarian rule before 1974, the President under Article 130 “answers before the Supreme Court of Justice for crimes committed in the performance of his functions[,]” conditional on a motion supported by two-thirds of the unicameral legislature.⁵¹ For crimes unrelated to official functions, the President can be pursued through the ordinary courts once their term has ended.⁵² In contrast, the Constitution of Finland (which did not join the Council of Europe until 1989) holds that “no charges shall be brought for the official acts of the President,” unless they are suspected of treason or a crime

44. François Quastana, *The Difficulty of Thinking About Executive Responsibility in a Republic: A Historical Perspective*, in REGIONAL ACCOUNTABILITY AND EXECUTIVE POWER IN EUROPE 248, 249 (Marcel Morabito & Guillaume Tusseau eds., 2024). See generally Manuel Eisner, *Killing Kings: Patterns of Regicide in Europe, AD 600–1800*, 51 BRIT. J. CRIMINOLOGY 556 (2011) (covering monarchs’ historically high risk of violent death).

45. See *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982); *Trump v. United States*, 603 U.S. 593, 594 (2024).

46. See Quastana, *supra* note 44, at 249.

47. FERDINAND MÜLLER-ROMMEL, MICHELANGELO VERCESI & JAN BERZ, PRIME MINISTERS IN EUROPE: CHANGING CAREER EXPERIENCES AND PROFILES 110 (2022) (finding that in 2011–2020, 82 percent of prime ministers in Western Europe, 70 percent in Southern Europe, and 71 percent in Central and Eastern Europe had previously been members of parliament).

48. See, e.g., 1994 CONST. (Belg.) art. 103.

49. See Gw. [CONSTITUTION] art. 119 (Neth.); C.E., B.O.E. n.311, Dec. 29, 1978, art. 102 (Spain); REGERINGSFORMEN [RF] [CONSTITUTION] 13:3 (Swed.).

50. See *infra* Part VI.B.5 (discussing Iceland).

51. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 130, nos. 1–2.

52. *Id.* art. 130, no. 4.

against humanity, in which case the parliament must vote by a three-fourths majority to initiate a trial in a special court.⁵³

In France, the 1958 Constitution of the Fifth Republic cloaked the President (at the time, the war hero Charles de Gaulle)⁵⁴ in broad immunity. Article 68 in its original wording provided that the President “is responsible for acts performed in the exercise of his functions only in cases of high treason.”⁵⁵ For that one crime they could be indicted only by an absolute majority of the combined membership of the bicameral national legislature, and would then be judged by a High Court of Justice, consisting of 24 legislators selected by the two chambers.⁵⁶ What was not clear, and would become an issue of contention in the twenty-first century, was whether a sitting President could be investigated and prosecuted for crimes not committed “in the exercise of his duties” (*dans l’exercice de ses fonctions*, a phrase that had not appeared in previous French constitutions and was open to competing interpretations).⁵⁷ Since the President initially served for seven-year terms with the possibility of one reelection, it would be possible for them to run out the clock on the statute of limitations for an offense committed before coming into office.⁵⁸

Only one pre-1990 member state, Cyprus, had a fully presidential regime akin to that in the United States and Latin America, with a vice president rather than a prime minister. Section 6 of Article 45 of the Cyprus constitution holds: “No action shall be brought against the President or the Vice-President of the Republic in respect of any act or omission committed by him in the exercise of any of the functions of his office[.]” unless he is charged with “high treason” or “an offence involving dishonesty or moral turpitude upon a charge preferred by the Attorney-General and the Deputy Attorney-General of the Republic” and then tried

53. SUOMEN PERUSTUSLAKI [CONSTITUTION] June 11, 1999, § 113.

54. See Philip G. Cerny, *The Process of Personal Leadership: The Case of de Gaulle*, 9 INT’L POL. SCI. REV. 131, 136–37 (1988).

55. 1958 CONST. art. 68.

56. *Id.*

57. See Pierre Égéa, *L’Étendue du Champ de l’Irresponsabilité pénale du président de la République française prévue par le premier alinéa de l’article 67 de la Constitution (à propos du témoignage en justice d’un ancien président de la République)* [The Scope of the Non-Criminal Responsibility of the President of the French Republic Provided for in the First Paragraph of Article 67 of the Constitution (Concerning the Testimony in Court of a Former President of the Republic)], 9 LES CAHIERS PORTALIS 127, 127–36 (2022) (Fr.) (explaining that the original constitutional text did not clearly resolve whether a sitting President could be subject to prosecution for acts not committed in the exercise of official functions).

58. See *The President: Four Questions Answered*, ÉLYSÉE (Dec. 15, 2022), <https://www.elysee.fr/en/french-presidency/the-president-four-questions-answered> [https://perma.cc/DZR3-8XR8].

by the Supreme Court.⁵⁹ After their term ends, they can be prosecuted “for any other offence committed during his term of office” if it was not connected to the execution of their functions.⁶⁰ At the time of writing, Cyprus’ Independent Anti-Corruption Authority has referred possible criminal charges to prosecutors against former President Nicos Anastasiades for alleged campaign financing irregularities, improper interference, and self-dealing while in office.⁶¹

In the meantime, Anastasiades brought his own suit for defamation against the former aide who exposed much of the alleged wrongdoing,⁶² which brings us to another kind of protection that heads of state in Europe enjoy: the criminalization of speech directed against them under prohibitions on insulting or disparaging a head of state, in some countries carrying penalties more severe than for defamation of ordinary citizens.⁶³ Rooted in Roman imperial law and early modern notions of seditious libel and *lèse-majesté*,⁶⁴ the shield was seen as a logical accompaniment to the principle of inviolability and serving the broader interest in having stable institutions; according to the *travaux préparatoires*

59. ΣΥΝΤΑΓΜΑ ΤΗΣ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ [CONSTITUTION] Aug. 16, 1960, art. 45(2)–(3), (6).

60. *Id.* art. 45(5).

61. Michele Kambas, *Cyprus Watchdog Finds Possible Abuse of Power by Ex-President Anastasiades*, REUTERS (June 16, 2026, at 07:37 CDT), <https://www.reuters.com/world/cyprus-watchdog-finds-possible-abuse-power-by-ex-president-anastasiades-2026-06-16/> [<https://perma.cc/M6RN-L5KS>].

62. *Anastasiades Sues Ex-Aide, Author Drousiotis over Corruption Allegations*, PHILENEWS (Apr. 25, 2024), <https://in-cyprus.philenews.com/local/anastasiades-sues-ex-aide-author-drousiotis-over-corruption-allegations/> [<https://perma.cc/HC7N-EZ2Q>].

63. SCOTT GRIFFEN, ORG. FOR SEC. & CO-OPERATION IN EUR., DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY 16 (Barbara Trionfi ed., 2017), <https://www.osce.org/fom/303181> [<https://perma.cc/QGR5-MHNU>]. This study identifies *lèse-majesté* laws in effect in six European monarchies (Belgium, Denmark, Sweden, Spain, Netherlands, and Monaco) that are members of the Organization for Security and Co-operation in Europe (OSCE) and laws prohibiting insult or defamation of heads of state in 18 OSCE republics: Andorra, Azerbaijan, Belarus, Germany, Greece, Iceland, Italy, Kazakhstan, Malta, Poland, Portugal, San Marino, Slovenia, Tajikistan, Turkey, Turkmenistan, Uzbekistan, and Vatican City. *Id.* at 16. Of those 24 countries in total, all but 6 (Belarus, Kazakhstan, Tajikistan, Turkmenistan, Uzbekistan, and Vatican City) are in the Council of Europe, and 13 of those 18 joined the Council before 1990. *Countries on the Council of Europe 2026*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/countries-on-council-of-europe> [<https://perma.cc/KK5G-G5DZ>]. Most of these countries also criminalized disparagement of foreign leaders (to avoid diplomatic rows and possibly wars), which Turkey’s President Recep Tayyip Erdoğan has attempted to use alongside his own country’s laws on an “industrial scale” to intimidate critics and satirists. See GRIFFEN, *supra*, at 23; AYTEKIN KAAAN KURTUL, CRIMINALISING DISSENT: LÈSE-MAJESTÉ AND THE PATH TO AUTOCRACY 107–08 (2025).

64. Yan Thomas, *L’institution de la Majesté* [*The Institution of the Majesty*], 112 REVUE DE SYNTHÈSE 331, 365 (1991) (Fr.); see KURTUL, *supra* note 63, at 1–3, 14–62.

(preparatory works) for Belgium's 1847 bill to repress offenses against the royal person:

The need to shelter the head of state from malicious attacks has been recognized by all peoples, and the measures taken to this end, far from being dictated by adulation, are imperatively dictated by social interests. Wherever royalty has found itself insulted with impunity, contempt has ultimately reached the other institutions of which it is the complement and safeguard; wherever order has been reestablished after violent political shocks, the starting point has been the guarantee of royal inviolability, and one can generally measure the constitutional stability of a nation by the respect inspired by the power that presides over the execution of laws.⁶⁵

This reasoning has been applied to modern republics in which the President is treated as an embodiment of the state and people, so the defense of the head of state against attacks could be justified as a line of defense against moves to undermine postwar democracy, civil order, and sovereignty.⁶⁶ However, in the context of a republic it is also more likely than in a monarchy to clash with other principles and values. As one expert acknowledged, "We then understand the difficulty for a democratic theory of authority in reconciling the equality of citizens, which is obviously the foundation of such a theory, with a minimum of respect for the holders of public functions."⁶⁷

While this may seem very alien to the First Amendment's robust protection of speech criticizing, mocking, or insulting the leaders of the United States, U.S. law prohibits "knowingly and willfully" advocating death or injury to the President, Vice President, or other officers in the line of succession.⁶⁸ This law has not fallen into desuetude: between 1986 and 2024, the federal government prosecuted 1,444 cases of spoken and written threats against Presidents or others in the line of succession.⁶⁹ Convictions can fetch multi-year prison sentences, even

65. GwH [Constitutional Court], Oct. 28, 2021, n °157/2021 (citation omitted).

66. OLIVIER BEAUD, *LA RÉPUBLIQUE INJURIÉE: HISTOIRE DES OFFENSES AU CHEF DE L'ÉTAT DE LA III^E À LA V^E RÉPUBLIQUE* [THE INSULTED REPUBLIC: HISTORY OF OFFENSES AGAINST THE HEAD OF STATE FROM THE THIRD TO THE FIFTH REPUBLIC] 586 (2019) (Kieran Williams trans.). Beaud focuses in particular on the use of the law by President de Gaulle against his far-right adversaries in the early 1960s, which Beaud sees as a virtual continuation of the battle during the Second World War between the forces aligned with the authoritarian Vichy regime and de Gaulle's Free French resistance. *See id.* at 585–86.

67. *Id.* at 613.

68. *See* 18 U.S.C. § 871(a).

69. Gary Fields, *Threats and Assassination Attempts Come with the Office Donald Trump Once Held and Is Seeking Again*, AP (Sep. 18, 2024, at 23:17 CDT),

in the absence of evidence of intent or ability to carry out the threat (whereas European cases often require consideration of *mens rea*). As noted by author Kyle Mabe, “Drunks, incarcerated persons, and the mentally unstable have all been found guilty of felonies for threatening the President because an objective test fails to consider the mental state of the speaker.”⁷⁰

IV. CHANGES AFTER 1990

The situation in Europe changed dramatically after the collapse of Communist regimes in 1989–91, whereupon the Council of Europe nearly doubled in membership.⁷¹ The role of Council institutions and the European Convention also changed, clarifying for member states’ institutions (especially courts) the “constitutional limits provided by Convention rights upon the exercise of national public power.”⁷²

Starting with Hungary’s accession in November 1990 and ending with Montenegro’s in May 2007, the enlargement of the Council brought in two dozen fledgling democracies that in many cases were also new states (successors to the failed federations of the Soviet Union, Czechoslovakia, and Yugoslavia) and were simultaneously shifting from planned to market economies.⁷³ In the course of this very demanding transition and major constitutional moment, 13 new members adopted a semi-presidential system modeled on France’s⁷⁴, in the belief that it would allow for dynamic leadership and symbolic embodiment of the nation, its

<https://apnews.com/article/presidential-threats-trump-republicans-democrats-bb2effdec58f3405e0782e182377365c> [<https://perma.cc/K3ZN-82J5>].

70. Kyle A. Mabe, Note, *Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential “True-Threat” Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 91–92 (2013) (footnotes omitted).

71. DENIS HUBER, A DECADE THAT MADE HISTORY: THE COUNCIL OF EUROPE (1989–1999) 150 (Vincent Nash trans., 1999) (noting the Council “catapulted its membership” from 23 to 40 countries between 1990 and 1996).

72. GREER, *supra* note 34, at 171; *see also* Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, ¶ 75 (Mar. 23, 1995), <https://hudoc.echr.coe.int/eng?i=001-57920> [<https://perma.cc/AK54-AX9Y>] (holding that the Convention is “a constitutional instrument of European public order”).

73. *See Hungary Makes History, Joins Europe Council*, DESERET NEWS (Nov. 6, 1990, at 00:00 MST), <https://www.deseret.com/1990/11/6/18889826/hungary-makes-history-joins-europe-council-br/> [<https://perma.cc/T6MV-MGXT>]; *Montenegro Becomes 47th Council of Europe Member*, RADIO FREE EUR./ RADIO LIBERTY (May 11, 2007, at 09:03 CET), <https://www.rferl.org/a/1076398.html> [<https://perma.cc/86KD-87DY>].

74. *See* Robert Elgie & Sophia Moestrup, *Semi-Presidentialism in Democracies, Quasi-Democracies, and Autocracies*, in SEMI-PRESIDENTIALISM IN THE CAUCASUS AND CENTRAL ASIA 1, 3, 6 (Robert Elgie & Sophia Moestrup eds., 2016) (the 13 new states being Armenia, Azerbaijan, Bulgaria, Croatia, Georgia, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, and Ukraine).

territorial integrity, or the stability of the state,⁷⁵ but also prevent concentration of abusable executive power in one person.⁷⁶ Among older members, Turkey also moved from a parliamentary to a semi-presidential system and then, through amendments in 2017, to a fully presidential system.⁷⁷ Even in established parliamentary systems there were “presidentialization” and “personalization” trends, to give prime ministers the status and resources to win elections and do their increasingly demanding jobs.⁷⁸

While Central and Eastern Europe were trying to build new bases of political authority in the aftermath of the Communist Party’s leading role, in Western Europe the end of the Cold War rivalry coincided with (and perhaps amplified) sociocultural shifts that resulted in a loss of taboos and decline in deference to officeholders.⁷⁹ A more assertive investigative press (and satirical outlets and sensationalist tabloids) and the spread of commercial broadcasting, a 24-hour news

75. See, e.g., KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË [CONSTITUTION] Nov. 28, 1998, art. 86 (Alb.); AZƏRBAYCAN RESPUBLIKASININ KONSTITUSIYASI [CONSTITUTION] Nov. 12, 1995, art. 8(I)–(II) (Azer.); КОНСТИТУЦИЯ НА РЕПУБЛИКА БЪЛГАРИЯ [CONSTITUTION] July 13, 1991, art. 92(1) (Bulg.); USTAV REPUBLIKE HRVATSKE [CONSTITUTION] Dec. 22, 1990, art. 94 (Croat.); საქართველოს კონსტიტუცია [CONSTITUTION] Aug. 24, 1995, art. 49(1) (Geor.); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. 9(1); CONSTITUȚIA REPUBLICII MOLDOVA [CONSTITUTION] July 29, 1994, art. 77(2) (Mold.); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 126 (Pol.); CONSTITUȚIA ROMÂNIEI [CONSTITUTION] Dec. 8, 1991, art. 80(1) (Rom.), УСТАВ РЕПУБЛИКЕ СРБИЈЕ [CONSTITUTION] Nov. 8, 2006, art. 111 (Serb.), КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] June 28, 1996, art. 102 (Ukr.).

76. See Elgie & Moestrup, *supra* note 74, at 17–18.

77. *Contrast* Teşkilat-ı Esasiye Kanunu [Constitution of the Republic of Türkiye], Apr. 20, 1924, art. 31 (Turk.) (“The President of the Republic is elected by the Assembly from among its members for a period equivalent to that of the parliamentary term.”), with Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Türkiye], Nov. 9, 1982, art. 101 (Turk.) (“The President of the Republic shall be elected for a term of office of seven years by the Turkish Grand National Assembly[.]”).

78. Paul Webb & Thomas Poguntke, *The Presidentialization of Contemporary Democratic Politics: Evidence, Causes, and Consequences*, in *THE PRESIDENTIALIZATION OF POLITICS: A COMPARATIVE STUDY OF MODERN DEMOCRACIES* 336, 340–41 (Thomas Poguntke & Paul Webb eds., 2005); Ariane Vidal-Naquet, *Conclusion: The Forms of Responsibility of the Executive*, in *COMPARATIVE EXECUTIVE POWER IN EUROPE: PERSPECTIVES ON ACCOUNTABILITY FROM LAW, HISTORY AND POLITICAL SCIENCE* 252, 264 (Marcel Morabito & Guillaume Tusseau eds., 2024).

79. See *The Alliance’s New Strategic Concept (1991)*, NATO (Nov. 8, 1991), <https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/1991/11/08/the-alliances-new-strategic-concept-1991> [<https://perma.cc/Y9L6-XEC4>]; Stuart Clayton, *Television and the Decline of Deference*, *HIST. TODAY* (Dec. 2010), <https://www.historytoday.com/archive/television-and-decline-deference> [<https://perma.cc/Y9KH-PSLL>].

cycle, and the Internet fueled a greater desire to expose and punish corruption and other wrongdoings that in the past would have gone unreported.⁸⁰ From around the mid-1980s, scandals went from being relatively rare to commonplace, featuring in 40 to 55 percent of elections by the late 1990s.⁸¹ In the most unsettled of the Council of Europe's original members—Italy—disgust at the discredited political class led to a meltdown of the party system in 1994 and attempts to prosecute former Prime Ministers Bettino Craxi and Giulio Andreotti as the personification of systemic corruption.⁸² In Greece, the legislature voted in 1989 to allow prosecution of a former Prime Minister, Andreas Papandreou, for alleged bribe-taking.⁸³

In France, there occurred a “desacralization of the presidential function,” swinging away from the earlier “hyper-respectful attitude toward the president of the Republic” toward what law professor Olivier Beaud calls an equally extreme “*désinvolture*” (casual flippancy).⁸⁴ Near the end of his second seven-year term (1988–1995), François Mitterrand, France's last “republican monarch,” was subject to previously unthinkable media revelations about his health (terminal prostate cancer), his ambiguous conduct during the wartime Vichy regime, and his out-of-wedlock daughter Mazarine Pingeot.⁸⁵ A Court of Justice of the Republic for the criminal trials of prime ministers and other cabinet members was created after the 1991 revelation of state liability for HIV contamination of blood products.⁸⁶ It has since been heavily used for more than 1,500 claims against sitting and

80. See Jean K. Chalaby, *Scandal and the Rise of Investigative Reporting in France*, 47 AM. BEHAV. SCIENTIST 1194, 1198–1200 (2004) (covering more assertive investigative press); Christina Holtz-Bacha, *Germany: How the Private Life of Politicians Got into the Media*, 57 PARLIAMENTARY AFFS. 41, 42 (2004) (commercial broadcasting).

81. Staffan Kumlin & Peter Esaiasson, *Scandal Fatigue? Scandal Elections and Satisfaction with Democracy in Western Europe, 1977–2007*, 42 BRIT. J. POL. SCI. 263, 273 (2011).

82. Both were convicted and sentenced to prison, but Craxi escaped to Tunisia and Andreotti was acquitted on appeal. See Jean-Louis Briquet, *History in the Courts: Andreotti's Two Acquittals*, 15 ITALIAN POL. 123, 124 (1999); William D. Montalbano, *Italy Targets Ex-Prime Minister Craxi in Probe of Milan Payoff Scandal*, L.A. TIMES (Dec. 16, 1992, at 00:00 PT), <https://www.latimes.com/archives/la-xpm-1992-12-16-mn-1930-story.html> [https://perma.cc/QX36-3273].

83. Like Andreotti, Papandreou was acquitted. See Eleni Mahaira-Odoni, *Government and Politics*, in GREECE: A COUNTRY STUDY 201, 222 (Glenn E. Curtis ed., 4th ed. 1995).

84. BEAUD, *supra* note 66, at 608.

85. Pierre-Emmanuel Guigo, *François Mitterrand: The Last Republican Monarch*, in PRESIDENTS, PRIME MINISTERS AND MAJORITIES IN THE FRENCH FIFTH REPUBLIC 109, 127–28 (Sergiu Mișcoiu & Pierre-Emmanuel Guigo eds., 2024).

86. Alexander Dorozynski, *Ex-Ministers to Face Trial in French “Blood Scandal”*, BRIT. MED. J. (Aug. 1, 1998), <https://pmc.ncbi.nlm.nih.gov/articles/PMC1174664/> [https://perma.cc/2VNZ-XLWU].

former ministers; meanwhile, it was established in case law that ministers could be tried in ordinary courts for nonofficial misdeeds.⁸⁷ To Beaud, France's embrace of penal populism came too much at the expense of more parliamentary forms of accountability.⁸⁸

Although laws protecting the head of state from insult could still result in fines or jail sentences in a dwindling number of European countries (Turkey above all), they were repealed in the Czech Republic (1997),⁸⁹ France (2013),⁹⁰ Norway (2015),⁹¹ and the Netherlands (2020),⁹² partly in response to critical decisions of the European Court of Human Rights.⁹³ In 2009, the British Parliament abolished the crime of seditious libel, for which no one had been convicted in decades.⁹⁴ In Belgium, the Constitutional Court struck down the country's *lèse-majesté* law on the grounds that it violated freedom of expression under the country's constitution

87. Romain Brunet, *Suppression de la CJR: les ministres bientôt jugés selon le droit commun* [Abolition of the CJR: Ministers Soon to Be Judged According to Common Law], FR. 24 (May 9, 2018, at 17:56 CT), <https://www.france24.com/fr/20180509-france-reforme-constitution-suppression-cjr-cour-justice-republique-ministres-droit-commun> [<https://perma.cc/P5DQ-T959>].

88. Olivier Beaud, *Le glissement d'une responsabilité politique vers une responsabilité pénale des ministres: regard critique sur un certain exceptionnalisme français, révélé par le cas de l'épidémie du coronavirus* [The Shift from Political Responsibility to Criminal Liability of Ministers: A Critical Look at a Certain French Exceptionalism, Revealed by the Case of the Coronavirus Epidemic], 21 REVUE DE DROIT D'ASSAS 151, 151–52 (2021) (Fr.).

89. *Criminal Defamation and "Insult" Laws: A Summary of Free Speech Developments in the Czech Republic*, COMM'N ON SEC. & COOP. IN EUR. (Jan. 9, 2002, at 05:00 CT), <https://www.csce.gov/articles/criminal-defamation-and-insult-laws-summary-free-speech-developments-czech/> [<https://perma.cc/38BW-E7TX>].

90. *Insulting President No Longer Criminal Offence in France*, BUS. STANDARD (July 26, 2013, at 13:25 IST), https://www.business-standard.com/article/news-ani/insulting-president-no-longer-criminal-offence-in-france-113072600304_1.html [<https://perma.cc/J49B-JLR8>].

91. GRIFFEN, *supra* note 63, at 30.

92. TARLACH MCGONAGLE ET AL., EUR. PARLIAMENT, SAFETY OF JOURNALISTS AND THE FIGHTING OF CORRUPTION IN THE EU 56 (2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU\(2020\)655187_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU(2020)655187_EN.pdf) [<https://perma.cc/5TMJ-8M3L>].

93. *See infra* Part VI.B.4.

94. KURTUL, *supra* note 63, at 67. Dozens of protestors objecting to the accession of King Charles III in September 2022 and his coronation in May 2023 were arrested and charged with "threatening or abusive words or behaviour," public nuisance, or breach of the peace, but in at least one case the police later admitted they had acted unlawfully and paid compensation. Daniel Boffey, *Police Admit Arrest of Anti-Monarchy Heckler in Oxford Was Unlawful*, THE GUARDIAN (Mar. 11, 2025, at 01:00 EDT), <https://www.theguardian.com/uk-news/2025/mar/11/police-admit-arrest-of-anti-monarchy-heckler-in-oxford-was-unlawful> [<https://perma.cc/3NQA-B62A>].

(Article 19) and the European Convention (Article 10).⁹⁵ In these cases, heads of state might still be covered by general laws protecting the honor of any public official, and they can also exercise the right of a private citizen to bring civil suits to prevent use of their image or name without permission and to protect their dignity or reputation.⁹⁶ For example, disparaging the President of the Czech Republic now falls under the generally applicable libel sanctions and lesser misdemeanors of violating someone's honor through ridicule or gross insult and disrespecting the position of an official in the exercise of their authority.⁹⁷ However, when a town councilor, Martin Lang, began a post on Facebook in 2019 with the claim that President Miloš Zeman was “a second Hitler and it is necessary to slit his throat like a pig” and finished with “it is necessary to cut off the heads of such evildoers and burn the shit that remains of them,” prosecutors wanted to charge him with the more serious offense of incitement to commit a criminal act, carrying a prison sentence of up to two years.⁹⁸ The case went all the way to the Supreme Court where it was dismissed in December 2020.⁹⁹

95. GwH [Constitutional Court], Oct. 28, 2021, n °157/2021.

96. BEAUD, *supra* note 66, at 13, 599. President Nicolas Sarkozy of France successfully sued a satirical newspaper in 2010 to prevent it from using a photomontage of him engaged in a sexual act. *Court Tells Spoof Paper to Blot Out Sarkozy Sex Photos*, RFI (July 16, 2010, at 21:52 CT), <https://www.rfi.fr/en/france/20100716-court-forces-spoof-paper-black-out-sarkozy-sex-photos> [<https://perma.cc/ALB6-HL6P>]. In 2023, however, an attempt by a regional official to have a woman fined under the law on “insulting a person holding public authority” for referring to President Emmanuel Macron on Facebook as *ordure* (filth, trash) was dropped because Macron, although a campaigner for greater respect for the “Jupiterian” presidency, had not filed the complaint himself. *Pas de procès pour une “gilet jaune” accusée d’avoir traité Macron d’ordure* [No Trial for a “Yellow Vest” Accused of Calling Macron “Scum”], BFM GRAND LITTORAL (July 4, 2023, at 14:39 CT), <https://www.bfmtv.com/grand-littoral/gilet-jaune-accusee-d-avoir-traite-macron-d-ordure-le-parquet-va-demander-la-nulliteAD-202307040513.html> [<https://perma.cc/2YDL-3ZVM>]. In 1998, Czech President Václav Havel successfully sued a shoemaker for using his image without permission in an advertising campaign. See *Rozsudek Nejvyššího soudu ze dne 26.07.2000 (NS)* [Decision of the Supreme Court of July 26, 2000], sp.zn. 30 Cdo 2304/99.

97. *Criminal Defamation and “Insult” Laws: A Summary of Free Speech Developments in the Czech Republic*, *supra* note 89.

98. *Rozsudek Nejvyššího soudu ze dne 09.12.2020 (NS)* [Decision of the Supreme Court of Dec. 9, 2020], sp.zn. 8 Tdo 1171/2020 (Kieran Williams trans.).

99. *Id.* Czech case law has been unsettled with regard to the President's rights. Zeman successfully pursued another city councilor, Svatopluk Bártík, for claiming on Facebook in 2017 that the President was dying of cancer. *Bártík se musí Zemanovi omluvit za výroky o rakovině. Soud prezidentovi přikl 250 tisíc korun* [Bártík Must Apologize to Zeman for His Statements About Cancer. The Court Awarded the President 250 Thousand Crowns], IROZHLAS (Sep. 11, 2020, at 17:15 CT), https://www.irozhlas.cz/zpravy-domov/soud-svatopluk-bartik-milos-zeman-rakovina_2009111446_miz [<https://perma.cc/ER75-YHTB>]. In

In the future, aggrieved presidents will have to take into account the European Union's 2024 directive to protect persons from "strategic lawsuits against public participation" (SLAPPs), which the Council of Europe echoed in a concurrent recommendation.¹⁰⁰ The EU directive is intended primarily to protect the free speech of "journalists, publishers, media organisations, whistleblowers and human rights defenders, as well as civil society organisations, NGOs, trade unions, artists, researchers and academics" and includes "commentary or satirical communications, publications or works" among the forms of protected expression.¹⁰¹ It does not, however, prevent suits if the "defendant disseminated disinformation or fabricated allegations for the purpose of damaging the claimant's reputation."¹⁰² This would thus seem to leave room for options such as the protection of personality proceedings used successfully in 2022 by the President of Slovakia, Zuzana Čaputová, to compel a legislator, Ľuboš Blaha, to desist from alleging on Facebook that she was a treasonous agent of the United States

2020, Bártík was ordered by the court to pay Zeman 250,000 Czech crowns in compensation for libel and damaging the rights of another person. *Id.* However, Zeman did not prevail in a similar effort against a psychiatrist, Džamila Stehlíková, who in a blog post in 2021 had speculated that Zeman's poor health was due in part to delirium tremens (a form of alcohol withdrawal). Daniela Lazarová, *Psychiatrist Džamila Stehlíková Need Not Apologize for Remarks About Zeman's Health*, RADIO PRAGUE INT'L (Oct. 24, 2024), <https://english.radio.cz/psychiatrist-dzamilastehlikova-need-not-apologize-remarks-about-zemans-health-8832711> [<https://perma.cc/AE8Z-ETWM>]. In 2024, the Prague city court of appeal acknowledged her medical expertise and "stressed that as a public figure Zeman had to accept the fact that he was under public scrutiny." *Id.*

100. Directive 2024/1069, of the European Parliament and of the Council of 11 April 2024 on Protecting Persons who Engage in Public Participation from Manifestly Unfounded Claims or Abusive Court Proceedings ('Strategic Lawsuits Against Public Participation'), 2024 O.J. (L 110) [hereinafter *Parliament Directive on SLAPPs*]; Recommendation CM/Rec(2024)2 of the Committee of Ministers to Member States on Countering the Use of Strategic Lawsuits Against Public Participation (SLAPPs), Adopted by the Committee of Ministers on 5 April 2024, at the 1494th Meeting of the Ministers' Deputies, <https://rm.coe.int/0900001680af2805> [hereinafter *Committee of Ministers Recommendation on SLAPPs*]. The Council of Europe's statement builds on earlier similar calls, such as the 2004 Declaration on Freedom of Political Debate in the Media which declared, "Political figures should not enjoy greater protection of their reputation and other rights than other individuals[.]" Declaration on Freedom of Political Debate in the Media, Adopted by the Committee of Ministers on 12 February 2004 at the 872nd Meeting of the Ministers' Deputies, <https://rm.coe.int/09000016805dddf8>.

101. *Parliament Directive on SLAPPs*. The category of "journalist" was defined broadly to include "reporters, analysts, columnists and bloggers, as well as others who engage in forms of self-publication in print, on the internet or elsewhere." *Id.*

102. *Id.* The Council of Europe's recommendation also circumscribed "public interest" such that "it cannot be reduced to the public's thirst for information about the private lives of others, or to an audience's wish for sensationalism or voyeurism." Committee of Ministers Recommendation on SLAPPs.

government.¹⁰³ Stated by Čaputová on her own Facebook page: “Even as a public official, I am not obliged to endure systematic public harassment and baseless public accusations of committing crimes.”¹⁰⁴

Even monarchs have discovered that their immunity might not be personally perpetual if they quit the throne. Abdicating has become routine among European monarchs, with six doing so since 2000, including Spain’s Juan Carlos in 2014.¹⁰⁵ Six years later, prosecutors at Spain’s Supreme Court launched an investigation into a money gift to him from the King of Saudi Arabia, on suspicion that it had played an improper role in a contract to build a high-speed railway.¹⁰⁶ After two years, the investigation ended without a decision to charge Juan Carlos, but it was speculated that the privilege of full material inviolability for a reigning Monarch in Article 56.3 of the Spanish Constitution might not rule out prosecution of *el Rey emérito* (the king emeritus) for actions unrelated to his royal duties, even for ones committed before he stepped down.¹⁰⁷ Erring on the side of caution, Carlos took up residence outside the country.¹⁰⁸

The drive to hold leaders more accountable was not unique to Europe, but global: between 1990 and 2008, “sixty-seven heads of state or government from forty-three countries around the globe had been formally charged or indicted with

103. *Smer MP Blaha Must Stop Spreading Lies About the President*, SLOVAK SPECTATOR (Mar. 24, 2022, at 11:29 CT), <https://spectator.sme.sk/politics-and-society/c/smer-mp-blaha-must-stop-spreading-lies-about-the-president> [https://perma.cc/7ALF-ZTQZ].

104. Zuzana Čaputová, FACEBOOK (Mar. 24, 2022), <https://www.facebook.com/zcaputova/posts/524616282355079> [https://perma.cc/R5LH-QZM7]; see Tomáš Kysel', *Súd nariadil Blahovi prestať šíriť o prezidentke Čaputovej, že je vlastizradkyňou a agentkou USA* [The Court Ordered Blaha to Stop Spreading About President Čaputová That She is a Traitor and an Agent of the United States], AKTUALITY.SK (Mar. 24, 2022, at 09:45 CT), <https://www.aktuality.sk/clanok/mefeiuw/sud-nariadil-blahovi-prestat-sirit-o-prezidentke-caputovej-ze-je-vlastizradkynou-a-agentkou-usa/> [https://perma.cc/5PLP-2VD2].

105. Emily Burack, *A Guide to Abdication in the 21st Century*, TOWN & COUNTRY (Oct. 3, 2025, at 09:24 EDT), <https://www.townandcountrymag.com/society/tradition/g46267774/royal-abdication-21st-century-guide/> [https://perma.cc/42K5-EEGH].

106. *Former Spanish King Faces Probe over Saudi Kickbacks Scandal*, NEW ARAB (June 9, 2020), <https://www.newarab.com/news/former-spanish-king-faces-probe-over-saudi-kickbacks-scandal> [https://perma.cc/NK4F-VD93].

107. See Marina Fernández Torné, *Can Former King Juan Carlos I Be Judged?*, ELNACIONAL.CAT (Mar. 8, 2020, at 19:09 CT), https://www.elnacional.cat/en/politics/can-former-king-juan-carlos-be-judged_477393_102.html [https://perma.cc/Z6B6-RTGB].

108. Diana Norton, *Scandal, Shame and the Former King of Spain: ¡Hola! Magazine and Its Coverage of Juan Carlos I from 2012 to 2022*, 101 BULL. SPANISH STUD. 777, 797 (2024).

serious criminal offenses[.]”¹⁰⁹ This ambition was also expressed in the 1998 Rome Statute to establish the International Criminal Court (ICC), which has been signed by most Council of Europe members.¹¹⁰ In some states this led to queries to their constitutional courts regarding compatibility with articles conferring immunity on heads of state and prohibiting extradition of nationals, with courts sometimes finding conflicts that could only be resolved by amending the constitutions.¹¹¹

A. The French Amendments

The Constitutional Council of France was the first to point this out in January 1999,¹¹² and the French legislature followed up by adding Article 53-2 to the Constitution, recognizing the jurisdiction of the ICC as the only court beside the High Court of Justice that could judge a French President.¹¹³ However, the matter did not end there. Three months after the Constitutional Council’s decision, a satirical-investigative weekly broke the story that President Jacques Chirac, during his long stint as the mayor of Paris (1977–1995), had participated in a scheme to funnel public funds into his party through fake city payroll jobs.¹¹⁴ Other accusations, involving favoritism in housing and printing contracts, followed.¹¹⁵

109. Ellen L. Lutz & Caitlin Reiger, *Introduction*, in PROSECUTING HEADS OF STATE 1, 12 (Ellen L. Lutz & Caitlin Reiger eds., 2009) (noting about half of these cases were in Latin America).

110. See Cenap Çakmak & Ahmet Göksel Uluer, *Sovereignty Cost, Terrorism and Türkiye’s Reluctance to Join the International Criminal Court (ICC)*, INT’L J. HUM. RTS., May 13, 2025, at 1, 1–2 (providing context to Turkey’s engagement with the Rome Statute and Council of Europe); *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT’L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [<https://perma.cc/XH4T-5HKT>] (stating that the ICC issued an arrest warrant for Vladimir Putin, the first against a European head of state, for the war crime of deportation and transfer of children.).

111. Second Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court - Supplement to the Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court (CDL-INF(2001)001), Adopted by the Venice Commission at its 76th Plenary Session on 17-18 October 2008, <https://www.coe.int/en/web/venice-commission/-/cdl-ad-2008-031-e>.

112. Conseil constitutionnel [CC] [Constitutional Court] decision No. 98-408 DC, Jan. 22, 1999, J.O. 1297.

113. See 1958 CONST. art. 53-2.

114. Bernard Lachaise, *Jacques Chirac: The Failure of Social Gaullism, the Longest Cohabitation and the Spectre of the Far Right*, in PRESIDENTS, PRIME MINISTERS AND MAJORITIES IN THE FRENCH FIFTH REPUBLIC 133, 144 (Sergiu Mișcoiu & Pierre-Emmanuel Guigo eds., 2024).

115. *Id.*

An official investigation was launched, and soon voices on the left and right were asking whether an ordinary criminal court could ever try a President for actions unrelated (*détachables*) to the exercise of their functions as head of state.¹¹⁶ The Constitutional Council, in its January 1999 decision, seemed to rule this out, but in doing so left some commentators dissatisfied, on the grounds that a privileged system of political justice for the President alone seemed a vestige of a bygone age.¹¹⁷ The Constitutional Council felt so attacked that it issued a statement in October 2000 to assert its authority and defend its decision as being in line with “the constitutional tradition of France” and “republican principles.”¹¹⁸

The picture became even more confused exactly one year later, when the top appellate court, the Court of Cassation, ruled that the President could in fact be pursued through the regular courts for unofficial acts, on the condition that the case be suspended until they had left office; in the meantime, the President could not be compelled to appear as a witness in trials of coconspirators.¹¹⁹ This split between the country’s top two courts with regard to presidential immunity compelled President Chirac, after his reelection in 2002, to commission a task force led by Pierre Avril, an esteemed professor of public law, to review the penal provisions regarding the head of state in Article 68.¹²⁰ The 12-person team, comprised mainly of law professors, reported at the end of the year.¹²¹ Having considered the traditions and practice in France and dozens of other countries (including the United States), the commission recommended that France retain a broad immunity

116. *See France: Will Chirac Stand Trial at Last?*, THE WK. (Jan. 8, 2015), <https://theweek.com/articles/500027/france-chirac-stand-trial-last> [<https://perma.cc/L2TK-PNPG>].

117. Philippe Ardant et al., *La responsabilité pénale du président français. Réponses à deux questions* [*The Criminal Responsibility of the French President. Answers to Two Questions*], 92 POUVOIRS 61, 73 (2000) (Fr.).

118. *Communiqué de Presse du 10 Octobre 2000* [*Press Release of 10 October 2000*], CONSEIL CONSTITUTIONNEL [CONSTITUTIONAL COURT] (Oct. 10, 2000), <https://www.conseil-constitutionnel.fr/actualites/communiquede/communiquede-presse-du-10-octobre-2000> [<https://perma.cc/D6HJ-LJEK>].

119. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Oct. 10, 2001, Bull. Crim., No. 206; *see* Guillaume Chetard, *Criminal Liability of Political Decision-Makers in France*, in CRIMINAL LIABILITY OF POLITICAL DECISION-MAKERS: A COMPARATIVE PERSPECTIVE 63, 83–85 (Frank Zimmermann ed., 2017).

120. Décret 2002-961 du 4 juillet 2002 portant création d’une commission chargée de mener une réflexion sur le statut pénal du Président de la République [Decree 2002-961 of July 4, 2002 on the Creation of a Commission Responsible for Conducting a Review of the Criminal Status of the President of the Republic], <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000005633155/> [<https://perma.cc/96ZW-FZ9B>].

121. *Id.*; RAPPORT DE LA COMMISSION DE RÉFLEXION SUR LE STATUT PÉNAL DU PRÉSIDENT DE LA RÉPUBLIQUE [REPORT OF THE COMMISSION OF REFLECTION ON THE CRIMINAL STATUS OF THE PRESIDENT OF THE REPUBLIC] 51 (2002) [hereinafter RAPPORT DE LA COMMISSION].

so that a sitting President can perform their constitutional duty to ensure the functioning and continuity of the state (Article 5), but impeachment should not be limited to cases of high treason.¹²² The commission proposed to start with an entirely new Article 67:

The President of the Republic is not responsible for acts carried out in this capacity, subject to the provisions of Articles 53-2 [on the jurisdiction of the ICC] and 68. During his term of office, he may not be required to testify before any French court or administrative authority, nor be the subject of any investigatory, judicial, or prosecutorial action. The conditions under which such proceedings may be initiated or resumed after the end of the President's term are determined by an organic law.¹²³

The commission recommended a revised Article 68 to govern the workings of the High Court of Justice:

The President of the Republic can only be removed from office in the event of a breach of duties manifestly incompatible with the exercise of his mandate. Removal is pronounced by Parliament sitting as the High Court.¹²⁴

The subsequent clauses of Article 68 stipulated that the President (Speaker) of the National Assembly would preside over the High Court, which would reach a decision within two months (during which the President would be suspended from performing their functions), and vote by secret ballot and a simple majority.¹²⁵

The commission had been given less than half a year to complete its work, and even though its report ran more than 100 pages, it did not pause to explain its choice of words in several key places.¹²⁶ The original provision in Article 68 that the President is accountable for the acts undertaken in the exercise of his duties (*dans l'exercice des fonctions*) only in the case of high treason rested on an ambiguity in the French preposition *dans* (in), which the commission said could refer "either to the duration of the mandate or to the nature of the acts

122. RAPPORT DE LA COMMISSION, *supra* note 121, at 7–8.

123. *Id.* at 9. Under Article 46 of the French Constitution, an "organic law" concerns fundamental operations of the system of government and requires qualified majorities and preclearance by the Constitutional Council to be passed. 1958 CONST. art. 46.

124. RAPPORT DE LA COMMISSION, *supra* note 121, at 9.

125. *Id.* at 9–10.

126. *Id.* at 13, 43; Décret 2002-961 du 4 juillet 2002 portant création d'une commission chargée de mener une réflexion sur le statut pénal du Président de la République, *supra* note 120.

performed.”¹²⁷ The commission was confident that the wording in the new Article 67 put the focus squarely on the acts committed “in this capacity,” (*en cette qualité*) while still leaving some room for interpretation as to what fell within “capacity.”¹²⁸

Also in need of elaboration was the proposed revision of Article 68 that would govern the impeachment process, whereby a president “can only be removed from office in the event of a breach (*manquement*) of duties manifestly (*manifestement*) incompatible with the exercise of his mandate.”¹²⁹ No longer limited to high treason, the proposed change would open up the potential range of wrongdoings for which a president might be put before the High Court of Justice.¹³⁰ So what would constitute a breach (*manquement*)? The commission indicated that it might, but would not necessarily, have to be something for which the deposed president could then be prosecuted in a criminal court.¹³¹ It could be any act that would compromise the “dignity of the function,” which the commission suggested might involve “a manifestly abusive use of Article 16.”¹³² The commission noted that they insisted on the adverb *manifestement* to impart that the finding of an “incompatibility” with the mandate had to “transcend the usual partisan cleavages, impress itself on practically everyone as objective fact, and not be seen by some as a purely political assessment. In short, the aim is truly to find a way out of an exceptional situation, and of that alone.”¹³³ However, the commission undermined this aspiration by setting the bar to remove the president at a simple majority vote, thereby not requiring a broader consensus across party lines.¹³⁴

It took more than four years for the political process to play out, but in February 2007, weeks before the end of Chirac’s second term, the French Parliament amended the Constitution.¹³⁵ It did so largely in line with the Avril Commission’s recommendations, with several substantive modifications:

127. RAPPORT DE LA COMMISSION, *supra* note 121, at 13, 43.

128. *Id.* at 43.

129. *See id.* at 45–46.

130. *Id.*

131. *Id.*

132. *Id.*; Article 16 of the French Constitution empowers the President to declare a state of emergency and use decree powers in the event of a threat to the country’s independence, institutions, territory or international obligations. *See* 1958 CONST. art. 16; John D. Huber, *Executive Decree Authority in France*, in EXECUTIVE DECREE AUTHORITY 233, 234–35 (John M. Carey & Matthew Soberg Shugart eds., 1998).

133. RAPPORT DE LA COMMISSION, *supra* note 121, at 45–46.

134. *See id.* at 48.

135. Loi 2007-238 du 23 février 2007 portant modification du titre IX de la Constitution (1) [Law 2007-238 of February 23, 2007 Amending Title IX of the Constitution (1)],

The new text of Article 67 adds the express proviso that all statutes of limitations and deadlines during the presidential term are suspended, so they will not expire while someone is in office.¹³⁶

Rather than leave the details to an organic law, the new Article 67 specifies that legal action against a former president can resume or commence one month after “the end of his functions.”¹³⁷

The new Article 68 omitted the proposed suspension of the president from office during proceedings in the High Court of Justice; shortened the deliberation time from two months to one; and raised the threshold for removal from a simple majority vote to two-thirds.¹³⁸ The final text thus ensured less disruption of governance, less time to debate the allegations, and less likelihood of removal of the head of state.¹³⁹

The organic law that was required by Article 68 to flesh out new details of the High Court of Justice (reduced from 24 to 22 judge-legislators) also added thresholds within the National Assembly for convening it, and thus also reduced the likelihood of success.¹⁴⁰

The grand consequence of these amendments is that French presidents now have more clarity about their immunity while in office (they cannot be made to testify in court and they cannot be investigated or prosecuted for unofficial acts), but also about their liability to impeachment for a potentially wider range of “breaches,” not just high treason, and also the potential to be prosecuted once they leave office (for acts not committed in their “capacity” as president).¹⁴¹ That Presidents are at low risk of impeachment is clear from the almost immediate

https://www.legifrance.gouv.fr/eli/loi_constit/2007/2/23/2007-238/jo/texte
[<https://perma.cc/96FL-F4ZV>].

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. Loi 2014-1392 du 24 novembre 2014 portant application de l'article 68 de la Constitution (1) [Law 2014-1392 of November 24, 2014 Implementing Article 68 of the Constitution (1)], <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029796562/> [<https://perma.cc/U6Z2-79AU>]. Previously, the High Court's judges were elected by the two chambers from among their members, but now they are selected by the chambers' steering committees (speakers, deputy speakers, representatives of the parties). *See France*, JUDICIARY HUB, <https://judiciaryhub.eu/country/france/> [<https://perma.cc/79ER-B2C3>].

141. *See* 1958 CONST. arts. 67–68.

failure of two attempts to initiate it under the new rules in 2016 and 2024.¹⁴² That they are at real risk of prosecution after serving in office for acts *détachables* from their capacity as President is clear from the fates of Jacques Chirac and his even more scandal-prone successor, Nicolas Sarkozy—both have been convicted in ordinary courts for bribing judges, illegal campaign funds, and embezzlement, and punished with suspended sentences, home detention, and loss of state honors.¹⁴³ In 2025, Sarkozy was sentenced to five years in prison for taking 50 million euros from Libyan dictator Muammar Gaddafi to fund his 2007 presidential campaign.¹⁴⁴

B. The Czech Amendments

Among the newer members of the Council of Europe, the Czech Republic also amended its Constitution with regard to presidential immunity in ways that went beyond acknowledging the ICC. The 1993 Constitution, adopted after the restoration of democracy and the breakup of the federation with Slovakia, reproduced language from the 1920 Constitution of Czechoslovakia that had given the President (at the time, the revered founding figure Tomáš G. Masaryk) sweeping immunity unless convicted of treason by the Senate.¹⁴⁵ The 1993 Constitution (written in consultation with another revered President, Václav

142. Radouan Kourak, *From 2016 to 2024: From the Attempted Dismissal of Hollande by LR to That of Macron by LFI*, ENTREVUE.FR (Aug. 20, 2024), <https://entrevue.fr/en/politique/de-2016-a-2024-de-la-tentative-de-destitution-de-hollande-par-lr-a-celle-de-macron-par-lfi/> [https://perma.cc/J5ZP-LNCT].

143. FP News Desk, *supra* note 4; *Former French President Jacques Chirac Convicted on Corruption Charges*, TIME (Dec. 15, 2011, at 09:53 CT), <https://time.com/archive/7156222/former-french-president-jacques-chirac-convicted-on-corruption-charges/> [https://perma.cc/XWJ3-DCG8] (discussing Chirac's suspended sentence); Sylvie Corbet, *Why France's Ex-President Sarkozy May Be Released from Prison After Just 20 Days*, AP (Nov. 9, 2025, at 02:01 CDT), <https://apnews.com/article/sarkozy-prison-release-appeal-4846eabe30544ca216d31a897d38e8a9> [https://perma.cc/VS6Q-4MXG] (discussing Sarkozy being ordered to wear an electronic monitor); Ségolène Le Stradic, *Former French President Begins Prison Term*, N.Y. TIMES (Oct. 21, 2025), <https://www.nytimes.com/2025/10/21/world/europe/sarkozy-france-president-jail.html> (discussing Sarkozy being stripped of France's highest honor distinction).

144. *French Ex-President Sarkozy Gets 5-Year Jail Term in Libya Campaign Case*, AL JAZEERA (Sep. 25, 2025), <https://www.aljazeera.com/news/2025/9/25/french-ex-president-sarkozy-guilty-of-conspiracy-in-libya-campaign-case> [https://perma.cc/74VJ-3X8N].

145. See Ústavní zákon č. 1/1920 Sb., Ústava České Republiky [Constitution of Czechia] § 66 (“The President of the Republic shall not be answerable at law in the exercise of his functions. The Government shall be answerable for all the President’s official utterances.”) “Official utterances” (*projevů jeho souvisejících s úřadem prezidentovým*) could be translated more literally as “pronouncements related to the presidential office.”

Havel) had likewise immunized the President in Section 3 of Article 54 and a three-pronged Article 65.¹⁴⁶

Art. 54

....

(3) The President of the Republic shall not be responsible for the performance of his office.¹⁴⁷

....

Art. 65

(1) The President of the Republic cannot be detained, criminally prosecuted, or prosecuted for an offense (*přestupek*) or other administrative violation (*delikt*).

(2) The President of the Republic may be prosecuted for high treason before the Constitutional Court based on charges brought by the Senate. The punishment may be loss of the presidential office and of eligibility to regain it.

(3) Criminal prosecution for criminal acts committed during the term of office as President of the Republic is forever excluded.¹⁴⁸

The impetus to modify this text was the decision to move from election of the largely ceremonial President by the bicameral legislature to direct election by the people.¹⁴⁹ Even though the office's formal powers would not change and the system would not become "semi-presidential," a President with a popular mandate and adversarial temperament might feel emboldened to use them more assertively.¹⁵⁰ The Czech government's draft amendment was initially modest, leaving most of Article 65 unchanged other than broadening the grounds for impeachment and trial in Section 2, so that it could be for "gross violation of the Constitution or other segment of the constitutional order" and not limited to high

146. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of Czechia] arts. 54(3), 65 (1993 unamended constitution).

147. *Id.* art. 54(3) (1993 unamended constitution).

148. *Id.* art. 65 (1993 unamended constitution).

149. See Jan Kudrna, *The Question of Conducting Direct Elections of the President in the Czech Republic (A Live Issue for Already 20 Years)*, 18 JURISPRUDENCIA 1295, 1310 (2011).

150. *Id.* at 1318.

treason.¹⁵¹ On presenting the amendment to the legislature in September 2011, the Justice Minister said it was inspired by the model in Germany, where the President, Christian Wulff, had just come under intense scrutiny after a series of media reports of improper loans and paid trips.¹⁵²

The main opposition in Parliament, the Czech Social Democratic Party, wanted to go further; eliminate Section 3's perpetual immunity and amend Section 1, so that it would read: "The President of the Republic *during the exercise of his function* cannot be detained, criminally prosecuted, or prosecuted for an offense or other administrative violation."¹⁵³ In contrast to the 2007 French amendment, which had emphasized the acts of office, this alteration would focus on the time period (the term of office).¹⁵⁴ Supporters of this competing amendment said they wanted to end the President's "medieval" privilege and bring in a regime more akin to what had recently been demonstrated in Israel, where former President Moshe Katsav had been sentenced to seven years in prison for rape.¹⁵⁵ The

151. Ústavní zákon č. 71/2012 Sb., Ústava České Republiky [Constitution of Czechia]. The amendment also incorporated into Art. 65 §2 the statutory definition of high treason as "conduct of the President of the Republic directed against the sovereignty and integrality of the Republic, as well as against the democratic order of the republic." *Id.*

152. *Parlament České republiky, Poslanecká sněmovna 2010 – 2013* [Parliament of the Czech Republic, Chamber of Deputies 2010 – 2013], POSLANECKÁ SNĚMOVNA PARLAMENTU ČESKÉ REPUBLIKY (Sep. 20, 2011, at 20:20 CT), <https://www.psp.cz/eknih/2010ps/stenprot/023schuz/s023039.htm> [<https://perma.cc/EEF9-2V8G>]. Wulff resigned in February 2012, just as investigators began to seek to lift his immunity; two years later, he was cleared of wrongdoing by a regional court. See Melissa Eddy, *German Ex-Leader Acquitted of Graft Charges from His Time as Governor*, N.Y. TIMES (Feb. 27, 2014), <https://www.nytimes.com/2014/02/28/world/europe/christian-wulff.html>.

153. See POZMĚŇOVACÍ A JINÉ NÁVRHY K VLÁDNÍMU NÁVRHU ÚSTAVNÍHO ZÁKONA, KTERÝM SE MĚNÍ ÚSTAVNÍ ZÁKON Č. 1/1993 SB., ÚSTAVA ČESKÉ REPUBLIKY, VE ZNĚNÍ POZDĚJŠÍCH ÚSTAVNÍCH ZÁKONŮ (TISK 415) [AMENDMENTS AND OTHER PROPOSALS TO THE GOVERNMENT DRAFT OF THE CONSTITUTIONAL LAW, WHICH AMENDS CONSTITUTIONAL ACT NO. 1/1993 COLL., THE CONSTITUTION OF THE CZECH REPUBLIC, AS AMENDED BY LATER CONSTITUTIONAL LAWS (PRINT 415)] 3 (2011) (emphasis added), <https://www.psp.cz/sqw/text/orig2.sqw?idd=77066> [<https://perma.cc/U3CF-ANZN>].

154. *Contrast id.* (noting the president cannot be detained or prosecuted during office), with Loi 2007-238 du 23 février 2007 portant modification du titre IX de la Constitution (1) [Law 2007-238 of February 23, 2007 Amending Title IX of the Constitution (1)], <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000245803> [<https://perma.cc/96FL-F4ZV>] (noting the president may not be required to testify before any court or be the subject of an action, investigation, or prosecution).

155. See *Parlament České republiky, Poslanecká sněmovna 2010–2013* [Parliament of the Czech Republic, Chamber of Deputies 2010–2013], POSLANECKÁ SNĚMOVNA PARLAMENTU ČESKÉ REPUBLIKY: DIGITÁLNÍ REPOZITÁŘ (Dec. 7, 2011), <https://www.psp.cz/eknih/2010ps/stenprot/032schuz/s032047.htm> [<https://perma.cc/E793-RP4R>] (transcribing Stanislav

government had to incorporate the Social Democrats' wording in order to get the three-fifths majority to amend the constitution.¹⁵⁶

Soon after the amendment was enacted, the first man to be directly elected to the Czech presidency, Miloš Zeman, provided ample opportunity to explore the redefined limits of the office's immunity.¹⁵⁷ At a conference in 2015 to commemorate the liberation of the Auschwitz concentration camp, Zeman claimed that on the eve of the Second World War a prominent Czech journalist, Ferdinand Peroutka, had written an article with the title, "Hitler is a gentleman[.]"¹⁵⁸ Zeman's remarks were interpreted as casting aspersions on an intellectual's integrity and judgment, a recurring theme in his populist messaging.¹⁵⁹ Peroutka's granddaughter Terezie Kaslová insisted that no such article existed and demanded a public apology from the President on the grounds that "even the highest and most powerful cannot hide behind their positions and tell untruths."¹⁶⁰ The ensuing legal battle ran for six years while lawyers and judges wrangled over whether Peroutka in fact wrote such an article or something comparable, whether the President could be held accountable for damaging the reputation of someone who had died in 1978, whether he made his remarks in a private capacity, and how an apology would actually be issued.¹⁶¹ Finally, after appeals from both sides to the Czech Supreme Court, it was determined in October 2021 that Zeman had spoken in an official way that was not covered by his constitutional immunity, but instead was governed

Polčák's remarks during a parliamentary meeting); Josef Federman, *Ex-Israeli President Exits Prison After 5-Year Rape Sentence*, AP (Dec. 21, 2016, at 10:00 CDT), <https://apnews.com/general-news-7cd1e6eed8554e5b80742f0c69c14a37> [https://perma.cc/354F-WK8E] (reporting the former Israeli President's imprisonment).

156. For a critical view of the changes and related issues, see Jan Kudrna, *Responsibility for Acts of the President of the Czech Republic*, 56 ACTA JURIDICA HUNGARICA 39 (2015).

157. See Ian Willoughby, *Miloš Zeman Becomes First Directly Elected Czech President*, RADIO PRAGUE INT'L (Jan. 26, 2013), <https://english.radio.cz/milos-zeman-becomes-first-directly-elected-czech-president-8547868> [https://perma.cc/TP2E-NA7S].

158. Brian Kenety, *Hitler No 'Gentleman', but Court Rules Czech State Need Not Apologize for President's Claim Ferdinand Peroutka Said So*, RADIO PRAGUE INT'L (Oct. 14, 2019), <https://english.radio.cz/hitler-no-gentleman-court-rules-czech-state-need-not-apologize-presidents-claim-8118226> [https://perma.cc/5JZN-YXFT].

159. *Id.*

160. Anna Jadrná, *Peroutkova vnučka Kaslová: Ani ti nejmocnější se nemůžou schovávat za svou funkci a říkat nepravdy* [Peroutka's Granddaughter Kaslová: Even the Most Powerful Cannot Hide Behind Their Office and Tell Untruths], IROZHLAS (Oct. 14, 2021, at 12:55 CT), https://www.irozhlas.cz/zpravy-domov/ferdinand-peroutka-terezie-kaslova-milos-zeman-spor-soud-hitler-je-gentleman_2110141255_ako [https://perma.cc/P7FY-CNMM].

161. Ivo Šlosarčík, *Constitutional Design, Rule of Law and Mutual Recognition in the Czech Republic*, STUDIA EUROPEJSKIE – STUD. EUR. AFFS., 2019, at 113, 115–18.

by Article 36 of the Czech Charter of Fundamental Rights and Basic Freedoms.¹⁶² His pronouncement constituted maladministration under the 1998 Act on Liability for Damage caused in the exercise of public authority, but under that law the state (via the Ministry of Finance as the default office) would deliver the apology to Kaslová on his behalf.¹⁶³

Zeman became embroiled in a similar case for remarks he made in 2017 during an interview on a private television network, alleging a former adviser, Zdeněk Šarapatka, had been dismissed for “incompetence.”¹⁶⁴ Šarapatka, a pediatrician, demonstrated he had left of his own initiative, and the court ordered the state to apologize on behalf of Zeman.¹⁶⁵ However, this case showed, as in France, high courts can differ in their interpretation of presidential liability, as the Czech Constitutional Court intervened and held that Zeman made the remarks in a nonofficial capacity and should apologize personally.¹⁶⁶ Even though Article 54 of the Czech Constitution declares the President “shall not be responsible for the performance of his duties”, the Constitutional Court held it “does not mean that in private law relations there is no entity liable for damage caused by the President of

162. Rozsudek Nejvyššího soudu ze dne 06.10.2021 (NS) [Decision of the Supreme Court of Oct. 6, 2021], sp.zn. 30 Cdo 3889/2020. Charter of Fundamental Rights and Basic Freedoms art. 36, appended to the Czech Constitution, holds that “Everybody is entitled to compensation for damage caused him by an unlawful decision of a court, other state bodies, or public administrative authorities, or as the result of an incorrect official procedure.” Ústavní zákon č. 295/2021 Sb., Art. 36(3) Ústava České Republiky [Constitution of Czechia].

163. *Peroutkové vnučce náleží za Zemanův výrok omluva, potvrdil Nejvyšší soud. Ministerstvo se omluví* [Peroutka's Granddaughter Deserves an Apology for Zeman's Statement, the Supreme Court Confirmed. The Ministry Will Apologize], IROZHLAS (Oct. 14, 2021, at 12:09 CT), <https://www.irozhlas.cz/zpravy-domov/ferdinand-peroutka-terezie-kaslova-milos-zeman-nejvyssi-soud2110140814ako> [<https://perma.cc/KBV4-4N79>]; *Konec kauzy Peroutka. Česko se za dehonestující výroky omlouvá, napsala Schillerová k Zemanově lži* [The End of the Peroutka Case. 'The Czech Republic Apologizes for the Disparaging Statements,' Schillerová Wrote About Zeman's Lie], IROZHLAS (Nov. 5, 2021, at 13:38 CT), <https://www.irozhlas.cz/zpravy-domov/ferinand-peroutka-milos-zeman-terezie-kaslova-omluva-ministerstvo-financi2111051338ako> [<https://perma.cc/2CRM-GAUU>].

164. Jakub Ferenčík, *Zeman Must Apologize and Pay 50,000 CZK in Šarapatka Case*, RADIO PRAGUE INT'L (Jan. 23, 2025), <https://english.radio.cz/zeman-must-apologize-and-pay-50000-czk-sarapatka-case-8840738> [<https://perma.cc/RU94-X65S>].

165. See Usnesení Nejvyššího soudu ze dne 31.08.2020 [Resolution of the Supreme Court of Aug. 31, 2020], 30 Cdo 1877/2020-183; see also *Ministerstvo financí odeslalo omluvu Zdeňku Šarapatkovi* [The Ministry of Finance Sent an Apology to Zdeněk Šarapatka], MINISTERSTVO FINANCÍ (Sep. 11, 2020), <https://mf.gov.cz/cs/ministerstvo/media/aktuality/2020/ministerstvo-financi-odeslalo-omluvu-zde-39384> [<https://perma.cc/L8QP-4J6Z>] (publishing the apology).

166. See Usnesení Nejvyššího soudu ze dne 31.08.2020 [Resolution of the Supreme Court of Aug. 31, 2020], 30 Cdo 1877/2020-183.

the Republic in the performance of his duties.”¹⁶⁷ Zeman sent a written apology in April 2024 but repeated the original claim on a website; consequently, he was ordered to apologize again and pay Šarapatka 50,000 Czech crowns, which he did in February 2025 with money from supporters.¹⁶⁸

Germany’s Constitutional Court also considered whether a largely ceremonial President can be held legally responsible for his speech. The far-right National Democratic Party (NPD) complained about remarks by President Joachim Gauck made to a group of vocational students at an August 2013 event to encourage participation in the upcoming federal election.¹⁶⁹ When asked about the NPD, the President expressed his negative view and added, “We need citizens who take to the streets and show the nutcases their limits and who say, ‘Up to here and no further.’”¹⁷⁰ On deciding the NPD’s complaint, the Constitutional Court held, “[I]t would contradict the principle of the rule of law if political parties, whose right to equal opportunities [in competition] is an essential element of the democratic basic order, had no legal protection vis-à-vis the federal president” who is expected to keep “a certain distance[.]”¹⁷¹ The Court also held, however, that as the embodiment of state unity, the President enjoyed a broad discretion in deciding how to perform his office’s “integrative tasks” aimed at the “common good,” so long as he did not “take sides arbitrarily” (*willkürlich Partei ergreift*) or engage in “defamatory criticism” (*Schmähkritik*).¹⁷² The Court determined that Gauck was not inciting violence against the NPD and interpreted his “nutcases” statement as a reference to people who failed or refused to learn the lessons of Germany’s Nazi past.¹⁷³ The Court thus determined that he was acting consistently with the postwar Constitution’s deep commitment to safeguarding democracy.¹⁷⁴

167. *Id.*

168. Radek Nohl, *Definitivní tečka. Soud zastavil exekuci proti Zemanovi* [Definitive Period. The Court Stopped the Enforcement Proceedings Against Zeman], SEZNAM ZPRÁVY (June 20, 2025, at 12:59 CT), <https://www.seznamzpravy.cz/clanek/domaci-kauzy-definitivni-tecka-soud-zastavil-exekuci-proti-zemanovi-279738> [<https://perma.cc/5J6B-Y88H>].

169. BVerfG, 2 BvE 4/13, June 10, 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/06/es20140610_2bve000413en.html [<https://perma.cc/8JLD-4RFZ>].

170. *Id.* ¶ 3.

171. *Id.* ¶¶ 24, 31.

172. *Id.* ¶¶ 29–31.

173. *Id.* ¶ 34.

174. *Id.*; see also Thomas Kliegel, *Freedom of Speech for Public Officials vs. the Political Parties’ Right to Equal Opportunity: The German Constitutional Court’s Recent Rulings Involving the NPD and the AfD*, 18 GERMAN L.J. 189, 197–200 (2017) (discussing the judgment by the German Constitutional Court).

V. NATIONAL LAW AND PRACTICE AMONG MEMBERS OF THE COUNCIL OF EUROPE IN THE TWENTY-FIRST CENTURY

In this Part, I will attempt to give an overview of immunity in Council of Europe member states as of 2025. In this endeavor I am drawing primarily on a report issued by the Council's team of legal experts, the European Commission for Democracy through Law (commonly known as the Venice Commission), which compiled all the relevant passages from member states' laws and constitutions regarding immunity for heads of state, heads of government, ministers, and legislators.¹⁷⁵

A. Head of State Immunity

From the Venice Commission report, it emerges that the norm in Europe is to provide heads of states (Presidents and Monarchs) with strong immunity for acts committed in the exercise of official functions, and protection from investigation and prosecution for unofficial acts while in office.¹⁷⁶ Presidents might be open to some kind of impeachment or prosecution for a very limited range of crimes (usually high treason, which can be defined to include participation in a coup or attempt to change the political system), subject to a vote of approval by the legislature by qualified majority, and then possibly involving the constitutional court or a special court (as in Greece) or select legislators sitting as the high court (as in France).¹⁷⁷ Impeachment has led to only one successful conviction of a sitting European president: Rolandas Paksas of Lithuania in 2004.¹⁷⁸

175. EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), COUNCIL OF EUR., KEEPING POLITICAL AND CRIMINAL RESPONSIBILITY SEPARATE: CONSTITUTIONAL (LEGISLATIVE) PROVISIONS (2013) [hereinafter VENICE COMMISSION REPORT], [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2012\)040-bil](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2012)040-bil) [<https://perma.cc/24DL-M55T>]; see also Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 57 (2017) (explaining the workings of the Venice Commission).

176. See VENICE COMMISSION REPORT, *supra* note 175 (illustrating the immunity that sitting European presidents enjoy). *But cf.* *Clinton v. Jones*, 520 U.S. 681, 705–06 (1997) (holding that U.S. presidents may be subject to civil litigation while in office).

177. See VENICE COMMISSION REPORT, *supra* note 175 (providing examples of the high standard for when a President may be subject to removal in most European countries, such as France, Greece, and Romania).

178. Valentinas Mite, *Lithuania: Paksas Becomes First European President to Be Removed from Office*, RADIO FREE EUR./ RADIO LIBERTY (Apr. 6, 2004, at 16:47 CET), <https://www.rferl.org/a/1052192.html> [<https://perma.cc/AJ4B-SGAM>]; see also *Paksas v. Lithuania*, App. No. 34932/04 (Jan. 6, 2011), <https://hudoc.echr.coe.int/eng?i=001-102617> [<https://perma.cc/D6GP-88QQ>] (holding that banning the deposed President from running for a seat in the legislature violated his rights under Art. 3 of Protocol No. 1 (requiring free elections at regular intervals) of the European Convention).

Twelve Council of Europe states—Bosnia and Herzegovina, Croatia, Estonia, Germany, Hungary, Montenegro, Poland, Portugal, San Marino, Serbia, Switzerland, and Ukraine—permit prosecution of heads of state for official-capacity acts (rare in practice: Germany, Hungary, and San Marino allow it only post-mandate).¹⁷⁹ An example of this less watertight coverage can be illustrated by Poland, where the post-Communist Constitution of 1997 carried over a quasi-judicial body, the Tribunal of State, that appeared in the 1921 Constitution, disappeared in 1947 and was then reintroduced in 1982, shortly after the Communist regime had instituted martial law.¹⁸⁰ The Tribunal’s operation is now governed by Article 199 of Poland’s Constitution:

The Tribunal of State shall be composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm [lower house of parliament] for the current term of office of the Sejm from amongst those who are not Deputies or Senators. The deputy chairpersons of the Tribunal and at least one half of the members of the Tribunal shall possess the qualifications required to hold the office of judge.¹⁸¹

The preceding Article identifies who might be brought before the Tribunal:

For violations of the Constitution or of a statute committed by them within their office or within its scope, the following persons shall be constitutionally accountable to the Tribunal of State: the President of the Republic, the Prime Minister and members of the Council of Ministers¹⁸²

It is not stated whether a former President can be judged by the Tribunal, but it is presumed that they can be, as a complaint can be filed up to 10 years after the wrongdoing allegedly took place.¹⁸³

The liability of the President is set down in Article 145, just after the Article setting out at length the President’s official duties:

179. See *Saakashvili v. Georgia*, App. Nos. 6232/20 & 22394/20, ¶ 102 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>] (listing 12 Council of Europe member states that allow “prosecution of the head of State for acts committed in his or her official capacity”).

180. See Jakub Szumski, *The State Tribunal and the Paradoxes of Socialist Legality in 1980s Poland*, 18 J. MOD. EUR. HIST. 297, 298 (2020).

181. KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 199(1). Tribunal sessions are chaired by the first president of the supreme court. *Id.* art. 199(2).

182. *Id.* art. 198(1).

183. Robert Kropiwnicki, *Between the Politicisation and Juridisation of Constitutional Accountability in Poland*, 21 PRZEGLĄD POLITOLOGICZNY 39, 41 (2023); Sabina Grabowska, *The State Tribunal as a Special Organization Adjudicating on the Constitutional Responsibility of the President*, 40 PRZEGLĄD PRAWA KONSTITUCYJNEGO 219, 228 (2017).

1. The President of the Republic may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence.
2. Bringing an indictment against the President of the Republic shall be done by resolution of the National Assembly passed by a majority of at least two-thirds of the statutory number of members of the National Assembly, on the motion of at least 140 members of the Assembly.¹⁸⁴

Once convened, the Tribunal of State follows criminal procedure, its decisions are made in camera and cannot be appealed to another court.¹⁸⁵ The types of punishment it may impose are set out in the (amended) statute from 1982 that resurrected the Tribunal.¹⁸⁶ With regard to the President, Article 2(1) states that they may be held accountable before the Tribunal for “violating the Constitution, a statute, committing a crime or a fiscal crime.”¹⁸⁷ Even if the Tribunal accepts that the President broke the law unintentionally, they will be removed from office.¹⁸⁸ Article 25 of the statute also empowers the Tribunal to impose, for periods between two and ten years, loss of the right to vote and hold managerial positions in the public sector.¹⁸⁹ Article 26 holds that for acts constituting a crime or a fiscal crime, the Tribunal can impose “penalties or penal measures,” understood to include imprisonment.¹⁹⁰ So, while the President could be brought before the Tribunal for all manner of wrongdoing, including failure to act, they still enjoy the high political bar that has to be surmounted to initiate proceedings.¹⁹¹ As a result, “The experience to date shows that in practice accountability before the Tribunal of State – be it constitutional or criminal – does not function.”¹⁹²

B. Head of Government Immunity

From the same Venice Commission report, it is clear that Prime Ministers, who bear much of the real power and responsibility for day-to-day governing, have

184. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 145(1)–(2).

185. Grabowska, *supra* note 183, at 225.

186. Ustawa z dnia 26 marca 1982 r. o Trybunale Stanu [Act of March 26, 1982 on the State Tribunal], Dz. U. z 2022 r. poz. 762.

187. *Id.* art. 2(1).

188. *See* Grabowska, *supra* note 183, at 228.

189. Ustawa z dnia 26 marca 1982 r. o Trybunale Stanu [Act of March 26, 1982 on the State Tribunal] art. 25, Dz. U. z 2022 r. poz. 762.

190. *Id.* art. 26.

191. MIROSLAW GRANAT & KATARZYNA GRANAT, *THE CONSTITUTION OF POLAND: A CONTEXTUAL ANALYSIS* 156 (2019) (noting that for the Tribunal to be convened, the National Assembly must first vote to initiate the proceedings).

192. *Id.*

little to no immunity.¹⁹³ They usually have the same protection afforded to any member of the legislature, which might have to vote to allow prosecution unless the person is arrested *in flagrante delicto*.¹⁹⁴ A present or former Prime Minister might also be tried in a court of appeal as the court of first instance, at the supreme or constitutional court, or a court of special jurisdiction.¹⁹⁵ Figure 1 shows recent examples of attempted prosecution of Prime Ministers in 18 of 46 Council of Europe member states.¹⁹⁶

*Figure 1. Prime Ministers indicted since 2010 for offenses or violations committed during their time in office.*¹⁹⁷

Country	Prime Minister	Accusation	Outcome
Austria	Sebastian Kurz	Perjury	8-month suspended sentence (2024), overturned on appeal (2025) ¹⁹⁸
Bosnia & Herzegovina	Fadil Novalić	Abuses related to procurement of respirators during COVID-19 pandemic	4-year prison sentence (2023) ¹⁹⁹

193. See generally VENICE COMMISSION REPORT, *supra* note 175 (describing the immunity of prime ministers and other government officials throughout Europe).

194. See *id.*

195. This is the case in Belgium, Bulgaria, Cyprus, Finland, France, Greece, Iceland, Netherlands, Norway, Poland, Romania, Slovenia, Spain, and Sweden. *Id.* at 6–7, 12, 14, 17–18, 22–23, 30, 32, 34, 38–40.

196. See *infra* Figure 1. Not included in this figure are people who served as Prime Minister but were charged for acts committed before or after their time in the office, such as Alain Juppé and François Fillon (France) and Andrej Babiš (Czech Republic), or were tried in a foreign court, such as Pavlo Lazarenko (Ukraine) and Nikola Šainović (Serbia).

197. While the figure is current as of this Article's publication and cites each matter separately, other sources catalog ongoing accusations against state leaders. See, e.g., *List of Heads of State and Government Who Were Later Imprisoned*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_heads_of_state_and_government_who_were_later_imprisoned [<https://perma.cc/WN3X-VT3Q>]; ORGANIZED CRIME & CORRUPTION REPORTING PROJECT, <https://www.occrp.org/en> [<https://perma.cc/RU93-JMWT>]; RADIO FREE EUR./ RADIO LIBERTY, <https://www.rferl.org/> [<https://perma.cc/JDU8-3Y8H>].

198. Bethany Bell & Frances Mao, *Austria's Ex-Chancellor Has Conviction Quashed*, BBC (May 26, 2025), <https://www.bbc.com/news/articles/c989dr3erp2o> [<https://perma.cc/Y9UT-F7EG>].

199. RFE/RL's Balkan Service, *Ex-Prime Minister of Bosniak-Croat Federation Begins Jail Term*, RADIO FREE EUR./ RADIO LIBERTY (Mar. 22, 2024, at 17:06 CET), <https://www.rferl.org/a/bosnia-novalic-corruption-prison-novalic/32350526.html> [<https://perma.cc/T583-N84B>].

Country	Prime Minister	Accusation	Outcome
Bulgaria	Kiril Petkov	Abuse of power (for arresting previous prime minister, Boyko Borisov)	Ongoing ²⁰⁰
Croatia	Ivo Sanader	Three cases involving forms of corruption	18-year combined sentence in semi-open prison (2019) ²⁰¹
Czech Republic	Petr Nečas	Perjury (two counts); bribery	1-year suspended sentence and 100,000 Kc fine for perjury; 2.5 years suspended sentence and Kc 1 million fine for bribery (2024) ²⁰²
Greece	Kyriakos Mitsotakis	Lawsuit filed by 370 citizens regarding government's complicity in Tempi train disaster	Ongoing since May 2025 ²⁰³
Iceland	Geir Haarde	Gross negligence	Found guilty but not sentenced (2012) ²⁰⁴

200. Georgi Slavov, *Bulgarian Ex-PM Petkov Faces Prosecutors Over 2022 Arrest of Political Rival*, REUTERS (Jan. 10, 2025), <https://www.reuters.com/world/europe/bulgarian-ex-pm-petkov-faces-prosecutors-over-2022-arrest-political-rival-2025-01-10/> [https://perma.cc/8H7U-4VEZ].

201. See Z.D., *Ivo Sanader – From Prime Minister to Head of the Prison Library*, SLOBODENPECAT <https://www.slobodenpecat.mk/en/ivo-sanader-od-premier-do-shef-nazatvorska-biblioteka/> [https://perma.cc/3GA3-BLMU]; *Croatia Jails Former PM Sanader for Party Slush Funds*, REUTERS (Nov. 13, 2020), <https://www.reuters.com/world/croatia-jails-former-pm-sanader-party-slush-funds-2020-11-13/> [https://perma.cc/5TKV-R3QE].

202. Anna Fodor, *Prosecutor Proposes Suspended Sentences for Nečas and His Wife in Bribery Case*, RADIO PRAGUE INT'L (June 12, 2023), <https://english.radio.cz/prosecutor-proposes-suspended-sentences-necas-and-his-wife-bribery-case-878576> [https://perma.cc/PH4V-28NB].

203. *Criminal Indictment Filed Against Greek PM, Ministers Over Tempi Crash*, TOVIMA (May 14, 2025, at 13:30 CT), <https://www.tovima.com/politics/criminal-dossier-filed-against-greek-pm-ministers-over-tempi-crash/> [https://perma.cc/4FM9-T6VD].

204. *Iceland Ex-PM Haarde 'Partly' Guilty Over 2008 Crisis*, BBC (Apr. 23, 2012), <https://www.bbc.com/news/world-europe-17817174> [https://perma.cc/W84X-ZFSA].

Country	Prime Minister	Accusation	Outcome
Italy	Silvio Berlusconi ²⁰⁵	Paying for sex with a minor and abuse of power to secure her release from detention; tax fraud	For sex with minor: 7-year prison sentence and lifetime ban from public office (2013), overturned on appeal (2014); for tax fraud: one year of community service and a 6-year ban from elected office (2013)
Latvia	Andris Šķēle	Fraud and money laundering	Acquitted (2022) ²⁰⁶
Malta	Joseph Muscat	Kickbacks in connection with sale of three state-run hospitals	Ongoing since May 2024 ²⁰⁷

205. *Silvio Berlusconi Sex Conviction Overturned*, BBC (July 18, 2014), <https://www.bbc.com/news/world-europe-28369408> [<https://perma.cc/SG43-7Q39>].

206. LETA/TBT Staff, *Court Acquits Everybody in So-Called Second Digital TV Case*, BALTIC TIMES (Jan. 31, 2022), https://www.baltictimes.com/court_acquits_everybody_in_so-called_second_digital_tv_case/ [<https://perma.cc/C9MA-BZX7>].

207. *Malta's Former Prime Minister Charged with Corruption Over Hospital Scandal*, ED NEWS (May 9, 2024, at 19:50 CT), <https://ednews.net/en/news/world/660461-maltas-former-prime-minister-charged> [<https://perma.cc/L8Y6-BYHD>]; see also Khadija Sharife, Jacob Borg & David Lindsay, *Companies Behind Malta Hospital Controversy Spent Millions on Luxuries, Payments to Director*, ORGANIZED CRIME & CORRUPTION REP. PROJECT (May 17, 2023), <https://www.occrp.org/en/investigation/companies-behind-malta-hospital-controversy-spent-millions-on-luxuries-payments-to-director> [<https://perma.cc/LJA4-MQ3N>] (investigating corruption case before charges officially filed).

Country	Prime Minister	Accusation	Outcome
Moldova	Vlad Filat	Taking bribes and trafficking in influence; money laundering	9-year prison sentence (2016), released in 2019; European Court of Human Rights found a violation of Article 6 of the European Convention (2023); 2-year prison sentence for money laundering (2025) ²⁰⁸
North Macedonia	Nikola Gruevski	Unlawfully influencing government officials to purchase luxury car	2-year sentence (2018), fled to Hungary to avoid prison. ²⁰⁹
Poland	Mateusz Morawiecki	Abuse of power and failure to perform official duties in regard to presidential elections during COVID-19 pandemic	Ongoing: (in 2020 an administrative court found Morawiecki had “grossly violated the law,” ²¹⁰ overturned by Constitutional Tribunal in 2024; in 2025 new criminal and constitutional tort charges filed) ²¹¹

208. See Eliza Mihalache, *French Court Sentences Former Moldovan PM Vlad Filat to Prison for Money Laundering*, MOLDOVA1 (Dec. 22, 2025, at 16:18 CT), <https://moldova1.md/p/64964> [<https://perma.cc/5SAY-58A8>]; *Moldova: Former PM Sentenced in Billion-Dollar Bank Fraud Case*, ORGANIZED CRIME & CORRUPTION REP. PROJECT (June 30, 2016), <https://www.occrp.org/en/news/moldova-former-pm-sentenced-in-billion-dollar-bank-fraud-case> [<https://perma.cc/5PFP-JBM7>].

209. Maja Jovanovska, *Ex Macedonia PM Flees to Hungary to Dodge Arrest*, ORGANIZED CRIME & CORRUPTION REP. PROJECT (Nov. 13, 2018), <https://www.occrp.org/en/news/ex-macedonia-pm-flees-to-hungary-to-dodge-arrest> [<https://perma.cc/66UN-FMY7>].

210. Daniel Tilles, *Ex-PM Acted Constitutionally in Trying to Organise Pandemic Postal Elections, Rules Top Court*, NOTES FROM POL. (May 21, 2024), <https://notesfrompoland.com/2024/05/21/ex-pm-acted-constitutionally-in-trying-to-organise-pandemic-postal-elections-rules-top-court/> [<https://perma.cc/6A7R-SQXB>].

211. Mateusz Jaronski, *Euronews Exclusive: State Tribunal for Poland's Former PM and Members of His Government?*, EURONEWS (Dec. 4, 2025, at 20:25 GMT),

Country	Prime Minister	Accusation	Outcome
Portugal	José Sócrates	Money laundering & falsifying documents	Ongoing since November 2014 (Sócrates was in pre-trial jail detention and house arrest for 1 year); trial set to start in July 2025. ²¹²
Romania	Adrian Năstase	Multiple counts of corruption	3-year suspended jail sentence for blackmail (2012); 2-year jail sentence for corruption (2012, served 8 months); 4 years in jail for bribery and concurrent 3-year prison sentence for blackmail (2014, served 7 months) ²¹³
Slovenia	Janez Janša	Kickback for his party from Finnish defense contractor; abuse of office in a property sale	2-year prison sentence for kickback (2013), released after 6 months and verdict overturned by Constitutional Court; property-related charges dismissed by trial court (2025) ²¹⁴

<https://www.euronews.com/2025/12/04/euronews-exclusive-state-tribunal-for-polands-former-pm-and-members-of-his-government#vuukle-comments-2851869>
[<https://perma.cc/MPN8-DRB9>].

212. Reuters, *Portuguese Former Prime Minister Socrates Goes on Trial in Graft Case*, U.S. NEWS (July 3, 2025, at 10:14 CT), <https://www.usnews.com/news/world/articles/2025-07-03/portuguese-former-prime-minister-socrates-goes-on-trial-in-graft-case> [<https://perma.cc/NNT7-RPFB>].

213. *Romania: Former Prime Minister Receives Jail Sentence, Again*, ORGANIZED CRIME & CORRUPTION REP. PROJECT (Jan. 7, 2014), <https://www.occrp.org/en/news/romania-former-prime-minister-receives-jail-sentence-again> [<https://perma.cc/FW4M-22GN>].

214. *See Court Acquits Slovenia's Ex-PM Jansa of Corruption Charges*, REUTERS (Apr. 18, 2025), <https://www.reuters.com/world/court-acquits-slovenias-ex-pm-jansa-corruption-charges-2025-04-18/>; *Slovenia: Higher Court Upholds Ex-PM's Prison Sentence for Bribery*,

Country	Prime Minister	Accusation	Outcome
Ukraine	Yulia Tymoshenko	Multiple counts of corruption	Sentenced to 7 years in prison (2011); released and legally rehabilitated in 2014. ²¹⁵
Ukraine	Mykola Azarov	Treason	Ongoing since 2024 (in absentia) ²¹⁶
United Kingdom	Boris Johnson	Violating limits on indoor gatherings during COVID-19 pandemic	Fine (2022; amount undisclosed) ²¹⁷

From Figure 1 we can discern that most cases involving a Prime Minister arise in post-Communist Central and Eastern Europe, and they relate mainly to kickbacks or embezzlement, using the office to settle scores, or—and less often—for partisan ends.²¹⁸ It's also clear that a Prime Minister's fate is usually decided by the political process (resignation, removal by their own party, or defeat at an election), while most attempts to use the courts end in acquittal or suspended sentences.²¹⁹ It is rare that a Prime Minister would be judged as severely as Ivo Sanader of Croatia, who was given a combined 18-year sentence for three cases involving corrupt dealings.²²⁰ But even he has been serving that sentence in a semi-open prison and is occasionally seen on the streets of the capital.²²¹

ORGANIZED CRIME & CORRUPTION REP. PROJECT (Apr. 30, 2014), <https://www.occrp.org/en/news/slovenia-higher-court-upholds-ex-pms-prison-sentence-for-bribery> [https://perma.cc/4YWP-QWPT].

215. Sarah Richmond, *The Supreme Court of Ukraine Clears Former Prime Minister Yulia Tymoshenko in Gas Contract Case*, WILEY (June 26, 2014), <https://www.wiley.law/pressrelease-815> [https://perma.cc/36S8-NYUK].

216. Valentyna Romanenko, *Former Ukrainian PM Azarov to Face Trial for Treason and Anti-Ukrainian Messages on Telegram*, UKRAINSKA PRAVDA (Mar. 21, 2024, at 13:42 CT), <https://www.pravda.com.ua/eng/news/2024/03/21/7447506/> [https://perma.cc/VB2U-95HP].

217. *Partygate: Which Downing Street Parties Have Resulted in Fines?*, BBC (May 27, 2022), <https://www.bbc.com/news/uk-politics-60124162> [https://perma.cc/4HHG-DQGF].

218. See *supra* Figure 1.

219. See *supra* Figure 1.

220. See Z.D., *supra* note 201.

221. See *id.*; Ivo Sanader snimljen u šetnji Zagrebom: Evo što kažu iz zatvora [Ivo Sanader Filmed Walking Through Zagreb: Here's What They Say from Prison], JUTARNJI (Feb. 5, 2025, at 22:23 CT), <https://www.jutarnji.hr/vijesti/crna-kronika/ivo-sanader-snimljen-u-setnji-zagrebom-evo-sto-kazu-iz-zatvora-15550186> [https://perma.cc/8M43-X39H]. Sanader can probably count on being released after serving half or two-thirds of the sentence. See *Former French President Jacques Chirac Convicted on Corruption Charges*, *supra* note 143.

There has been no drive to build up immunity provisions for European Prime Ministers to match those of Presidents or Monarchs. The exception was Silvio Berlusconi, the media magnate and Prime Minister of Italy in 1994–1995, 2001–2006, and 2008–2011 — a man exceptionally involved in legal trouble.²²² In Italy, under Article 96 of the Constitution, the Prime Minister and other government ministers “even if they resign from office, are subject to normal justice for crimes committed in the exercise of their duties,” provided that consent is given by one of the two legislative chambers.²²³ While most of Berlusconi’s woes related to his businesses and private conduct (embezzlement, bribing judges, tax fraud, false accounting) rather than his use of office, he was constantly entangled in expensive court battles while in government.²²⁴ In June 2003, during his second stint, his party was able to pass a law that would confer temporary criminal immunity on the Prime Minister as well as the President of the Republic, Presidents of the two legislative chambers, and the President of the constitutional court while they held office.²²⁵ Any proceedings underway before they took office would be suspended, but not the statute of limitations. Combined with other laws that decriminalized or shortened the limitations period for the kinds of white-collar crimes that Berlusconi tended to be accused of, and with Italy’s notoriously dilatory appeals process, virtually any case against him would wither on the vine.²²⁶

This first attempt to shield Berlusconi failed quickly: the Constitutional Court of Italy struck it down in January 2004 for violating the principle in Article 3 of the Constitution, under which “All citizens have equal social dignity and are equal before the law. . .” and the due process guarantee in Article 24.²²⁷ Never one to take a court’s unfavorable decision as the last word, Berlusconi put a second immunity bill through when he returned to power in 2008, this time also suspending the statute of limitations while the covered person was in office.²²⁸ This too was struck down by the Constitutional Court, which expanded its reasoning to object to the use of an ordinary statute to create immunities that should be the

222. See Brendan Quigley, Note, *Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System*, 34 HASTINGS INT’L & COMPAR. L. REV. 435, 437–38, 440–43 (2011).

223. Costituzione Italiana [Constitution of the Italian Republic], Art. 96.

224. See Quigley, *supra* note 222, at 438.

225. See *id.* at 450–51; *Silvio Berlusconi*, BRITANNICA (Jan. 2, 2026), <https://www.britannica.com/biography/Silvio-Berlusconi> [<https://perma.cc/E3CH-NK6E>].

226. See Quigley, *supra* note 222, at 439, 451, 456–57.

227. Costituzione Italiana [Constitution of the Italian Republic], Arts. 3, 24; see Quigley, *supra* note 222, at 451; Sascha Hardt & Mariolina Elia Antonio, ‘Thou Shalt Be Saved’ (from Trial)? The Ruling of the Italian Constitutional Court on Berlusconi’s Immunity Law in a Comparative Perspective, 7 EUR. CONST. L. REV. 17, 18 (2011).

228. See Quigley, *supra* note 222, at 452; Hardt & Elia Antonio, *supra* note 227, at 18; *Silvio Berlusconi*, *supra* note 225.

subject of a constitutional amendment.²²⁹ Thus, three pending trials involving Berlusconi could proceed.

While his lawyers were using legal technicalities to maximum effect, Berlusconi attempted yet another bill in 2010 that would permit government ministers to have a criminal case adjourned for 18 months if appearing in court would interfere with their official functions.²³⁰ Although this law was not construed as conferring immunity per se, it would have required a trial judge to grant the delay on demand.²³¹ Ruling in 2011, the Constitutional Court found that such a bill would be acceptable only if it gave judges the discretion to reject the request, and if the delay was for only six months.²³² Later that year, Berlusconi resigned as Prime Minister and in 2012 was finally convicted of tax fraud, which resulted in his 2013 expulsion and six-year ban from politics and, on account of his age, community service in lieu of prison.²³³ He died in 2023, having just returned to a seat in the Italian Senate.²³⁴

VI. COUNCIL OF EUROPE INSTITUTIONS

So far, the Council of Europe has been referred to as a community of states. Now this Article will turn to the Council's own institutions and their contributions to the development of shared standards on issues relating to immunity. It first discusses reports and statements from the Parliamentary Assembly of the Council of Europe, and then the European Court of Human Rights. Both have been supported by the Venice Commission in their work.

A. *The Parliamentary Assembly*

The Parliamentary Assembly of the Council of Europe (PACE) is not directly elected but consists of delegations from the national legislatures of the member states.²³⁵ It meets in Strasbourg, France, four times a year, operates nine general committees, engages in many fact-finding missions, and issues resolutions—but cannot pass legislation with direct effect (unlike the European

229. See Quigley, *supra* note 222, at 455; Hardt & Eliantonio, *supra* note 227, at 20.

230. See Quigley, *supra* note 222, at 458–59.

231. See *id.* at 458.

232. See *id.* at 459.

233. *Silvio Berlusconi*, *supra* note 225.

234. Emilio Parodi, Elvira Pollina & Alvisi Armellini, *Silvio Berlusconi: Former Italian Prime Minister Has Died at 86*, REUTERS (June 12, 2023), <https://www.reuters.com/world/europe/former-italian-pm-silvio-berlusconi-has-died-italian-media-2023-06-12/> [https://perma.cc/27BA-6DGD].

235. *Parliamentary Representation*, PARLIAMENTARY ASSEMBLY, <https://pace.coe.int/en/pages/representation> [https://perma.cc/JNW4-TL25].

Parliament).²³⁶ PACE acts instead as a “soft law” norm-changer, using its resources to draw attention to issues, apply moral pressure on member states, and propose standards that might someday be put into law.²³⁷

As new member states joined in the 1990s, bringing with them a preference for semi-presidential systems and the roughness of post-Communist politics, PACE had to address the threefold problem of immunity, impunity, and misuse of criminal justice for political ends.²³⁸ Impunity was a concern because, as is evident from the preceding section on Prime Ministers, most attempts to prosecute senior politicians fail. Over time, public impression grows that the powerful will always get away with their crimes even if they are not protected in formal immunity.²³⁹ In response, PACE adopted resolution 1675 (2009), holding that “all perpetrators of serious human rights violations must be held to account for their actions” and “that state secrecy and immunities do not prevent effective, independent and impartial investigations into serious human rights violations.”²⁴⁰

However, experience also cautions that investigations and prosecutions might be used not to hold politicians to account, but instead to intimidate, scapegoat, and retaliate against rivals—in effect, making courts into venues for partisan competition and power struggles.²⁴¹ PACE was troubled by the incarceration of the former Ukrainian Prime Minister, Yulia Tymoshenko, in a case that was perceived as motivated by President Viktor Yanukovich’s desire to sideline her (and others) from contention.²⁴² This prompted PACE in 2012 to

236. *Presentation of the Parliamentary Assembly of the Council of Europe*, SWISS PARLIAMENT, <https://www.parlament.ch/en/organe/delegations/delegations-international-parliamentary-assemblies/council-europe/presentation> [<https://perma.cc/49CB-7U5A>].

237. Jerzy Jaskiernia, *Odpowiedzialność polityczna i odpowiedzialność karna polityków oraz kategoria więzienia politycznego w percepcji Zgromadzenia Parlamentarnego Rady Europy* [*Political Responsibility and Criminal Liability of Politicians and the Category of Political Prisoner in the Perception of the Parliamentary Assembly of the Council of Europe*], 22 *STUDIA IURIDICA LUBLINENSIA* 79, 92 (2014) (Pol.).

238. *See Origins and History*, PARLIAMENTARY ASSEMBLY, <https://pace.coe.int/en/pages/brief-origins> [<https://perma.cc/KUN4-JZ3X>].

239. *See infra* Part V.

240. Eur. Parl. Ass., *State of Human Rights in Europe: The Need to Eradicate Impunity*, Res. No. 1675 (2009).

241. *See, e.g.,* Maria Popova, *Ukraine’s Politicized Courts*, in *BEYOND THE EUROMAIDAN: COMPARATIVE PERSPECTIVES ON ADVANCING REFORM IN UKRAINE* 143, 145–48 (Henry E. Hale & Robert W. Orttung, eds., 2016).

242. *See id.*; *PACE Co-Rapporteurs Express Concern at Tymoshenko Sentence*, PARLIAMENTARY ASSEMBLY (Oct. 11, 2011), <https://pace.coe.int/en/news/3647> [<https://perma.cc/UTT7-JZKF>]. After the 2014 Euromaidan events that resulted in President Yanukovich’s flight to Russia, Tymoshenko was released and cleared of all charges. *See*

define who qualifies as a “political prisoner,” so that justice not be misused, but also so politicians who genuinely deserve punishment cannot evade it by claiming they are being persecuted for their beliefs rather than their crimes (which would bring the circle back to the problem of impunity).²⁴³

In 2013, PACE tried to pull the various strands together in a resolution on “Keeping Political and Criminal Responsibility Separate.”²⁴⁴ Building on reports from the Venice Commission²⁴⁵ and PACE’s Committee on Legal Affairs and Human Rights,²⁴⁶ the resolution tried to mark out a “Goldilocks zone”, in which “politicians should be accountable for ordinary criminal acts in the same way as ordinary citizens” *but* “democracy and the rule of law require that politicians shall be effectively protected from criminal prosecutions based on their political decisions.”²⁴⁷ Each member state enjoys a certain margin of appreciation in how it juggles immunity and justice, but PACE advised that a crime such as “abuse of office” or “misuse of powers” should be interpreted narrowly (in connection with a showing of personal gain) and used only as a “last resort.”²⁴⁸ The punishment should be proportional to the offense and not tinged by ulterior political motives or pandering to punitive moods (especially in the aftermath of something like the economic crisis of 2008–2010).²⁴⁹ Ultimately, as discussed in the court cases below, whatever procedures or types of court a country uses to hold a politician criminally responsible must conform to expectations of due process and a fair trial under the European Convention.²⁵⁰

Associated Press, *Ukraine’s Former Prime Minister Freed, Speaks to Protesters*, TRIB LIVE (Feb. 22, 2014), <https://archive.triblive.com/news/world/ukraines-former-prime-minister-freed-speaks-to-protesters/> [https://perma.cc/LJS7-8KUZ].

243. See Eur. Parl. Ass., *The Definition of Political Prisoner*, Res. No. 1900 (2012).

244. Eur. Parl. Ass., *Keeping Political and Criminal Responsibility Separate*, Res. No. 1950 (2013).

245. See VENICE COMMISSION REPORT, *supra* note 175.

246. Eur. Parl. Ass., Comm. on Legal Affs. & Hum. Rts., *Keeping Political and Criminal Responsibility Separate*, Doc. No. 13214 (2013).

247. Eur. Parl. Ass., *Keeping Political and Criminal Responsibility Separate*, Res. No. 1950 (2013).

248. *Id.*

249. *Id.*

250. EUR. CT. OF HUM. RTS., COUNCIL OF EUR., EUROPEAN CONVENTION ON HUMAN RIGHTS (1950) [hereinafter EUROPEAN CONVENTION ON HUMAN RIGHTS], https://www.echr.coe.int/documents/d/echr/Convention_ENG [https://perma.cc/X2AG-UHZC].

B. *The European Court of Human Rights*

The European Court of Human Rights (ECtHR), like PACE, sits in Strasbourg, France.²⁵¹ Any of the approximately 700 million people under its jurisdiction can sue a member state, which has led to an enormous caseload and backlog, even though most applications are rejected as inadmissible (complainants must first exhaust all domestic remedies and usually must be a natural person who can claim personal injury).²⁵² Each member state has one judge, and most of its cases are heard by panels of three or seven, including the judge from the country that is being sued.²⁵³ In especially significant cases, a panel decision might be referred or relinquished to a Grand Chamber of 17 judges.²⁵⁴

The ECtHR serves as a “quasi-Constitutional Court *sui generis*,” in that it has used its case law to embody “shared European values,” identify “structural problems with the exercise of power by national public bodies,” and encourage “convergence in the way institutions at every level of governance operate in Europe,” but it does not have the power to nullify a national law, action, or decision.²⁵⁵ It can only find that a member state’s government did not act in accordance with the country’s own laws or in ways prescribed by law, or that a member state’s law, policy, or practice violates the European Convention.²⁵⁶ It can then order the offending country to pay (modest) financial compensation to the complainant with the hope that the member state will feel compelled to change its law, policy, or practice.²⁵⁷ Enforcement of an ECtHR decision is undertaken by the Council of Europe’s Committee of Ministers, an annual gathering of the member

251. *What is the European Court of Human Rights?*, EQUAL. & HUM. RTS. COMM’N (Aug. 9, 2016), <https://www.equalityhumanrights.com/human-rights/what-are-human-rights/what-european-court-human-rights> [https://perma.cc/F5GT-F47X].

252. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 21–22.

253. *Id.* at 17–18.

254. *Id.*

255. GREER, *supra* note 34, at 171–72; see Geir Ulfstein, *Transnational Constitutional Aspects of the European Court of Human Rights*, 10 GLOB. CONSTITUTIONALISM 151, 153, 166 (2021).

256. GREER, *supra* note 34, at 171.

257. See Bart van der Sloot, *The Quality of Law: How the European Court of Human Rights Gradually Became a European Constitutional Court for Privacy Cases*, 11 J. INTELL. PROP., INFO. TECH. & ELEC. COM. L. 160, 161 (2020). Van der Sloot notes that in cases involving national surveillance, the Court has accepted *in abstracto* claims brought by complainants (including organizations) who do not know for certain that they have been harmed by the state (on account of the secret nature of the activity). *Id.* at 161, 166. Under its “pilot-judgment” procedure since 2011, when the Court senses a structural or systemic problem that is generating multiple complaints, it can give member states detailed direction as to how they should bring problematic laws into compliance with the Convention. *Id.* at 180. In this context, the ECtHR is behaving more like a national constitutional court. *Id.* at 178.

states' foreign ministers or their deputies.²⁵⁸ Noncompliance with ECtHR rulings is a persistent problem, with one tally estimating that more than half failed to prompt the offending country to eliminate the cause of the complaints.²⁵⁹

Professor Steven Greer notes that with enlargement eastward, the Convention and its enforcement by the ECtHR has become even more of “a mechanism for changing the political character” of member states or, more gently, “encouraging, rather than instigating, change.”²⁶⁰ Out of this grows a new objective of “promoting convergence in national public institutions, processes, and norms around Convention principles,” especially in states where these are not yet engrained (and democratic backsliding has become a significant concern in several member states since 2010).²⁶¹

The ECtHR has been asked several times to review national laws and national courts' decisions in matters concerning immunity and criminal prosecution of heads of state and government.²⁶² To be heard by the ECtHR, the cases have to be framed as claims of a violation of an article or protocol (addition) of the European Convention, which in these matters are most commonly Articles 6, 7 or 10.²⁶³

1. *Article 6: The Right to a Fair Trial*

The key provision in Paragraph 1 is that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”²⁶⁴ The ECtHR is not a court of appeal but seeks to “ascertain

258. *Id.* at 178; GREER, *supra* note 34, at 171.

259. Veronika Fikfak, *Changing State Behaviour: Damages Before the European Court of Human Rights*, 29 EUR. J. INT'L L. 1091, 1092 (2018); *see also* José M. Reis & Marcel Garz, *Media Attention and Compliance with the European Court of Human Rights*, 69 J. CONFLICT RESOL. 814, 818–19, 831–32 (2025) (highlighting the importance of domestic media coverage for compliance).

260. GREER, *supra* note 34, at 57.

261. *Id.*

262. *See, e.g.,* M.M. v. France, App. No. 13303/21 (Apr. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-234049> [<https://perma.cc/6HRL-TRWB>] (examining whether French courts' refusal to investigate torture allegations against a sitting head of state, based on head-of-state immunity, was compatible with Articles 3 and 6, thereby illustrating the Court's role in reviewing national decisions concerning immunity and criminal prosecution of heads of state).

263. EUR. CT. OF HUM. RTS., COUNCIL OF EUR, THE ECHR IN 50 QUESTIONS 9–12 (2021), https://www.echr.coe.int/documents/d/echr/50questions_eng [<https://perma.cc/G66M-9PE6>].

264. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 9; *see* Filat v. Republic of Moldova, App. No. 72114/17 (Jan. 31, 2023), <https://hudoc.echr.coe.int/eng?i=001-222779> [<https://perma.cc/9WUQ-BPTL>] (finding that a trial of a former Moldovan Prime Minister was not sufficiently public).

whether the proceedings as a whole, including the way in which evidence was taken, were fair[.]”²⁶⁵ As a standard, “fairness” can vary to reflect circumstances and public interest, but any balancing must put greater weight on the rights of the complainant (who, in these cases, was usually the defendant in a matter pursued by their home state’s public prosecutors).²⁶⁶ What counts as an “independent and impartial tribunal” may also be open to interpretation but cannot be compromised unduly to accommodate other goals, such as costs and administrative convenience.²⁶⁷

2. Article 7: No Punishment Without Law

The key provision in Paragraph 1 states, “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”²⁶⁸ While this would seem to be an unqualified commitment to the ancient principle of *nullum crimen, nulla poena sine lege* (no crime, no punishment without law), the ECtHR acknowledged in landmark cases on marital rape that there may also need to be some judicial creativity to accommodate changes in social expectations that have yet to find statutory reflection:

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. . . . Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.²⁶⁹

The last clause is as vital as it is open to debate: What is the metric for reasonably expecting someone to have been able to foresee that they could end up being punished for an act that technically was not a crime at the time it was committed?

265. *Haarde v. Iceland*, App. No. 66847/12, ¶ 114 (Nov. 23, 2017), <https://hudoc.echr.coe.int/eng/?i=001-178700> [<https://perma.cc/N6Q8-WH4X>].

266. GREER, *supra* note 34, at 251–52.

267. *Id.* at 248, 251–52.

268. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 10.

269. *C.R. v. United Kingdom*, App. No. 20190/92, ¶ 34 (Nov. 22, 1995), <https://hudoc.echr.coe.int/?i=001-57955> [<https://perma.cc/TBR5-Q8GE>]; *S.W. v. United Kingdom*, App. No. 20166/92, ¶ 36 (Nov. 22, 1995), <https://hudoc.echr.coe.int/?i=001-57965> [<https://perma.cc/QQJ9-DBCQ>]; see GREER, *supra* note 34, at 240.

3. *Article 10: Freedom of Expression*

The key passage establishes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[.]” but it is a qualified right subject to:

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁷⁰

There is also a strong (but also qualified) right of privacy in Article 8 and “prohibition of abuse of rights” in Article 17, which might be cited to justify restrictions on speech.²⁷¹

4. *ECtHR Decisions Regarding Lèse-Majesté Speech*

The Council of Europe’s institutions have, with singular accord, expressed skepticism about defamation laws that give special protection to heads of state and other prominent figures.²⁷² While Article 10 of the European Convention allows for national measures “for the protection of the reputation or rights of others”²⁷³

The limits of acceptable criticism are drawn more widely as regards a politician than they are as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance[.]²⁷⁴

Whatever may be a state interest in protecting the reputation of a head of state or government, “such an interest cannot justify conferring on [them] a privilege or special protection vis-à-vis the right to inform and express opinions about it. Thinking otherwise cannot be reconciled with the practice and political

270. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 12.

271. *Id.* at 11, 14.

272. KURTUL, *supra* note 63, at 223–27.

273. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 12.

274. MAC TV s.r.o. v. Slovakia, App. No. 13466/12, ¶ 44 (Nov. 28, 2017), <https://hudoc.echr.coe.int/eng?i=001-178958> [<https://perma.cc/B5UC-MUWQ>].

conceptions of today.”²⁷⁵ This line has been developed in a series of cases decided at the ECtHR.²⁷⁶

The first thing to highlight about the case law is that the Court makes no distinction between Monarchs and Presidents—Article 10 assumes that a member state is a “democratic society” regardless of constitutional form, and kings are no more deserving of protection from irreverent address than elected or selected heads of state.²⁷⁷ A number of key cases have involved situations in which the king of Spain was denounced for his symbolic connection to the central government’s treatment of separatist movements in Catalonia and Basque Country, and the Court has tended to bring them under the protection of Article 10.²⁷⁸ As one case states:

[T]he fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy.²⁷⁹

The Court made a controversial exception in the case of *Rivadulla Duró v. Spain*, which concerned a series of tweets and a song on YouTube²⁸⁰ by a Catalan rapper who performs as Pablo Hasél.²⁸¹ Directed against King-emeritus Juan Carlos (for his Saudi business dealings) and the police and security forces, his lyrics were construed in the Spanish courts as slander of the head of state (punishable by fine) and public praise or justification of terrorism, fetching a nine-month prison sentence.²⁸² The ECtHR found that Hasél’s references to violent action “went far beyond what could be perceived as protest messages, as the

275. *Artun v. Turkey*, App. No. 75510/01, ¶ 31 (June 26, 2007), <https://hudoc.echr.coe.int/eng?i=001-81182> [<https://perma.cc/A2AD-B42W>]. This case concerned an attempt by the President of Turkey, Süleyman Demirel, to sue a journalist and editor for articles criticizing his response to the 1999 İzmit earthquake and alleged ties to contractors responsible for shoddy construction. *Id.* ¶¶ 6–9.

276. See KURTUL, *supra* note 63, at viii–x (providing a list of the relevant cases); *id.* at 223–59 (discussing cases). Kurtul also covers the domestic backgrounds of these cases. See *id.* at 70–73, 85–86, 105.

277. *Id.* at 228.

278. *Id.* at 76.

279. *Otegi Mondragon v. Spain*, App. No. 2034/07, ¶ 56 (Mar. 15, 2011), <https://hudoc.echr.coe.int/eng?i=001-103951> [<https://perma.cc/7FJ3-TVAN>].

280. See PABLO HASEL, *Pablo Hasél,,, Juan Carlos el Bobón* (YouTube, Aug. 26, 2016), https://youtu.be/S6VcZidg66Q?si=aUdFN_SrepzxWE7R [<https://perma.cc/YSF3-9NPU>].

281. *Rivadulla Duró v. Spain*, App. No. 27925/21, ¶¶ 2–3 (Oct. 12, 2023), <https://hudoc.echr.coe.int/eng?i=001-229004> [<https://perma.cc/72TF-8CX6>].

282. *Id.* ¶¶ 2–5, 8–9, 12, 41, 43.

applicant described them, and beyond the acceptable limits of criticism” and the tweets about the former King “constitute serious accusations and allegations of serious offences without any evidence[.]”²⁸³ In this case, the Court deferred to the reasoning of the national courts and rejected Hasél’s petition as “manifestly ill-founded[.]”²⁸⁴ This decision suggests that the ECtHR is not prepared to determine that any *lèse-majesté* law facially violates Article 10.

In addition to cases involving an abdicated monarch, the ECtHR has had to decide one involving a dead president. In *MAC TV s.r.o. v. Slovakia*, a private Slovak television station was challenging a fine for a reporter’s editorial comment as part of his coverage of the airplane crash that killed the President of neighboring Poland, Lech Kaczyński, in April 2010.²⁸⁵ Couched in sarcastic language, the comment clearly did not mourn “the death of a man who represented an extreme Polish conservatism” and expressed “envy” of the Poles for their loss.²⁸⁶ The country’s broadcasting regulator found that the remarks were defamatory and “interfered with the dignity” of the deceased, and the Slovak Supreme Court and Constitutional Court agreed.²⁸⁷ The ECtHR worked almost line-by-line through the short comment and concluded that “using a sarcastic tone and ironic language” did not amount to a form of hate speech that would not be protected under Article 10.²⁸⁸

Considering what the Court has said about Monarchs and Presidents (most of the time), it is not surprising that they would also question any special defamation protections for Prime Ministers.²⁸⁹ In fact, the pathbreaking 1986 ECtHR decision in this matter concerned not a President but a head of government, Chancellor Bruno Kreisky of Austria, who had sued a journalist over articles that had cast aspersions on the Chancellor’s motives and morals.²⁹⁰ While the journalist’s words might have been hyperbolic, the Court affirmed its key holding in the 1976 case of *Handyside v. United Kingdom* that Article 10 exists to protect

283. *Id.* ¶¶ 35, 47.

284. *Id.* ¶¶ 37–38, 52; see also *Spain: European Court of Human Rights Ruling on Pablo Hasél’s Case a Blow to Freedom of Expression*, AMNESTY INT’L (Feb. 16, 2024), <https://www.amnesty.org/en/documents/eur41/7720/2024/en/> [<https://perma.cc/RF2G-BU2A>] (criticizing the court’s decision).

285. See *MAC TV s.r.o. v. Slovakia*, App. No. 13466/12, ¶ 44 (Nov. 28, 2017), <https://hudoc.echr.coe.int/eng?i=001-178958> [<https://perma.cc/B5UC-MUWQ>].

286. *Id.* ¶ 7.

287. *Id.* ¶¶ 9, 12, 14.

288. *Id.* ¶¶ 49–50.

289. See KURTUL, *supra* note 63, at 223–59 (discussing how the ECtHR has historically declined to find special defamation protections for prime ministers and other heads of state).

290. *Lingens v. Austria*, App. No. 9815/82, ¶ 20 (July 8, 1986), <https://hudoc.echr.coe.int/eng?i=001-57523> [<https://perma.cc/F6S9-AAHG>].

speech that shocks, offends, or disturbs, especially when the subject is a public figure.²⁹¹ Similar conclusions were reached in cases arising from multiple attempts by Recep Tayyip Erdoğan, then-Prime Minister of Turkey (2003–2014), to sue journalists and politicians.²⁹²

5. Prime-Ministerial Liability for Negligence: Haarde v. Iceland

As mentioned above, several European countries operate special courts to judge Prime Ministers and cabinet members.²⁹³ While often referred to as “impeachment” courts, the term fits only in the sense that the legislature votes to initiate a trial of a public official, but it does not then sit in judgment.²⁹⁴ Instead, in the example of Iceland, the case is heard by the National Court (*Landsdómur*), which consists of the five longest-serving judges of the supreme court, one judge from the district court of the capital, one professor of constitutional law from the University of Iceland, and eight lay members chosen for a six-year term by the legislature (but not from its own ranks).²⁹⁵

Iceland’s Constitution (Article 14) holds that “Ministers are accountable for all executive acts” but that can also apply to failures to act, and the trial can take place even after the minister has left office.²⁹⁶ In the first case since the National Court was established in 1905, Geir Haarde was impeached in September 2010 for “serious neglect of his duties” as Prime Minister, even though he had resigned in January 2009.²⁹⁷ It was alleged that in 2008, he had failed to initiate timely discussion of the country’s growing banking crisis and take steps to mitigate the fallout; he thus failed to comply with Article 17 of the Constitution, under which ministerial meetings “shall be held in order to discuss new legislative proposals

291. *Id.* ¶¶ 40–41; see also KURTUL, *supra* note 63, at 227–29 (summarizing the *Lingens* case).

292. See *Tuşalp v. Turkey*, App. Nos. 32131/08 & 41617/08 (Feb. 21, 2012), <https://hudoc.echr.coe.int/eng?i=001-109189> [<https://perma.cc/T7FD-P2AM>]; *Uzan v. Turkey*, App. No. 30569/09 (Mar. 20, 2018), <https://hudoc.echr.coe.int/eng?i=001-181787> [<https://perma.cc/5NPH-3YDH>]; *Kılıçdaroğlu v. Turkey*, App. No. 16558/18 (Oct. 27, 2020), <https://hudoc.echr.coe.int/eng?i=001-205898> [<https://perma.cc/478D-TFDL>].

293. See *supra* Part V.B.

294. See *supra* Part V.

295. See *Haarde v. Iceland*, App. No. 66847/12, ¶¶ 7, 15, 18 (Nov. 23, 2017), <https://hudoc.echr.coe.int/eng?i=001-178700> [<https://perma.cc/N6Q8-WH4X>]; see Ragnheiður Bragadóttir, *Criminal Law and the Financial Crisis: The Proceedings Against Iceland’s Former Prime Minister Geir H. Haarde*, in *CRIMINAL LIABILITY OF POLITICAL DECISION-MAKERS: A COMPARATIVE PERSPECTIVE* 357, 360 (Frank Zimmermann ed., 2017); Jón Ólafsson, *The Case Against Leaders: A Moral Reading of Geir Haarde’s Conviction for Negligence of Ministerial Duties*, *FRONTIERS POL. SCI.*, May 2021, at 1, 3.

296. See *STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS* [CONSTITUTION] June 17, 1944, art. 14.

297. Ólafsson, *supra* note 295, at 14.

and important state matters.”²⁹⁸ That failure in turn violated the Ministerial Accountability Act, which carried penalties potentially involving fines and up to two years in prison.²⁹⁹ On a 9-to-6 vote, the National Court found Haarde guilty, but chose not to impose a sentence.³⁰⁰

Turning to the ECtHR, Haarde challenged the entire framework under which the National Court had handled his case.³⁰¹ He did not claim immunity but instead alleged that the “rules governing the impeachment proceedings and the penal provisions of the Ministerial Accountability Act and other invoked legislation were . . . so unclear” and so open to partisan intrigue as to violate the right to a fair trial under Article 6 of the Convention.³⁰² The ECtHR acknowledged the risk of politicization in a case such as Haarde’s, since the wish of some parties to scapegoat him for the crisis could have played a role in the vote to impeach.³⁰³ But on reviewing the records for each step, the Court concluded that “the process leading to the applicant’s indictment was not arbitrary, nor political to such an extent that the fairness of his trial was prejudiced.”³⁰⁴

As for the National Court as an “independent and impartial tribunal,” required by Article 6, Haarde objected to the selection of a majority of the National Court’s judges by the Parliament, on suspicion that they might have been “loyal party followers.”³⁰⁵ Here, too, the ECtHR was reluctant to impugn a member state’s institutions, and took comfort in the requirement that the National Court’s judges sign a pledge to exercise their duties impartially.³⁰⁶ Haarde also could produce no evidence that the eight lay judges were under remote control or were biased as a bloc against him (they split 4-to-4 on whether to convict).³⁰⁷

Haarde’s most serious Article 6 objection was that he was being condemned not for what he did but what he did not do, which created an “irrebuttable

298. *Id.* at 6; STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [CONSTITUTION] June 17, 1944, art. 17.

299. Act on Ministerial Accountability, 1963 (Act. No. 4), art. 11.

300. Hannes H. Gissurarson, *The Impeachment of Geir H. Haarde, Part I: Political Machinations and Legal Manoeuvres*, EUR. CONSERVATIVE (May 21, 2023), <https://europeanconservative.com/articles/analysis/the-impeachment-of-geir-h-haarde-part-i-political-machinations-and-legal-manoeuvres/> [<https://perma.cc/LTP6-9VF9>].

301. Haarde v. Iceland, App. No. 66847/12 (Nov. 23, 2017), <https://hudoc.echr.coe.int/eng?i=001-178700> [<https://perma.cc/N6Q8-WH4X>].

302. *Id.* ¶ 27.

303. *Id.* ¶ 85–86.

304. *Id.* ¶ 87.

305. *Id.* ¶ 99; EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 250, at 9.

306. Haarde v. Iceland, App. No. 66847/12, ¶ 105 (Nov. 23, 2017), <https://hudoc.echr.coe.int/eng?i=001-178700> [<https://perma.cc/N6Q8-WH4X>].

307. *Id.*

presumption” that Iceland would have suffered a less severe financial crisis had he convened ministerial meetings.³⁰⁸ The ECtHR ducked the question by reminding everyone that it is not a court of “fourth instance” called upon to give its own assessment of the evidence, and serves only to ensure that a trial was “fair.”³⁰⁹ In this case, that meant that Haarde had every opportunity to answer the charges and the National Court had explained its reasoning for the finding of gross negligence as defined in Icelandic law.³¹⁰

All seven judges on the ECtHR panel voted to reject Haarde’s complaint under Article 6, but had a minor split with regard to Article 7.³¹¹ Haarde had claimed that the wording of the relevant passages in the Iceland Constitution and Ministerial Accountability Act were so vague as to violate the Convention with regard to foreseeability of prosecution.³¹² The calling of ministerial meetings had been governed for decades by its own conventions, and Haarde said he could not have known that his not calling a meeting with regard to the banking crisis would lead to criminal charges.³¹³ Writing in a partially dissenting opinion, Judge Wojtyczek agreed with Haarde that Icelandic law provided politicians with too little guidance as to what constituted “important state matters” to bring to cabinet, nor did it expressly identify the Prime Minister as the sole person responsible.³¹⁴ While the Prime Minister might have had a “clear moral obligation” to act more energetically with regard to the banking sector, he had had no reason to “foresee that he could face criminal liability.”³¹⁵

6. *Presidential Immunity from Prosecution for Defamation: Urechean and Pavlicenco v. Moldova (2014) and Mesić v. Croatia (2022)*

The first case was brought by two politicians in Moldova, Serafim Urechean (mayor of the capital city, Chişinău) and Vitalia Pavlicenco (a member of the parliament), who wanted to sue their country’s President, Vladimir Voronin, for libel.³¹⁶ They complained that during interviews on two privately owned television channels in 2004 and 2007, the President accused Mayor Urechean of creating “a very powerful mafia-style system of corruption” in the capital, and claimed that

308. *Id.* ¶ 111.

309. *Id.* ¶ 112.

310. *Id.* ¶ 113.

311. *Id.* ¶ 43.

312. *Id.* ¶ 123.

313. *Id.* ¶ 124.

314. *Id.* ¶ 7 (Wojtyczek, J., partly dissenting and partly concurring).

315. *Id.* ¶ 9.

316. *Urechean v. Republic of Moldova*, App. Nos. 27756/05 & 41219/07, ¶¶ 6, 8 (Dec. 2, 2014), <https://hudoc.echr.coe.int/eng?i=001-148267> [<https://perma.cc/4YYN-G2NN>].

Pavlicenco “came straight from the KGB.”³¹⁷ Moldova’s courts said that the President was protected by Article 81 of the Constitution, which guaranteed him a “large” immunity and, like members of the legislature, he could not be held “legally responsible for opinions expressed in the exercise of his mandate.”³¹⁸ “Opinions,” the country’s constitutional court had explained in a 1999 decision, covered “views, opinions, beliefs . . . in respect of matters and events from public life.”³¹⁹ Immunity for those kinds of statements, the court had ruled, was “absolute and perpetual;” it did not, however, protect “public calls to rebellion, violence or other actions, which according to the law in force are criminally prosecuted.”³²⁰

The applicants, both from parties opposed to Voronin’s Communist Party, argued that he had not been expressing opinions but presenting misstatements of fact, and he was not speaking in the exercise of “official functions” (which are enumerated in detail in the Constitution).³²¹ Even if he were, they said, presidential immunity for speech should be narrower than that enjoyed by legislators because the President’s role as “guarantor of national sovereignty, independence and the unity and territorial integrity of the nation” requires them “to display balanced and respectful behaviour.”³²² In response, the Moldova government’s counsel said that it was precisely because of his role that the President needed *wider* immunity than a legislator, as it is not always clear when indeed he is acting pursuant to his “official mandate.”³²³

The ECtHR reframed the dispute in terms of seeking a “fair balance” between the public interest in a President who can speak freely when exercising their duties and the interest of any person in a right to court for, at the very least, a reasoned reply to a complaint.³²⁴ The ECtHR seized on what they saw as the failure of the national courts to determine whether the President had indeed been speaking in his “official capacity”, and the refusal of the private television networks to give the complainants airtime to respond to his remarks.³²⁵ In Moldova’s limited media market, the refusal of courts to allow a defamation lawsuit to proceed amounted to “blanket immunity” for the head of state and violated Article 6 of the

317. *Id.* ¶ 7.

318. *Id.* ¶¶ 9–10.

319. *Id.* ¶ 15.

320. *Id.* A president’s immunity can be lifted by a two-thirds vote of the legislature to allow trial by the supreme court if he “commits an offence.” *Id.* ¶ 13. However, immunity could not be lifted for a case in a civil dispute. *Id.* ¶ 26 (noting the constitution provides the president immunity from civil jurisdiction in actions for libel).

321. *Id.* ¶¶ 8, 11, 32.

322. *Id.* ¶¶ 13, 29.

323. *Id.* ¶ 35.

324. *Id.* ¶ 34.

325. *Id.* ¶¶ 51–53.

Convention.³²⁶ In short, the Court said, presidential immunity needed to be interpreted “in a clear and restrictive manner” and “blanket inviolability and immunity are to be avoided.”³²⁷

Three of the seven judges on the ECtHR panel dissented on the grounds that they believed Moldova’s courts had handled the matter properly and established that Voronin’s remarks were covered by his functional immunity for “opinions on matters of public interest.”³²⁸ The dissenters also had less sympathy for the complainants as public figures “within the category of persons open to close scrutiny”, who could have tried harder to use the Moldovan civil code to insist on a right of reply in the media and seek correction of information that damages “honour, dignity and professional reputation.”³²⁹ Underlying the dissent was discomfort with the majority’s departure from “generally recognized principles” relating to the immunity of high-ranking officials such as the President.³³⁰

The Court returned to the issue of presidential liability for defamation in a case involving a president of Croatia, Stjepan Mesić.³³¹ In 2006, shortly after his election to a second term, Mesić was accused by a lawyer of being part of a

326. *Id.* ¶¶ 52, 55.

327. *Id.* ¶¶ 47, 52. As a remedy, the Court ordered Moldova to pay Pavlicenko the equivalent of EUR 8900 in damages and costs (Urechean was not seeking compensation). *Id.* ¶¶ 59–60. Additional litigation ensued in the Moldovan courts and ran until 2019, when the supreme court ordered Voronin (out of office since 2009) to pay Pavlicenko 30,000 Moldovan lei (around EUR 1500) for “moral damage” and to retract his claim about her KGB ties. See *Судебные иски молдавских политиков* [*Lawsuits of Moldovan Politicians*], LOGOS PRESS (June 5, 2019), <https://logos-pres.md/ru/novosti/sudebnye-iski-moldavskikh-politikov/> [<https://perma.cc/2JC7-8B4K>]. The Council of Europe’s Committee of Ministers finally declared the case closed in September 2024. See Resolution CM/RESDH(2024)191 Execution of the Judgment of the European Court of Human Rights Urechean and Pavlicenco Against the Republic of Moldova, Adopted by the Committee of Ministers on 19 September 2024, at the 1507th Meeting of the Ministers’ Deputies, <https://rm.coe.int/0912594880261440>.

In a similar case in 2021, the ECtHR found an Article 10 violation when a group of Moldovan journalists were convicted in national courts of defaming President Igor Dodon and his Socialist Party after they reported that his 2016 campaign had been financed with Russian money via a Bahamas-based company. See *Ass’n of Investigative Reps. & Ed. Sec. of Moldova v. Republic of Moldova*, App. No. 4358/19 (Oct. 12, 2021), <https://hudoc.echr.coe.int/eng?i=001-212124> [<https://perma.cc/6TJX-5YX5>].

328. *Urechean v. Republic of Moldova*, App. Nos. 27756/05 & 41219/07, ¶ 32 (Dec. 2, 2014) (Šikuta, Pardalos & Gričco, JJ., dissenting), <https://hudoc.echr.coe.int/eng?i=001-148267> [<https://perma.cc/4YYN-G2NN>].

329. *Id.* ¶¶ 2, 34.

330. *Id.* ¶ 31.

331. *Mesić v. Croatia*, App. No. 19362/18, ¶¶ 5, 13 (May 5, 2022), <https://hudoc.echr.coe.int/eng?i=001-217119> [<https://perma.cc/5CRW-Y2PG>].

conspiracy to kill one of the lawyer's clients.³³² In response, Mesić questioned the lawyer's mental health and advised him to seek psychiatric care.³³³ The lawyer sued and won damages in Croatian court.³³⁴ Accepting that Croatia's Constitution did not confer immunity in this situation, Mesić alleged that the lawsuit chilled his own rights of expression under Article 10 of the European Convention.³³⁵ In 2022, the Court, in line with the *Urechean* decision, rejected the complaint, expressing particular displeasure at cases such as this of "high-ranking State officials attacking the reputation of lawyers and making them objects of derision with a view to isolating them and damaging their credibility."³³⁶

7. *Presidential Immunity from Prosecution for Use of the Pardon Power: Saakashvili v. Georgia*

The most recent and potentially most important foray of the ECtHR into the question of presidential immunity was *Saakashvili v. Georgia*, decided on May 23, 2024.³³⁷ Since becoming independent in 1991, Georgia has suffered many of the nightmarish scenarios that Justice Sotomayor hypothesized could happen in the United States if the President were above the law.³³⁸ Mikheil Saakashvili, Georgia's charismatic but polarizing President from 2004 to 2013, was sentenced to six years in prison after leaving office for a number of acts, including ordering a near-fatal assault on a member of Parliament and using the pardon power to thwart a murder investigation that would have implicated allies of the President.³³⁹ The head of state under then-Article 75 of Georgia's constitution enjoyed a guarantee of inviolability: "The President cannot be arrested or be subjected to a criminal prosecution during [his or her] tenure of office[,]" but not of lifelong functional immunity that would shield a former president from prosecution; even for official acts.³⁴⁰

332. *Id.* ¶¶ 5–6.

333. *Id.* ¶ 17.

334. *Id.* ¶ 16.

335. *See id.* ¶¶ 13, 21.

336. *Id.* ¶¶ 103, 109, 114–15. The Court did agree that the protracted ping-pong between Croatia's trial and appellate courts violated Mesić's Article 6 rights. *See id.* ¶¶ 129, 131.

337. *See Saakashvili v. Georgia*, App. Nos. 6232/20 & 22394/20 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761>.

338. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Georgia*, OFF. OF THE HISTORIAN, <https://history.state.gov/countries/georgia> [<https://perma.cc/FV6G-55Q2>]; *see Trump v. United States*, 603 U.S. 593, 684–85 (2024) (Sotomayor, J., dissenting).

339. *Saakashvili v. Georgia*, App. Nos. 6232/20 & 22394/20, ¶¶ 2, 5, 6, 7, 16, 33, 42 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>].

340. *Id.* ¶¶ 75–76. This provision has since been removed from the Georgian Constitution. *See საქართველოს კონსტიტუცია* [CONSTITUTION] Aug. 24, 1995.

Nevertheless, Saakashvili challenged his conviction for abuse of power regarding his use of clemency.³⁴¹ Under then-Article 73 of the Constitution of Georgia, the President's power to "pardon convicts" was listed without any qualification (such as countersignature by a minister), which Saakashvili took to mean that he had a completely free hand in using it.³⁴² Furthermore, his petition to the ECtHR claimed that "from a comparative-legal point of view there was a constitutional consensus among many Western democracies that heads of State enjoyed immunity from jurisdiction for the exercise of their discretionary powers – such as the power to grant a pardon (which was considered to be unlimited/absolute in many jurisdictions around Europe.)"³⁴³ Prosecuting him for use of the power thus violated Article 7 of the Convention, insofar as it "did not constitute a criminal offence under national or international law at the time it was committed" and thus it was not foreseeable that he might face charges.³⁴⁴

This was a situation in which the ECtHR had to tread very carefully, as it might be one in which the President really was guilty of abuse of power (and the ECtHR was reluctant to second-guess the judgment of the national courts in a homicide matter) or, equally possible, it could be one in which Saakashvili's opponents were using the courts for political purposes (which the Council of Europe also wanted to prevent).³⁴⁵ There were still more possibilities, that the prosecution was politically motivated *and* Saakashvili deserved to go to prison, or deserved to—but for something other than his use of the pardon power.³⁴⁶

The ECtHR engaged in a scan of practice across the member states as well as Georgian law to ascertain what a President should reasonably assume about the potential legal consequences of his actions.³⁴⁷ Doing so led the Court to conclude that Saakashvili had no grounds for a "legitimate expectation" of immunity for his exercise of a discretionary power.³⁴⁸ They also relied heavily on an advisory

341. Saakashvili v. Georgia, App. Nos. 6232/20 & 22394/20, ¶¶ 55, 136 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>].

342. *Id.* ¶¶ 75, 86, 136.

343. *Id.* ¶ 136.

344. *Id.* ¶¶ 135, 137.

345. *See id.* ¶¶ 143, 156.

346. *Id.* ¶¶ 153, 161.

347. *Id.* ¶¶ 148–50. On the roles of comparison and trend analysis in the ECtHR's jurisprudence, see KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 172 (2015); Vincent Martenet, *Shaping Rights Through European Consensus or Trend*, 25 GERMAN L.J. 1436, 1452 (2024) (finding that comparison is more important in cases concerning "political or general policy, sensitive moral or ethical issues, or changes in the case law").

348. Saakashvili v. Georgia, App. Nos. 6232/20 & 22394/20, ¶ 151 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>].

opinion the Court had issued in 2020, at the request of the constitutional court of Georgia's neighbor, Armenia, in connection with the trial of a former President, Robert Kocharyan.³⁴⁹ Shortly before leaving office in 2008, Kocharyan had used his command of the armed forces and power to declare a state of emergency in order to shut down protests against the election of his successor.³⁵⁰ Ten years later, despite the assurance of broad, lifelong immunity in Armenia's Constitution (Article 56(1)), he was arrested and accused of overthrowing the constitutional order, a crime punishable by up to 15 years in prison under the 2009 criminal code.³⁵¹ Armenia's constitutional court asked the ECtHR whether the prosecution would run afoul of Article 7 on foreseeability and nonretroactivity grounds, to which the Court replied in line with the *Haarde* decision that "particular caution in assessing whether a specific conduct may entail criminal liability may be required of professional politicians or high-office holders."³⁵² In other words, men like Kocharyan should be held to a more exacting standard, either because they themselves have a greater knowledge of the law or have people close to hand who could advise them so as to avoid future trouble.³⁵³

In the case of Saakashvili, the ECtHR determined that as a "leading politician . . . who had an extensive legal background and wide experience in juridical and public-administration matters" (he holds an LLM from Columbia Law School), he should have been able to foresee possible legal consequences for "his decision to collude with the people who had either directly committed the homicide or had conspired to cover up the scope of that very serious crime."³⁵⁴ The Court thus

349. *Id.* ¶ 141.

350. Advisory Opinion Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison Between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law, Req. No. P16-2019-001, ¶ 14 (May 29, 2020), <https://hudoc.echr.coe.int/fre?i=003-6708535-9909864> [<https://perma.cc/77QF-TWVT>].

351. *Id.* ¶¶ 16, 26; ՀԱՅԱՍՏԱՆԻ ՀԱՆՐԱՊԵՏՈՒԹՅԱՆ ՍԱՀՄԱՆԱԴՐՈՒԹՅՈՒՆ [CONSTITUTION] July 5, 1995, art. 56(1).

352. Advisory Opinion Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison Between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law, Req. No. P16-2019-001, ¶ 68 (May 29, 2020), <https://hudoc.echr.coe.int/fre?i=003-6708535-9909864> [<https://perma.cc/77QF-TWVT>].

353. *See id.* At the time of writing, the case against Kocharyan is still ongoing. *See Court Session in Robert Kocharyan Case Turns Tense*, *supra* note 2.

354. *Saakashvili v. Georgia*, App. Nos. 6232/20 & 22394/20, ¶ 154 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>]. In a partial dissent, two judges, Georges Ravarani (Luxembourg) and Kateřina Šimáčová (Czech Republic), denounced the unconditional pardon power as "reminiscent of medieval monarchical

rejected Saakashvili's Article 7 complaint as unfounded.³⁵⁵ Although his trial took place in a politically charged environment, the Court saw no evidence that it was unfair to the point of violating Article 6 of the Convention.³⁵⁶ At the time of writing, Saakashvili has been in prison since 2021, and in March 2025, his original sentence was extended for conviction on additional fraud charges, such that he may be incarcerated until 2030.³⁵⁷

VII. CONCLUSION

The ECtHR cases cited in Part VI.B.4–7 involved a large number of judges—78 in total, drawn from every member state—and no two cases had the same lineup; 20 judges were involved in two cases, 9 were involved in three, and 2 (Alena Poláčková from Slovakia and Valeriu Grițco from Moldova) were involved in four of the cases.³⁵⁸ Despite the constantly tilting kaleidoscope of participants, the cases' combined thrust seems to be an effort to inject greater uncertainty about immunity in order to cool politicians' ardor and nudge member states toward more civil, circumspect politics.³⁵⁹ The Court itself tries to model civility, in that even when there are differences in opinions, the judges avoid the vituperative acrimony of *Trump v. United States*. In situations where the plain text of a law or constitution would seem to confer clear protection, the Court has introduced an element of doubt. European Presidents and Prime Ministers are, in effect, being held to a higher standard and directed to be duly cautious. In light of these decisions, they would be well advised to give a sober second thought to their every action, inaction, and even each sentence that passes their lips, regardless of whether it would seem to fall safely within their official duties, functions or capacity.

prerogatives" but accepted that if it was in Georgia's Constitution, and there was no precedent to the contrary, then Saakashvili could not have foreseen that he would be held accountable for its use or misuse. *See id.* ¶ 2 (Ravarani & Šimáčová, JJ., dissenting). They said he should have been prosecuted on other grounds, such as for tampering with a witness. *Id.* ¶¶ 2–7. On Saakashvili's legal credentials, see *Mikheil Saakashvili '94 LL.M., President of Georgia, Returns to Columbia Law School*, COLUM. L. SCH. (May 29, 2013), <https://www.law.columbia.edu/news/archive/mikheil-saakashvili-94-llm-president-georgia-returns-columbia-law-school> [<https://perma.cc/JP9U-9B8H>].

355. *Saakashvili v. Georgia*, App. Nos. 6232/20 & 22394/20, ¶ 155 (May 23, 2024), <https://hudoc.echr.coe.int/eng?i=001-233761> [<https://perma.cc/49MB-4V85>].

356. *Id.* ¶¶ 133–34.

357. Light, *supra* note 5.

358. *See supra* Part VI.B.4–7. The only cases decided by almost the same panels were the defamation cases of *MAC TV s.r.o. v. Slovakia* (2017) and *Stern Taulats and Roura Capellera v. Spain* (2018), sharing six judges of the Court's third section.

359. *See supra* Part VI.B.4–7.