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contended, was incompatible with the concept of a right to vote. Also, the nature of the penalty for defaulting voters has not been specified. Nor does the law provide mechanisms for dealing with the possibility of an electoral victory by the ''None of the Above'' option. It has been left to the State Government to work out appropriate regulations for both situations; it is unclear if this degree of legislative delegation is constitutionally permissible.

India's federal Election Commission as well has not been particularly welcoming of the changes. Chief Election Commissioner Navin Chawla rejected proposals for implementing a similar rule nationally:

> ''The issue of compulsory voting has multiple dimensions, and it's for Parliament to legislate on this. As for the Election Commission, we think it's not practical to enforce 815 million-odd voters in a country as large as ours to compulsorily vote. Having said that, we would watch the Gujarat initiative with interest.''[4]

In contrast, Lalu Yadav, a long-time political rival of Gujarat Chief Minister Narendra Modi, has come out in support of the proposals.[5] Expressing concern that vote percentages have been slipping, he suggested that a similar provision be made nationally applicable.

Italy—Constitutional Court rules law protecting Prime Minister and three other top officials unconstitutional—trials of Prime Minister Berlusconi recommence—*Trial for constitutional legitimacy of Lodo Alfano (Law 124, July 23, 2008) promoted by the Court of Milan and the Court of Rome*, judgment 262, October 7, 2009[6]

LT Constitutional law; Immunity from prosecution; Italy; Law reform; Ministers; Prime Minister

For the second time the Italian Constitutional Court has declared unconstitutional an ordinary law granting to the President of the Republic, the two Speakers of the Houses of Parliament and the Prime Minister immunity from prosecution, including for crimes committed before taking up those offices.

The first time occurred with Law 140/2003 (*Lodo Schifani*), which provided immunity for the five highest political offices (including the President of the Constitutional Court). Part of political and of public opinion considered it a way to solve Berlusconi's legal troubles. The Court stated that *Lodo Schifani* infringed the principle of equality and the right to act and to defend before a tribunal (judgment 24 of January 13–20, 2004): first, because it did not

[4] Suman Jha, ''Not practical to make voting compulsory all India'', *Indian Express*, December 21, 2009, at *http://www.indianexpress.com/news/guj-law-not-practical-to-make-voting-compulsory-all-india/557030/* [Accessed February 1, 2010].

[5] ''Lalu Supports Modi on Mandatory Voting'', *Economic Times*, December 22, 2009, at *http://economictimes.indiatimes.com/news/politics/nation/Lalu-supports-Modi-on-mandatory-voting/articleshow/5364296.cms* [Accessed February 1, 2010].

[6] Luca Paladini.

guarantee the right of defence for people holding those offices and for the injured parties; secondly, the suspension combined with repeated terms of office could bring to an unreasonable delay to the course of trials; and finally the members of the bodies chaired by those five people did not also benefit from the same immunity. The court considered other grounds argued in this earlier case ''absorbed'', thus two delicate points remained open, namely the infringement of the principle of equality as a fundamental principle and the amendment of the Constitution by an ordinary law (instead of following the special procedure under art.138).

In 2008 the Parliament approved Law 124/2008 (*Lodo Alfano*). It was drafted taking into account aspects of the judgment of 2004 (it was now possible to renounce to the immunity, as the Speaker of the Lower House did in October 2009) but granted the same immunity for the four highest political offices (now excluding the President of the Constitutional Court). Part of public opinion clearly considered it as the second attempt to exempt Prime Minister Berlusconi from criminal trials.

The *Lodo Alfano* suffered the same fate as the *Lodo Schifani*. The court declared it infringed the principle of equality and art.138 of the Constitution (which sets out how the Constitution may be amended). The judges stated that suspension of trials derogated from the principle of equality and created a privilege, and that this could only be achieved by constitutional amendment. Ordinary laws cannot change privileges *in peius* or *in melius*, since they are part of a balance that only the Constitution and constitutional laws can derogate from and re-equilibrate.

The other grounds were considered absorbed, so the court once more left open the issue of the infringement of equality as a fundamental and imperative principle. Nevertheless, it also reaffirmed (as it did in 2004) that equality before the courts is one essential of the rule of law; a fundamental principle which cannot be derogated from. In fact, according to the court's case law, the Italian Constitution includes supreme principles embodying fundamental values that cannot be derogated from and equality can be included among those principles.

The immediate impact of the judgment on the *Lodo Alfano* was that Prime Minister's legal problems resurfaced in his agenda, and so the immunity saga is still going on.

A constitutional amendment to achieve the same end as the two stricken provisions, but for the benefit of all the members of the Parliament (in the region of 942 people) has been prepared. The art.138 constitutional amendment procedure requires two affirmative votes in each chamber of the Parliament; there is also the possibility of a referendum. Prime Minister Berlusconi's coalition has the numbers to adopt such a law, but problems could come from the length of the procedure and the referendum.

In addition, the Italian Parliament is discussing a law draft fixing a final term to trials on certain crimes. The effect would be that two trials involving Berlusconi before the Court of Milan (one involving the English lawyer David Mills, the other, alleged false accounting of Mediaset broadcasting rights) would cease. This law draft represents ''the other face of the coin'', because it regards the length of cases for all Italian citizens, and not their suspension for ''some

selected Italians''. Given the backlog in some Italian courts there is a degree of worry for this proposal given that it would in effect deny plaintiffs in a number of cases a hearing of their claim, or halt live criminal trials.

Standing above the legal manoeuvring, the saga is revealing of the contemporary realities of Italian political life. In his defence the Prime Minister declares he has to respect the Italians' vote (for him at the general election) and so he has to govern the country (at all costs). When the opposition asks him to abandon the political scene in order to defend himself in front of a court, Berlusconi's political allies label these invitations as attacks to democracy.

New Zealand—can the state be sued for monetary damages for a fault of the judicial branch?—*Attorney-General of New Zealand v Chapman* [2009] NZCA 552[7]

LT Appeals against conviction; Damages; Judicial decision-making; Judicial immunity; New Zealand; State liability

Mr Chapman had been convicted of sexual offences. His appeal to the Court of Appeal was dismissed. But subsequently, in an unrelated case (*R. v Taito* [2003] 3 N.Z.L.R. 577), the Judicial Committee of the Privy Council held that the New Zealand Court of Appeal's general process for dealing with prisoners' appeals constituted a breach of their fair trial rights (affirmed in s.25(a) of the New Zealand Bill of Rights Act 1990).

As a result Chapman gained a new appeal. That appeal was successful and a new trial ordered. No new trial in fact occurred because the complainant was unwilling to testify a second time. Chapman was discharged. He then brought this action against the Attorney-General of New Zealand seeking compensation of NZ $900,000 for alleged breaches by the Court of Appeal of his fair trial rights at the first appeal. He relied on the cause of action established by *Simpson v Attorney-General (Baigent's Case)* [1994] 3 N.Z.L.R. 667 NZCA, whereunder monetary compensation is, in principle, an available remedy for breach of the New Zealand Bill of Rights. The Attorney-General sought to strike the claim out on various grounds, and the New Zealand Court of Appeal has now ruled on these.

First, the Attorney-General, represented by the Crown Law Office, contended that monetary compensation pursuant to *Baigent's Case* was available only in respect of breaches perpetrated by the *executive* branch of government, or by bodies under its control, and not by the judicial branch. However, while *Baigent's Case* itself had concerned actions of police officers, the Court of Appeal had relied substantially on the Privy Council decision in *Maharaj v Attorney General of Trinidad and Tobago (No.2)* [1979] A.C. 385 PC, a case where the impugned action was that of a judge. For this and other reasons the court concluded that a monetary remedy against the state was indeed available for judicial breaches of the Bill of Rights.

[7] Paul Rishworth.