MAY THE LAW RULE THE PAST? WHAT IF THE ECTHR HAD DECIDED BERLUSCONI'S CASE

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Abstract

In a long-awaited judgment, the European Court of Human Rights has decided not to decide on Berlusconi's disqualification from the Italian Parliament. The case regarded the Italian anti-corruption legislation that prohibits convicted individuals from sitting in Parliament, and its conformity with the human right to not be subject to retroactive criminal sanction – Article 7(1) European Convention of Human Rights. The former Prime Minister of Italy claimed his disqualification fell under the latter, and therefore the new legislation should not have been applied to his criminal conduct that predated its adoption. However, the Italian Government maintained that the measure was administrative law, thus it was duly applied in Berlusconi's case. The Strasbourg Court took a long time to decide on the case. Meanwhile, Berlusconi was rehabilitated through the Italian legal system, getting back his right to stand for election. The analysis the European Court of Human Rights should have undertaken would have provided a welcome clarification on the relationship between the rule of law concept and its temporal application. This article aims to accomplish this task with a simple conclusion: a backward-looking law is not only possible, but sometimes even necessary for the sake of rule of law.

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1. Introduction

On November 22, 2017, the European Court of Human Rights (ECtHR) held a hearing on a curious petition: the former Prime Minister of Italy, Silvio Berlusconi, claimed that he suffered an injustice by the application of the new Italian legal anti-corruption framework. Indeed, Berlusconi had lost his seat in Parliament on account of this law, as a consequence of his prior criminal conviction. He claimed that, being this disqualification substantially a criminal sanction, it should have been subject to the principle of non-retroactivity according to Article 7(1) European Convention of Human Rights (ECHR). In the opinion of the Italian Government, conversely, the disqualification was considered to be an administrative law measure, and therefore it was justly applied to past acts as well, such as the criminal acts committed by Berlusconi, which predated the adoption of the law. One year later, and five years after Berlusconi's expulsion from the Italian Parliament, the ECtHR declined to pronounce judgment on the case. On May 11, 2018, Berlusconi had obtained a judgment of rehabilitation by the competent Italian court that ended the effects of his criminal conviction; thereby, the disqualification's effects ceased as well since they expressly relied on the conviction dismissed.

Accordingly, on July 27, 2018, Berlusconi withdrew his claim at the ECtHR. Finally, the ECtHR concluded in its Decision of November 27, 2018, that no special circumstances relating to

respect for human rights required it to continue the examination of the case.

Despite the odd conclusion of the case, and its neutral outcome – Berlusconi having back his passive electorate and Italy not having repealed its law –, the issues at stake are so crucial that a legal analysis and a possible conclusion are needed. So, *what if* the ECtHR had ruled – or had decided to rule – on the substance of the case? The actual question that the ECtHR should have dealt with is to what extent and in which fields the law – read, a legislation that provides for disqualification of convicted parliament members – may rule the past. In principle, a backward-looking law is incompatible with the rule of law.

The rule of law ideal has been interpreted, *inter alia*, as a guiding tool for human actions. From this perspective, how could the law rule past events without infringing the very basic dignitarian principle that an individual's behaviour should be judged according to the legal framework operating at the time? The very notion that someone could be punished for a rule that came into existence only after they had acted is repulsive to us. The traditional criminal law prohibition of retroactivity – *nullum crimen, nulla poena sine praevia lege poenali* – refers to this concept. Nonetheless, the rule of law would fail in its goal to govern human behaviour if it were prevented from ruling on events that have already taken place. In truth, any legal adjudication necessarily involves past events, and the prohibition of retroactivity only aims to set exclude certain types of legal entitlements from the general temporal projection of the ruling of the current law. This other feature of the rule of law is expressed by the principle *tempus regit actum,* according to which a judgment should be formulated having due regard to the law in force at the time when the judgment itself is made. When this is applied to acts committed under a past legal framework, the law is said to rule retrospectively to that extent.

Should a law deprive citizens who have been sentenced for a particular offence of an otherwise strong legal entitlement, such as the right to be elected to a public office, whom should be affected by this law? Everyone who had previously been sentenced, only those sentenced when the law was already in force – such as Berlusconi – or only those who committed the relevant acts amounting to a criminal offence after the law had

been enacted? Strict compliance with the prohibition of retroactivity demands that we consider only the third option, since in the other two categories, the individual could not have relied on that law to guide their behaviour.

According to the principle of *tempus regit actum*, the law would surely apply to the last two categories and, through a more complex process, to the first one as well. At first glance, the choice would mainly depend on the legal category under which the ruling law falls. If the deprivation of political rights due to a criminal conviction were considered a criminal sanction, the argument for the prohibition of retroactivity would gain strength: applying a law to persons convicted when that law was not in force when they committed the relevant facts would mean violating the prohibition of retroactive criminal law. Should the law be classified as of an administrative nature instead, its application to convicted persons would not be obstructed by these temporal questions.

Obviously, the matter becomes more complicated if we do not rely on the division between criminal and administrative according to the national law, but according to the ECHR.

In this article, I will preliminary adopt a legal theory approach to examining the question. The current argument is that the rule of law, where inspired by an administrative law perspective, has an inherently progressive character. That is, it may legitimately dismantle consolidated and former legal entitlements, thereby permitting its retrospective enforcement. In order to examine the possible compliance of Italian law with ECHR, the first claim will be that the law challenged does not provide a criminal sanction, but an administrative requirement, thus to be applied to past events. Secondly, a law regulating political rights contains general interests that go beyond the individual right's entitlement, which should be applied equally to everyone to prevent distortion in the electoral competition. In conclusion, the Parliamentary vote for the disqualification of Berlusconi was a due act as the law providing it was in compliance with the ECHR. The ECtHR should have decided in this manner had it ruled on the case.

2. The Italian legal Anti-corruption framework and Berlusconi's claim

Italy has traditionally been considered the "black sheep" of Europe in the fight against corruption. An effort to halt this trend was carried out in 2012, when the Italian Parliament adopted the law of November 6, 2012, n. 190 containing criminal and administrative anti-corruption provisions. The law also delegated to the Government the task of adopting a regulation regarding the access to public offices, and the provision of disqualifications in cases where candidates or public officials hold criminal convictions. Accordingly, the Government adopted Legislative Decree December 31, 2012, n. 235. Under the name of "incandidabilità" it provided a six years ban on running for public elected offices, or loss of one's seat in case the office had already been assigned, for those who had been sentenced with imprisonment for a period longer than two years for crimes whose provision of incarceration was at least four years.[1]

The adoption of the new regulation on loss of public office did not raise any particular debate. It was even applied in a regional election without causing any scandal,[2] until the day former Prime Minister of Italy, and active Parliament Member, Silvio Berlusconi, was convicted.

During the Parliamentary election of February 24, 2013, Berlusconi was elected to the Senate of the Republic. The Court of Appeal of Molise, the district where he got elected, ratified his election on March 1, 2013. However, on August 1, 2013, Berlusconi was convicted of tax fraud and sentenced to four years imprisonment by the Court of Cassation.[3] According to the law, Parliament should only have taken notice of the conviction and proceeded to vote in favour of the expulsion of Berlusconi from Parliament. After a long debate, on November 27, 2013, Parliament finally did so, taking Berlusconi's seat in Senate from him.[4]

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[1] Article 1, Sec. 1, *c*, d.lgs. 31 December 2012, n. 235.

[2] Cons. St., Sez. V, 6 February 2013, n. 753.

[3] Corte Cass., Sez. Fer., 1 August 2013, n. 35729, which rejected the appeal against Corte d'Appello di Milano, Sez. II Pen., 8 May 2013, n. 3232, which confirmed Tribunale di Milano, Sez. I Pen. 26 October 2012, n. 10956, which had sentenced Berlusconi.

[4] Senate of the Italian Republic, Order 27 November 2013, Doc. III, n. 1.

Beyond mere political[5] and other elective[6] issues, a serious legal concern was raised, by Berlusconi supporters and eminent jurists alike: at the time that Berlusconi committed the facts for which he was convicted, the law on access to and loss of public offices did not yet exist. How could he be deprived of the political right to be elected, because of a crime for which, when committed, the legal framework had not provided that kind of additional consequences? The criminal conviction was delivered when the law was already in force, but, according to Berlusconi's claim, the application of the ban to public offices as a result of his wrongdoings, considering the relevant facts had occurred in a distant past, would have constituted a retroactive criminal sanction, which is prohibited under the Italian Constitution.[7] Indeed, the Legislative Decree came into force on January 5, 2013, while the facts for which Berlusconi was convicted dated back to 2004. However, the case law on the application of the new legal framework of conditions on access to and loss of public offices the consistently ruled otherwise. Actually, the claims presented were related to positions even more critical than Berlusconi's: in these cases, the criminal convictions were delivered even before the law had been adopted.

Thus, the limitation of the individuals' rights to run for or to hold a public office was even more difficult to link to the related criminal convictions, since at the time of delivering, the legal provision of ban or loss of public office had not yet been enacted. Their grounds for claiming the unfair retroactive application of the same legal provision were therefore stronger than

[5] Three political problems were raised: the opportunity to vote for the expulsion of the leader of one of the coalition Government from the Parliament, the several legal proceedings in which Berlusconi was involved at that time, giving strength to his claim of being a "legal martyr", and that he was only expelled once his political stardom had started waning.

[6] In particular Berlusconi could have been indeed declared not eligible to sit in Parliament through the law regarding the eligibility of Parliamentary Members (d.p.r. 30 March 1957, n. 361), given his position of public concessionaire (Art. 10, Sec. 1). Nonetheless, the law had never been applied, even if invoked, after any other Parliament election, since the Parliamentary majority was always in Berlusconi's favor.

[7] Italian Constitution, Article 25, Sec. 2.

Berlusconi's. Nevertheless, these claims have not been successful.[8] Administrative courts, which are entrusted to hear this type of claims in the Italian legal framework, have mainly relied on the case law of the Constitutional Court on legitimacy of restraints to political rights. The Constitutional Court had indeed stated that the "incandidabilità" has the aim of identifying those candidates who lack the moral dignity for holding public offices and is then constitutionally legitimate.[9] The rationale of this legal provision was to keep the public offices clear of individuals, whose "moral indignity" – as a legal concept – had been established by a final judgment of criminal conviction. In order to achieve this goal, Parliament had the power to associate a final criminal conviction for certain offenses with a negative requirement for access to the public offices, being proof of moral indignity of the candidate or the holder.[10]

Additionally, the Council of State stated that, for the sake of the principles of integrity, efficiency and service to the Nation, Parliament's decision to associate criminal convictions, pronounced even before the adoption of the law itself, with a negative impact on the status of public offices was reasonable.[11] Successively, the Constitutional Court confirmed that a legal framework that sets particular conditions for access to and loss of public offices – such as Parliament seats – by prohibiting appointing members who have a criminal record, was consistent with the Italian Constitution. Interestingly, the Constitutional Court stated that the new disqualification provision was inherent to both administrative law's purview and the public administration needs.[12]

Subsequently, Berlusconi lodged a plea with the European Court of Human Rights (ECtHR),[13] claiming that, as he was

[8] Cons. St., Sez. V, 29 October 2013, n. 5222; T.A.R. Lazio, Sez. II *bis*, 8 October 2013, n. 8696.
[9] Corte Cost. 5 June 2013, n. 118; 15 July 2010, n. 257; 3 March 2006, n. 84.
[10] Corte Cost. 31 March 1994, n. 118.
[11] Cons. St., Sez. V, 6 February 2013, n. 695.
[12] Corte Cost. 19 November 2015, n. 236.
[13] In accordance with Article 34 ECHR and Articles 45, 47 Rules of ECtHR. The application was lodged on 10 September 2013, and registered as *Berlusconi v. Italy* (58428/13). The Grand Chamber – to which the jurisdiction was relinquished on 5 June 2017 – held a hearing on 22 November 2017.

expelled from Parliament, Article 7(1) [14] of the European Convention of Human Rights (ECHR) had been infringed in his case.[15] Article 7 ECHR provides for fundamental principles of the rule of law in the field of criminal law, such as prohibition of its retroactive application. With regard to Article 7 ECHR's substantial content, its application is limited to convictions and sentencings (*"nulla poena sine lege"*). However, the notion "penalty" has an autonomous meaning as established by the ECtHR, and does not depend on the classification in domestic law. Indeed, the ECtHR has already stated, on several occasions, that a law that would be considered of an administrative nature in the national legal order could be considered of criminal nature under the ECHR.[16] At the UN level, it is the almost equally worded Article 15 of the International Covenant on Civil and Political Rights that provides for the principle of legality and the prohibition of retroactive application for criminal law. Both provisions are founded on the basis of Article 11(2) of the Universal Declaration of Human Rights.[17] The EU Charter of Fundamental Rights further includes the principle of no "punishment" without law, and, in its Article 49, adopts almost all the safeguards provided at Article 7 ECHR.

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[14] European Charter of Human Rights, Article 7(1): *No punishment without law 1. 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

[15] Minor claims regarded Article 3 of Protocol No. 1 (right to free elections), since Berlusconi submitted that the legislation and the disqualification did not comply with the principles of legality and proportionality, thus breaching both his right to fulfill his electoral mandate and the electorate's legitimate expectation that he would serve his term as senator; Article 13 (right to an effective remedy), since he complained about the lack of an accessible and effective remedy under domestic law by which to challenge the disqualification; Article 14 (prohibition of discrimination), since he stated that he had been banned from standing for election for six years, on an equal footing with a person who had been given a more severe ancillary penalty of disqualification from public office than he had.

[16] ECtHR, *Grande Stevens & others v. Italy,* 4 March 2014; *S.W. v. The United Kingdom,* 22 November 1995; *C.R. v. The United Kingdom,* 22 November 1995; *Öztürk v. Germany*, 21 January 1984.

[17] Ben Juratovitch, *Retroactive Criminal Liability and International Human Rights Law* (2005) 75(1) British Yearbook of International Law 337; Charles Sampford and Andrew Palmer, *Judicial Retrospectivity* (1995) 4 Griffith Law Review 170.

Berlusconi made his claim against Italy in the hope that the ECtHR would declare the non-compliance of Italian law with the ECHR, and thereby get back his right to be elected – as Italy would be required to execute ECtHR rulings.[18]

While awaiting the Strasbourg judgment, Berlusconi applied for obtaining a judgment of rehabilitation that could end the effects of his criminal conviction.[19] On May 11, 2018, the competent Italian court issued the desired judgment.[20] In accordance with the anti-corruption law, the disqualification effects also expired, since they would rely on the conviction dismissed in the recent judgment.[21] As a result, the ECtHR took the application off its list on November 27, 2018.

The analysis of the possible decision the ECtHR could have made is principally based on its case law and its approach towards sanctions and political rights, but, preliminarily, a legal theory premise has to be clarified to understand the nature of the law provision in the broader context of backward-looking laws and administrative law.

3. The aims and limits of the Rule of Law in governing past human actions

The first, self-evident *desideratum* of a system the goal of which is to subject human conduct to the governance of its rule, is that there must be rules. However, general rules are not sufficient *per se*: a system cannot define itself as a legal system simply by having rules. A legal system has rules that are characterized by a series of requirements that distinguish the legal rules from any other form of rules.[22] In particular, legal rules should comply with certain requirements, which Lon Fuller called internal morality of law, among them, is the requirement that no law can be retroactive.[23] The nature and the rationale for the existence of

[18] ECHR, Article 46.
[19] Italian Criminal Code, Article 178.
[20] Tribunale di Sorveglianza di Milano, ord. n. 4208/2018, 11 May 2018.
[21] Article 15, Sect.2, d.lgs. 31 December 2012, n. 232.
[22] Joseph Raz, *The Authority of Law* (1979) 212.
[23] Lon Fuller, *The Morality of Law* (1964) 46 and 51.

these underlying requirements, and especially the prohibition of retroactive law, is much debated.[24]

Mostly, they have been held to be necessary for controlling and directing humans without infringing their dignity.[25] Actually, the prohibition of retroactive law seems essential once we assume the position that the value protected by the rule of law is human dignity.

Governing today's conducts with rules that will be enacted tomorrow blatantly impedes human dignity.[26] Indeed, it would be impossible for people to follow the rules laid down by law if the rules are retroactive.[27] In this context, a retroactive law truly seems a legal monstrosity.[28] Technically, the retroactive law applies to the past as though the law were in force when the past action took place, substituting yesterday's legal framework with that of today. By doing so, retroactivity alters the legal status of a past action: an action that was legally permissible at the time it occurred, is either made illegal, or is burdened, in the past, prior to the applicable date of the new law.

Nonetheless, there are rules that also apply to past human actions and still are not retroactive.[29] These rules are said to be retrospective, or, in the civil law tradition, their application

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[24] Tom Bingham, *The Rule of Law* (2010); Jeremy Waldron, *The Concept and the Rule of Law* (2008) 43 Georgia Law Review (2008), 1-64; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework* (1997) Public Law 467-87.

[25] Jeremy Waldron, *Is the Rule of Law an essentially contested concept* (2002) 21 Law & Philosophy.

[26] Jeremy Waldron, *The Appeal of Law - Efficacy, Freedom or Fidelity*? (1994) 13 Law & Philosophy.

[27] Fuller, cit. at 23, 39.

[28] Fuller, cit. at 23, 53.

[29] Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?* (2004) 10 Otago Law Review 631; Paul Salembier, *Understanding Retroactivity: When the Past Just Ain't what it Used to Be* (2003) 33 Hong Kong Law Journal 99; Jan G. Laitos, *Legislative Retroactivity* (1997) 52 Wash. U. Journal of Urban & Contemporary Law 81; Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making* (1995) 75 Boston University Law Review 954; Stephen R. Munzer, *A Theory of Retroactive Legislation* (1982) 61 Texas Law Review 425; Elmer A. Driedger, *Statutes: Retroactive Retrospective Reflections* (1978) 56 Canadian Bar Review 268; David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking* (1960) 48 California Law Review 216.

follows the principle *tempus regit actum*.[30] A law that operates with retrospectivity affects the legality of past action but after the applicable date of the law: while it also affects pre-enactment actions, it does so only in the post-enactment future. Therefore, these rules do not set a new legal command, but rather they shape the value of past human actions for the present and the future. The difference between retroactive law and retrospective law is thus evident, even if they both operate on past actions. Retroactive laws explicitly state that their effects will take place before the day of their enactment, whereas retrospective laws modify the legal consequences of what happened in the past exclusively from the day of its enactment.[31]

For distinguishing the two, should the law have a backward-looking effect, it is necessary to ask whether the law alters the legal status of an action in the past (pre-enactment), retroactive, or in the present and in the future (post-enactment), retrospective. For backward-looking legislation to be retroactive, the legislation must change past legal status of past human actions; it is not enough that the legislation has an effect that eventually adversely affects past human actions. [32] Therefore, retrospective legislation does not seem radically inconsistent with the rule of law.[33] Firstly, its effect on the past is limited compared to retroactive legislation, reducing the harm to the rule of law requirement; secondly, it is needed to permit the proper enforcement of the rule of the law. The idea of ruling through the law itself requires that, whereby the prohibition of retroactivity for human dignity reasons does not apply, the general scope of the current law re-enacts, ruling the whole reality, as formed by different and multiple past events, through the law. Indeed, a

[30] Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law* (2013) 507; Henry Hart and Martin Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1995) 64.

[31] Against this distinction, Jill Fisch, *Retroactivity and Legal Change: An Equilibrium Approach* (1997) 110 Harv. L. Rev. 1056-1069; Michael J. Graetz, *Retroactivity Revisited* (1985) 98 Harv. L. Rev. 1820-1822.

[32] Indeed, Fuller writes that backward-looking laws may sometimes "*be essential to advance the cause of legality*" Fuller (n 23) 53; Tony Honore, *Real Laws*, in Peter Hacker and Joseph Raz (eds.), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (1977) 105.

[33] Jeremy Waldron, *Transcendental Nonsense and System in the Law* (2000) 100 Colum. L. Rev. 16.

system of laws exclusively prospective in nature would be too confining and limiting to a lawmaker wishing to modify the *status quo*. The rule of law thus needs laws that also rule the past, or, at least, its consequences for the sake of present and future, as retrospective legislation does.[34]

Here, retrospectivity, as opposed to retroactivity, is an inherent element of the rule of law, performing an indispensable role: its backward-looking character is essential for having the law ruling.[35] If the prohibition to retroactive law were so broad as to comprehend also retrospective law, the ideal of the rule of law itself would have an intrinsic, ineradicable conservative character. Its character would be closely linked to maintenance of current and previous legal entitlements. If every time someone relied on existing law in arranging their affairs, they were made secure from any future change in legal rules, the body of law would be ossified forever. Even if this perspective would sound appropriate to many great legal thinkers of the rule of law – Hayek above all –, [36] this conception would sound terribly limited to us, and in an injust way, if the rule of law had not the power to readdress the past for the sake of today's goals.

4. The scope of the application of the concepts of retroactivity and retrospectivity

Constitutional provisions prohibiting *ex post facto* laws are common in constitutional law,[37] added to which the principle *nullum crimen, nulla poena sine praevia lege poenali* is also held as a general principle in international law.[38] For those legal systems that rely on judge-made-law principles, the development of criminal law through judicial law-making is permissible only within the boundaries of foreseeability, which echoes the

[34] Jeremy Waldron, *The Rule of Law in Public Law*, in Mark Elliott and David Feldman (eds.), *The Cambridge Companion to Public Law* (2015) 58.
[35] Charles Sampford, *Retrospectivity and the Rule of Law* (2006) 139.
[36] Friedrich A. Hayek, *The Constitution of Liberty* (1973) 21.
[37] E.g. Italian Constitution, Article 25, Sect. 2; US Constitution, Article 1, Sect. IX; German Constitution, Article 103; Spain Constitution, Article 9(3); Declaration of the Rights of the Man and of the Citizen, Article 8.
[38] ICJ Statute, Article 38 (1) c.

provision of prohibition of retroactive laws. [39] Whatever its variants, the principle of prohibition of retroactive law has been mainly set down in the criminal law area, since, among all branches of the law, criminal law is the one that mostly aims to shape and sanction human actions.[40] However, it is also true that laws of all kinds, and not merely criminal law, enter into people's calculations, and drive their actions.

An *ex post facto law* interferes with the stability and certainty of legal relationships, no matter under which area it falls. Nonetheless, it is retroactive criminal law that seems most like a legal monstrosity to us, punishing humans today for something done yesterday when it was not prohibited. Thus, the prohibition of retroactive law is commonly only applicable in the area of criminal law. Outside of that, it is generally accepted that laws can rule past actions, by retroactive or retrospective application, without relying much on the distinction.[41] From this perspective, the problem of the scope of application of the prohibition of retroactive law essentially becomes a question of the scope of application of criminal law. A law ruling on the past is forbidden by constitutional provisions, and likewise by Article 7 ECHR, if it falls within the area of criminal law. The same legal provision, however, would be allowed if its content does not fall within the criminal law area; its application to the past will then be generally permitted, as it is in the Italian legal system.[42]

While the civil law tradition is clearer in establishing that retroactive criminal laws are not permitted – and thus retroactive non-criminal laws are in principle allowed –, the common law

[39] ECtHR, *Del Rio Prada v. Spain,* 21 October 2013, para. 91; *S.W. v. The United Kingdom*; 22 November 1995, para. 35 *contra* ECtHR, *C.R. v United Kingdom,* 22 November 1995.

[40] ECtHR, *Del Rio Prada v. Spain*, 21 October 2013, para. 82; *Gheorghe v. Romania*, 3 April 2012, para. 26; *Öztürk v. Germany*, 21 January 1984, para. 53.

[41] ECtHR, *Del Rio Prada v. Spain*, 21 October 2013, para. 116; *Kokkinakis v. Greece*, 25 May 1993, para. 52.

[42] In Italy, Article 11 Preliminary Rules to Law; Corte Cost., 7 July 2006, n. 274; Oliviero Mazza, *Lo chassé-croisé della retroattività in margine alla "legge Severino"* (2014) Archivio Penale 1; Remo Caponi, *Tempus regit actum. Un appunto sull'efficacia delle norme processuali nel tempo* (2006) Riv. Dir. Proc. 449; Marco Siniscalco, *Irretroattività delle leggi in materia penale. Disposizioni sostanziali e disposizioni processuali nella disciplina della successione di leggi* (1987); Giovanni Grottanelli De' Santi, *Profili costituzionali della irretroattività delle leggi* (1970).

tradition frames the concept slightly differently. The latter affirms that retroactive laws are not permitted at all (besides very exceptional cases), while retrospective laws are permitted, even in the criminal law area. One could say that the two conceptions conflict. However, in my opinion, their theoretical differences could be solved. In civil law systems, the distinction between what is criminal and what is not is generally more marked and more easily perceived by citizens than in common law. In the former, what the constitutional provisions aim at most is prohibiting law ruling the past in as much as it impacts on those interests (liberty and life above all) that are traditionally covered by criminal law. In common law, it is more difficult to draw the boundaries between criminal laws. Therefore, its main concern has been to restrain the temporal projection of the law itself, no matter its nominal definition, generally allowing all retrospective laws and banning all retroactive laws.

However, both conceptions originate in the same ideal of the rule of law that has been previously mentioned, and share a similar application. The rule of law general projection is inevitable, and it is a specific value of its capacity to amend what has been done in the past. This projection is only impeded when the new legal consequences attached to an action are so unforeseeable that they interfere with the dignitarian principle contained in the way of ruling human actions that the rule of law entails. The core of this principle could be protected by a limitation of its scope, such as in the civil law tradition, where criminal law covers the area that is supposed to be more closely linked to human dignity that would be dramatically infringed by the State's coercive power. In the common law tradition, the very same principle is maintained by a conceptual limitation instead, since any retroactivity at all is prohibited, meaning that retrospective changes are allowed, since they simply attach legal consequences and do not alter what the law prescribes.

Whichever tradition is followed, both legal concepts have the same function. Actually, the same principles inspiring these concepts allow a bridging between them: In the civil law tradition, the most common rule is a general prohibition of retroactive law, which could be derogated from through law, but not in the criminal law area; this is equivalent to the general prohibition of *ex post facto* laws in common law systems, which admits

exceptions, but never in criminal law. At the same time, according to the civil law principle of *tempus regit actum*, a judgment should be formulated having due regard to the law in effect when the judgment itself is made; in common law, conversely, the same cases are covered by retrospective legislation, which is the application of a legislation that attaches a new legal consequence to an event that took place in the past.[43] However, if we reconsider this complex relationship, the common-law principle of retrospective legislation is simply the consequence of the principle *tempus regit actum*, since the law in force at the time should be applied to all the pending cases even if their constitutive elements have been developed in the past. At the same time, the civil law principle of *tempus regit actum* is the theoretical premise to the application of legislation when it has retrospective effects.

5. The necessarily temporal nature of our Administrative Law

Despite the fact that distinguishing between retroactivity and retrospectivity is not always an easy task,[44] they affect the rule of law differently. While the former is generally an anathema, and should be avoided as much as possible, the latter has a constitutive value for the rule of law itself, and especially in regard to administrative law. Even if, theoretically speaking, retroactive administrative law could exist, most of the administrative laws that rule the past are retrospective instead, following the principle of *tempus regit actum* in their application.[45]

This is not surprising at all. The principle of *tempus regit actum* is particularly consistent with the function and the scope of administrative law. The principle simply states that administrative power should be exercised in accordance with the legal framework of the time of its enforcement, and that only one procedure need be followed at any time, which is the one currently in force. There could be no other option: what kind of

[43] Waldron, cit. at 27, 3.
[44] Waldron, cit. at 26, 137.
[45] Particularly, in Italy: Corte Cost. 4 July 2017, n. 218; 7 July 2006, n. 274; 19 March 1990, n. 155; Cons. St., Sez. IV, 28 June 2016, n. 2892; Sez. IV, 21 August 2012, n. 4583; Sez. IV, 7 May 1999 n. 799; Corte Cass., Sez. III, 15 February 2011, n. 3688.

ruling would the rule of law be if the law should apply a no longer valid legal framework? And how many discrepancies and inequalities would it carry out, to judge each individual case according to the legal framework in force at the time of events rather than judgment?

Two pillars of the functioning of administrative law would be dramatically interfered with – the law in force at the time of judgment as the only legal source for the legitimate exercise of an administrative power, as a matter of rule of law and legal sources; equality in the application of administrative power, as a matter of rule of law and impartiality of administrative action. By its very nature, administrative law is positioned on a temporal line. It rules the functioning of the modern State, in all its aspects: healthcare services, public contracting, business licenses, work permits, judiciary, and democratic functioning.[46] The need for the development of all these activities to be regulated in accordance with the law currently in force, is intuitive to us. No one would claim that since they started to carry out one of these activities in compliance with rules of a previous legal framework, they would, in the present, still be entitled to act as they used to notwithstanding a change in the law.[47] Therefore, the temporal nature of administrative law is a requirement of the rule of law. Otherwise, the ruling of law would be ineffective by leaving the task of ruling the future to past legislators and depriving the current legislator of the possibility of doing so. Evidently, this risk exists for all areas of law, but it is particularly significant for the administrative law area.

Otherwise, the State apparatus, which mainly operates through administrative law, would be bound to apply a legal framework no longer existent. The legitimacy of the public

[46] We can use procedural statutes as an example. Procedural statutes are always applied retrospectively to all proceedings that are not concluded at the time of the judgment, no matter when the action occurred. It would be indeed unfair to apply different procedural rules to the same actions based on when they had occurred. This could even be applied to procedural statutes in criminal law, even if with more conceptual difficulties: e.g., the first criminals apprehended and charged primarily on the basis of DNA evidence could have claimed that, had they known that the police could make use of it, they would have changed their behavior, perhaps even have decided not to commit the crime. See Sampford (n 34) 123 and 244.

[47] Andrei Marmor, *The Rule of Law and its Limits* (2004) 23 Law & Philosophy.

functions would be dramatically impeded. At the same time, sustaining that administrative law should be bent to the law in force at the time the legal entitlement was awarded, would be a gross violation of the principle of equality. In fact, this would imply differentiated treatment between individuals by applying a different set of rules in respect of the time of activity, in turn making it unreasonable and irrational. Thus, the rule of law is necessarily progressive, meaning a refusal of an inferiority complex towards the previous legal entitlements, where the law is inspired from the perspective of administrative law.

6. Moral dignity as an administrative requirement rather than a sanction

In accordance with what has been expressed regarding the scope of the rule of law and the temporal nature of administrative law, it is possible to make an assessment on the administrative, rather than criminal, nature of the Italian law disqualification, in order to evaluate its compliance with Article 7 ECHR which prohibits retroactive criminal sanctions, and even to dismiss the whole issue by emphasizing the non-sanctioning nature of the provision.

First at all, it should be noted that, when assessing whether a legal act constituted a criminal offence under national law at the time when it was committed, the ECHR's Contracting States' classification is of certain significance. Indeed, interpreting and applying the law lies primarily within their purview. However, compliance with the ECHR could not be exclusively delegated to national parameters.[48] The effectiveness of the ECHR as a tool for protecting human rights would be seriously jeopardized if national legal orders were entirely free to determine what does and what does not constitute criminal law, thus simply overcoming the guarantees provided by the ECHR itself. To this end, the ECtHR has set down three parameters for developing its own autonomous judgment on the nature and existence of a criminal sanction, the so-called *Engel* criteria:[49] the qualification of

[48] ECtHR, *Grande Stevens & others v. Italy,* 4 March 2014; *Menarini Diagnostics S.r.l. v. Italy,* 27 September 2011; *Zaicevs v. Latvia,* 31 July 2007; *Jussila v. Finland*, 23 November 2006.

[49] ECtHR, *Engel and others v. Neetherlands*, 8 June 1976, paras. 82-83.

the offence operated by the national legal system, the deterrent-punitive function of the sanction and its gravity.[50]

The first parameter does not require much clarification. As illustrated before, the preparatory works and the aim of the legislation, as well as the following administrative and constitutional judgments, make it clear that the Italian legal order clearly intends the legal provision as an administrative and not a criminal law provision, and thus Article 7 ECHR does not apply.[51]

The Italian Parliament did not intend to adopt a new criminal charge; it simply ruled that a non-discretionary and automatic consequence of unsuitability of a person for public office, outside of any margin of appreciation, is linked to certain convictions.[52]

The analysis of the second legal parameter – the presence of a deterrent in or punitive character of the legal provision – is more complicated, but it solves itself in a similar manner.[53] In the provision of a ban on running for public offices or loss of the seat after a criminal conviction, the function of punishment does not seem to exist. This is very clear in the case of people still running for public office; less so, but still uncontroversial, for those who already hold a public office. There is no punitive character when there is an automatic certification by an administrative authority, as happens when the candidate is excluded from the electoral competition for having reported a criminal conviction.[54] It is hard

[50] ECtHR, *Société Oxygène Plus v. France,* 17 May 2016; *Žaja V. Croatia*, 4 October 2016.

[51] It is of interest to note, that there is a general European consensus on the objectives the Italian law pursues, and that the Council of Europe anti-corruption body (GRECO)'s recommendations have been taken into account in the adoption of the law. The consensus was also wide in the Italian Parliament, which itself voted almost unanimously in favor of the law. Somewhat ironically, it was Berlusconi IV's Government that proposed a first draft of the law, which already contained the provision of "incandidabilità" (Art. 10, Government Bill 4 May 2010, n. 2156).

[52] ECtHR, *Rohlena v. Czech Republic*, 27 January 2015, para. 51; *Kononov v. Latvia*; 17 May 2010, para. 187.

[53] ECtHR, *Benham v. United Kingdom*, 10 June 1996, para. 56; *Bendenoun v. France*, 24 February 1994, para. 47; *Öztürk v. Germany*, 21 January 1984, para. 53.

[54] Interestingly, in Italy (Italian Criminal Code, Art. 28; Art. 2, Sect. 1, *d, e,* c. 2, d.p.r. 20 March 1967, n. 223), the ban to be elected could also be an ancillary sanction of the criminal conviction. *In that case*, it could be sustained that it is a criminal sanction, or better a criminal effect of a criminal sanction. It is also of

to speak of a punitive character of a sanction, where, as in this case, there is no specific, case-by-case evaluation but rather an automatic disqualification from public office.

In particular, the administrative authority providing the sanction – or better, which certifies the presence of a constraint on candidacy, such as a conviction – does not have discretional power of evaluation: it simply has to apply the law. The concept of punishment should indeed involve an evaluation of the circumstances with a proportioned ratio between the behaviour targeted and the punishment inflicted. Within the legal provision of the anti-corruption law, none of these elements is present. It is indeed quite challenging to speak about sanction, punishment, and individual penalty where it is not possible to have any singular evaluation regarding the case.

The concept of deterrence deserves a separate comment.[55] Deterrence does not flow from the law provision itself, but from the criminal sanction linked to the offence, such as bribery or embezzlement, to which the disqualification is attached. Indeed, it is hard to claim that someone would refrain from bribery or embezzlement because they are afraid that they will lose the possibility to run for public office – quite a remote possibility for many – but they would risk imprisonment. It is the latter sanction that causes widespread deterrence and is most commonly known.

Moreover, in this particular case, Berlusconi knew the law when he was elected as much as he knew that he was currently under criminal proceedings, as the first ruling against him had already been delivered. The law was already bound to direct his behaviour; he knew the normative framework and his personal state, so he could have decided not to compete in the electoral run and thus not to fall under the sanction that was provided by the

interest that Berlusconi has also been recipient of this sanction for a period of two years (Corte Cass., Sez. III, 14 April 2014, n. 770). However, the two provisions are structurally different. The judge, through their own discretionary evaluation, issues the ancillary sanction on grounds that are different from the ones sustaining the 'incandidabilità'. Moreover, according to Article 15, Sect. 2, d.lgs. 31 December 2012, n. 232 the disqualification operates independently from accessory sanction. Accordingly, the ECtHR Case *Welch v. United Kingdom* (9 February 1995, para. 33) could not be invoked here, since the 'incandidabilità' does not follow the discretion of the judge.

[55] ECtHR, *Demicoli v. Malta*, 27 August 1991, para. 34; *Campbell v. United Kingdom*, 28 June 1984, para. 72.

legal framework. In other words, the array of legal provisions regulating his life as a Parliament member was already stabilized and clear when he ran for the seat. The normative behaviour-directing function exercised by the rule of law is of one kind in criminal law, and another kind in administrative law, such as the regulation of access to public function. It would be difficult to affirm, for instance, that someone would not have committed a certain act if they had known that it would have changed their access to public office. This consequence to one's political right is not the primary object of the deterrence, the criminal punishment is. The same could be said about the parameter of the gravity of the sanction, which is often utilized as an integrative criterion to the former two.[56] The ban on running for public offices or the loss of a public office is a considerable drawback, but it actually does not seem to impede those fundamental rights of individuals, which, where prejudiced by the sanction, give gravity to the sanction. The declaration of disqualification from public office pales – or should pale – in comparison to the stigma attached to a conviction for a serious criminal offence.

Beyond an analysis of the applicability of the *Engel* criteria, a concrete approach to the question would have lead the ECtHR to the same conclusions. Preliminarily, it should be noted that previously the ECtHR had already denied the criminal nature of a similar French law provision, stating that they are directed to guarantee the proper functioning of parliamentary election, and not to punish personal behaviour.[57] From this point of view, there is another argument for sustaining the administrative nature of the provision. The ban on running for public office and the loss of public office refers to a situation of moral indignity for particular and serious convictions. This legal provision's aim is to protect the constitutional values of exclusive service to the Nation, [58] impartiality,[59] good administration,[60] public officials' loyalty and

[56] ECtHR, *Lauko v. Slovakia*, 2 September 1998, para. 57; *Garyfallou v. Greece*, 24 September 1997, para. 34; *Bendenoun v. France*, 24 February 1994, para. 47; *Campbell v. United Kingdom*, 28 June 1984, para. 73.
[57] ECtHR, *Pierre Bloch v. France*, 21 October 1997, para. 56.
[58] Italian Constitution, Article 98.
[59] Italian Constitution, Article 97.
[60] Italian Constitution, Article 97.

honour.[61] For the sake of these goals, the rule of law allows for the possibility of restraining a previous legal framework and individual rights as well, such as the one to be voted for. The rule of law may establish new facts that are relevant to prove the moral dignity of an individual, new requirements which, since the law entered into force, should be applied to everyone, notwithstanding the legal framework that was in place at the time they entered public office.

In conclusion, there is no question of any offence being caused or abolished by the law questioned. The exclusion from the election run or the loss of the public office is merely a declaratory act of a situation already determined by a criminal conviction. There is no retroactive application of a sanction: Parliament adopted a rule valid from the present on, which necessarily would regulate situations in the past, since the rule of law does not operate in a legal vacuum. In point of fact, it could be concluded that the provision of "incandidabilità" is neither a criminal sanction, nor even a sanction at all. It is a (negative) element for holding candidacy to public office that, for the subject who has reported a final criminal conviction, constitutes a prohibition. Would the lack of the right age or nationality requirements be considered a sanction?

Obviously not. Italian case law confirms this view: It is neither a part of the punishment for a criminal charge,[62] nor does it contain sanctions of a criminal or administrative nature:[63] it is simply not a sanctioning legal provision.[64] It all proves that there are other sanctions than criminal sanctions, and that there is other administrative law than administrative sanctions. The legal provision challenged is therefore an administrative law provision, not a criminal one. Its application correctly follows the principle of *tempus regit actum* and, consequently, it may operate retrospectively as in the Berlusconi case. Administrative law must comply with its own principles in addition to the rule of law principles. First and foremost of these principle is that the exercise of the administrative power has to comply with the rule, which regulates its action, and, in its temporal dimension, the

[61] Italian Constitution, Article 54, Sect. 2.
[62] T.A.R. Lazio, Sez. II *bis*, 8 October 2013, n. 8696.
[63] Cons. St., Sez. V, 29 October 2013, n. 5222.
[64] Cons. St., Sez. V, 6 October 2013, n. 695.

administrative power is ruled by the *tempus regit actum*. In the rule of law lexicon, this means that the current law regulates the law that must be applied.

7. The Rule of Law constraints to political rights

The refusal to consider Berlusconi's disqualification as a violation of human rights is also grounded in the nature of the right at the basis of the claim, and the general interest the law carries out. According to the interpretation given by the Italian Constitutional Court,[65] the general entitlement to the right to run for election is the norm, and its deprivation is exceptional.

This is also the general approach in the international legal practice.[66] In the Western legal tradition, the right to be elected –[67] as well as the right to vote – is defined as a political, functional and relative right.[68] Political, because it regards the individual in their function as part of the community, generally as a citizen, and to whom is, as such, entrusted a portion of the public power. Functional, because it has a direct and immediate impact on the functioning of the State and democracy. It remains an individual right, and its status of entitlement does not differ from other rights, but it also serves a goal that goes beyond the ones of the individual. In particular, it serves both an individual (expression of a political choice) and a general interest (composition of the elective public offices). Relative, since the individual's right to contribute to this public goal is not entirely unrestricted, and must be balanced with certain conditions that the representatives must comply with by law. This holds true for both the right to vote,[69] and the right to be elected.[70] These rights are the cornerstones of representative democracy that allow individuals to have a say in

[65] Corte Cost., 26 March 1969, n. 46.
[66] Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion n. 807/2015, October 26, 2015, para. 16.
[67] Alessandro Pace, *Problematica delle libertà costituzionali* (2003) 83.
[68] Giulio Enea Vigevani, *Stato democratico ed eleggibilità* (Giuffrè, 2001) 30.
[69] Italian Constitution, Article 48.
[70] Italian Constitution, Article 51.

the forming of a national Parliament, and determine the Nation's interest.[71]

Thus, while political rights remain individual fundamental rights, Parliament is entrusted with ruling them by setting conditions for their exercise.[72] In a similar case, the ECtHR had already stated that it is necessary to balance the general interest with the individuals' rights in democratic States.[73] The Opinion of the Venice Commission, presented in the Case before the ECtHR, follows this same line about balancing political rights and public interests.[74] Indeed, Parliaments are entitled to regulate – through the law – the exercise of the right of the active electorate and the right of the passive electorate.[75] It is rather obvious that the judgment, for example of moral dignity, is important for the right of the active electorate, but even more so for the right of the passive electorate. Public interest is very present in the exercise of the right to choose people's representatives, and even more in the right to be elected as a people's representative.[76] This is also evident in most of the national legal frameworks. While it is possible to be excluded from being elected for and at the same time maintain the right to vote, being excluded from voting always means to be excluded from being elected as well.

It is easier to lose the right to be elected than the right to vote because the first one should be assigned with even greater care.[77] Therefore, a precise hierarchy exist among the values of these rights: the right to be elected is the most delicate one, and the one that Parliament is allowed to restrain with more discretion

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[71] Malcolm Thorburn, *Justifications, Power, and Authority*, (2008) 117 Yale L. J. 1076.

[72] Corte Cost., 5 June 2013, n. 118.

[73] ECtHR, *Coeme v. Belgium*, 22 June 2000, para.145.

[74] Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion n. 898/2017. On July 19, 2017, the President of the ECtHR invited the Venice Commission to present observation as *amicus curiae* in the Case *Berlusconi v. Italy*. The opinion, requested on July 24, 2017, regarded "*the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office*". Opinion delivered on October 9, 2017.

[75] Venice Commission Opinion n. 898/2017, para. 6.

[76] Venice Commission Opinion n. 898/2017, para. 7.

[77] ECtHR, *Hirst v. the United Kingdom (n. 2)*, 6 October 2005, paras. 58-61 and 69-71.

– and States with a greater margin of appreciation –,[78] allowing individuals who lack moral dignity to maintain their voting rights, but only allow them to vote for individuals who instead have moral dignity. Clearly, these restrictions must be constructed in the negative form: the fundamental nature of political rights means that Parliament has to describe the situation, wherein any individual cannot be elected, as exceptional.[79]

Nevertheless, it is a relative right not only in the sense that it is functional to a goal, but also in the sense that the individual's right to contribute to this goal is not entirely unrestricted, but must be balanced with a certain general interest;[80] that the representatives in the assembly must fulfil certain fundamental conditions; that they are to be citizen of Italy, adult, literate, and with moral dignity, i.e., lack moral indignity.[81]

The Italian legal framework has long recognized two different types of constraints to political rights: incompatibility ("incompatibilità") and ineligibility ("ineleggibilità"). The challenged new law provision does not fall under either of these two, but it explicitly constitutes a third one called "incandidabilità". Particularly, "incandidabilità" differs from incompatibility, which merely refers to a case where the individual has the right to choose between the public office seat and a position elsewhere, and ineligibility, which protects the public office and the functioning of democracy from imbalance in the electoral competition. The distinction between ineligibility and "'incandidabilità" matters especially here, since they both refer to an obstacle to assuming the public office. The grounds for ineligibility relate to the functioning of the electoral competition, in order to prevent that certain individuals exercise a *captatio benevolentiae* and/or *metus potestatis* by using their powers or position, thus unfairly influencing the voting public.[82]

Therefore, it follows that the ineligibility grounds may be removed: once the individual no longer holds the position that has led to their ineligibility, they could be elected again. Conversely,

[78] ECtHR, *Paksas v. Lithuania*, 6 January 2011, para. 101; *Ždanoka v. Latvia*, 16 March 2006, paras. 106-114.
[79] First Additional Protocol to ECHR, Article 3.
[80] Corte Cost., 5 June 2013, n. 118.
[81] Corte Cost., 3 March 2006, n. 84.
[82] Corte Cost., 26 March 1969, n. 46.

the grounds for "incandidabilità" concern the status of the person, radical unsuitability to the public office. It cannot be amended since the requirement of moral dignity should have always been part of the individual's character. "Incandidabilità" operates before the election run. The competent electoral office checks on the disqualification grounds,[83] and must erase the name of any applicant who did not submit a declaration that there are no grounds for "incandidabilità".[84] Therefore, the rationale of this disqualification provision does not directly regard the electoral competition, but rather the person who aspires to it, and the public office concerned.[85] In this sense, this ban is "pre-democratic": it prevents access to the run for public offices to anyone lacking the requirements which are associated with public offices, which are Italian citizenship, adulthood, knowledge of language and writing, and moral dignity, at least to the degree that it is not compromised by certain criminal offenses. Hence, it has rightly been said that the "incandidabilità" is more of an inter-requisite than a pre-requisite to public office.[86]

The "incandidabilità" is therefore a legal status close to the lack of passive electorate, that, once again, is not a sanction. However, for different reasons, it attaches to the individuals who do not hold Italian citizenship, minors, illiterates and, to the extent provided by the anti-corruption law, certain convicts. The law provides that, in certain circumstances expressly provided by law, and solely in those, the right to be elected is *ope legis* diminished. This fundamental right is not eliminated but simply limited. It could also be restored if the grounds for which it has been limited, ceased to exist, as happened to Berlusconi once he obtained the rehabilitation that dismissed the effects of his conviction. This limitation to the right occurs in concurrence with the issuing of the conviction: the delegated authority certifies the conviction with a declaratory act, and proceeds to exclude the candidate from the electoral run.[87] The same could be said of the individuals who already hold public offices: the "incandidabilità" affects them at

[83] D.p.r. 30 March 1957, n. 361, Article 22.
[84] D.lgs. 31 December 2012, n. 235, Article 2, Sec. 2
[85] Corte Cost., 6 May 1996, n. 141; 31 March 1994, n. 118.
[86] Valeria Marcenò, *L'indegnità morale dei candidati e il suo tempo* (2014) 1 Giurisprudenza Costituzionale 621.
[87] Corte Cost., 31 March 1994, n. 118; 29 October 1992, n. 407.

the moment of the conviction, and the expulsion from office simply follows the modification of the electoral right. The delegated authority simply has to apply it: in this case, that means Parliament by the only means it is authorized for: voting.

The Berlusconi case should also be evaluated in this greater context: once established, not to apply the (exceptional) limitations to political rights means a violation of both the general interest that the law serves – having Parliament members with moral dignity – *and* the rights of the other candidates running who have complied with the requirements. The ban on retroactive legislation, claimed in Berlusconi's favour, does not consider that by lifting a restriction on him, could infringe on the other candidates' political rights. Berlusconi, as permitted by the electoral law of that time, was in competition with all the candidates of all the Italian sections. Concretely, a violation of a right would have occurred against the law-abiding runner-up in the Molise electoral district for which Berlusconi obtained a seat. Indeed, the Parliamentary election is a competitive situation by nature. In any competitive situation, the issue of not applying legislation always means disadvantaging the competitor who is in compliance with the law.

Conferring a benefit upon Berlusconi – by not applying the legal provision contained in the legislation of access to and loss of public offices to him – means disadvantaging another candidate to whom the past legal framework would only apply in their disfavour. The electoral competition is a "zero-sum" game: the due application of the same legal framework to all candidates places a disadvantage on one and gives an advantage to another, which has been established by law.

8. The lack of discretion in the application of the Administrative Law measure

Pending the decision of the ECtHR, Berlusconi's claim received surprising support from the Italian Parliament. Augusto Minzolini, also member of the Senate, was convicted for embezzlement with final judgment on November 12, 2015. In this case, no issue of retroactivity was raised because the first judgment against Minzolini dated back to February 14, 2013, when the law on access to and loss of public offices was already in force.

Surprisingly, on March 16, 2017, the Senate voted against Minzolini's suspension, in contrast to the order of the day that indicated removal. Some Parliament Members voted against the disqualification by stating that the judgment that led to the disqualification was tainted (*fumus persecutionis*) by political prejudge against him. Although Minzolini resigned a week later, the vote had shocking ripple effects because it eroded one of the pillars at the core of Berlusconi's expulsion, that the vote for the expulsion was a due act, required by law as an automatic consequence of a criminal conviction. The supporters of the legitimacy of Parliament's decision to not execute the criminal judgment in regard to the loss of seat of Parliament – and, thereby, the supporters of Berlusconi's position –, claimed that the law itself provided that it was for Parliament to decide on its own composition and thus to vote on the loss of the seat of one of its members discretionally, even if in opposition of a law which precisely provides that individuals with criminal convictions should lose their seats.

The law indeed requires that, in the case of disqualification due to a criminal conviction, the Parliament has to proceed in compliance with the Constitution that confers the right to vote in regard to its composition to Parliament alone. [88] A literal interpretation of the constitutional provision gives full discretionary power to Parliament, which also creates the possibility of rejecting the relevance of the criminal conviction and thus *de facto* overcoming the law provision of the loss of seat.

Interestingly, the Italian Government itself has sustained this interpretation, arguing before the ECtHR that the Berlusconi case concerned the non-validation of his election, and so his removal was a due act, while the Minzolini case represented the classic case of a procedure of disqualification, where Parliament may decide not to implement the disqualification even if the statutory conditions are met. Here, plausibly, the Italian Government followed the Opinion of the Venice Commission.[89] However, the Berlusconi and Minzolini cases are very similar. Through a systemic and teleological interpretation of the same constitutional rule, it is possible to demonstrate that the

[88] Italian Constitution, Article 66.

[89] Venice Commission Opinion n. 898/2017, para. 29.

Parliament was bound to disqualify Berlusconi as much as Minzolini.

Firstly, Parliament's right to vote on the access and loss of the seat of its members is a legal concept elaborated for preventing external intervention regarding its functioning and its composition.[90] Its rationale is to ensure that no subjects outside of the popular will interfere with the composition of Parliament. Therefore, it was not meant to frustrate the judicial activity in issuing criminal convictions the Parliament itself has established as a negative for acceding to its ranks. Secondly, the Constitution indicates that, in cases of incompatibility and ineligibility, the Parliament has a right to vote: perfectly logical. Parliament may assess the "incompatibility" between a job position and a Parliament seat or the "ineligibility" of a candidate on account of their undue influence over the electoral run. Regarding the situation of "incandidabilità", instead, there is nothing to be assessed. The criminal conviction is a simple fact that the Parliament has to take into account in regard to the admission of a candidate to the office or the removal if the conviction has emerged after they have been elected already. Thirdly, the Italian Parliament retains this discretionary power for cases of ineligibility, and, according to the law itself, the case of "incandidabilità" follows the ineligibility methods for determining the outcome of the whole procedure. However, in order to give effect to the law provision of "incandidabilità", another interpretation should be used, which is perfectly consistent with the conceptual category of this disqualification provision. "Incandidabilità" is a different kind of obstacle to public offices than that of ineligibility. If a candidate reports a criminal conviction, they should be deprived of the public office in the same way as a foreigner or a minor should be, had they obtained a Parliament seat by mistake.

The fact that the procedure for "incandidabilità" is the same one as for ineligibility is due to the lack of an autonomous office in Parliament that could examine whether candidates fulfil the requirements for candidacy. Parliament is indeed exclusively entitled to vote on its own composition, but this is so because voting is the one and only way to exercise its power: no other

[90] Venice Commission Opinion n. 898/2017, para. 13.

office can perform this function. Voting is the only expression of a political collective body: it is not a proof of entitlement of a discretionary power, but the inevitable recognition of the collective nature of the body. Disqualifications from Parliamentary office due to convictions are generally automatic. Even when they are not, the deciding body – be it Parliament in its entirety or a committee – does not control the judicial decision, but merely takes it into account, and may make the decision on the date that the convicted individual has to leave Parliament.[91]

Parliament's composition is restrained by the Constitution and by laws, and lack of the necessary requirement of nationality or age, provided by them, works as a limit to Parliament's composition that neither Parliament – through voting – nor the people – through election – have the power to overcome. The fact that a judge enacts the restraint does not interfere with Parliament's autonomy any more than the civil registry – an administrative office – certifying the age and nationality of the public office holder. The obligation of Parliament to vote according to what the law has established and a criminal proceeding has certified actually corresponds to enforcement of the rule of law, as set by Parliament itself, which should be its guidance. The only way in which Parliament could legitimately disregard this or other laws is through law-making, [92] by repealing the previous law and replacing it with another one that does not compel it to implement judicial decisions. Furthermore, the fact that Parliament disregards what the judiciary had decided, and which the law had established as binding for Parliament, is a breach of the separation of powers, which is another pillar of the rule of law.[93]

In the Minzolini case, the Italian Parliament breached the rule of law and the separation of power as determined in its own law, which had expressly given a certain balancing power to the judiciary – for the sake of the integrity of public offices –, which limits the popular will as a source for Parliament's composition.

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[91] Venice Commission Opinion n. 807/2015, para. 107.

[92] Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James Fleming (eds.), *Nomos 50: Getting to the Rule of Law* (2011) 3-31.

[93] Jeremy Waldron, *Separation of Powers in Ought and Practice* (2013) 54 B.C. L. Rev. 433.

As the Venice Commission pointed out, criminally sanctioned acts by the representatives – no matter when they are revealed – are relevant for the right of the passive electorate. This could make disqualification from public office following a criminal conviction – as supervening "incandidabilità" is – more admissible than ineligibility.[94] Disqualification of an electoral mandate should therefore not be considered as limiting democracy, but rather as a means of preserving it.[95] Parliament's autonomy, in a rule of law system, is always determined by different factors. The electoral power remains the Parliament's main source in establishing its members, with the constraints established by law, which, where it concerns the monitoring of criminal conducts, inherently relies on judicial activity and its judgments.

9. Conclusions

Berlusconi's case before the ECtHR has been analysed for the underlying problem of the case that is crucial from the standpoint of systematicity of a legal order. The legal order works as a system, and it works to the extent that the main rules hold it together. The principle of separation of power along with other rule of law values, such as the ordinary work of the *tempus regit actum* principle, are key to this systematicity. The situation wherein Parliament does not feel bound by its own legislation represents an attempt to undermine the rule of law.[96]

[94] Venice Commission Opinion n. 898/2017, para. 9.
[95] Venice Commission Opinion n. 898/2017, para. 11.
[96] Jeremy Waldron, *Legislation and the Rule of Law* (2007) 1 Legisprudence 91-74.