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May the Law Rule the Past? What if the ECtHR had decided Berlusconi's Case

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May the rule of law be retroactive? Berlusconi's case before the ECtHR.

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ABSTRACT.

On November 22, 2017 the European Court of Human Rights held a hearing on a curious petition: the notorious former Prime Minister of Italy, Silvio Berlusconi, claimed that he suffered an injustice by the application of the new Italian anti-corruption legal framework. Indeed, Berlusconi had lost his seat in Parliament as a consequence of his criminal conviction, as provided by the anti-corruption legislation. Berlusconi alleged that the loss of his Parliament seat was in substance a criminal sanction and thus, according to Article 7(1) of the European Charter of Human Rights, should have been subject to the principle of non-retroactivity. According to the Italian legal system, instead, the measure was considered to be an administrative law measure and thus it could have been applied also to events occurring in the past, such as the criminal acts committed by Berlusconi, which predated the adoption of the law. The questions that the ECtHR have to address, beginning with Berlusconi's highly visible case whose judgment is expected for Spring 2018, will provide an interesting insight of the relationships between the normative concept of the rule of law and its temporal application, as well as with individual rights and Parliamentary autonomy.

1. *Introduction.*

The question now pending before the ECtHR is in effect to what extent and in which fields may the law rule the past. In principle, the rule of law ideal itself seems to clash with the possibility that the law can rule retroactively. The normative concept of the rule of law has been interpreted, *inter alia*, as an orientation tool for human behaviors; from this perspective, how could the law rule past events without offending the very basic dignitarian principle that an individual's behavior should be judged according to the legal framework operating at the time? The idea that someone could be punished for a rule that came into existence only after he had acted repulses us. The traditional criminal law prohibition of retroactivity - *nullum crimen, nulla poena sine praevia lege poenali* - refers to this general idea.

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Nonetheless, the rule of law would fail in its goal to govern human behavior if it were prevented from ruling on events that have already taken place. In truth, any legal adjudication necessarily operates on past events, and the prohibition of retroactivity only aims to set aside certain types of legal entitlements from the general and a-temporal projection of the ruling of the 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 currently in force when the judgment itself is taken. And when this is applied to acts committed under a past legal framework, the law is said to that extent to rule retrospectively. Hence, a law deprives citizens who have been sentenced for some particular offences of an otherwise strong legal entitlement, such as the political right to be elected for a public office. Whom should this law affect? Everyone who has been sentenced, only those sentenced when the law was already in force – such as Berlusconi – or only those who have committed the relevant acts amounting to a criminal offence after the law had been enacted? Strict allegiance to the prohibition of retroactivity demands that we consider only the third option, since the other two categories of individual could not have relied on that law to orient their behavior. 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 too.

At first glance, the choice would mainly depend on the legal category into 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: it would be almost impossible to deny that 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. If, instead, the same law were classified as an administrative law measure, its application to convicted persons would not be hampered by these temporal questions. Clearly, the matter becomes more complicated if we do not simply rely on the division between what is criminal and what is administrative according to the national legal framework of reference, but according to the European Convention of Human Rights. In this article, I will adopt a general theory of law approach for examining the 'conventionality' of the Italian law with regard to the ECHR.

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I claim, firstly, that the rule of law, where inquired by and administrative law perspective, has an inherently progressive character that permits its retrospective enforcement. Secondly, that a law regulating political rights does not fall within the criminal law area and should be therefore classified of administrative law. Thirdly, that the retrospective application of the law with regard to Berlusconi was thus a due act and, in conclusion, in compliance with the ECHR.

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

Italy has traditionally been considered the "sick man" of Europe in the fight against corruption. Its level of corruption has no equals among the major nations in Europe, and within the EU only Bulgaria and Greece show worse results.[1] A serious effort to halt this trend and regain positions in the worldwide rank of clean countries was carried out in 2012, when the Italian Parliament adopted the law of the 6th of November 2012, n. 190 which contained criminal and administrative anti-corruption provisions. Among these legal provisions the law delegated to the Government the task of adopting a general regulation regarding the access to public offices, and the hypothesis of prohibition in the cases where the candidates or the current public officials hold criminal convictions.

Accordingly, the Italian Government adopted the legislative decree of the 31st of December 2012, n. 235 on conditions of access and loss to public offices. Particularly, the decree provided, under the name of 'incandidability', a six years ban on running for public elected offices, such as Parliamentary office, or the loss of the seat in case the office had already been assigned, for those who had been convicted of imprisonment for a period longer than two years for crimes whose provision of incarceration is at least four years.[2] The adoption of the new regulation on loss of public office did not raise any particular debate. It was even applied without any scandal within a local election[3] - until the day the former Prime Minister of Italy and still Parliament Member, Silvio Berlusconi, was convicted.

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[1] See, among the many, the Corruption Perception Index, https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

[2] Art. 1, c. 1, *c*, d.lgs. 31 Dicembre 2012, n. 235.

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

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During the Parliamentary election of February 24th 2013, Berlusconi was elected to the Senate of the Republic, and the Court of Appeal of Molise, the district where he got elected, ratified his election on March 1st 2013. However, on August 1st 2013 Berlusconi was convicted of tax fraud and sentenced to four years by the Court of Cassation.[4] Indeed, according to the law, Parliament should have only taken notice of the conviction and, by voting, proceeding for the expulsion of Berlusconi from Parliament.

After a long debate, on 27th November 2013, the Parliament finally proceeded in that direction and Berlusconi was expelled, losing his seat in the Senate.[5] As with everything regarding Berlusconi, many problems have been raised: the political opportunity to vote for the expulsion from Parliament of the leader of one of the coalition Government parties; the several legal proceedings of which Berlusconi was charged at that time, giving strength to his claim of being a "legal martyr"; the fact that Berlusconi could have been expelled from Parliament according to different laws in the past, which have never been applied, and that he was expelled only once his political stardom had started falling.[6] However, beyond these mostly political issues, a serious legal concern was raised, and not only by Berlusconi supporters but by eminent jurists too:[7] 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 did not provide that kind of additional consequences?

It is true that the criminal conviction was delivered once 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 by the Italian Constitution.

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[4] Corte Cass., Sez. Fer., 1 Agosto 2013, n. 35729 which rejected the appeal against Corte d'Appello di Milano, Sez. II Pen., 8 Maggio 2013, n. 3232 which had confirmed Tribunale di Milano, Sez. I Pen. 26 Ottobre 2012, n. 10956.

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

[6] Particularly Berlusconi could have been declared not eligible to seat in the Parliament though the law regarding the eligibility of Parliamentary Members (d.p.r. 30 March 1957, n. 361), given his position of public concessionaire (Article 10, c.1): nonetheless, after any other Parliament election, the law was never applied, even if invoked, since the Parliamentary majority was always in Berlusconi's favor.

[7] V. Marcenò, 'L'indegnità morale dei candidati e il suo tempo', 1 *Giur. cost*., 2014, 621.

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Indeed, the Italian legislative decree came into force on January 5th 2013 while the facts for which Berlusconi was convicted dated back to 2004. However, the Italian case law was consistently against Berlusconi's claim. The application of the new legal framework on conditions on access and loss to public offices has brought before the courts several claims by plaintiffs who claimed that their political rights were infringed upon, for being excluded from the electoral run by the administrative offices, which simply certified the presence of a criminal conviction in their curricula and therefore attested the lack of requirements to participate in the elections.

Actually this first series of claims was 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 relate to the related criminal convictions, since at the time of their delivering, the legal provision of ban or loss of public office was not yet enacted. The grounds for claiming the unfair retroactive application of the same legal provision were therefore stronger. Nevertheless, these claims have not been successful.[8] Administrative courts - which in the Italian legal framework are entrusted to hear this type of claims - have mainly relied on the case law of the Constitutional Court on legitimacy of restraints to political rights. The Constitutional Court, in turn, has confirmed that the 'incandidability' has the aim of identifying those candidates who lack of moral worthiness for holding public offices and, thus, is constitutionally legitimate.[9] The rationale of the legal provision of 'incandidability' was considered to keep the public offices free from individuals whose 'moral indignity' - as a legal concept - had been established by a final judgment of criminal conviction. For achieving this goal, Parliament was free to rule in the sense to declare a criminal conviction as a negative requirement to the access to the public offences, as a sign of modal indignity of the candidate or of the holder.[10] Particularly the Council of State held that Parliament was free to associate, in framing the rules about the right to be elected or appointed to a public office, a final criminal conviction for certain offenses to a radical evaluation of moral indignity.

[8] Cons. St., Sez. V, 29 Ottobre 2013, n. 5222; T.A.R. Lazio, Sez. II *bis*, 8 Ottobre 2013, n. 8696.
[9] Corte Cost., 5 Giugno 2013, n. 118; 15 Luglio 2010, n. 257; 3 Marzo 2006, n. 84.
[10] Corte Cost. 31 Marzo 1994, n. 118.

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The Council of State went further by assessing that, for the sake of the principles of integrity, efficiency and service to the Nation, the Parliament decision to associate the negative impact on the status of public offices with criminal convictions emanated even before the adoption of the law itself was reasonable. [11] The Constitutional Court, in turn, decided that a legal framework which sets particular conditions of access and loss to public offices – such as Parliament seats – by prohibiting appointing those ones who have a criminal record was consistent with the Constitution. Interestingly the Constitutional Court affirmed that the new 'incandidability' provision was inherent to both administrative law scope and the public administration needs[12].

Berlusconi then made a plea before the European Court of Human Rights (ECtHR),[13] claiming that as he was expelled from Parliament, Article 7(1)[14] of the European Convention of Human Rights (ECHR) had been breached in his regard.[15] Article 7 of the ECHR provides for fundamental principles of the rule of law in the field of criminal law, such as its retroactive application is prohibited. At UN level, it is the almost equally worded Article 15 of the International Covenant on Civil and Political Rights which provides for the principle of legality of criminal offences and penalties and the prohibition of retroactive application of criminal law. Both provisions go back to Article 11(2) of the Universal Declaration of Human Rights.[16] The EU Charter of Fundamental Rights includes as well the principle of no 'punishment' without law, and which in its Article 49 adopts almost all safeguards of Article 7 ECHR.

With regards to the substance of Article 7 ECHR, its application is limited to convictions and sentences (*"nulla poena sine lege"*). The notion 'penalty' has, however, the autonomous meaning as established by the ECtHR and does not depend on the classification in domestic law.

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[11] Cons. St., Sez. V, 6 Febbraio 2013, n. 695.
[12] Corte Cost. 19 Novembre 2015, n. 236.
[13] In accordance with Articles 34 ECHR and 45, 47 Rules of ECtHR. The application was lodged on 10 September 2013 and registered as *Berlusconi v. Italy* (58428/13). On 22 November 2017 the ECtHR Grand Chamber – to which on 5 June 2017 the 1st Section has relinquished jurisdiction – held a hearing.
[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 concern the application of Article 3 of Protocol No. 1 (right to free elections) to the ECHR, Article 13 (right to an effective remedy) and Article 14 ECHR (prohibition of discrimination).
[16] B. Juratovitch, 'Retroactive Criminal Liability and International Human Rights Law', 75(1) *British Yearbook of International Law*, (2005), 337.

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Indeed, the ECtHR has already stated, in several occasions, that a law that is considered of administrative nature in the national legal order could be of criminal nature where inquired under the perspective of the ECHR.[17] Thus, Berlusconi made his claim against Italy hoping that the ECtHR would declare the non-compliance of Italian law with the ECHR and then – Italy being required to give execution to ECtHR rulings[18] – get back his right to be elected.

3. The aims and limits of the rule of law in governing human behaviors.

The first, self-evident *desideratum* of a system whose goal is to subject human conducts 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 legal rules and legal rules are characterized by a series of requirements that distinguish the law from any other form of commands.[19] Particularly legal rules should comply with certain formal requirements - which Lon Fuller called internal morality of law[20] - and, among them, that should not be retroactive laws.[21] The rationale for the existence of these underlying requirements or principles that justified the rule of the law instead of other forms of ruling is much debated: mostly, they have been held that they are necessary for controlling and directing humans without hampering their liberty[22] or their dignity[23]. Actually, the prohibition of retroactive law seems essential once we assume the position that the value protected by the rule of law ideal [24] is human dignity: speaking of governing today's conducts with rules that will be enacted the day after is blatantly hampering the human dignity concept. It is indeed impossible to use rules to guide people conduct if the rules are retroactive.[25] Here, a retroactive law seems truly a legal monstrosity.[26]

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[17] 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.
[18] ECHR, Article 46.
[19] J. Raz, *The Rule of Law and its Virtue*, in *The Authority of Law*, 1979.
[20] L. Fuller, *The Morality of Law*, Yale University Press, 1964, 46.
[21] Fuller, *supra* note 20, 51.
[22] J. Waldron, 'The Appeal of Law - Efficacy, Freedom or Fidelity?', 13 *Law & Philos* (1994).
[23] Fuller, *supra* note 20, 240.
[24] J. Waldron, 'Is The Rule Of Law An Essentially Contested Concept', 21 *Law & Philos* (2002).
[25] Fuller, *supra* note 20, 39.
[26] Fuller, *supra* note 20, 53.

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Nonetheless, I claim there are also rules that apply to past human conduct and rule them and still are not retroactive and whose looking-backward character is essential to enforce the rule of law itself. These rules are said to be retrospective or, in the civil law tradition, that their application follows the principle *tempus regit actum.* The human conduct these laws refer to is a past conduct: however, while they operate retrospectively, they do not violate human dignity by modifying the nature of the command of the law. These rules do not set a new legal command, but rather they shape the value of human behaviors that happened in the past for the current times.[27] The difference between retroactive law and retrospective law is striking, even if they both operate on the past. Retroactive law operates on the past as though the law were in force when the past event took place. It substitutes the yesterday legal framework with that of today. Retrospective law, instead, does not affect the legal status of what happened in the past, but it modifies its legal consequences in the present and in the future. In conclusion, retrospective legislation is a legislation that attaches some legal consequence for the present and for the future to an event that took place in the past.

Retrospective legislation is thus consistent with the rule of law: it is the enforcement of the rule of the law, ruling the reality, as formed by past events, through the law. The idea of ruling itself requires that, whereby the prohibition of retroactivity does not apply, the scope of the law re-enacts, and, therein, only the law currently in force could rule the adjudication. If the prohibition to retroactive law were so broad to comprehend also retrospective law, the ideal of the rule of law itself would have an intrinsic, ineradicable conservative character. Its character would be intimately linked to the maintenance to the previous legal entitlements. If every time a man relied on existing law in arranging his affairs, he were made secure against any future change in legal rules, the whole body of the law would be ossified forever. Even if this perspective would sound appropriate to many great legal thinkers of the ideal rule of law - A. Von Dicey[28] and F.A. Hayek[29] above all - this conception would sound terribly limited to us, and in a way unjust, if the rule of law had not the power to readdress the past for the sake of the today's goals.

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[27] R. G. Natelson, 'Statutory Retroactivity: the Founders' View', 39 *Idaho Law Review* (2003).
[28] A.V. Dicey, *An Introduction to the Study of Law and the Constitution,* Macmillan, 1887.
[29] F.A. Hayek, *The Road To Serfdom*, University of Chicago Press, 1944.

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4. Scope of application of the concepts of retroactivity and retrospectivity.

Constitutional provisions prohibiting *ex post facto* laws are commons in constitutional law[30] and the principle *nullum crimen, nulla poena sine praevia lege poenali* is held as a general principle also in international law.[31] 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 provision of prohibition of retroactive laws.[32] Whatever its variants, the principle of prohibition of retroactive law has been mainly settled in the criminal law area, since, among all the branches of law, criminal law is the one that mostly aims at shaping and sanctioning human conducts.[33]

However, it is also true that laws of all kind, and not merely criminal law, enter into men's calculations and decisions and drive their conducts. An *ex post facto law* hampers stability and certainty of legal relationships no matter in which area it falls. However, it is the 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 accepted only in the area of criminal law; outside of that, it is accepted that laws can rule past behaviors, or better, that laws may attach different legal consequences than the ones provided at the time when the behaviors took place.[34]

Then, in 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 of the ECHR, if it falls within the area of criminal law. The same legal provision, however, is allowed if its content does not fall within the criminal law area, and its temporal application to the past will be called retrospective.[35]

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[30] E.g. Italian Constitution, Article 25(2); US Constitution, Article 1, Sect. IX., clause 3; German Constitution, Article 103; Spain Constitution, Article 9(3); Declaration of the Rights of the Man and of the Citizen, Article 8 which has constitutional value in France.

[31] ICJ Statute, Article 38 (1) c.

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

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

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

[35] In Italy, Article 11 Preliminary Rules to Law; Corte Cost., 7 Luglio 2006, n. 274.

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While the civil law tradition is harsher in setting that retroactive criminal laws are not permitted – and thus retroactive non-criminal laws are in principle allowed – the common law tradition frames the concept slightly differently, by affirming that retroactive laws are not permitted at all (aside from exceptional cases) while retrospective laws are indeed permitted, even in the criminal law area.

One might say that the two conceptions conflict however I do believe that their theoretical differences – being *ex abstracto* in civil law possible to have retrospective non-criminal laws which deeply hamper human dignity and in common law retrospective criminal law that do the same – could be brought back to unity. In civil law systems the distinction between what is criminal and what is not is more marked and easily perceived by citizens than in common law and thus what the constitutional provisions aim at most is prohibiting to have law ruling the past which touches those interests (liberty and life above all) which are in the criminal law field. In common law, instead, it is more difficult to draw the boundaries of criminal laws and therefore the main concern of the legal thinkers is to restrain the temporal projection of the law itself, no matter its nominal definition, generally allowing all retrospective laws and generally banning all retroactive laws. However, both conceptions go back to the same ideal of the rule of law that has been previously mentioned, and they both have a similar application. The rule of law needs laws that rule the past, or better its consequence in the present, and, to a certain degree, the law always applies to past events. If the law had no prospective element at all, even at the subsidiary level, there would be no practical point in enacting it. Its temporal projection is inevitable and it is a specific value for its capacity to amend what has been done in the past.

This temporal projection is only barred when the new legal consequences attached to an action are so unforeseeable that they hamper the human dignity idea contained in the way of ruling behaviors that the rule of law entails. The core of this principle could be protected by scope limitation, such as in the civil law tradition, where the criminal law covers this area that is supposed to be more intimately linked to the human dignity that would be dramatically hampered by the coercive power of the State. In the common law tradition the very same principle is maintained by a conceptual limitation, since retroactivity at all is prohibited, by meaning that retrospective changes are allowed, since they simply modify the legal consequences and do not attach a new command to

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what the law prescribed. Whether tradition is followed, both the legal systems operate the same function. Actually, the same principles inspiring these concepts seem to allow this bridging between the two conception of the same legal issue: in the civil law tradition, the rule that is found at most it is general prohibition of retroactive law which could be amended by the law itself but not in the criminal law area; this is similar to the general prohibition of *ex post facto* laws in common law systems which itself admits exception but never in the criminal law area.

The common-law definition of retrospective legislation is a legislation that attaches an existing legal consequence to an event that took place in the past.[36] In the civil law tradition it is known, instead, as the principle of *tempus regit actum*, according to which a judgment should be formulated having due regard to the law in effect when the judgment itself is taken. But 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 currently in force should be applied to all the pending causes even if their constitutive elements have been developed in the past; and, at the same time, the continental principle of *tempus regit actum* is the theoretical premise to the legal application of legislation when it has retrospective effects.

5. The necessary temporal nature of administrative law.

The distinction between retroactivity and retrospectivity is not the be-all and end-all;[37] but retroactivity and retrospectivity somehow affect differently the rule of law and while the former is generally an anathema and should be avoided as much as possible, the latter seems to have a constitutive value for the rule of law itself, 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 rather retrospective and follow the principle of *tempus regit actum* in their application.[38]

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

[36] Waldron, *supra* note 22, 3.
[37] Waldron, *supra* note 24, 137.
[38] Cons. St., Sez. IV, 7 Maggio 1999 n. 799.

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states that administrative power should be exercised in accordance with the legal framework of the time of its enforcement.

It could not be different: which kind of ruling would the rule of law be if the law should apply a legal framework no longer valid? And how many discrepancies and inequalities it would carry out, to judge any case according to each individual case legal framework in force at that time? Two pillars of the functioning of administrative law – the law currently in force as the legal source for the administrative power, as a matter of rule of law and legal sources, and the equality in the application of the administrative power, as a matter of rule of law and impartiality of administrative action – would be hampered. By its very nature, administrative law lives within a temporal horizon: it rules the functioning of the modern State, in all its features: healthcare services, public contracting, business licenses, folding of the trials, and functioning of democracy. The need that the development of all these activities has to be regulated in accordance to the law currently in force is intuitive to us. None would claim that since he or she started to carry out one of these activities according to that time legal framework is still entitled, right now, to act as he or she was used to, in compliance with the rules of the times.[39]

The temporal nature of administrative law is a requirement of the rule of law: affirming otherwise, the ruling of law would be ineffective - leaving to past legislators the task of ruling the future and depriving the current legislator of the possibility of doing. It is true that this risk regards all the area of law, but it is particularly significant for the administrative law area: affirming otherwise, the State machine, which mainly operates through administrative law, would be bounded to apply the legal framework not existent anymore. The legitimacy of the main public function activities would be hampered.

At the same time, sustaining that administrative law should be bent to the law currently in force at the time the legal entitlement was awarded, would be a gross violation to the principle of equality. This would in fact imply a differentiated treatment among individuals, by applying a different set of rules in respect of the time anyone has started his or her activity, and thus would also turn in being unreasonable and irrational. Thus, the rule of law is necessarily progressive where the law is inquired under the perspective of the administrative law.

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[39] A. Marmor, *'The Rule of Law and its Limits'*, 23 *Law and Philosophy* 1 (2004).

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6. The principle of moral indignity to public office as an administrative requirement, not a sanction.

In accordance with what has been expressed before regarding the scope of the rule of law and equally the temporal nature of administrative law, it is possible to make an assessment on the administrative, rather than criminal, nature of the debated legal provision inserted in the Italian anti-corruption law, in order to assess its compliance with Art. 7 ECHR, that prohibits retroactive criminal sanctions.

The scope of Article 7 thus includes classical criminal offences, administrative offences as well as certain disciplinary offences. In general, the starting point for assessing whether there is substance for a criminal offense within the meaning of Article 7- as claimed within Berlusconi's pleas - is whether the measure in question was imposed following a conviction for a criminal offence. Other factors to be taken into account are the nature and purpose of the measure, its characterization under national law, the procedures involved in the making and implementation of the measure, and its severity. When assessing whether an act or omission constituted a criminal offence under national law at the time when it was committed, the Member States enjoy a margin of appreciation. Indeed, it is primarily for them to interpret and apply the domestic law.

However, the compliance with the ECHR could not be exclusively delegated to national parameters.[40] The effectiveness itself of the ECHR as a tool for protecting human rights would be seriously jeopardized if the national legal order were entirely free to determine what is and what is not criminal law, thus simply overcoming the guarantees provided by the ECHR itself. Particularly the ECtHR has fixed three parameters for developing an own autonomous judgment on the nature of criminal sanction, the so-called *Engel* criteria[41]: the qualification of the offence operated by the national legal system, the deterrent-punitive function of the sanction and its gravity.[42]

The first parameter does not require many clarifications. 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

[40] 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.
[41] ECtHR, *Engel and others v. Neetherlands*, 8 June 1976, §§ 82-83.
[42] ECtHR, *Société Oxygène Plus v. France,* 17 May 2016; *Žaja V. Croatia*, 4 October 2016.

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legal provision as an administrative and not criminal law provision and thus Article 7 of the ECHR is not concerned.[43] Parliament did not intend to adopt a new criminal charge: it simply ruled that to a certain circumstance there is linked a non-discretionary and automatic consequence, privy of appreciation, of unsuitability of that person to the public office.

The analysis of the second legal parameter - the presence of a deterrent or punitive character in the legal provision - is more complicated but it does seem to resolve itself in the same direction.[44] 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 running for public offices; less, but still uncontroversial, for those who already hold a public office. Indeed there is no punitive character when there is an automatic certification from an administrative authority activity, such as happens when the candidate is excluded from the electoral competition for having reported a criminal conviction.[45] Particularly it seems hard to speak in favor of the punitive character of a sanction where, such as in this case, there is no specified evaluation case by case but just an automatic exclusion of forfeiture of the public office. Actually, the same concept of punishment should involve a certain degree of evaluation of the circumstances and a proportioned ratio between the behavior targeted and the punishment inflicted. Within the legal provision of the anti-corruption law, none of these elements is present.

A separate comment deserves the concept of deterrence.[46] Actually, deterrence does not flow from the law provision itself, but from the criminal sanction linked to the offence that forms the legal basis for the 'incandidability', such as bribery or embezzlement.

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

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

[45] It is interesting to note that, in the Italian legal systems (Art. 28 Penal Code; Art. 2, c. 1, lett. *d*, *e,* c. 2, d.p.r. 20 Marzo 1967, n. 223) the ban to be elected could also be an ancillary sanction of the criminal conviction and *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 interest that Berlusconi has been recipient also of this sanction for the period of 2 years (Corte Cass., Sez. III, 14 Aprile 2014, n. 770): however, as the Court has explained, the two provisions are structurally different. The judge throughout an own discretionary evaluation issues the ancillary sanction on grounds that are different from the one which sustain the notion of 'incandidability'. Accordingly, the case ECtHR, *Welch v. United Kingdom*, 9 February 1995, § 33 could not be here invoked, since the 'incandidability' does not follow the discretion of the trial judge.

[46] ECtHR, *Demicoli v. Malta*, 27 August 1991, § 34; *Campbell and Fell v. The United Kingdom*, 28 June 1984, § 72.

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Indeed, it is hard to claim that people refrain from bribery and similar activities because they are afraid that they will lose the possibility to run for public office - quite a remote possibility for anyone - rather than they will risk an imprisonment sanction. It is the latter which causes widespread deterrence and which is of common knowledge. Particularly, the administrative authority providing the sanction – or better which certifies the lack of requirement or the presence of a negative requirement such as a conviction – does not have discretional or an autonomous power of evaluation it simply has to apply the law. It is indeed quite challenging to speak about sanction, punishment, deterrence, and principle of the individual nature of penalty where it is not possible to have any singular evaluation. This argument is however, double-faced: on the one hand, it reinforces the thesis that the 'incandidability' is an administrative law provision, since the authority has only to apply the law to prevent a conviction for a public office or to be elected. On the other hand, perversely, it militates again whereas the person already has a public office, since the only way to enforce its resignation is to use the discretionary tool par excellence, the vote, as applies according to the law itself. However, as explained later, this is not due to the law and to the nature of the sanction, but to the structure of modern parliaments.

Moreover, Berlusconi knew the law when he was elected as much as he knew that he was currently under criminal proceedings, the first ruling against him having already been delivered: the law was already apt to orient his behavior; he knew the normative framework and his personal conditions and so he could have decided to not compete for the electoral run and thus not to fall within the sanction that was provided by the legal framework. In other words, the array of legal provisions regulating his life as Member of Parliament was already stabilized and clear when he ran for parliamentary seat. The normative orientation-behavior function exercised by the rule of law is of a kind in criminal law, of another kind in administrative law, such as the regulation of the accession to public function. It would be difficult to affirm, for instance, that a man would not have committed a certain behavior if he had known that a particular incidence on its access to public offices would have been modified. This consequence on his political rights is not the primary object of the deterrence effect: the criminal punishment is.

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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.[47] The ban on running for public offices or the loss of a public office is a considerable drawback but, actually, it does not seem to hamper those fundamental rights of individuals which, where prejudiced by the sanction, give to the sanction the character of gravity.

This analysis faces a less immediate challenge. The law provision of 'incandidability' is directly linked to a criminal conviction: even if not directly a criminal sanction, it is a sanction linked to a criminal one; this would give a clear argument to anyone who sustains that, stemming from a criminal judgment, should therefore be criminal itself the sanction. Actually, the criminal nature of the conviction is relevant for determining the seriousness of the consequence, but only where united with the degree of typicality (only certain offences) and/or seriousness (only above a certain threshold). The fact that this consequence is linked to a criminal conviction does not mean that the consequence has a criminal nature: the criminal conviction is simply appreciated as a constitutive element for the disqualification, in its procedural layout.

Beyond an analysis of the applicability of the *Engel* criteria, a concrete approach to the question too would lead the ECtHR to the same conclusions. Preliminarily, it should be noted that the ECtHR has already denied the criminal nature of a similar French law provision of 'incandidability', stating that they are directed to guarantee the proper functioning of parliamentary election and not to punish a personal behavior.[48] From a substantial point of view, there is even a stronger point for sustaining the administrative nature of the sanction. The ban on running for public office and the loss of the 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,[49] the impartiality,[50] the good administration,[51] the loyalty of public officials and their honor[52] of the public offices.[53]

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[47] ECtHR, *Lauko v. Slovakia*, 2 September 1998, § 57; *Garyfallou AEBE v. Greece*, 24 September 1997, § 34; *Bendenoun v. France*, 24 February 1994, § 47; *Campbell and Fell v. The United Kingdom*, 28 June 1984, § 73.
[48] ECtHR, *Pierre Bloch v. France*, 21 October 1997, § 56.
[49] Art. 98 Italian Constituion.
[50] Art. 97 Italian Constitution.
[51] Art. 97 Italian Constitution.
[52] Art. 54, c. 2, Italian Constitution.

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The moral requirement is lacking in anyone who has a criminal conviction of that degree. The case where the criminal conviction has been issued before the adoption of the law is not a case of retroactivity issue: it is just in the rule of law that the Parliament, since from the law has force, to state that, from now to the future, but thus necessarily regulating situations already arisen in the past since the rule of law does not operate on a *tabula rasa*.

The legal provision challenged is therefore an administrative law provision, not a criminal one, and its application correctly follows the principle of *tempus regit actum* and, by consequence, it operates retrospectively. The rule of law admits the possibility of restraining a previous legal framework and thus also a political right, such as the one to be voted. The rule of law may establish new facts which are relevant to prove the moral dignity of an individual, new requirements which, since the law entered into force, should be applied, to everyone, despite which was the legal framework at the time they got the public office.

There is no question of any offence being created or abolished by the law questioned. The rationale behind the prohibition to retroactivity is that the individual shall know in advance if his behaviors will attach him criminal consequences. The exclusion from the election run or the loss of the public office is not considered a criminal sanction: it is merely a recognitive and declaratory act of a situation already determined and settled by a criminal conviction. Thus, no criminal law matter is at stake nor any issue about the retroactivity and thus the ECtHR should reject Berlusconi's claim. Consequently, the principle of the *tempus regit actum* is rightly invoked in the circumstances of Berlusconi's case.

Actually, this is not even a sanction; it is a (negative) required element for holding the public office that, for the subject who has reported a final criminal conviction, constitute a prohibition. Would the lack of requirement of age, nationality or alphabetization be considered a sanction?

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[53] It is of interest to note, for the purpose of the ECtHR judgment, that there is a large European consensus on the goals and the objective the Italian law pursues and that the Council of Europe anti-corruption body (GRECO) recommendations have been taken in account in the adoption of the law. The consensus was large also in the Italian Parliament, which voted the law itself almost unanimously. Somehow ironically, it was the Berlusconi IV Government which proposed a first draft of the law, which already contained the provision of 'incandidability (Art. 10, Government bill 4 May 2010, n. 2156).

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Again, the Italian case law has confirmed this view: the ban to public office is not itself a sanction: it is not a part of the sanctioning treatment of a criminal charge[54]; it has not, neither broadly, sanctioning nature, nor criminal nor administrative[55]; it is simply not a sanctioning legal provision.[56] All this proves that there is more to administrative law than the administrative sanction, and administrative law must comply with its own principles and with the rule of law principles. And 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 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.

According to the interpretation given by the Constitutional Court on Art. 51 of the Italian Constitution[57] that regulates the right to be elected, the deprivation of this right is exceptional, and the individual entitlement is the norm. Thus, while political rights are held to be individual fundamental rights, the Parliament is entrusted to limit and rule them by fixing conditions for their exercise.[58] Political rights are called functional and relative rights in the legal literature.[59] Individuals are entitled to them by their own right but, while they are exercised, they do not satisfy only an individual but a general interest too. This is because political rights have a direct and immediate impact on the functioning of the State and of democracy: they are still individual rights and their status of entitlement is not different from other personal rights but they also serve a goal which go beyond the individuals' ones. This is true for both the right to vote (Art. 48 of the Italian Constitution) and the right to be voted (Art. 51 of the Italian Constitution): these rights are the cornerstones of representative democracy that allow individuals to concur in forming the national Parliament, and thus to determinate the Nation interest.[60]

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[54] T.A.R. Lazio, Sez. II *bis*, 8 Ottobre 2013, n. 8696.
[55] Cons. St., Sez. V, 29 Ottobre 2013, n. 5222.
[56] Cons. St., Sez. V, 6 Febbraio 2013, n. 695.
[57] Corte Cost. 26 Marzo 1969, n. 46.
[58] G.E. Vigevani, *Stato democratico ed eleggibilità*, Milano, 2001, 30.
[59] A. Pace, *Problematica delle libertà costituzionali*, Padova, 2003, 83.
[60] M. Thorburn, 'Justifications, Power, and Authority', 117 *Yale Law Journal* (2008), 1076.

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The Venice Commission's opinion, presented for the case before the ECtHR, follows this same setting-out in balancing private and collective rights.[61] Indeed, Parliaments are entitled to regulate the exercise - through the rule of its law - of the right of active electorate and the right of passive electorate.[62] And it is quite obvious that the judgment, for example of moral dignity, is important for the right of active electorate but even more important for the right of passive electorate: the general interest contained in the exercise of the right of choosing the people's representative is even stronger in those ones who are chosen to be the people's representatives.[63] This is also evident from the legal framework itself: while it is possible that one could vote but not be elected, one who could not vote cannot be elected. It is easier to lose the right to be voted than the right to vote because the first one is even should be assigned with even greater care.[64]

The limits on voting always exclude the possibility to be elected too and therefore there is a precise hierarchy of values among these rights: the right to be voted is the most delicate one and the one which Parliament is allowed to restrain with more discretion – and the States with a greater margin of appreciation [65] – allowing that individuals who lacks moral dignity could still vote, but could vote only individuals who instead have moral dignity. Clearly, these restrictions must be built in negative: the fundamental nature of the political rights means that Parliament may describe the hypothesis wherein the individuals cannot be voted as exceptional.[66] But it is a relative right not only in the sense that it is functionalized to a goal but also in the sense that the individual's right to contribute to this goal is not entirely free but must be balanced with a certain general interest[67] that the representatives in the assembly must fulfill certain fundamental conditions, that, in the Italian legal framework, are to being adult, citizen, literate, and with moral dignity, or better, without the lack of moral indignity.[68]

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

[62] Venice Commission Opinion, § 6.

[63] Venice Commission Opinion § 7.

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

[65] ECtHR, *Paksas v. Lithuania*, 6 January 2011, § 101; *Ždanoka v. Latvia*, 16 March 2006, §§ 106-115.

[66] First Additional Protocol to ECHR, Art. 3.

[67] Corte Cost. 5 Giugno 2013, n. 118.

[68] Corte Cost. 3 Marzo 2006, n. 84.

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The same constitutional article recognizes two different typologies of constraints to political rights: the legal categories of incompatibility and ineligibility. The law provision challenged does not fall within this two, but it constitutes a third one called 'incandidability'. Particularly, 'incandidability' differs from incompatibility, which merely refers to a case where the individual has the right to choose between a job position and the public office seat, and ineligibility, which protects the public office and the functioning of democracy from distortion within the electoral competition.

The distinction between 'incandidability' and ineligibility here especially matters, since they both refer to an obstacle to assuming the public office. The grounds for 'incandidability' concern a status of the person, of radical and functional unsuitability for the public office. This status is not amendable – there is no leniency or evaluation of the circumstances in favor of the applicant – and it operates before the election run: it simply does not admit the contiguity among public offices and criminal behaviors.

The grounds for ineligibility refers instead to the regular functioning of the electoral competition, in order to prevent that an individual, using their powers or their position, exercise a *captatio benevolentiae* and/or *metus potestatis* thus hampering the free exercise of the voting rights. The provision of ineligibility is thus directed to avoid that certain individuals, for their offices or for their relationship with the people, may be in circumstances of incompatibility with the public offices, for their influence both on the voting by the people and on the office itself.[69] The aim is therefore to prevent individual and unfair advantage; to avoid improper influences on the voting; to sanction the conflicts of interest and to ensure the separation of public offices. It is logical, therefore, that the ineligibility ground may be removed: the individual *in abstracto* may be elected but he or she cannot assume the function insofar that he or she still faces a ground of ineligibility.

The fact that the 'incandidability' status is not amendable is testified by the requirement of the moral dignity that should always be born by the individual. The lack of the moral dignity requirement prevents the access to the public office to the individual or it determinates its loss if it happens during the exercise of the public function.

[69] Corte Cost., 26 Marzo 1969, n. 46.

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It is interesting to note that it is the competent electoral office that checks out the 'incandidability' grounds before the election run.[70] The electoral office is ought to erase the name of the applicant who did not present a declaration of lack of grounds of 'incandidability'.[71] Therefore, the rationale of the 'incandidability' does not directly regard the electoral competition, but rather the person who aspires to it, and the public office concerned.[72] In this sense this ban is 'pre-democratic': it prevents the access to run for public offices for the lack of the requirements which are associated to the particular public offices, which are Italian citizenship, age, knowledge of language and writing, and, a moral dignity, as provided by the anti-corruption law, at least to the degree it is not compromised by certain criminal offenses. Rightly, thus, it has been said that the 'incandidability' is more an inter-requisite than a pre-requisite to public office.[73] The 'incandidability' is therefore a legal status close to the lack of passive electoral right: again, not a sanction, but an administrative status, which, for different reasons, covers the individuals who do not hold Italian citizenship, minors, the illiterates and, to the extent provided by the anti-corruption law, certain convicts.

The law provides that, in certain circumstances expressly provided by the law itself, and solely in those, the right to be elected is *ope legis* compressed. This, fundamental right is not eliminated for the sole existence of a conviction; it is simply limited, and it could expand itself again if the grounds for which it has been limited ceased to exist. This right is limited *ope legis* in the same moment that the conviction is issued: the delegated authority just certifies his conviction and proceeds. The exclusion from the electoral run is a mere declaratory act, which recognizes a previous status of the person, determined in this case by the criminal conviction.[74] The same could be said of those convicted who already hold public offices: the 'incandidability' hits them in the moment of the conviction, the forfeiture is simply the outcome of this situation, it follows the modification of the electoral right and it is determined by it; and the delegated authority has simply to apply it: in this case Parliament has to do it, by the only mean it is authorized for: by voting. It is not a sanction but an effect, connected to a criminal conviction but administrative by its nature.

[70] Art. 22, T.U. Marzo 1957, n. 361.
[71] Art. 2, c. 2, d.lgs. 31 Dicembre 2012, n. 235.
[72] Corte Cost., 6 Maggio 1996, n. 141; 31 Marzo 1994, n. 118.
[73] Marcenò, *supra* note 7.
[74] Corte Cost., 31 Marzo 1994, n. 118; 29 Ottobre 1992, n. 407.

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The Berlusconi case should also be evaluated in this greater context: since the derogations from the political rights should be exceptional it would be unfair not to apply them when established for the sake of other candidates in the electoral run who instead complied with the requested requirements. The 'incandidability' differs from ineligibility for having a different function for the same goal of having a certain asset of Parliament – having Parliament members with moral dignity *versus* having Parliament members who have been elected without the use of their (undue) influence – and so does not directly refer to the electoral competition as the ineligibility does.

However, the *effects* of the legal provision of 'incandidability' do concern the electoral competition. The ban on retroactive legislation, claimed in Berlusconi's favor, does not consider that by lifting a burden on him it is hampering another candidate's position. Indeed, the Parliamentary election is a *naturaliter* competitive situation. In a competitive situation, the issue of not applying the legislation means hampering the competitor who is instead in compliance with the law.[75] Conferring a benefit to Berlusconi – by not applying the legal provision contained in the legislation of access to and loss of public offices in his regard – means disadvantaging another candidate to whom the past legal framework would apply only in his disfavor. 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 advantage to another.

8. The lack of discretion in the application of the administrative law measure.

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

[75] The argument concerning the competition between the two candidates for the office is not totally persuading, *ex abstracto*, since Berlusconi, as permitted by the electoral law of the time, was in competition with all the other candidates in all the other Italian sections and so it is difficult to sustain that his possible lack of forfeiture has damaged a singular candidate who instead had the needed requirements. However, *in concreto*, the breach existed against the second arrived candidate in the Molise section for which Berlusconi has opted to seat for.

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Surprisingly, on March, 16th 2017 the Senate voted against the loss of the seat to Minzolini provided by the law, repelling the order of the day which disposed his removal.[76] Although a week later Minzolini resigned, the vote was shocking because it struck down one of the pillars at the core of Berlusconi's expulsion: that the vote for the expulsion was a due act, requested by the law as the consequence of a criminal conviction and automatic for the respect due to the judiciary power who had sentenced his case.

The supporters of the legitimacy of Parliament's decision not to give execution to the criminal judgment in regard to the loss of Parliament seat - and, by consequence, the supporters of Berlusconi's position - claimed that the law itself provided that it was up to Parliament to decide on its own composition and thus to vote, discretionally, on the loss of the seat of one of its members, even despite a law which precisely provides that individuals with criminal convictions should lose their seats.

The law indeed requires that, in the case of loss of the seat due to a criminal conviction, the Parliament has to proceed in compliance with Art. 66 Italian Constitution. This provision confers to Parliament the right to vote in regard to its composition: its rationale is to ensure that external subjects - outside of the popular will which form the Parliament through the elections - cannot interfere with the composition of Parliament.

A literal interpretation of the constitutional provision gives a fully discretionary power to Parliament, which also admits the possibility of rejecting the relevance of the criminal conviction and thus overcoming *de facto* the law provision of the loss of seat in Parliament. Interestingly the Italian Government itself has sustained this interpretation, arguing in front of the ECtHR that Berlusconi's case concerned the non-validation of his election, and so his removal was a due act, while Minzolini' s one represented the classic case of a procedure of disqualification, where the Parliament may decide to not implement the disqualification even if the statutory conditions are met.

[76] The surprising outcome of the vote was determined by some left-wing Members of Parliament who voted against the loss of the Parliament seat: particularly it was claimed that the criminal judgment which has led to the loos of the seat was tainted (*fumus persecutionis*) by the fact that one of the judge of the court that was a political competitor of Minzolini.

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Here, plausibly, the Italian Government followed the Venice Commission's opinion.[77] However, Berlusconi and Minzolini cases really look alike and through a systemic and teleological interpretation of the same constitutional rule it is possible to demonstrate that the Parliament was bound to disqualify Minzolini.[78]

Firstly, Parliament's right to vote on the access and loss of the seat of his members is a legal concept elaborated for preventing external intervention regarding its functioning and consequently its composition.[79] It was not meant to prevent the judicial activity that has to identify criminal conviction the same Parliament has established as an obstacle, such as a negative requirement, for acceding to its ranks. Secondly, the Constitution indicates that in the situation of incompatibility and ineligibility Parliament has a right to vote: and this is perfectly logic. Parliament may assess the incompatibility between a job position and a Parliament seat or the existence of an undue influence in the electoral run; but regarding the situation of 'incandidability', there is nothing to be appreciated. The criminal conviction simply stays as a fact that Parliament has to take in account in regard to the admission of a candidate to its ranks or the removal if the conviction has emerged once he or she has already been elected. Thirdly, it is true that regarding the cases of ineligibility, Parliament retains this power and, according to the law itself, the case of 'incandidability' follows the ineligibility methods for determining the outcome of the procedure. But for giving effect to the law provision of 'incandidability' another interpretation should be given which is perfectly consistent with the conceptual category of 'incandidability'.[80] 'Incandidability' is a different kind of obstacle to public offices than that of ineligibility: if a candidate reports a criminal conviction, he or she should be deprived of the public office in the same way as a non-national or a minor had, by mistake, obtained the Parliament seat, for lacking a requirement for holding the public office. The fact that the procedure for 'incandidability' simply is the same as the one for incompatibility and ineligibility is due to the lack in Parliament of an office which examines who has the requirements and who has not.

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[77] Venice Commission Opinion, § 29.
[78] V. Lippolis, *Art. 66*, in Commentario della Costituzione, G. Branca (Eds. by), 1986, 164.
[79] Venice Commission Opinion § 13.
[80] Interestingly, the Venice Commission opinion (§§ 9-10) leaves room to this interpretation: accordingly, it states that subsequently revealed and criminally sanctioned acts by the elected representatives are relevant for the passive electorate and this could make disqualification from office following a criminal conviction – as supervening 'incandidability' is – more admissible than ineligibility to be elected.

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Parliament alone is indeed entitled to vote on its own composition but just because voting is the one and only way to exercise its power: no other 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 nature of the body itself.

Parliament's composition is restrained by the Constitution and by the laws, and it is accepted that the lack of the requirement of nationality or age, provided by the Constitution and by the current laws, work as limits to Parliament's composition on which nor the Parliament – through its voting – nor the people – through the election – have the power to overcome. The fact that a judicial organ realizes the restraint does not hamper Parliament's autonomy as much as it is not hampered by the fact that is the civil registry - an administrative office - that certifies the age or the nationality of the public office holder. The restraint of Parliament to vote according to what has been established by the law and certified by the criminal judgment does not prejudice its autonomy but actually corresponds to an enforcement of the rule of law, as settled by the law itself, which should be its guidance until the law itself is not changed.

Furthermore the fact that Parliament may disregard what the judiciary had decided and which the law itself had established as binding for Parliament to determine its composition constitutes a breach to the separation of powers, which is another central pillar of the rule of law.[81] The only way Parliament has to legitimately disregard this - or other laws - is through its typical activity of law making, that is by repelling the previous law and replacing with another one which, in this case, does not compel the judiciary interference in its composition. At the current status of things, instead, Parliament has breached the rule of law and the separation of power as determined by its own law which had expressly given to the judiciary – for the sake of integrity of public offices – a certain balancing power, which, limits the popular will as source of Parliament's composition. As the Venice Commission pointed out, disqualification voiding an electoral mandate should not be considered as limiting democracy, but a mean of preserving it.[82]

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[81] J. Waldron, 'Separation of Powers in ought and Practice', 54 *B.C.L. Rev* (2013) 433.
[82] Venice Commission Opinion, § 11.

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Parliament's autonomy, in a system of rule of law, is always determined by different factors. The electoral power remains Parliament's main source in establishing its members, with the constraints settled by law for the reaching of the abovementioned goals, which, concerning the checks of previous criminal conducts, by nature relies on the judicial activity and its judgments.

9. Conclusions.

The Berlusconi's case before the ECtHR seems important not only for his own political career: the underlying problem of the case if of major significance and emblematic from the standpoint of sistematicity of a legal order. The legal order works as a system; and it works to the extent that the overall integrity of the system is held 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 keys to that systematic integrity. The situation wherein the Parliament does not feel bound by its own legislation may instead represent an attempt to the rule of law.[83]

[83] J. Waldron, 'Legislation and the Rule of Law', 1 *Legisprudence* 1 (2007).

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