



Strasbourg, 16 June 2015

CDL(2015)032*

Opinion No. 807 / 2015

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

ON

EXCLUSION OF OFFENDERS

FROM PARLIAMENT

by

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1. The Venice Commission is preparing a report on the exclusion of offenders from Parliament (ineligibility and dismissal). The members are required to provide information about the experience of their Countries in the matter. These notes will be devoted to the Italian experience which presents recent events of interest in the field. Moreover they take into consideration the possible follow-ups of the jurisprudence of the European Court of Human rights on the interpretation of the Italian relevant legislation as far as that jurisprudence regards the Italian case.

2. According to art. 1 of the Legislative Decree (delegated law) 31 December 2012, n. 235, persons who have been condemned to serve more than two years in prison for the crimes punctually specified there, are not allowed a) to stand as candidates for the election in the national election of the Chamber of Deputies and the Senate of the Republic, and to stay in office as members of these two legislative Assemblies of the Italian Republic. On the basis of this provision the following art. 3 of the same legislative text provides for the immediate deliberation of the removal from their office of the Senators and of the Deputies who are condemned according to the mentioned art. 1 during the term of their mandate. There are also provisions forbidding the election of offenders to local governing bodies and allowing their dismissal if they are condemned when in office.

3. The implementation of the mentioned art. 1 and of the following ones of the mentioned Legislative Decree has raised hot discussions, specially having regard to their possible effects on the development of the political life and of the relations between the political parties in Italy, specially if they were supposed to have effects interesting persons elected before their entry in force with regard to previous crimes. But, as a matter of fact, at the time of their entering in force the mentioned rules about the incandidability of the offenders to the legislative Assemblies and their exclusion from the Chamber and the Senate, and the extension of the similar provisions to the candidates to local government governing bodies and members of these bodies were not considered unconstitutional by the majority of the judges, and were immediately applied in the frame of the local government institutions.

4. Constitutional Court and administrative judges which had dealt with similar questions in the past, shared the idea that it is not irrational providing the incandidability of offenders condemned in relation with crimes of peculiar gravity and special negative importance, even if committed before the entry in force of the relevant legislation. The purpose of such a legislative choice was construed as the result of the decision of avoiding the presence in the elected assemblies of persons who have been judged morally unworthy: the sentence by which they are condemned to serve in prison was interpreted as an element of negative qualification. The conclusion was that what is at stake, it is not a sanction comparable with criminal and administrative sanctions, and – therefore – it is not covered by the art. 7 of the European Convention for the protection of human rights and fundamental freedoms, whose internal implementation in the Italian legal order is bound by the constitutional guarantee of the conformity of the internal legislation with the international obligations of the Italian Republic.

5. On this basis the Section V of the Council of State, for instance, rejected the proposal of submitting to the Constitutional Court the question of the constitutionality of the application of the rule of the incandidability in view of the removal of members of the Parliament elected before the entering in force of the rule itself (sentence 6.2.2013 n. 695 concerning provisions of the mentioned Legislative Decree n. 235/2012). The retroactive effect of the rule – the judge said - does not conflict with the Constitution as far as he was not dealing with a sanction.

6. The rule implying the incandidability of offenders condemned for crimes committed (and the removal of those previously elected) before the entering in force of the rule itself was,

therefore, applied in many cases. But the constitutional question was reopened when the former President of the Council of Ministers senator Silvio Berlusconi was condemned by the Tribunal of Milano to serve in prison for years with relation of a fiscal crime. The Court of Appeal of Milano and the Court of Cassation confirmed the sentence which became final. Therefore the internal bodies of the Senate of the Republic started the necessary procedure aimed at the removal of Mr. Berlusconi, according to the opinion that the sentence had created the condition for depriving him of his status of member of the Assembly. After a long debate, taking in consideration also papers submitted by the concerned person, who informed the Senate of his decision of submitting the case to the European Court of the Human Rights, the Electoral Committee of the Senate proposed to the plenary Assembly, and this body approved the dismissal of Mr. Berlusconi from his office of senator (October 2013).

7. In the meantime, while the Court in Strasbourg has not yet decided the Berlusconi case, and some judicial bodies followed the reasoning of the Senate excluding that the dismissal (or the suspension, in case of a not final sentence) of an elected public official was a retroactive sanction, other judges have submitted the relevant constitutional questions to the Constitutional Court. In particular, the Court of Appeal of Bari adopted on January 27th, 2014 (N.R.G. 1748/2014), a decision requiring the Constitutional Court to judge – *inter alia* - about the conformity of some provisions of the mentioned decree with the act of delegation approved by the Parliament, having regard a) to the difference of treatment between the members of the Parliament and the regional councillors, and specially b) to the extension of the effects of criminal sentences on the status of member of an elected Assembly (in the case at stake, a suspension following a not final sentence affecting a regional councillor) even in presence of crimes committed before the entry in force of the legislative decree n. 235/2012. The question sub b) is specially important in view of the report which the Venice Commission will prepare. According to the opinion of the judge of Bari the suspension or recall of an elected member of an Assembly condemned to serve in prison for at least two years is rationally justified by the purpose of avoiding the presence in a democratic deliberative body of a person morally unworthy. But the application of this administrative sanction – the Court of Appeal said - cannot infringe the constitutional guarantees of the electoral rights, and it cannot specifically be adopted in violation of the principle which forbids the application of a criminal sanction for crimes committed before the entry in force of the law providing for the relevant sanction. With regard to this last specific point the judge considered the existence of a doubt of unconstitutionality and explicitly made reference to art. 7 of the European Convention for the protection of the human rights and fundamental freedoms, asking a decision of the constitutional judge on the merit.

8. On October 30th, 2014, also the first section of the Regional administrative Tribunal of the Region Campania (n. 04798/2014) submitted to the Constitutional Court questions concerning the legislative decree n. 235/2012 in a case concerning the suspension of the Mayor of the town of Napoli. The reasoning of this judge started from the qualification of the suspension as a sanction, even if he does not deny that the purpose of the concerned legislation is the exclusion from the democratic representative elected bodies of the State, Regions and local government of those persons who are affected by dishonourable criminal sentences, in view of insuring a functioning of these bodies coherent with the principles of democracy, fairness, integrity and transparency. If the measure affecting the status of the condemned person is construed as a sanction, it has to comply with the constitutional principles of the criminal system of law and cannot be applied in a retroactive way. Therefore, a provision authorizing the dismissal or the suspension of a public official condemned for a crime committed before the entry in force of the law providing for the dismissal or for the suspension should be considered unconstitutional. The judge of Napoli asked a judgement of the Constitutional Court mentioning the possible violation of the relevant constitutional principles.

9. The Constitutional Court has not yet decided both the cases I mentioned in these Notes. But it has adopted a decision which could be relevant in view of the decision of the cases which are of interest in preparing the report of the Venice Commission. It is not a case that the President of the Court mentioned it in his last press conference of this year as an example of reasoning based on the jurisprudence of the Court in Strasbourg. He talked about the sentence n. 104 adopted on April 14th, 2014, which declared unconstitutional a legislative rule providing for the retroactive application of an administrative sanction because of the violation of the principle of irretroactivity of the criminal law. The Court explains that there is not a specific constitutional provision in the matter, but it shares the idea of the European Court of Human Rights that there is a general implicit principle of law which extends to all the afflicting punitive measures the principles of the criminal sanctions. In any case we have to keep in mind the fact that the decision of the Italian constitutional judge does not regard the delicate matter of the balancing of rights and interests in the electoral field.

10. With regard to Italian electoral legislation, reference could, instead, be made also to the case *Scoppola v. Italy* (n. 3), a judgement of the Grand Chamber of the European Court of Human Rights adopted on May 22th, 2012, according to which people serving in jail can have their electoral rights restricted in specific case. The proportionality of this measure can be insured by the legislation itself without the necessary adoption of a *case-by-case* decision of the competent judge. The conclusions of the Strasbourg judge underline the importance of the role of the legislator in shaping the rules in the electoral matter. In the *Scoppola* case the coexistence of different interests – those concerning the exercise of the personal electoral rights of the prisoners and those relevant in view of the implementation of the criminal sentence – is the result of a balancing directly operated by the legislator. As a matter of fact, both the group of interests regard the personal status of the concerned people, even if the interest in the implementation of the criminal sentences pertains to the defence of the superior value of the observance of the criminal law. The fairness and integrity of the electoral process is affected in a very limited measure as far as the vote of very few electors is interested.

11. In the case at stake, it could be objected that the presence and the participation of a condemned member in the working of one of the legislative Assemblies or of the local governing bodies has a major relevance because he is not only a voter but he is also allowed to take part in the formation of the will of the relevant body through his activity in the discussion and evaluation of the single items inscribed in the agenda. He may submit proposal and see them discussed and approved by the body. It is easy to understand that the relevance of the personal interests and rights of the individual members of a democratically elected body, and their interests in keeping the seat gained at the election or their right to run in an electoral competition has a minor weight when compared to the public interest in a correct and fair functioning of the public institutions. The relevance of the constitutional role of an elected assembly is prevailing on the personal interests of the offenders who are excluded from the electoral competition or are dismissed from the assembly itself. Therefore it is not sufficient comparing the provision for the incandidability or for the dismissal or the suspension of a condemned person with the yardstick of the guarantee of the personal electoral rights of the concerned person. It is necessary taking into consideration the constitutional priority of the interests in the integrity of the elected body at stake which is the main purpose of the legislative decree n. 235/2012. It follows that it shall be correct balancing the different interests in the matter through giving the preference to the exigencies of the integrity and fairness of the deliberative processes of the public decisions. Moreover it is evident that this conclusion has to be taken *in specie* consideration in those Countries where the public corruption is spread in all the institutions of the State and the presence of corrupted persons is very high in the deliberative bodies at the national, regional and local level.