



Strasbourg, 25 September 2017

Opinion No. 898/2017

CDL(2017)029 *

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**AMICUS CURIAE BRIEF
FOR THE EUROPEAN COURT OF HUMAN RIGHTS
IN THE CASE OF BERLUSCONI V. ITALY**

**ON THE MINIMUM PROCEDURAL GUARANTEES
WHICH A STATE MUST PROVIDE IN THE FRAMEWORK
OF A PROCEDURE OF DISQUALIFICATION
FROM HOLDING AN ELECTIVE OFFICE**

On the basis of comments by

Ms Claire BAZY-MALAUERIE (member, France)
Mr Osman CAN (member, Turkey)
Mr Oliver KASK (member, Estonia)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Content

I. Introduction 3

II. General comments based on previous Venice Commission's works on the loss of mandate..... 3

III. The procedural guarantees for the loss of mandate..... 5

IV. Conclusion 9

Draft - restricted

I. Introduction

1. By letter of 24 July 2017, the Registrar of the European Court of Human Rights (hereinafter “ECtHR” or “the Court”) informed the Venice Commission that on 19 July 2017 the President of the Court had decided to invite the Commission to present written observations in the case of Berlusconi v. Italy, on the following issue:

What are the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office?

2. Ms Bazy-Malaurie, Mr Can and Mr Kask acted as rapporteurs for this amicus curiae brief. A comparative table of the pertinent legislation of 39 Venice Commission member states was prepared (CDL-REF(2017)041).

3. The present amicus curiae brief relates to the voiding of the mandate of a member of Parliament. It was prepared on the basis of contributions by the rapporteurs. Following its discussion at the Sub-Commission on Fundamental Rights (Venice, [date] 2017), it was adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2017).

II. General comments based on previous Venice Commission’s works on the loss of mandate

4. The Venice Commission’s Code of Good practice in electoral matters¹ states as follows:

*“i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
ii. it must be provided for by law;
iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”*

5. The Venice Commission has specifically examined the question of disqualification voiding an MP’s election in its recent report on the exclusion of offenders from Parliament, in which however it did not address the question of the minimum procedural guarantees required in the procedure of disqualification.² In this report, the Commission stressed that legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle, which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state: a person who is not ready to recognise the standards of conduct in a democratic society, may be unwilling to obey the constitutional or international standards on democracy and the Rule of Law. The basis for the restriction on such a person’s right to be elected or to sit in Parliament is the occurred violation of democratically adopted criminal law, i.e. of generally recognised standards of conduct.³

¹ CDL-AD(2002)023rev, I.1.1.d, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e).

² Venice Commission, Report on the exclusion of offenders from parliament, CDL-AD(2015)036, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)036-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)036-e)

³ Venice Commission, Report on the exclusion of offenders from parliament, § 139.

6. Disqualification voiding a member's election may appear as contrary to the very notion of elections to a sovereign Parliament, if it is considered that the mandate given by the people may only be withdrawn by the people, while no other authority, especially not the judiciary, is allowed to interfere. However, as the debate in France underlined,⁴ the voters of a certain constituency are only a part of the voters who have enabled the formation of Parliament; only Parliament as a whole is sovereign. It belongs to Parliament as a collective body to exercise its sovereignty and decide the manner in which each individual may participate in the exercise of such sovereignty as a voter or as an elected representative. Within the limits of the Constitution, it is therefore within the power of Parliament to define these conditions.

7. Article 3 of the First Additional Protocol to the European Convention on Human Rights (hereinafter "the ECHR") implies the (active) right to vote as well as the (passive) right to be elected. This was made clear by the ECtHR. The principles and values discussed in the ECtHR's case-law on the right to vote have to be observed. Ineligibility must first be based on clear norms of law. It must pursue a legitimate aim. However, a "wide range of purposes may ... be compatible with Article 3".⁵

8. According to the case-law of the European Court of Human Rights on Article 3 of the First Additional Protocol to the ECHR, restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning is more likely to be compromised by an elected official with a criminal record than by the exercise by an ordinary voter of his or her right to vote.

9. In particular, the democratic nature of the elections is not hampered if the mandate is terminated when the conviction enters into force after the elections and the person has already assumed office, even if the effects of the restriction are more severe for a member of an elected body than for a person standing for election.⁶ Through their vote, voters express their trust in the chosen representative. Trust is based on the elements which were in the voters' knowledge before the elections. Subsequently revealed and criminally sanctioned acts by the elected representative are relevant for the voters' trust. On the other hand, as long as disqualification is coupled with ineligibility to be elected which goes beyond the end of the mandate, voters would not have the possibility to express their trust in this representative through another vote.

10. This could make disqualification from office following a criminal conviction more easily admissible than ineligibility to be elected. This is reflected in the law of countries such as Finland and Sweden, which provide for the loss of mandate but not for ineligibility to be elected following a criminal conviction. In fact, it would go against the principle of democracy that a representative retains his or her mandate despite being convicted for an offence committed after assuming office, especially if the election results may have been affected by the crime committed by the candidate (e.g. misuse of administrative resources, gain of assets with corruption). The principle of free elections presumes that the voters are aware of the acts committed by the candidates and all the candidates have equal opportunities. The use of illegally obtained assets goes against that principle.

11. In the Commission's view, in conclusion, disqualification voiding an electoral mandate should not be considered as limiting democracy, but as a means of preserving it.

⁴ On 4 March 1901, Mr Laferre, MP, rapporteur in the case concerning the disqualification of Mr Déroulède, in relation to Article 3 of the Déclaration des droits de l'homme et du citoyen stated that: "*Il n'a jamais été admis qu'une fraction du peuple pût représenter la souveraineté nationale tout entière*" (it was never accepted that a fraction of the people may represent the whole of the national sovereignty).

⁵ ECtHR, *Hirst v. UK* (no. 2) judgment, § 74.

⁶ Venice Commission, Report on the exclusion of offenders from parliament, § 162.

12. The Venice Commission also stated that “[i]t is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms[...] On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all[...]”⁷

13. There is no codified standard as concerns the level of regulation of disqualification from holding an elective office (see Code of good practice in electoral matters, II.2.a).⁸ However, as the universal right to vote is one of the main cornerstones of democratic government, the Commission is of the view that disqualification should preferably be laid out in the constitution or – possibly organic - legislation adopted by parliament. The question arises whether a legislative decree adopted by the Executive upon detailed mandate of Parliament in a specific law is an appropriate level of regulation. Shielding the Parliament and the individual MPs from interference by the Executive is an important requirement of the separation of powers. In the Commission’s view, therefore, even when the delegation is sufficiently precise, regulation through a law adopted by the parliament itself is preferable. The question also arises as to whether regulation in the rules of procedure of parliament is appropriate. To the extent that these rules are subject to a control of constitutionality, the answer should be positive, parliamentary rules of procedure presenting the advantage of being completely insulated from the Executive.⁹

III. The procedural guarantees for the loss of mandate

A. Brief overview of the legislation in selected Venice Commission member states

14. Arrangements for voiding an electoral mandate vary considerably among Venice Commission’s member states.

15. In some states, disqualification may be pronounced by a judge as an ancillary penalty in the form of a ban from public office within the framework of a criminal procedure.¹⁰ This presupposes the discretion of the judge as to whether or not to apply the ancillary penalty and as to its duration.

16. In other states, disqualification is determined by law,¹¹ Such statutory disqualification removes the discretion of the judge. It may operate in connection with a final sentence of a given duration,¹² of a final conviction for offences of certain gravity (crimes),¹³ or of specific offences, irrespective of the duration of the sentence imposed,¹⁴ or a combination of both criteria.¹⁵ In few countries, neither the nature nor the gravity of the conviction entailing

⁷ Venice Commission, Report on the exclusion of offenders from parliament, § 25.

⁸ “2. Regulatory levels and stability of electoral law. a. Apart from rules on technical matters and detail – which may be included in regulations of the executive –, rules of electoral law must have at least the rank of a statute.

⁹ Venice Commission, Opinion on the rules of procedure of Ukraine, CDL(2017)027, § 13.

¹⁰ E.g. France, Italy, Germany.

¹¹ E.g. Albania, Armenia, Austria, Azerbaijan, Belgium, Brazil, Canada, Chile, Croatia, Estonia, Germany, Iceland, Ireland, Italy, Kazakhstan, Latvia, Malta, Mexico, Moldova, Turkey. In Italy and in Germany, statutory disqualification exists in parallel to the possibility for the criminal judge to apply it as an ancillary sanction.

¹² E.g. Belgium, Chile, Croatia, Germany, Greece.

¹³ E.g. Albania

¹⁴ E.g. Portugal

¹⁵ E.g. Italy, Germany, Turkey.

disqualification are specified, and reference is rather made to the need for representatives to have an unblemished reputation¹⁶ or to the heinous character of the acts committed.¹⁷

17. Disqualification, both statutory and in the form of ancillary penalty decided by a judge, may operate automatically,¹⁸ subject possibly to certain administrative formalities,¹⁹ or require a subsequent decision by Parliament (for bicameral Parliaments, often the relevant chamber).²⁰ In this latter case, a limited number of states provide for the possibility of appealing to the Constitutional Court.²¹ In Lithuania, the Constitutional Court presents conclusions as to whether the concrete actions of the Member of Parliament against whom a disqualification procedure had been instituted are in conflict with the Constitution, it therefore takes a decision on the case before Parliament. A few countries provide for a decision by Parliament only.²²

18. In some States where a decision by Parliament is required, a specialised permanent committee is tasked with the preparation of the case prior to the vote by the Chamber. In Italy, the procedure before each chamber of Parliament provides the possibility to make representations in person or through an attorney and includes a public hearing; the final decision is public.

19. In almost all the States,²³ the Parliament has only mandatory powers, its competence being limited to ascertaining that the legal conditions for disqualification are met, while in very few countries²⁴ Parliament has the discretionary power to decide against disqualification even when the legal conditions are met.²⁵ In two countries, Parliament has the power to decide whether the offence is such that the representative does not command the trust and respect necessary for the elected office, and therefore to decide to disqualify.²⁶ In Finland, Parliament has the power to decide by qualified majority whether or not a final criminal conviction and sentence to imprisonment or for an electoral offence justifies disqualification.

¹⁶ E.g. Iceland

¹⁷ E.g. Iceland. Canada refers to "infamous crimes".

¹⁸ E.g. Albania, Azerbaijan, Belgium, Chile, Cyprus, Estonia, Kazakhstan, Latvia, Mexico, Republic of Moldova, Romania, Sweden, Turkey, Ukraine, United Kingdom. In Turkey, even though the disqualification applies ipso iure by effect of Article 53 of the Criminal Code which commands the loss of the right to vote and to stand for elections and of the parliamentary mandate, the court must state the disqualification in the judgment.

¹⁹ In Turkey, for example, the final conviction in connection with the cases listed in Article 76 of the Constitution must be notified to parliament and read out at the General Assembly (Article 84 of the Constitution of Turkey). The General Assembly does not have the power to make any additional determinations.

²⁰ E.g. Austria, Brazil, Bulgaria, Georgia, Iceland, Italy, Lithuania, Serbia. In Croatia and Germany, parliament decides on the date of termination of office.

²¹ E.g. Germany, Austria, Brazil, Bulgaria, Georgia, Portugal, Slovakia, Croatia (the Constitutional Court is the last instance after the Administrative Court), "the former Yugoslav Republic of Macedonia". In Greece the appeal is to the Special Highest Court. In Turkey, the possibility of applying to the Constitutional Court exists for disqualification for discretionary decisions of parliament on disqualification on account of poor attendance or the deputy's undertaking a duty which is incompatible with his or her mandate. In the case of disqualification for criminal conviction, no parliamentary decision and no subsequent judicial review are required.

²² E.g. Finland, Hungary.

²³ E.g. Germany, "the former Yugoslav Republic of Macedonia"

²⁴ E.g. Italy, Lithuania.

²⁵ In Italy, for example : see the case of Augusto Minzolini, member of the Italian Senate: the Select Committee on Elections and Parliamentary Immunity of the Italian Senate recommended on 28 July 2016 that he should be disqualified but the Senate on 16 March 2017 decided against it (by 137 votes with 94 against and 20 abstentions).

²⁶ E.g. Iceland, Canada.

20. In France, disqualification requires a decision by the constitutional council.

B. The procedural guarantees

21. The European Court of Human Rights, in its judgment *Scoppola v. Italy* No. 3, has stated in respect to disenfranchisement that “while the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.”²⁷ The Court has added that “the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction.”²⁸

22. The Venice Commission is convinced, as is the ECtHR,²⁹ that stricter requirements may be imposed on the eligibility to stand for election to Parliament, as distinguished from voting eligibility. The States’ margin is therefore wider when it comes to ineligibility than to deprivation of the right to vote. This applies a fortiori to disqualification from office (see para. 10). It follows that States have the possibility to incorporate provisions on disqualification from office into their laws, provided that the ensuing restrictions are not general, automatic and indiscriminate.

23. This means that if the substantive guarantee of proportionality is respected in the statute, there is no obligation under the European Convention on Human Rights to provide for the procedural guarantee of judicial proceedings. The statute should prove “the legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender”.³⁰ Disqualification should only be provided in connection with certain types of offences or with particularly long sentences. It would appear appropriate that the law also adjust the duration of the measure to the sentence imposed and thus, by the same token, to the gravity of the offence.³¹

24. In a number of States, disqualification voiding an elective office does not take effect automatically, but requires a formal implementing decision by Parliament (see above, at paragraph 17). The question arises whether this subsequent decision (“*déchéance*” in French) amounts in itself to an autonomous interference with the right to be elected or if it is only the logical, necessary and undisputable consequence of either the ancillary sanction or the operation of a statutory disqualification.

25. The Venice Commission is of the latter view: the decision by Parliament is to be seen as a measure of implementation of the disqualification decided by the judge or by statute.³² According to the Code of Good Practice in Electoral Matters, the withdrawal of political rights may only be imposed by a court of law. If the ground for the loss of mandate is decided by a court, a subsequent decision by Parliament would not limit the right to be elected any further. Such political decision-making do not therefore impinge upon individual rights, but only upon

²⁷ ECtHR, *Scoppola v. Italy* (No. 3) judgment of 22 May 2012, § 99.

²⁸ *Ibidem*, § 102.

²⁹ *Melnichenko v. Ukraine*, 17707/02, 19 October 2004, § 57; cf. *Paksas v. Lithuania* [GC], 34932/04, 6 January 2011, § 96

³⁰ ECtHR, *Scoppola v. Italy* (No. 3), § 106.

³¹ See *mutatis mutandis* ECtHR, *Scoppola v. Italy* (No. 3), § 106.

³² This conclusion would not seem to apply in cases when parliament, and not a judge, is empowered to decide whether a criminal conviction justifies disqualification.

the general democratic nature of the society, should the decisions by Parliament be based on political affiliations only.

26. Parliament will indeed normally only be called upon to verify whether the legal conditions for disqualification are respected. It will therefore only dispose of mandatory powers ("compétence liée" in French). It is the case in most States, including Germany and Austria, for example.

27. In these conditions, the required procedural guarantees will be only limited and concern amongst other: the pluralistic composition of the parliamentary committee tasked with the preparation of the case; its nature as standing committee; the right of the MP to submit arguments, to appear before the Parliament in person and to be assisted by an attorney; the holding of a public hearing. The decision should always be public.

28. A limited number of States provide for the possibility to apply to a Court, notably the Constitutional Court, against the implementing decision by Parliament.³³ This is an additional guarantee which may appear to be logical in countries where there already exists the possibility of a direct application by MPs to the Constitutional Court. However, it should not be seen, in the Commission's view, as a necessary requirement, if the procedure before Parliament meets the requirements indicated above. The ratio of disqualification is to avoid that members of Parliament who have gravely violated the law take part in the law-making: it is therefore important that a decision be taken swiftly. Avoiding an additional judicial phase saves time, and some basic judicial guarantees like the right to be heard at a public hearing and to be represented may be embodied in the parliamentary procedure.

29. In very few States, Parliament disposes of discretionary powers in respect of the implementation of the decision of disqualification.³⁴ This competence flows from the sovereignty of Parliament vis-à-vis the judiciary³⁵, and appears logically linked with the power of Parliament to examine the regularity of the electoral mandates. Discretionary, however, cannot mean arbitrary:³⁶ Parliament may decide not to implement the disqualification even if the statutory conditions are met, while it would be inadmissible and contrary to the rule of law if Parliament could decide to disqualify when the statutory conditions are not met. Does parliamentary discretion not to implement the disqualification raise an issue in terms of need for an additional procedural guarantee? The answer must be negative, because should Parliament decide not to disqualify, the MP would benefit of this decision and would not be a victim of an interference with his or her right to be elected anymore. On the other hand, if parliament instead disqualifies it may be said that the interference with the MP's right to be elected originally derived from the criminal conviction.

30. As regards the possibility that parliamentary discretion may turn into political abuse (resulting in disqualification in the absence of the legal conditions), this risk may be averted by providing the procedural guarantees indicated above.

³³ Judicial review of discretionary disqualification decisions taken by parliament may appear more difficult, although in Turkey, for example, the Constitutional Court has the power to review discretionary parliamentary decisions on lifting the immunity of an MP.

³⁴ Italy, Lithuania.

³⁵ In Italy it has its basis in Article 66 of the Constitution.

³⁶ Venice Commission, Rule of Law Checklist, II.L c, esp. para. 65.

IV. Conclusion

31. The Venice Commission has been invited by the European Court of Human Rights to submit an *amicus curiae* brief in the case of Berlusconi v. Italy, on the question of what minimum procedural guaranteed a State must provide within the framework of a procedure of disqualification from holding office.

32. The European Court of Human Rights has previously stated that the States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. This possibility applies *a fortiori* to disqualification voiding an elective mandate, because stricter requirements may clearly be imposed on the eligibility to stand for election to Parliament (and in the Commission's opinion, even more in case of disqualification voiding the electoral mandate), as distinguished from voting eligibility, as also the Court has accepted.

33. Statutory disqualification should take into account such factors as the gravity and nature of the offence committed and the conduct of the offender. Disqualification should therefore only be provided in connection with certain types of offences or with particularly long sentences. It would also appear appropriate that the law adjust the duration of the measure to the sentence imposed and thus, by the same token, to the gravity of the offence.

34. In States where disqualification does not operate automatically but requires an implementing decision by Parliament, its decision does not represent an autonomous interference with the representative's right to be elected. For this reason, only limited procedural requirements apply, in particular the right of the MP to submit arguments, to appear before the Parliament in person and to be assisted by an attorney, the holding of a public hearing, the public character of the decision. An appeal to the Constitutional Court against the decision by Parliament appears to be a logical additional guarantee in countries where direct access to the Constitutional Court is already provided, but should not be regarded as necessary.

35. The Venice Commission has carried out a comparative research of the legislation of 37 of its member states on the procedural guarantees provided in connection with disqualification (CDL-REF(2017)041), and puts it at the disposal of the Court.