How a Futile Constitutional Challenge Could Save Berlusconi's Career

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In Italy a political controversy is presently raging as to whether Silvio Berlusconi can remain a Senator after having been sentenced to four years imprisonment. What exactly is the legal situation?

Legally speaking, the general parameters are relatively clear. To date there has existed only a rather vague law from 1957 that regulates conflicts of interest where parliamentary candidates are concerned. Notwithstanding, Berlusconi was still elected four times. In the last legislative period, however, parliament passed a law saying that no one who has been sentenced to more than two years of prison can be a candidate for the Chamber of Deputies or the Senate. There already existed such criteria for regional elections, and now the law has been expanded to encompass parliamentary elections. The interpretive scope here is relatively limited. The State Council has already issued judgments that make fairly clear how these criteria are to be understood.

And how are they to be understood in the Berlusconi case?

That Berlusconi cannot remain a Senator.

But at the time of his candidature the law still did not apply – correct?

Correct. But in Article 1, Paragraph 63, the law clearly states that an elected Senator, if he has been sentenced to two or more years, cannot stay in office.

Can this be understood as being retroactive and therefore anti-constitutional?

Politically one can attempt it, but from a legal perspective it's pointless. The law itself says that there is only one case in which it cannot be retroactive – in a criminal trial where an understanding between defendant and prosecution leads to a conviction. That is the sole exception. In terms of the prohibition on retroactive punishment, the loss of a parliamentary seat is not a penal sanction. This falls not within the sphere of criminal but parliamentary law. Politically it is perhaps a sanction, but not legally speaking.

What possibilities exist for the Berlusconi camp to evade this legal predicament?

In the Italian constitution there is Article 66, which states that each chamber must decide as to the admission requirements of its members and as to any retroactively effective reasons for their incommensurateness and ineligibility. This means that the parliamentary chambers must be sovereign entities in terms of who can and cannot join them.

Which in turn means that the Senate could override the law of ineligibility?

Exactly. Article 66 of the constitution gives parliament the right, for purely political reasons, not to apply the law and keep Berlusconi in office. The coalition partners on the left will naturally not accede to this. Many say that the Senate should attempt to get the Constitutional Court to declare the law anti-constitutional.

What would be the constitutional-law approach here?

Of course a simple law may not take precedence over a constitutional norm – and it doesn't do so here. It merely advances criteria as to who can be a candidate or who is eligible to be elected, and it does not infringe upon that parliamentary law which determines admission requirements and whether there are retroactively effective reasons for incommensurateness and ineligibility. As stated, the Senate can indeed make the decision as to whether they apply the law or not. I regard the law as clearly constitutional, and I am also certain that the Constitutional Court would also arrive at the same conclusion. A constitutional challenge would only be a way of playing for time.

Can the Berlusconi camp raise such a challenge on its own or does it require the votes of its coalition partners?

Any challenge must be raised by the Senate as a whole, and so the coalition partners must be involved. And that wouldn't be such a bad idea from a political point of view. Berlusconi would remain in a kind of limbo and the government could proceed apace.

How long would it take for the constitutional court to arrive at a decision?

At least a few months. But it's not that easy to construct such a constitutional challenge. After all, the law that the Senate is now attacking as being unconstitutional was passed by the Senate itself just nine months ago. Of course one could argue that this was in the last legislative period. It is naturally paradoxical, but we all know that no parliament can bind the hands of its successor. But then one must find a way of demonstrating how the law violates Article 66 of the constitution – when Article 66 of the constitution permits the Senate full discretion in applying it. This must be skilfully done – otherwise the constitutional court will immediately reject the challenge as inadmissible.

Then why did the coalition partners even pass this law nine months ago? Berlusconi's PDL Party backed it, didn't they? Didn't they reckon with the possibility that sooner or later it would be applied to Berlusconi?

I don't know. It was certainly not difficult to foresee that eventuality. The law was conceived as a political signal – that sternness must be shown. They were probably thinking ahead to the next election and felt that they would simply address any problems as they emerged. In this country no has any medium-term or longer-range strategies.

Does the coalition have other options apart from a constitutional challenge?

Theoretically there are two possible expedients – but they aren't feasible from a practical standpoint. One is a pardon by the President. But there is no real scope for this, and Berlusconi does not want to apply for it. In order to receive a pardon it is not enough that you merely wish to protect your political career – and it wouldn't help Berlusconi in any case. He has other trials taking place and will sooner or later be convicted.

And the other options?

An amnesty. But for that you need a two-thirds majority in both chambers – something he doesn't have. One would then have to amnesty all tax frauds and tax evaders. That would not be sending a good message, particularly in our country.

This means that a constitutional challenge is the only way for Berlusconi to remain in politics?

No matter how this whole process develops, following his conviction Berlusconi cannot stand for election again. He cannot assume public office – depending on the outcome of the appeal proceedings – for either three or five years. It's now or never in terms of him being saved. His only chance is to remain as Senator. Then he can at least hope that his party wins the election and changes the law.

This interview was conducted by Maximilian Steinbeis.Translation: Kevin McAleer

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