

The wrong conflict of interests

Giovanni Birindelli

21 March 2009



“If, on the one hand, it is undeniable that Mr. Berlusconi’s conflict of interests exists, and that it is considerable, on the other it is however deniable that this conflict of interest has any relevance whatsoever. In fact, Mr. Berlusconi’s conflict of interests is the direct expression, or the necessary consequence, of a more general one, namely that of the Italian parliament.”

In Italy, saying “Berlusconi” or saying “conflict of interests” is practically the same thing, to the extent that the two have almost become synonyms. In fact, the first thought that uttering the Italian prime minister's name is likely to provoke in Italians is that of all the “laws” that the parliamentary majority he directly controls passed in order to protect his particular interests, those of his businesses and those of his friends. Vice versa, the first thought that uttering the word “conflict of interests” is likely to provoke in Italy is that of the smiling face of Mr. Berlusconi.

If, on the one hand, it is undeniable that Mr. Berlusconi's conflict of interests exists, and that it is considerable, on the other it is however deniable that this conflict of interest has any relevance whatsoever. In fact, Mr. Berlusconi's conflict of interests is the direct expression, or the necessary consequence, of a more general one, namely that of the Italian parliament.

In fact, in Italy the parliament has de facto two powers. On the one hand, it has the power to pass laws, that is to decide on matters of principle. On the other hand, it has the power to approve the measures proposed by the government, that is, to put it in lemons terms, to decide on matters of money, for example. One does not need to be a Nobel laureate in order to foresee that, in this situation, whichever majority runs a country, the former power will necessarily be used in function of the latter, that is principles will be arbitrarily bent (or made disappear altogether) in order to defend and promote particular interests.

Now, whether the particular interests promoted are those of an individual (e.g. Mr. Berlusconi), those of a political party, or those of the category of individuals whose votes a political party needs in order to be elected (e.g., the “middle class”, the “working class”, etc.), of course, it is irrelevant. The use of public powers and resources for the promotion of the particular interests of one individual is of course a more evident expression of such structural conflict of interests than the use of such powers and resources for the promotion of the particular interests of an entire political group, or of those of the portion of the population that elects it (e.g. the majority); however, it is not necessarily a worse one. As Lord Acton says, “it is bad to be oppressed by a minority, but it is worse to be oppressed by a majority. For there is a reserve of latent power in the masses which, if it is called into play, the minority can seldom resist” (Acton, 1985, vol. 1, p. 13).

Most Italians are unable to understand the difference between laws and measures, and therefore the root of this structural conflict of interest of parliament. I can see two reasons of this inability: one is that measures are often called “laws” in order for them to have the same dignity and the same power of being enforced as laws have. The second reason, which in fact is an aspect of the first, is that most people have absorbed the positive idea of law that authority has successfully managed to impose on them: in other words, they see the “law” as the command imposed by the authority, for example via majority vote in parliament (for a beautiful synthesis of legal positivism, see Dworkin, 1977, p. 17).

It is impossible here, of course, to compare different approaches to the concept of law (for this we suggest Hayek, 1982; Leoni, 1961; Dworkin, 1977, 1986). However, it is possible to remind that, as was mentioned in the previous article, there is a different idea of law according to which this is not the command imposed by authority, but rather the principle discovered by it, if necessary. Being a principle, a law does not have anything to do with money, power or allocation of resources: in fact, in Dworkin's words, a principle is “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality” (Dworkin, 1977, p. 22) and therefore (if we accept Hume's idea of justice - Hume, 2007, pp. 307-322) because it emerged as the result of a spontaneous process of 'natural selection' of successful conventions and institutions ('successful' in the sense that they proved to be able to enhance the chances of survival of the group - see also Hayek, 1960, p. 59). The law therefore exists before legislation (Hayek, 1982, p. 73), not after it: Mr. Berlusconi does not have the power to make false accounting just, he only has the power to make it legal. In a similar way, the modern socialists do not have the power of making the violation of the principle of inviolability of private property just, but only that of making it legal. Legislation that uses centralized knowledge to arbitrarily “make” the law, in fact tends to destroy it (Leoni, 1961, p. 218), in the sense that it tends to destroy the abstract principles that are spontaneously felt as just and uniting a people because they are, after all, the product of their and their ancestors' spontaneous interaction. This arbitrariness (that is this use of centralized knowledge for replacing the result of dispersed knowledge of individuals accumulated in generations and contained in commonly felt abstract principles that should be discovered and defended, especially against the strongest and the majority) is probably one of the key components of the current social decay.

Now, this confusion of terms, this deliberately provoked inability to distinguish measures and laws, is not accidental, but rather necessary for the preservation of this structural conflict of interests, which is therefore embedded in the very idea of law and of democracy accepted in Italy (though, of course, not only here).

In Italy, the left periodically (and unsuccessfully) raises the irrelevant issue of Mr. Berlusconi's conflict of interests, deliberately ignoring the structural conflict of interest of which that is the direct expression. In other words, the opposition conveniently ignores the cause of problem, for, if it had to address it successfully, it could not benefit from its own conflict of interests when it will be its turn to be in power.

There have been some concrete proposals in order to solve this structural conflict of interests (see for example Hayek, 1982, vol. 3, ch. 17), which of course may have their own limits (De Jasay, 2002, p. 11). The point is that, until this structural conflict of interests will be solved, or at least addressed, the vicious circle that will inexorably continue eroding freedom and transforming us in that “flock of timid and industrious animals of which the government is the shepherd” Tocqueville predicted long ago (Tocqueville, 1945, vol. 2, p. 319), will never be inverted.

REFERENCES

- Acton, J.E.E.D., *Essays in the history of liberty* (Liberty Fund, Indianapolis).
- De Jasay, A., 2002, *Justice and its surroundings* (Liberty Fund, Indianapolis).
- Dworkin, R., 1977, *Taking rights seriously* (Duckworth, London).
- Dworkin, R., 1986, *Law's empire* (Fontana Press, London).
- Hayek, F. A., 1960, *The constitution of liberty* (Routledge and Kegan Paul, London).
- Hayek, F. A., 1982, *Law, legislation and liberty* (Routledge & Kegan Paul, London).

Hume, D., 2007, *A treatise of human nature* (Clarendon Press, Oxford).

Leoni, B., 1961, *Freedom and the law* (Liberty Fund, Indianapolis).

Tocqueville, A. d., 1994, *Democracy in America* (David Campbell, London).