JUDGMENT NO. 38 YEAR 2019

In this case, the Court heard a referral order challenging a provision of an ordinary law that required courts to obtain advance authorization from a parliamentarian's House of membership in order to use records related to communications as evidence in legal proceedings against that MP. The referring court alleged that the advance authorization requirement, already in place for transcripts and recordings of intercepted communications, equated information "external" to communications with the contents of the communications themselves, unlawfully expanding the scope of the constitutionally established parliamentary prerogative according to which parliamentarians are granted protection in the form of an exception to the principle of equal treatment before the courts. The Court held that the question was unfounded. It pointed to previous case law stating that the advance authorization requirement reflects the purpose of an investigatory action (the purpose of obtaining information relating to a parliamentarian's communications), as evidenced by, for example, the fact that special protection is not limited to intercepting communications on devices belonging to MPs, but also extends to devices belonging to third parties in frequent contact with them, and even to places frequently visited by them. Moreover, the Court disagreed with the claim that there is an ontological, or natural, difference between the contents of communications and the data about them found in external records (like the date, duration, participants, and location of a communication). The Court said that this "external" data are, in fact, communication evidence. Therefore, it rightly falls under the constitutional guarantee that protects the freedom and autonomy of the functioning of Parliament (and, only as a secondary and indirect matter, protects the individual members of Parliament), a conclusion supported by the case law of the Supreme Court of Cassation. Thus, Court held that it is legitimate to extend the constitutional protection of parliamentary communications to investigatory acts able to have a direct impact on said communications, and obtaining telephone records, which can reveal highly invasive information, falls into this category.

[omitted]

THE CONSTITUTIONAL COURT

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 6(2) of Law no. 140 of 20 June 2003 (Provisions for the implementation of Article 68 of the Constitution and concerning criminal proceedings involving high-level State positions), initiated by the judge for preliminary investigations [*giudice per le indagini preliminary*, hereafter also GIP] of the Ordinary Tribunal of Bologna, in criminal proceedings against C.A. G. and others, with a referral order of 3 May 2017, registered as no. 162 of the 2017 Register of Referral Orders, and published in the *Official Journal* of the Republic no. 46, first special series of 2017.

Considering the intervention by the President of the Council of Ministers;

having heard from Judge Rapporteur Nicolò Zanon in chambers on 23 January 2019.

[omitted]

Conclusions on points of law

1. – The judge for preliminary investigations of the Ordinary Tribunal of Bologna questions the constitutionality of Article 6(2) of Law no. 140 of 20 June 2003 (Provisions for the implementation of Article 68 of the Constitution and concerning

criminal proceedings involving high-level State positions), in reference to Article 68(3) of the Constitution, in the part in which it provides that courts must request authorization from the parliamentary House to which a parliamentarian belongs or used to belong in order to use communication records related to telecommunication lines belonging to third parties who have had contact with the parliamentarian.

The referring court argues that the challenged provision equates telephone records with transcripts and recordings of the intercepted conversations or communications, in any form, in which members of Parliament have taken part, used in the course of proceedings concerning third parties, with the consequence that the court (when it considers it necessary to use records that show contact between third parties and a member of Parliament) must request the authorization in question.

The referring court holds that equating records and intercepted communications clashes with Article 68(3) of the Constitution, since the constitutional provision mentions the interception of conversations and communications, but not records, making Article 6(2) of Law no. 140 of 2003 an unlawful extension of the scope of application of the constitutionally established parliamentary prerogative.

In particular, the referring court claims that Article 68(3) of the Constitution is intended to protect members of Parliament "from illegitimate judicial interference in the exercise of their representative mandate," for purposes of guaranteeing the full decision-making autonomy of the legislative assembly, not, it states, to guarantee the interests of the physical person of the specific member of Parliament who may be affected by the performance of the act. From this, it concluded that, as an exception to the principle of equal treatment before the courts, this constitutional provision should be interpreted narrowly, and the ordinary legislator cannot supplement or extend its text.

The referring court also observes that there is an "ontological and normative" difference between interception of telephone calls and the external data relating to such interception, arguing that, while the former are "methods that allow us to learn, at the very moment it is expressed, the content of a conversation or communication, content which would otherwise, due to the way in which it is transmitted, be inaccessible to anyone not party to the communication itself" (here Judgment no. 81 of 1993 of this Court is cited), the records provide the documentation of data "extrinsic" to the conversation, which would include its duration, the telephone lines involved, and the cell towers used.

Finally, the referring court states that, due precisely to this difference, this Court would not have held that the regulatory scheme provided for under criminal procedure for intercepting communications may be extended to apply to records (Judgments no. 81 of 1993 and 281 of 1998).

2.– The question is unfounded.

2.1.– Article 68(3) of the Constitution, after the reform of the Constitution effected by Constitutional Law no. 3 of 29 October 1993 (Modification of Article 68 of the Constitution), which substituted the original authorization to take legal action against members of Parliament with a system based on specific, per-action authorizations, states that authorization from the House of membership is necessary "to subject members of Parliament to interception, of any kind, of conversations or communications and seizure of correspondence."

The constitutional provision was implemented by Articles 4 and 6 of Law no. 140 of 2003.

Article 4 of that law provides that, when it is necessary to intercept, in any way, conversations or communications of a member of Parliament, or acquire communication

records, the competent judicial authority shall submit a request for authorization directly to the individual's House of membership.

In this case, authorization must be obtained in advance, before investigators proceed with the investigatory action.

This court has explained that authorization must be requested in advance not only when the investigatory act directly targets telecommunication lines in the name of, or available to, the parliamentarian (so-called "direct" interception), but also any time an interception targets communication lines belonging to the persons in frequent contact with the parliamentarian, or carried out in places he or she presumably frequents, for the specific purpose of learning the contents of the member of Parliament's conversations and communications. For purposes of the request for advance authorization, what is important, in other words, is not the ownership of the telecommunication line or place, but rather the purpose of the investigatory action (Judgment no. 390 of 2007).

The later version of Article 6(2) of Law no. 140 of 2003, on the contrary, regulates the requests submitted to the applicable House for authorization to use an investigatory act that has already been carried out in current proceedings: falling "outside the scenarios envisaged by Article 4," it refers to cases in which the GIP considers it necessary to use intercepted communications or records that have already been acquired, with respect to which, due precisely to the unexpected nature of the interlocution of the member of Parliament, the judicial authority could not have been able, even if it wanted to, to attain advance authorization from the appropriate House (on the difference between "targeted" interceptions, on the one hand, and "random" or "fortuitous" interceptions, on the other, see Judgments no. 114 and 113 of 2010 and 390 of 2007, and Order no. 263 of 2010).

In the present case, the question of constitutionality that has been brought to this Court's attention does not concern the "successive" character of the authorization relative to the use of transcripts or recordings of a "random" or "fortuitous" interception, or, rather, involves already acquired records that reveal contacts with the member of Parliament. But it involves Article 6(2) of Law no. 140 of 2003, only in the part in which said authorization is also required for the use, as concerns the member of Parliament, of communication records, which reveal contacts between the parliamentarian and third parties under investigation, in alleged contradiction with the literal provisions of Article 68(3) of the Constitution, which allegedly applies exclusively to transcripts or recordings of interceptions of conversations or communications.

2.2.– The referring court correctly underscores that the prerogatives established in order to protect the functioning of the Parliament entail an exception to the principle of equal treatment before the courts, a principle which stands at the origin of the establishment of the rule of law (Judgments no. 262 of 2009 and 24 of 2004), and, therefore, unduly expansive interpretations must be avoided.

Moreover, this requirement was reinforced within the current system of parliamentary immunity and prerogatives, after the aforementioned reform of Article 68 of the Constitution. Presently, criminal proceedings are no longer considered to have a negative impact, in and of themselves, on the freedom and independence of the parliamentary function, but only certain specific actions taken within them, and, as such, these are subject to the necessary authorization from the House of which the relevant individual is a member (Judgment no. 74 of 2013).

The requirement at issue concerns not only the interpretation and application of the constitutional and legislative texts that contain the prerogatives in question, but, even before that, the ways in which the ordinary legislator implements, when necessary,

the applicable constitutional provision. Indeed, the legislator is forbidden to carry out any supplementation or extension of the Constitution, and is permitted to provide for its implementation only to the extent to which this is intended to make the prerogative immediately and directly operative at the procedural level, without this entailing any undue expansion of the guarantees put in place by the Constitution (Judgments no. 269 of 2009 and 120 of 2004).

Whether the reference to communication records contained in the challenged provision (in relation to the text of Article 68(3) of the Constitution, although it does not explicitly mention them) complies with these principles is the constitutional question before this Court.

2.3.– Not presently under discussion is the fact, opportunely brought to light by the referring court, that the procedural regulations in force are considerably different for the general population when it comes to the conditions under which the contents of a conversation or communication may be intercepted, for one, or the extrinsic data concerning them may be acquired, for another, with particular reference to the judicial authority that may order one measure or the other.

Only the GIP, and only for certain crimes (with limits that have become more stringent over time, see Articles 266 *et seq*. of the Code of Criminal Procedure), may authorize interceptions, while, for obtaining records, it has always been considered sufficient for the prosecutor to submit a request with a decree under Article 256 of the Code of Criminal Procedure (concerning the duty to reveal confidential or secret documents to the judicial authorities), as later confirmed (albeit with a more detailed regulatory scheme) by Article 132 of Legislative Decree no. 196 of 30 June 2003, entitled "Code for the protection of personal data, laying down provisions for conforming the national system to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC."

Thus, these legislative rules do not entirely overlap, a choice which this Court did not condemn (Judgments no. 281 of 1998 and 81 of 1993), in consideration of the fact that they aim to acquire different elements of information, and to satisfy different investigative needs. Although Judgment no. 81 of 1993 found that "external" data pertaining to a conversation, knowable by means of acquiring telephone records (the persons between whom the communication takes place, the date and time of its occurrence, and its duration), must nevertheless benefit from the guarantee that Article 15 of the Constitution ensures for the freedom and confidentiality of all forms of communication.

What matters for purposes of the present decision is, in any case, that legislative rules must be read in light of the Constitution; it is not the Constitution that must be understood in light of the scheme established by law (the procedural one, in this case). For this essential reason, it is not acceptable to start from the procedural rules governing interception and acquisition of records in order to draw definitive conclusions about the specific, constitutionally sanctioned regulatory scheme for these same matters, as applied to parliamentarians. One reason for this is that the code might very well change in the future, precisely with regard to the elements relevant here, and may potentially even to move in a direction that favors more homogenous treatment of interceptions and acquisition of records.

Therefore, it falls to this Court to verify if Article 68(3) of the Constitution contains a specific regulatory scheme for communications of parliamentarians, comparing it with the relevant ordinary legislation, which is explicitly intended to

implement that constitutional provision.

To that end, it is not possible to start, as the referring court does (again, in light of the current procedural framework), from the presumption that there is an "ontological" difference between the contents of a conversation or a communication, on the one hand, and the document that reveals the extrinsic data concerning the conversation or communication, on the other.

In the first place, the existence of the "ontological" difference is doubtful, since this Court held that even "external" data pertaining to a communication, obtainable from telephone records, fall under the protection of Article 15 of the Constitution for all subjects of the legal system. But, above all, with reference to the scheme explicitly laid down for members of Parliament, it is, instead, a matter of verifying whether, as the referring court claims, the text of Article 68(3) of the Constitution truly does, in the part in which it uses the terms "conversations" and "communications," exclude any reference to a document, like records, which contains information not about their content, but about elements which are surely "external," yet which, nevertheless have, as mentioned above, unquestionable communicative significance. Such data include the date and time at which the conversations or communications occurred, their duration, the devices involved, and also, thanks to technological advancements, allow for the location and movements of holders of mobile devices to be traced.

According to the referring court, the "natural" difference between the contents of a conversation or communication, on the one hand, and the document that reveals the extrinsic data relating to them, on the other, makes the challenged provision unconstitutional at its root, since it equates the two types of evidence, making them both subject to mandatory authorization by the House to which the parliamentarian belongs in order to be used in judicial proceedings.

Nonetheless, on a textual basis, the assumption is incorrect.

The two-part reference in Article 68(3) of the Constitution to "conversations or communications" leads to the conclusion that purely historical and external data are comparable to the contents of a conversation or communication and fall, therefore, under the protection of the Constitution, since they themselves are "facts of communication." Moreover, among the common meanings of the term "communication" are "contact," "relationship", and "connection:" meanings evocative of precisely the kind of data and information that a telephone record is able to provide and reveal.

The Supreme Court of Cassation – despite its well-established case law, which, in reference to the overall regulatory scheme of the Code of Criminal Procedure, has always clearly distinguished between interception and the acquisition of records – has expressly affirmed, in the context of the specific regulatory area at issue here, that even the acquisition of records is an activity that aims to enter into the sphere of the communications of the member of Parliament, similar to recording conversations (Supreme Court of Cassation, Sixth Criminal Division, Judgment no. 49538 of 22 September 2016).

2.4.– Based on the above, the provision requiring authorization in order to use telephone records as evidence, capable of revealing elements of primary importance inherent to the communications of a member of Parliament, is not an unacceptable violation of the principle of equality before the law, but rather the implementation of the treatment required by constitutional protections.

Moreover, the purpose of the guarantee in Article 68(3) of the Constitution is not to protect the rights of an individual, but rather to protect the freedom of the function that individual exercises, in conformity with the very nature of parliamentary

immunities, which are primarily intended to protect the autonomy and decision-making independence of the Houses against undue interference by other powers, and are only instrumentally intended to benefit the persons invested with that function (Judgment no. 9 of 1970).

For this reason, the guarantee in question may be extended to an investigatory act able to have an impact on a parliamentarian's freedom of communication, as the use of a telephone record as evidence in legal proceedings most certainly does.

The case law of this Court has, moreover, already highlighted "the notable intrusive capacity" of investigative actions that involve records (Judgment no. 188 of 2010), confirming that, for every citizen, resorting to this investigative tool must necessarily be subject to the guarantees laid down in Article 15 of the Constitution.

It has also observed that this intrusive capacity takes on additional meanings where the communications of a member of Parliament are concerned. Not because the privacy of a citizen who is also a parliamentarian has greater value [than that of other citizens], but because the pervasiveness of the means of investigation in question may come to put pressure on the free exercise of the parliamentary function. A telephone record may, indeed, open up insights into the relationships of a member of Parliament, particularly institutional ones, "which have far greater breadth than that which is required for one specific investigation, and may involve other subjects (especially other parliamentarians) concerning whom the same level of protection of the independence and freedom of their function applies and must apply" (Judgment no. 188 of 2010).

Therefore, an ordinary law that makes the use of telephone records, containing "external" data relating to the communications of a member of Parliament, in judicial proceedings subject to authorization by the House to which the member belongs, equating them to how recordings and transcripts of an intercepted communication are treated, does not violate Article 68(3) of the Constitution.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the question of constitutionality concerning Article 6(2) of Law no. 140 of 20 June 2003 (Provisions for the implementation of Article 68 of the Constitution and concerning criminal proceedings involving high-level State positions), raised by the judge for preliminary investigations of the Ordinary Tribunal of Bologna, in reference to Article 68(3) of the Constitution, with the referral order indicated in the Headnote, is unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 23 January 2019.