JUDGMENT NO. 1 YEAR 2013

In this case the Court considered a jurisdictional dispute initiated by the President of the Republic against the Palermo public prosecutor in relation to telephone conversions between the President and a suspect in a criminal investigation, whose telephone was being tapped by the investigating authorities. The President argued that the recordings should be destroyed immediately without any consideration of their pertinence and without following the ordinary procedures applicable to the destruction of non-pertinent evidence. The Court considered the matter with reference to an overall examination of constitutional law, rather than a specific textual exegesis, holding that the functions of the President of the Republic are premised on informal contacts and networking, which would be entirely thwarted were any of his communications to become public. The Court thus held that the conversations had been recorded "outwith the situations permitted by law" and could hence be destroyed by order of a judge without the involvement of the other parties to the criminal proceedings.[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state arising following telephone taps ordered in relation to criminal proceedings pending before the public prosecutor at the *Tribunale di Palermo* on a third party number, during which conversations of the President of the Republic were recorded, initiated by the President of the Republic by an application filed on 24 September 2012, filed in the Court Registry on 26 September 2012 and registered as no. 4 in the Register of Jurisdictional Disputes between Branches of State 2012, merits stage.

Considering the entry of appearance by the Public Prosecutor at the *Tribunale di Palermo*;

having heard the judge rapporteurs Gaetano Silvestri and Giuseppe Frigo at the public hearing of 4 December 2012;

having heard the State Counsels [*Avvocati dello Stato*] Michele Giuseppe Dipace, Gabriella Palmieri and Antonio Palatiello for the President of the Republic and Counsel Giovanni Serges, Counsel Mario Serio and Counsel Alessandro Pace for the public prosecutor at the *Tribunale di Palermo*.

[omitted]

Conclusions on points of law

1.– The President of the Republic has raised a jurisdictional dispute between branches of state "due to violation of Articles 90 and 3 of the Constitution and the provisions of ordinary law that implement it" – specifically Article 7 of Law no. 219 of 5 June 1989 (New provisions on ministerial offences and the offences provided for under Article 90 of the Constitution), "also with reference to Article 271 of the Code of Criminal Procedure" – against the public prosecutor at the *Tribunale di Palermo*, in relation to the telephone taps ordered against a third party number in relation to criminal proceedings pending in Palermo, during which conversations between that person and the President of the Republic were recorded.

2.– As a preliminary matter, it is necessary to summarise the key facts of the case which gave rise to the dispute, as stated in the arguments and documentary submissions of the parties.

The disputed telephone taps were ordered against the telephone number of a Senator – no longer in office – Nicola Mancino, who was under investigation along with numerous other persons as part of criminal procedure no. 11609/08 concerning the "negotiations" between the state and the Mafia between 1992 and 1994 in relation to which it is suspected that the offence of violence or aggravated threats against a political, administrative or judicial authority was committed.

Specifically, between 7 November 2011 and 9 May 2012 9,295 telephone calls were tapped on the number used by Senator Mancino, under the terms of two separate authorisation orders (including subsequent extensions of the second order), four of which, with an overall duration of eighteen minutes, were held with the Head of State: the first two were made by the person under investigation, whilst the others calls were placed by the President.

In the light of the results of the investigations, the Palermo Public Prosecutor decided to pursue criminal action only against some of the suspects in relation to some of the offences, and to continue inquiries against the other suspects and in relation to the remaining offences, reserving the right to make further assessments. Consequently, on 1 June 2012, the procedure relating to the persons against whom a decision had been made to prosecute, which included Senator Mancino, was officially separated.

The Public Prosecutor only placed the telephone taps that were deemed to be pertinent for the subsequent proceedings on the case file relating to the procedure thereby separated – registered as no. 117919/02, regarding which a request that the suspects be committed for trial was made, following which the preliminary hearing was scheduled – which did not include the conversations involving the Head of State. Accordingly, the documentation concerning those discussions, which remained in the case file for the original procedure no. 11609/08, has not yet been placed on file, which would make it available to the parties to the procedure.

As stated in the referral order initiating these proceedings, the President of the Republic learned of the recording following an interview given to the daily newspaper "La Repubblica" by the deputy prosecutor Mr Antonino Di Matteo, published on 22 June 2012. In that interview, in response to a question raising the issue, the interviewee asserted that "there is no trace of conversations involving the Head of State in the documents filed and this means that they are not in the slightest pertinent", whilst adding – in response to a further question as to whether this precluded their destruction – that the Palermo prosecutors would apply "the law in force": "those that will have to be destroyed following the initiation of proceedings before the [judge for preliminary investigations] will be destroyed, whilst those relating to other events to be investigated will be used in other proceedings".

By a note of 27 June 2012, acting on the instructions of the President, the General State Counsel thus requested a "confirmation or denial" from the Palermo public prosecutor of that which those declarations appeared to indicate: namely "that the telephone conversations of the President of the Republic had been tapped, which are as things stand deemed to be non-pertinent but which the Palermo public prosecutor has [reserved the right] to use".

In response to the query, by note of 6 July 2012 – including an enclosed letter from Mr Di Matteo from the previous day – the Palermo public prosecutor stated that since he "had already assessed as non-pertinent for the purposes of the procedure any telephone conversation on the case file directed to the Head of State, he [did] not envisage any usage in investigations or as part of a trial, but exclusively their destruction, which would be carried out in accordance with legal formalities".

By a later note, distributed by press agencies on 9 July 2012, Mr Messineo further asserted that "under the current state of the law no rule requires or even simply authorises the immediate cessation of monitoring and recording when a conversation between the person whose telephone is tapped and another person against whom telephone tapping could not be ordered is heard by chance during the course of a telephone tap which was lawfully authorised"; he went on to add that, "in these cases the conversation, which has been lawfully heard and recorded, will only be subsequently destroyed exclusively after the conversation has been assessed as non-pertinent for the purposes of the procedure, acting on the authorisation of the judge for preliminary investigations, having heard the parties". Finally, in a letter addressed to the daily newspaper "La Repubblica" published on 11 July 2012, the public prosecutor repeated that "the procedure leading to the destruction of telephone taps deemed not to be pertinent" would be "activated in the manner and subject to the time limits prescribed by law".

3.– In the opinion of the applicant, the position stated by the Palermo public prosecutor untenable, and it must by contrast be concluded that telephone taps involving the conversations of the Head of State, even indirectly or by chance, must be subject to an absolute statutory prohibition.

This prohibition is claimed to be inherent within the guarantee of the exemption from responsibility for acts carried out whilst exercising his functions (except cases involving high treason or attempts to undermine the Constitution) granted to the President of the Republic under Article 90 of the Constitution in view of the conduct of the exceptionally important tasks allocated to him, which is claimed to be confirmed by a systematic interpretation of the provisions of ordinary law intended to implement the said guarantee.

In fact, Article 7(3) of Law no. 219 of 1989 lays down an absolute prohibition on ordering telephone taps against the President of the Republic, unless the Constitutional Court has suspended him from office (in which case, only the parliamentary committee competent for prosecutions is competent to order them). The prohibition is laid down in relation to offences for which the President may be charged under Article 90 of the Constitution, and in relation to the "direct" tapping of his communications. However, the exclusion must logically be extended first also to "indirect" or "chance" communications, which are also liable to impair the scope of the Head of State's immunity, and secondly also to proceedings relating to other suspected criminal offences which may involve the President. Moreover, the usage of conversations involving the Head of State which were intercepted by chance as part of investigations into offences for which other persons are suspected, such as those that gave rise to the present dispute, must *a fortiori* be regarded as inadmissible.

However, such telephone taps are also not subject to Article 6 of Law no. 140 of 20 June 2003 (Provisions implementing Article 68 of the Constitution as well as in the area of criminal proceedings against the high offices of state), having regard to the chance recording of the conversations or communications of Members of Parliament, as the position of the Head of State is not equivalent to that of a Member of Parliament.

Consequently, the recordings in question cannot be assessed, used or transcribed in any way, and the judge must by contrast be asked to destroy them immediately pursuant to Article 271 of the Code of Criminal Procedure on the grounds that they have been made "outwith the situations permitted by law".

On the basis of the above, the applicant considers that the Palermo public prosecutor encroached upon his constitutional prerogatives on various grounds, and that the latter exercised his powers incorrectly. The said prerogatives are claimed to have been encroached upon specifically by the recording of conversations; the retention of the relative documentation on the procedure file; the fact that they were deemed to be pertinent for possible investigations or as part of a trial and, above all, by the stated intention of the public prosecutor to arrange a hearing in accordance with the procedures regulated under Article 268 of the Code of Criminal Procedure in order to determine whether they are to be placed on the case file or destroyed; due *inter alia* to the conduct of discussions between the parties concerning this issue, it is claimed that

this procedure would aggravate the harmful effects of the previous conduct, rendering its effects definitive.

The applicant has thus asked the Court in the referral order initiating these proceedings to rule that it is not for the Public Prosecutor at the *Tribunale di Palermo* "to refrain from the immediate destruction of the chance telephone taps of the conversations of the President of the Republic", or to assess "whether or not they are pertinent" by presenting them to the "separation hearing" governed by Article 268 of the Code of Criminal Procedure.

4.– It is necessary first and foremost to confirm the admissibility of this dispute – as already declared by this Court in an initial summary ruling by order no. 218 of 2012 – as the subjective and objective prerequisites have been met.

As regards the subjective aspect, the nature of the state's power and the resulting entitlement of the President of the Republic to bring a jurisdictional dispute in order to protect his own constitutional prerogatives have been clearly established in the case law of this Court (see judgments no. 200 of 2006 and no. 129 of 1981, order no. 354 of 2005). The President is vested with a complex range of powers, which cannot be classified within the traditional tripartite division of the branches of state, and may be exercised in a position of full independence and autonomy, guaranteed under the Constitution (see order no. 150 of 1980).

The case law of the Court has also been settled in acknowledging the public prosecutor's status as a branch of state. In fact, investigating authorities are vested with the power - also guaranteed under constitutional law - pertaining to the mandatory exercise of criminal prosecutions (Article 112 of the Constitution), which is related to direct and exclusive responsibility for the investigations relating to prosecutions (see *inter alia*, judgments no. 88 and no. 87 of 2012, orders no. 241 and no. 104 of 2011). In view of the division of the said power between different judicial offices with geographical and functional competence, whilst the individual offices are organised internally on a hierarchical basis, investigating authorities constitute a “partially diffused” branch of state. This means that standing to sue and to be sued in jurisdictional disputes between branches of state lies with the head of the relevant office – specifically the public prosecutor at the court – on the grounds that he is competent to

state the definitive position of the branch of state to which he belongs, in accordance with the function referred to above (see order no. 60 of 1999).

As regards the objective prerequisites, the intention of the application is to safeguard the prerogatives of the President of the Republic, which are argued to be inherent within the guarantee of immunity provided for under Article 90 of the Constitution, in conjunction with the other provisions of constitutional law that define the role and functions of the Head of State (the reference to Article 3 of the Constitution is purely secondary), as well as the provisions of ordinary legislation related to the said guarantee, in the face of encroachments claimed to have been committed or impending by the Palermo public prosecutor whilst performing his duties.

5.– However, the objection raised by counsel for the respondent public prosecutor in his written statement that the dispute is inadmissible due to its supposed “premature” nature, in that it seeks to censure a mere “expression of intent” without any current and tangible harm, is groundless. The reference relates specifically to the intent of the Palermo public prosecutor – stated in the note of 6 July 2012 in response to the request by the General State Counsel – to destroy the telephone taps in question "in accordance with legal formalities": the applicant considers this to be evocative of the procedure governed by Article 268(4) et seq of the Code of Criminal Procedure – also in the light of the assertions contained in the subsequent note of the public prosecutor of 9 July 2012, which was distributed by press agencies.

It should be pointed out as a preliminary matter that the objection does not extend to the content of the application in its entirety, which also relates to acts previously carried out by the Palermo public prosecutor, such as for example the assessment of the relevance of the communications intercepted.

As regards the acts that have not yet been carried out, it has been repeatedly asserted in the case law of the Constitutional Court that the Court "is required as a body for settling disputes to rule not on disputes that are abstract and hypothetical, but that are current and tangible" (see judgment no. 106 of 2009, order no. 404 of 2005). This is according to the general principle whereby it is only possible to apply to the courts to ascertain a right (or in this case an entitlement) when that right (or that entitlement) has been harmed or threatened. Precisely within this perspective moreover, this Court has held that, for the purposes of establishing interest to sue, even the mere threat of harm is

sufficient, provided that it is current and tangible and not merely conjectural. A jurisdictional dispute will be inadmissible when it relates to a situation involving a merely hypothetical dispute, that is when the dispute is initiated "even though there have been no actual objections regarding the 'delineation of the sphere of powers of the various branches of state laid down by constitutional law'" (see order no. 84 of 1978), as the Court cannot be seized "merely for the purpose of consultation"; however, for the purposes of establishing the admissibility of jurisdictional disputes, it is necessary only that there be "an interest to sue, the existence of which is necessary and sufficient to vest the dispute with the essential prerequisites of current and tangible effects" (see judgments no. 379 of 1996 and no. 420 of 1995).

On this basis, it has thus been concluded – having regard to jurisdictional disputes between bodies from the same branch of state, although the assertion can without doubt be extended to disputes between branches of state – that "any significant conduct" will constitute suitable grounds for a dispute if it has external relevance, even if it is preparatory and not definitive, although provided that it in any case appears to be aimed "at expressing in a clear and unequivocal manner the claim to exercise a given power, the exercise of which may result in an encroachment on the powers of another body, or otherwise an infringement, or otherwise an equally tangible restriction on the ability to exercise those powers" (see *inter alia* judgments no. 332 of 2011, no. 235 of 2007 and no. 382 of 2006).

In the case under examination, even though the documents signed by the Palermo public prosecutor, which have been annexed to the application, do not expressly refer either to the procedure under Article 268(4) et seq or that under Article 269(2) of the Code of Criminal Procedure, it is indisputable – and the arguments submitted by the respondent in these proceedings provide eloquent proof of this fact – that, in view the *modus operandi* of the public prosecutor, the destruction of the telephone taps should follow the procedures referred to above, and not that laid down by Article 271 of the Code of Criminal Procedure, which by contrast the applicant purports should be applied (on the grounds that it amounts to a procedure with “no involvement of the parties”). In fact, the public prosecutor infers the “prognosis” that the material will be destroyed after it has been assessed as non-pertinent for the purposes of the procedure – which, according to the public prosecutor itself, will be subject to review by the judge, during

which the parties will be entitled to make representations, which could support differing assessments – and not that the conversations recorded are ineligible for use on the grounds that they were obtained *contra legem*.

In conclusion, the conduct of the public prosecutor is unequivocally indicative of a claim that he has the right-duty to launch the selection procedure provided for under Article 268, and that it is only upon conclusion of this procedure that the destruction of the material in question could be ordered pursuant to Article 269(2) of the Code of Criminal Procedure "in order to protect confidentiality" – although exclusively upon request by the "interested parties" (that is, in this case, by the President of the Republic himself) in a further hearing held in chambers.

Within this context, it is evident that the respondent's assertion that the President of the Republic should await a refusal by the judge to destroy the material before initiating a jurisdictional dispute (and consequently to initiate a jurisdictional dispute against the judicial authority, rather than the investigating authorities) cannot be endorsed. The breach objected to by the applicant is not related solely to the eventuality that, in view of the submissions made by the private parties, the judge may adopt the opposite view to the public prosecutor regarding the non-pertinence of the conversations, and thus order their inclusion in the case file with a view to their usage in the proceedings. The harm feared – which the present jurisdictional dispute seeks to avoid – is also related first and foremost to the disclosure of the content of the President's discussions to further parties (and in particular to private individuals, such as the defence counsel for the parties), which would inevitably result from the application of the procedures provided for under Articles 268 and 269 of the Code of Criminal Procedure, with the resulting risk of their general divulgement. In this respect, according to the applicant, any subsequent reaction to the judge's order would clearly be late, as the harm would by that time have already been irreparably caused.

6.– The other objection that the jurisdictional dispute is inadmissible, which was also raised by the respondent in his written statement, according to which applicant improperly launched a jurisdictional dispute in order to object to a mere procedural error by the judiciary – that supposedly resulting from the (recommended) recourse to one procedure rather than another in order to achieve the destruction of the material –

consequently raising a question relating exclusively to the interpretation and application of procedural rules, is likewise groundless.

In support of that objection the Palermo public prosecutor invokes the case law of this Court concerning the limits on the admissibility of jurisdictional disputes brought against acts of the judiciary: according to this case law, a jurisdictional dispute cannot be initiated in order simply in order to review supposed errors *in iudicando* or *in procedendo* during the exercise of judicial powers, which would transform it into an improper means of appeal.

In this regard, it should be observed first and foremost that this case does not involve judicial acts, as no measure adopted by a judge is relevant, but only judicial activities carried out by the investigating authorities.

At any rate, the position stated within the case law of the Constitutional Court referred to by the Palermo public prosecutor itself is that judicial acts may constitute the basis for a jurisdictional dispute (either within the judiciary or with another branch of state) when it is objected that the act which resulted in the jurisdictional dispute is absolutely excluded from the scope of the judiciary, that is when the very existence of the judicial power in relation to the applicant is called into question, or more generally, a breach of the limits - other than the general requirement (including under constitutional law) that the courts must be subject to the law - to which the judiciary is subject within the legal system as a guarantee for other constitutional powers is objected to (see on jurisdictional disputes between branches of state, judgment no. 359 of 1999, orders no. 285 of 2011, no. 334 and no. 284 of 2008; on jurisdictional disputes between bodies from the same branch of state, see judgments no. 195 and no. 39 of 2007, no. 326 and no. 276 of 2003).

In the present case, the application by the President of the Republic is intended specifically to dispute the very existence of the public prosecutor's power over the respondent, owing to his constitutional prerogatives, which power the public prosecutor claims is vested in it. The power at issue is the ability to intercept the conversations of the Head of State, at least where the recordings are "occasional", and to use the President's conversations thereby intercepted for procedural purposes. Moreover, as mentioned above, this power is a logical prerequisite for an assessment by the public prosecutor that the conversations are "non-pertinent" and the stated conviction that, if

they are to be destroyed, this should occur in a "separation" hearing pursuant to Article 268 of the Code of Criminal Procedure.

Besides, this Court has on various occasions ruled admissible jurisdictional disputes launched in relation to acts or omissions of the public prosecutor that are structurally analogous, as regards the issue under examination, to those covered by the current dispute (see for example judgments no. 88 and no. 87 of 2012, no. 106 of 2009; orders, no. 241 and no. 104 of 2011).

7.– Moreover, the further objection – raised by counsel for the respondent in the its entry of appearance in the proceedings – that the application is inadmissible "due to fact that the remedy sought is impossible as a matter of law" is also groundless.

In fact, it cannot be concluded that the President of the Republic asserted that the public prosecutor was under a duty to destroy itself, *omisso medio*, the documentation relating to the telephone taps: according to the respondent, such conduct "cannot be required" under the applicable procedural rules since destruction may only be ordered by a judge, both in the scenario provided for under Articles 268(6) and 269(2) and that governed by Article 271(3) of the Code of Criminal Procedure.

Conversely, it should be pointed out that, according to the settled case law of this Court, the subject matter of a jurisdictional dispute must be identified on the basis of an overall reading of the application initiating the dispute, which may indeed clarify or supplement the formal statement of the remedy sought (see inter alia judgments no. 334 of 2011, no. 223 of 2009, no. 286 of 2006 and no. 137 of 2001).

In the present case – even disregarding the unequivocal clarification subsequently provided by the State Counsel in his written statement – in the light of the overall tone of the application initiating the dispute it is in actual fact evident that the phrase used in the conclusions ("asks the Court to rule that it is not for the Public Prosecutor at the *Tribunale di Palermo* to refrain from the immediate destruction of the chance telephone taps of the conversations of the President of the Republic") covers various scenarios, and that the applicant does not in fact exclude the possibility that destruction of the evidence may have to be subject to review by the judge. This result is not pointed to solely by the explicit reference, as a “supplementary parameter”, to Article 271 of the Code of Criminal Procedure – paragraph 3 of which provides that destruction shall be ordered by the judge – but also by the specific assertion on page 3 of the application that

the public prosecutor should immediately "request the judge" to destroy the President's tapped conversations, even though they were "indirect or occasional" (an assertion which moreover also features in the Decree of the President of the Republic of 16 July 2012 on the decision to initiate the jurisdictional dispute and ordering that the President be represented by the State Counsel, which is referred to in the application and in the written statement itself).

Moreover, as regards the request that the Palermo public prosecutor be recognised as being subject to an obligation to destroy the material acquired "immediately", in the light of the overall tone of the application, it is clear that the choice of adverb by no means evokes the direct and exclusive involvement of the public prosecutor in the procedure. This term rather means not only that the act should be urgent but also that the applicant considers that destruction should not be preceded by any “intermediate” formalities that the Palermo public prosecutor may intend to carry out, i.e. the "separation hearing" or the procedure held in chambers with the involvement of the parties pursuant to Article 269 of the Code of Criminal Procedure.

Ultimately – as is confirmed by the State Counsel in his own written statement – the applicant has sought to object to the fact that the respondent did not promptly arrange for the material to be destroyed, submitting a request to that effect to the judge.

Thus, the related and conclusive objection raised by the public prosecutor that the application is inadmissible on the grounds that the remedy sought contradicts the reasons submitted in support of it, as the former must be established precisely in the light of the latter automatically, is unsuccessful from the outset.

8.– On the merits, the appeal is well founded.

8.1.– In order to resolve this jurisdictional dispute it is not sufficient to carry out a mere textual exegesis of ordinary or constitutional legislation. On the contrary, it is necessary to refer to the overall body of principles of constitutional law, which establish the position and role of the President of the Republic within the Italian constitutional system.

Moreover, it need hardly be pointed out that ordinary legislation must be interpreted in the light of the Constitution by all judicial bodies (and thus not only by the Constitutional Court). The Constitution lays down principles and rules which not only apply with preference over other sources of law and thus condition ordinary legislation

– and may render the latter unlawful in the event of any breach – but also contribute to shaping that legislation by virtue of the duty incumbent upon the courts to interpret all legislation according to the meaning closest to constitutional law, and to raise a jurisdictional dispute before this Court only when it is impossible to identify a compatible interpretation, owing to insuperable textual barriers (see judgment no. 356 of 1996). Naturally, the Constitutional Court must be inspired by the same principle.

Moreover, the constitutionality of a court's interpretation cannot be limited to a mere textual and literal comparison between the legislative provision that is to be interpreted and the reference provision of constitutional law. The Constitution is made up above all of principles which are closely related to and balance out one another, which means that the assessment of constitutionality must be made with reference to the system as a whole, and not to individual rules considered in isolation. A fragmentary interpretation of the provisions of constitutional and ordinary legislation risks leading to paradoxical results in many cases, which would end up contradicting their very goal of furnishing protection.

8.2.– In give of the above methodological premises, when describing the overall powers of the President of the Republic within the Italian constitutional system, it will become clear that he has been placed by the Constitution outside the traditional branches of state, and naturally above all political parties. He is thus vested with powers that impinge upon each of the aforementioned branches of state, with the aim of safeguarding both their separation and their equilibrium. This singular characteristic of the President's position is reflected by the nature of his powers, which do not imply the power to take decisions in relation to specific issues, but give him the means to induce other constitutional powers to fulfil their functions correctly, thereby brining about the relative decisions on the merits. The special nature of the Head of State's position is based on the nature of his powers, which set him apart from other constitutional authorities, without however impinging upon the principle of parity between them.

In the light of the above, the President of the Republic "represents national unity" (Article 87(1) of the Constitution) not only in the sense of the territorial unity of the state, but also and above all in the sense of the cohesion and harmonious functioning of the powers, policies and guarantees comprising the constitutional framework of the Republic. The President is an authority for ensuring moderation and stimulus for other

branches of state, which may be assumed to have a tendency towards an excessive exercise of their powers or inertia.

Therefore, all of the powers of the President of the Republic have the goal of enabling him to direct appropriate efforts at the occupants of the offices that must take decisions on the merits; he must not act as a surrogate for them but encourage and support their operation or, in situations of stalemate or blockage, take measures aimed at relaunching the ordinary mode of operation of constitutional authorities. These include for example the power: to dissolve Parliament in order to enable the electorate to indicate the political solution to a crisis situation that does not enable a government to be formed or has a serious effect on the representative status of Parliament; to appoint the President of the Council of Ministers and, acting on a proposal by the former, also the ministers in order to enable the highest body of the executive branch to function; and also, acting in his capacity as the President of the Supreme Council of the Judiciary, to take initiatives seeking to guarantee the external conditions for the independent and coherent exercise of judicial functions.

8.3.– In order to perform effectively his role as a guarantor of constitutional equilibrium and of a "body of influence", the President must constantly maintain a network of relations with the purpose of harmonising any conflicts or severe disputes, and to indicate to the various holders of constitutional office the principles according to which they may and must search for solutions with as broad a consensus as is possible for the various problems arising from time to time.

Within this framework, it is indispensable that the President continue to supplement his formal powers expressly provided for under the Constitution, which manifest themselves in the adoption of specific individual acts, with a discrete use of what has been defined as the "power of persuasion"; this power is essentially comprised of informal activities either before or after the adoption of specific measures by other constitutional bodies both to assess on a preventive basis whether they are appropriate on an institutional level and also to sound out at a later stage their impact on the system of relations between branches of state. Informal activities are thus inextricably linked to formal activities.

The aforementioned informal activities, which result from meetings, messages and discussions, necessarily involve the assertion by the President and his interlocutors or

partial and provisional judgments. This networking and exercise of influence may and must be assessed and judged - whether positively or negatively - on the basis of its results, and not on a fragmentary and occasional basis through partial and improper extrapolations. The efficacy and very feasibility of the functions of networking and persuasion would inevitably be compromised by any indiscriminate and chance publication of the contents of individual communications. It is practically self-evident that informal activity involving stimulus, moderation and persuasion – which makes up the core of the President's role within the Italian form of government – would be destined for certain failure were it to be exercised in the public domain. The discretion, and hence confidentiality, of the communications of the President of the Republic are thus both essential to his role within the constitutional order. This does not run contrary to the general principle of equality of all persons before the law. Moreover, it is also an essential feature of the exercise of the function of a constitutional balancing – resulting directly from the Constitution and not from other sources of law – the maintenance of which is necessary in order to enable the fundamental rights, which are generally guaranteed by and premised in that equilibrium, to be protected.

9.– It follows from the above that the President of the Republic must be able to rely on the absolute confidentiality of his own communications, not with reference to a specific function but in order to enable the effective exercise of all functions. Also those functions that imply very incisive decisions manifesting themselves in solemn formal acts, such as the advance dissolution of Parliament (see Article 88 of the Constitution), presuppose that, during the run-up to his decision, the President pursue intense contacts with the political forces represented in Parliament and with other figures from civil society and public institutions with the goal of assessing all possible alternatives under constitutional law, both in order to enable Parliament to arrive at its natural expiry and in order to resolve, by way of an appeal to the electorate, situations of deadlock and ungovernability. The divulgement of the contents of those discussions, during which each of the interlocutors can provide non-definitive and partial statements and assessments regarding individuals and political forces, would be extremely harmful not only for the person and functions of the Head of State, but also and above all for the overall constitutional system, which would be required to bear the consequences of heightened divergences and clashes.

The same considerations may be made in relation to the contacts necessary for the effective implementation of the role of President of the Supreme Council of the Judiciary, which is not to be reduced to official speeches during the solemn sessions of that body or the signature of measures resolved upon by it, but implies a familiarity with specific situations and problems relating to the exercise of judicial powers on all levels, without obviously interfering with the merits of the procedural and substantive decisions made by the courts during the exercise of their functions.

It must also be recalled that the Head of State chairs the Supreme Defence Council and is the commander of the armed forces, and that he is required to conduct relations and to exchange communications also in this capacity, the reserved status of which does not need to be demonstrated.

The examples provided above indicate the scale on which the inherent requirements of the system are significant in the area of constitutional prerogatives, even though they are not always set forth by the Constitution in explicit rules, but are nonetheless entirely evident if a viewpoint that is sensitive to the striking of a balance between branches of state is adopted. This Court has repeatedly asserted that, as derogations from the principle of equal treatment before the courts, imposed at the outset as a requirement of the rule of law (see judgment no. 24 of 2004), the prerogatives of constitutional bodies are grounded in the text of the Constitution, which must be implemented narrowly by ordinary legislation (see judgment no. 262 of 2009) with no new derogations being added through ordinary law. Moreover, this requirement is also met when that foundation is unequivocally clear from the constitutional system, notwithstanding the lack of any formal and express enunciation (see judgment no. 148 of 1983).

Moreover, it is evident that all constitutional bodies require a particularly far-reaching guarantee of confidentiality as regards their respective communications relating to informal activities, on the grounds that such a guarantee – as a general principle applicable to all persons pursuant to Article 15 of the Constitution – takes on specific features and aims where other interests deserving protection under constitutional law come into play, such as for example the effective and free conduct of parliamentary and governmental activities.

Article 68(3) of the Constitution on the members of the two houses of Parliament may be viewed within this perspective. This provision stipulates that telephone taps or

other invasive means of gathering evidence may not be ordered against such persons unless authorised by the competent House. Specific limitations on the exercise of powers of inquiry through invasive acts, such as telephone taps, are laid down by rules of constitutional standing also for members of the government (see Article 10 of Constitutional Law no. 1 of 16 January 1989 laying down "Amendments to Articles 96, 134 and 135 of the Constitution and to Constitutional Law no. 1 of 11 March 1953 and the provisions on proceedings for the offences falling under Article 96 of the Constitution").

However, the position of the individuals referred to above differs from that of the President of the Republic in two distinct senses. First, the President is vested only with the functions of networking and ensuring an equilibrium, which do not imply the taking of political decisions as part of his everyday activities – for which he would have to answer to the electorate or to the body which elected him – but require him to liaise with all holders of the highest public office, exercising the powers of stimulus, persuasion and moderation referred to above, which necessarily require discretion and confidentiality. On the other hand, and not by chance, the Constitution does not provide for any instrument for removing the exclusion on the use of invasive forms of gathering evidence against the President, in contrast to the position for members of Parliament and of the government, against whom it is only possible to exercise those forms of control if the competent House grants the prescribed authorisation, acting in accordance with the various rules governing such matters.

Besides, the legislative framework lacks any reference to institutions from which the judiciary could request authorisation to take such action against the President of the Republic. The absence of such provision could not be resolved through interpretation, not even by this Court, since there is no evident solution mandated by constitutional law. A body competent to grant such authorisation could only be identified by a rule of constitutional standing, which cannot be replaced by any other source, not least by a ruling of the Constitutional Court.

The failure to provide for authorisations similar to those in place for members of Parliament and ministers, along with the fact that constitutional law does not impose state limitations for categories of offence, cannot result in the paradoxical consequence that the communications of the President of the Republic should enjoy less protection

than that of the other institutional figures referred to. On the contrary, it must lead to the more consistent conclusion that the Constitution's silence on this point is an expression of the mandatory status – as a matter of principle, and subject to the necessary constitutional exception mentioned below – of the rule that the President's communications must remain confidential.

This mandatory status results from the position and role of the Head of State within the Italian constitutional system and cannot be inferred from a specific and explicit rule, since there is no provision that identifies an institutional figure competent to authorise exceptions to that prerogative. Therefore, it is not a lacuna, but on the contrary the logical prerequisite under constitutional law of the inviolable status of the communications of the supreme guarantor of the equilibrium between the branches of state.

It can be inferred from the above that no analogy - either expansive or restrictive - can be drawn, as regards the rules governing the prerogative of the confidential status of the communications of the Head of State, with the provisions laid down by Law no. 140 of 20 June 2003 (Provisions implementing Article 68 of the Constitution as well as in the area of criminal proceedings against the high offices of state), which must be regarded as the implementation of a constitutional rule applicable only to Members of Parliament, especially after this Court's judgment no. 24 of 2004. However, it is precisely Article 68 of the Constitution, and not its implementation through ordinary legislation, that may be used to infer logically the meaning referred to above a fortiori from the fact that the Constitution is silent on the interception of the communications of the President of the Republic.

10.– In actual fact, to conclude that there is no general protection guaranteeing the confidential status of the communications of the President of the Republic from the fact that there is no express provision of constitutional law to this effect would be to interpret the Constitution incorrectly.

For example, nobody could doubt the existence of the immunities granted to the offices of constitutional bodies solely because the Constitution does not provide for such immunity, which remains a matter exclusively for the efficacy of the regulations of those bodies, in which it is by contrast enshrined explicitly. This Court has already clarified that the provisions contained in the Constitution that seek to safeguard the

absolute independence of Parliament "are supplemented by parliamentary regulations, which implement and apply the principles of the former", and from regulations "it is customary to infer the rule of the 'immunity of the office' (which also applies for the other supreme organs of state) whereby no other authority can enforce its measures against Parliament and its bodies. Thus, if parliamentary bodies fail to comply with such measures, the only possibility available is to refer a jurisdictional dispute to this Court […]" (see judgment no. 231 of 1975). Ultimately, according to long-standing case law, whilst the laws and regulations of constitutional bodies cannot create new prerogatives, they can however express prerogatives that are implicit within the particular structure and specific functions of those bodies.

The immunity of constitutional offices is related to the very existence of the democratic state governed by the rule of law, which would certainly be jeopardised by the unconstrained exercise of powers of coercion also in those locations where the highest representative and guarantor functions are performed. The violation of the offices of constitutional bodies could only occur within an authoritarian police state, which obviously is the diametrical opposite of the constitutional state delineated in the 1948 Constitution.

The primitive method involving a merely literal interpretation of the legislation is rendered even more primitive if such canons of interpretation are applied to constitutional law, which lays down rules based on fundamental principles that are indispensable for the proper functioning of the institutions of the democratic republic. As this Court has repeatedly asserted, since the rules enshrining the prerogatives of constitutional bodies are exceptions from the principle of equality, the relative provisions must be interpreted narrowly. They are thus not amenable to an expansive or analogical interpretation, whilst a systematic interpretation enabling them to be accounted for in a consistent manner with the constitutional order remains possible, and in fact necessary.

On the other hand, it would not be reasonable to assert that the immunity of constitutional offices represents an unacceptable privilege for constitutional bodies in contrast with Article 3 of the Constitution, since the same immunity is not in place for the residences of private individuals. The rules in question substantiate a functional guarantee present within the Constitution, and as such are perfectly compatible with it.

It should be considered once again that, once the inviolability of the offices of constitutional bodies from the exercise of the coercive powers of the judiciary or the police has been established, it would be truly unreasonable to admit the possibility of interference with the telephone lines used by the holders of those offices, which have been installed precisely in the offices covered by immunity. If it is then pointed out that if not only telephone taps but also bugging is permitted – in relation to specific offences – then this would require the absurd conclusion that it is permitted to locate transmitting devices in the offices of Parliament, the government and the Constitutional Court if authorised by a judge solely because there is no explicit constitutional prohibition against carrying out such investigative acts.

The paradox associated with a merely literal scrutiny of the prerogatives could result in even more extreme consequences. Norms of constitutional standing impose express limits on the liability of the members of Parliament or the government to be subject to custodial measures or to investigative measures that breach the inviolability of communications and of the home (see respectively Article 68 of the Constitution and Article 10 of Constitutional Law no. 1 of 1989). Absent any analogous provisions regulating such matters, it would have to be concluded - according to the method rejected here - that the President of the Republic could be indiscriminately subject to coercive measures – which could even involve his incarceration – simply on the initiative of the investigating police. And this would apply irrespective of the nature of the alleged offence under investigation. As is known, if the consequence is unacceptable then so too is the method. Indeed, there is no lack of rules within the legal order pointing to the intangibility of the personal freedom of the Head of State. Consider for example the fact that it is not possible to invoke the ordinary procedures against him (thus also including forcible removal) in order to give evidence (see Article 205(3) of the Code of Criminal Procedure, in relation to paragraph 1 of that provision): far from constituting an exception (which would in this sense be unreasonable) from the more general possibility of coercion, the provision rather constitutes a specific application of the more general regime for protecting the function of the President.

11.– Article 90 of the Constitution provides that the President of the Republic shall not be responsible for acts committed in the course of duty, except high treason or attempts to undermine the Constitution. It is generally accepted that the immunity under

the above constitutional provision is all-embracing, i.e. that it applies to acts of criminal, civil, administrative and political relevance. However, since the President may be prosecuted for high treason or attempts to undermine the Constitution, particular invasive means of collecting evidence, such as telephone taps, may be used in order to ascertain such serious offences, which are significant not only on a personal but also an institutional level. This is a logical limitation inherent within the Constitution, which subjects the President of the Republic to criminal law jurisdiction – albeit subject to particular arrangements and procedures – with a view to establishing his responsibility for the commission of any of the above offences committed during the course of this duties.

As it has been deemed necessary to enable particularly far-reaching investigative powers to be exercised, such as (insofar as is of interest here) telephone taps, ordinary legislation has implemented the terms of the Constitution narrowly, in Article 7(2) and (3) of Law no. 219 of 1989. This legislation vests the parliamentary committee provided for under Article 12 of Constitutional Law no. 1 of 11 March 1953 (Provisions supplementing the Constitution concerning the Constitutional Court) with the power to approve telephone taps against the President of the Republic, provided that he has been suspended by the Constitutional Court: this is an exception, laid down by ordinary legislation, on the general prohibition which may be inferred from the constitutional system on intercepting the communications of the Head of State. The exceptional rule remains within the limits strictly necessary for the procedural implementation of Article 90 of the Constitution – which is in turn an exception – and provides moreover that, even in situations involving investigations into serious offences against the institutions of the Republic provided for under constitutional law, investigators are to be prohibited from ordering telephone gaps against the President in office.

The same *a fortiori* argument - which enables the fact that the Constitution is silent on whether the confidentiality of the communications of the Head of State is guaranteed to be interpreted in a manner consistent with the system - must be used in order to conclude from the strict rule laid down by Article 7(2) and (3) of Law no. 219 of 1989 that the guarantee in place even for investigations relating to the most serious offences against the state institutions implies that a lower level of protection cannot be supposed for other offences. Moreover, this is explicitly recognised also by that part of the

literature that circumscribes the President's prerogatives in the most restrictive sense. The Palermo public prosecutor itself - which is the respondent in these proceedings - does not dispute that all forms of telephone tapping against the President of the Republic are prohibited, and has rather focused its defence – as will be seen below – on the fact that is allegedly impossible to apply that prohibition to "chance" interceptions.

12.– On the basis of the considerations set out above, it must also be asserted that, when establishing the scope of the protection of the confidentiality of the communications of the President of the Republic, the distinction between offences committed during the course of this duties and those that are not has no relevance. This is because the constitutionally protected interest is not to safeguard the office holder, but the effective conduct of the functions of balancing and networking typical of the President's role within the Italian constitutional system, which is based on the separation of and integration between the branches of state.

It must also be stressed that the entire discussion regarding the distinction between the offences that may be imputed to the Head of State, as also conducted in this judgment, is extraneous to this interest, since the criminal proceedings which gave rise to this dispute did not at any time suggest any criminal charge against the President.

13.– Any discussion within these proceedings concerning the criminal responsibility of the President of the Republic for offences not committed during the course of this duties would be equally out of place. Indeed, it is well known that this Court has held that "Article 90 of the Constitution enshrines the immunity of the President – except the extreme cases of high treason and attempts to undermine the Constitution – only for 'acts committed in the course of duty'". The same ruling clearly concluded on this issue that: "It is therefore necessary to abide by the distinction between acts and statements relating to the conduct of his duties, and acts and statements that are not made during the course of this duties and are hence a matter for the office holder as a private individual, where they give rise to responsibility" (see judgment no. 154 of 2004).

In order to dispel any further doubt regarding this issue, it must be reasserted that the President is subject to the same form of criminal responsibility as any other person in relation to offences not committed during the course of his duties. What is not acceptable on the other hand is to use invasive instruments for collecting evidence, such as telephone taps, which would inevitably end up covering indiscriminately not only the

private conversations of the President but also all communications, including those that are necessary for the conduct of his essential official duties regarding which - it is important to repeat - there is a continuous interplay between personal and official aspects, which cannot be foreseen and hence cannot be calculated *ex ante* by the investigating authorities. Within such contexts, the search for evidence relating to any offences not committed in the course of his duties must be conducted using other means (documentation, witnesses and the like) not liable to cause harm to the President's communications, which are protected under constitutional law.

Ultimately, in the matters to which this dispute relates it is necessary to proceed taking account of the necessary balance that must be struck between the requirements of justice and the supreme interests of the institutions, without sacrificing either of them. Moreover, it must be repeated also in this regard that the issue of the criminal responsibility of the President of the Republic does not arise in these proceedings.

This Court was required to provide the clarifications referred to above since this issue was addressed in the submissions of the parties – albeit in order to arrive at opposite conclusions – in considering that the problem concerning the admissibility of telephone taps against the President of the Republic could be associated with that of his subjection to criminal law jurisdiction which, as noted above, this Court has for some time upheld and which must be reasserted in this case.

14.– Contrary to the assertions of the respondent, the distinction between direct, indirect and chance interceptions (which are still a matter of dispute in specific cases) is not relevant, other than on the grounds indicated below.

It must be recalled as a preliminary matter that, according to the case law of the Constitutional Court that has accrued regarding investigations into members of Parliament or of the government, a distinction must be drawn between the targeted eavesdropping of the communications of a person with immunity, and chance or occasional controls, which have occurred accidentally as a result of telephone taps ordered against a person with no immunity. The first two categories also include “indirect” telephone taps, i.e. investigations which, whilst not relating to telephone numbers used by a person with immunity (in contrast to “direct” telephone taps), are in any case aimed at recording communications, due to that person's personal or professional relationship with the person under control (see in this regard judgments no.

114 and no. 113 of 2010, no. 390 of 2007, and orders no. 171 of 2011 and no. 263 of 2010).

In the present case, the fact that the conversations were recorded by chance is not disputed by the parties. In fact, the applicant himself makes the explicit assumption both in the application initiating these proceedings and in the subsequent written statement that the President's conversations were recorded by accident, and does not suggest, or even hypothesise, a surreptitious intent on the part of investigators to access the communications of the Head of State by monitoring numbers used by the suspect.

However, even if the classification accepted by both parties is accepted, this does not mean that the telephone taps in question must be deemed to be permitted and eligible for use in the proceedings, on the basis of the argument that anything that occurs by chance cannot be prohibited. In fact, if the basis for protecting the confidential status of the President's communications is not the supposed – but non-existent – immunity of the President for offences not committed during the course of his duties, but rather the need to protect the informal activities of balancing and networking between the branches of state, that is between persons who perform political or guarantee functions of significance under the Constitution, then it must be acknowledged that the level of protection will not be reduced due to the fact - which was not foreseen by investigators and obviously not known to the President himself - that the telephone tap did not relate to a number used by the Head of State, but by a third party subject to judicial inquiries. According to the opposite view, this would result in the singular situation where constitutional protection weakened as a result of chance occurrences, which are unforeseeable even for investigators themselves.

If anything, the above distinction could be relevant in assessing the responsibility of the person ordering the telephone taps, since the position of any person who wilfully and unlawfully interferes with the confidential matters of a constitutional body is different from that of a person who is by chance confronted with a conversation recorded during controls lawfully targeted against another person.

If the telephone tap occurred by chance - that is if it was not foreseeable or avoidable - the problem is not to assert its preventive prohibition, which as a rule is required but is not applicable in this case – amongst other things due to the technical arrangements for implementing the taps – precisely due to the chance and unforeseeable

nature of the recording (a consideration which moreover deprives the applicant's request for a ruling that the investigators were not entitled to refrain from recording the conversations of its logical premise). The protective function of the prohibition is transferred from the stage prior to the telephone taps, during which the direction imposed on the investigative act by the investigating authority is relevant, to the subsequent stage, since the authority that ordered and implemented the taps is subject to an obligation to refrain from aggravating the encroachment on the confidential status of the President's communications, and to adopt all measures necessary and conducive in order to prevent the content of the telephone taps from being divulged.

These conclusions are perfectly compatible with the logic underlying prohibitions relating to evidence in criminal trials, which are associated with the sanction of ineligibility for use of such evidence (see Article 191 of the Code of Criminal Procedure). This procedural sanction operates as a guarantee of the interest protected by the prohibition, irrespective of whether the investigating authority incurred responsibility for the violation of procedural rules relating to the taking of evidence. The chance nature of a non-permitted recording (consider the occasional contact between a person lawfully subject to a telephone tap and a person bound by a duty of professional secrecy) does not impinge upon the need to protect the confidential status of the respective conversation.

It is therefore clear that, especially in relation to the absolute levels of protection encountered in relation to the communications of the President of the Republic, the mere disclosure to the press of the existence of recordings amounts to a breach that must be avoided. Were procedural initiatives liable to result in the divulgement of the contents of those communications to be initiated, the constitutional protection discussed above would be totally and irredeemably compromised. The duty of the courts – which are subject to the law, and hence first and foremost to the Constitution – is to prevent this from happening and, when it does happen by chance, to refrain from allowing the harm inadvertently caused to the constitutionally protected area of confidentiality to have further consequences.

15.– On the basis of the above, the solution to this dispute must of necessity be based on the obligation for the judiciary to destroy as quickly as possible the recordings made by chance of the telephone conversations of the President of the Republic, of

which there were four in this case, which moreover occurred over telephone lines from the Quirinale Palace.

The procedural instrument for achieving this result, which is mandated under constitutional law, cannot be that laid down by Articles 268 and 269 of the Code of Criminal Procedure, since these provisions require a hearing to be scheduled in chambers, to be attended by all parties to the proceedings, the representatives of whom have, pursuant to Article 268(6) "the right to examine the case file and to listen to the recordings" previously placed on file for that purpose. As this Court reiterated at the time in judgment no. 463 of 1994, the procedure applicable to destruction governed by Article 269(2) and (3) is focused on the procedure in chambers and the related guarantees provided by the right to make representations.

There are two reasons for concluding that the use of such procedural arrangements would not be legitimate.

First, the "separation hearing" provided for under Article 268(6) of the Code of Criminal Procedure is inconclusive in relation to the case that gave rise to the dispute, as its structural aim is to select the discussions that the parties deem to be pertinent for the purposes of ascertaining the facts at issue in the trial. In the light of the prohibition on divulgement, no such assessment of the pertinence of the facts under investigation, namely conversations of the President of the Republic intercepted by chance, may be made in the present case, not to speak of their use as evidence. As regards the destruction procedure with the involvement of the parties, this by definition relates to conversations with no relevance but that may theoretically be used, as is clear from the exclusionary clause inserted in relation to telephone taps the prohibition of which is prohibited, at the start of Article 269(2) of the Code of Criminal Procedure.

On the other hand, from the specific perspective of constitutional protection - which predominates - it is evident that the adoption of the procedures indicated would entirely and irredeemably compromise the guarantee of confidentiality for the communications of the President of the Republic.

However, there is another procedural rule – namely Article 271(3) of the Code of Criminal Procedure, which is invoked by the applicant – which provides that the judge shall order the destruction of documentation relating to telephone taps the usage of which is prohibited under the previous paragraphs of the same Article, including first

and foremost on the grounds that they were made "outwith the situations permitted by law", unless they constitute the object used to commit the offence. For the reasons illustrated above, the interceptions of the conversations of the President of the Republic fall under that broad provision, even though they occurred by chance.

As regards the procedure to be followed, the provision cited above does not contain any references to other provisions of the Code of Criminal Procedure, and lacks in particular a reference to Article 127, which however is made in the contiguous provision in Article 269 of the Code of Criminal Procedure. Thus, the procedural provision in question does not require a hearing in chambers “with the involvement of the parties” to be scheduled, but also does not exclude it.

The solution is consistent with the heterogeneous nature of the situations regulated by Article 271 of the Code of Criminal Procedure, as it enables the various reasons underlying the individual grounds for ineligibility for use to be taken into account. This may result on the one hand from the failure to comply with procedural rules, irrespective of the capacity of the individuals involved and the content of the communications recorded, such as specifically the requirements laid down by Articles 267 and 268(1) and (3), which are referred to in particular by Article 271(1) of the Code of Criminal Procedure, on the prerequisites for and arrangements governing the implementation of such operations. However, ineligibility for use may also result from substantive reasons that manifest a requirement of “enhanced” protection for certain discussions with a view to safeguarding values and rights of constitutional standing alongside the general interest in the secrecy of communications (such as freedom of religion, the right to a defence, protection of the confidential status of sensitive data and the like). This scenario, specifically provided for under paragraph 2, concerns the interception of the communications or conversations of the individuals referred to under Article 200(1) of the Code of Criminal Procedure (ministers of religious confessions, lawyers, private investigators, doctors and so on), provided that they relate to events known by virtue of their ministry, office or profession. However, this is obviously also the case for the interception, albeit by chance, of the conversations of the Head of State caused, as mentioned above, by interceptions made "outwith the situations permitted by law", with respect to which the reference contained in Article 271(1) is preliminary and distinct (as is unequivocally clear from the use of the disjunctive particle "or"): this

provision lends itself to providing “closure” for the rules on ineligibility for use, covering different grounds for exemption in addition to those indicated above, which also primarily fall under the Constitution.

As regards the rules to be followed in relation to the destruction of inadmissible material, the two categories of telephone taps must be treated differently. Telephone taps that are inadmissible due to procedural flaws relate to communications that are not per se immune, and could have been lawfully recorded had the correct procedure been followed. They may therefore be destroyed in accordance with the ordinary procedure in chambers, at which the parties will be entitled to make representations. On the other hand, in cases involving telephone taps that cannot be used on substantive grounds, owing to the violation of an “absolute” protection of the discussion by virtue of the status of the participants or the pertinence of its subject matter, the previous solution would undermine the rationale for protection. Any access by the other parties to the proceedings, with the tangible risk of the contents of the conversation being divulged outwith the trial, would thwart the objective pursued, thereby sacrificing the principles and rights of constitutional standing which are intended to be safeguarded. It is sufficient to consider a situation in which a third party becomes aware of the contents of a confession given to a religious minister – or worse still where they are disclosed through the media – or the disclosure to counsel for the civil claimant of a private discussion between the accused and his lawyer (which could occur where the procedure under Article 271(3) of the Code of Criminal Procedure was launched after the prosecution was initiated).

In the situations referred to above – and also, even more so (given the status of the interests involved), in that involving the interception of the President's conversations – it must be concluded that the principles protected by the Constitution cannot be sacrificed in the name of a theoretical procedural symmetry, which is moreover not expressly required by Article 271(3) of the Code of Criminal Procedure. Moreover, it is not valid to invoke against this the Court's judgment no. 173 of 2009, which held that a hearing in chambers at which the parties were entitled to make representations was necessary before destroying documents, media or files containing data illegally obtained in relation to telephone or fax communications, or to information illegally obtained. Irrespective of any other consideration, the case which gave rise to the question resolved

in that ruling concerned documents which themselves constituted the object used to commit the offence. Such documents are explicitly exempt from destruction under Article 271(3) of the Code of Criminal Procedure, which was evidently inapplicable in that case.

16.– The telephone taps at issue in this jurisdictional dispute must in any case be destroyed under the supervision of the judge, and it is not acceptable - and has not been requested by the applicant - for the public prosecutor to destroy them unilaterally. This control is a guarantee of legality as regards first and foremost the actual fact that the conversations intercepted involve the Head of State, and thus more generally of their ineligibility for use in accordance with the constitutional and ordinary legislation cited above.

Without prejudice to the absolute ineligibility for use within the proceedings that gave rise to the dispute of the telephone taps involving the President of the Republic, and in any case the fact that a hearing in chambers "with the involvement of the parties" cannot be held, the judicial authority must also take account of any requirement to ensure that interests relating to supreme principles of constitutional law are not sacrificed: the protection of life and personal freedom and the safeguarding of the constitutional integrity of the institutions of the Republic (see Article 90 of the Constitution). In such extreme cases, the judicial authority will itself take the measures permitted by law.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that it was not for the Palermo public prosecutor at the *Tribunale di Palermo* to assess the pertinence of the telephone taps of conversations of the President of the Republic ordered in relation to criminal procedure no. 11609/08;

rules that it was not for the public prosecutor to refrain from requesting the judge to order the immediate destruction of the documentation relating to the telephone taps indicated, pursuant to Article 271(3) of the Code of Criminal Procedure; that the public prosecutor must not subject the request to a hearing at which the parties are entitled to

make representations and must act in a manner capable of upholding the secrecy of the content of the conversations intercepted.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 December 2012.