Corte costituzionale

JUDGMENT NO. 200 OF 2006

Annibale MARINI, President

Alfonso QUARANTA, Author of the Judgment

JUDGMENT NO. 200 YEAR 2006

In this case, the court considered a jurisdictional dispute between the President of the Republic (applicant) and the Minister of Justice (respondent) concerning the granting of a pardon to a convicted criminal. Whereas the President, having accepted the application for clemency, considered that the drafting of the relative decree of clemency was an "institutionally required act" on the part of the Minister. The Minister did not enter an appearance, and made his position clear in a ministerial note, essentially claiming substantive joint participation in the decision to grant a pardon, rather than a merely formal procedural role, hence implicitly limiting the President's decision making autonomy. Whilst the Court did indeed recognise that the Minister had to countersign decrees granting pardons, it ruled that the substantive decision was vested exclusively in the President as a *super partes* institution. "To accept that the Minister may either refuse to conclude the necessary preliminary inquiries or may in any case remain inactive would be tantamount to asserting that he enjoy an inadmissible power of constraint, or a kind of veto, in relation to the conclusion of the procedure leading to the emanation of the decree of pardon desired by the Head of State." Therefore, signature by the Minister is required in order simply to confirm "the completeness and regularity of the preliminary inquiries and the procedure followed".

THE CONSTITUTIONAL COURT

Composed of: President: Annibale MARINI; Judges: Franco BILE, Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Romano VACCARELLA, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO,

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state, commenced with reference to the note of 24 November 2004 in which the Minister of Justice declared that he would not act on the decision of the President of the Republic to pardon Ovidio Bompressi, pursuant to an appeal by the President of the Republic against the Minister of Justice, notified on 29 November 2005, deposited in the court

registry on 1 December, and registered as No. 25 in the Register of disputes between branches of state 2005, merits stage.

Having heard in the public hearing of 2 May 2006 the Judge Rapporteur Alfonso Quaranta;

having heard the *Avvocato dello Stato* Ignazio Francesco Caramazza for the President of the Republic.

The Facts of the Case

1.- By appeal of 10 June 2005 the President of the Republic, represented and advised by the *Avvocatura Generale dello Stato*, commenced a jurisdictional dispute against the Minister of Justice "concerning the refusal by the latter to act on the decision of the President of the Republic to pardon Ovidio Bompressi"; the said refusal was contained in the note of 24 November 2004 sent by the Minister to the Head of State.

1.1.- In view of the fact that the President notified the Justice Ministry in the note of 8 November 2004 (issued after having received and examined the documentation from the preliminary inquiry concerning the request for a pardon submitted by Bompressi) of his decision to allow the requested clemency measure – thus inviting the Minister to draft the relative decree of pardon for subsequent promulgation – the appellant contests the Minister's communication that he was "not able to adhere to this request" since it cannot be accepted "neither on constitutional grounds nor on the merits", since – in his opinion – "the Constitution in force assigns responsibility for formulating proposals for pardons to the Minister of Justice".

The President of the Republic argues on the contrary that the power to grant pardons – reserved "expressly and exclusively to the Head of State under Article 87 of the Constitution" – "would be negated by any failure to formulate the proposal by the Minister". Moreover, there is no constitutional or statutory requirement for the proposal to be made as a prerequisite for the granting of the benefit in question. The appellant considers therefore that where, as in the case before the court, he makes "a decision to pardon a person convicted of a crime, then both the drafting of the relevant decree as well as the subsequent signature constitute 'institutionally required acts' for the Justice Minister".

On this basis accordingly, the appellant commenced a jurisdictional dispute – pursuant to Articles 37 et seq of law No. 87 of 11 March 1953 – against the Justice Minister, "due to violation of Articles 87 and 89 of the Constitution".

1.2.- It is beyond doubt – according to the appellant – that the dispute is admissible between these two parties, since the classification of the President of the Republic as a branch of state "is entirely evident", as also is the capacity of the Minister of Justice "to be a party in a jurisdictional dispute between branches of state ...on account of the institutional role" which the Constitution reserves to the Minister of Justice (the appellant refers on this point to this court's judgments No. 380 of 2003, No. 216 of 1995 and No. 379 of 1992). In the light of the above, the appellant avers – in relation to the substance of the claim – that the powers which the Constitution confers on the Head of State "when exercising the power to grant pardons" have been infringed.

1.3.- On the merits in fact, the appellant avers – as specified above – the violation of Articles 87 and 89 of the Constitution, since the refusal by the Minister "to formulate the proposal to pardon Ovidio Bompressi, considering it to be a necessary prerequisite for the relevant decree of pardon", amounts *de facto* to a claim to the "right, by his own decision (or even through a failure to act), to prevent the exercise of the presidential power to grant pardons", and hence to the attribution "of a substantive power of co-decision which is however not provided for within the constitutional order".

Furthermore, additional arguments "not only systematic but also reasoned on strictly legal grounds", also confirm the that this power is vested exclusively in the President of the Republic in accordance with the wording of Article 87 of the Constitution.

1.3.1.- Of particular relevance for this argument – according to the appellant – is *in primis* the rationale of the institution of pardon, that is its "humanitarian and equitable" goal (recognised also by this court in judgment No. 134 of 1976 and order No. 388 of 1987) of "mitigating the application of the criminal law in all cases where it comes into conflict with higher sentiments of substantive justice".

Whilst it may be true that the pardon aims to satisfy the requirement of "an equitable correction" of the letter of the law (or to operate – as also emerges from the government report on the draft proposal of the Code of Criminal Procedure of 1988, commenting on Article 672 – as an "instrument of re-socialisation" for individuals convicted of criminal offences, "in the light of the results of the rehabilitation" to which they have been

subject), it therefore appears to be “natural” – according to the appellant – both that pardons be granted in complete isolation “from considerations of a political nature” and also that “the exercise of a power of such a heightened and delicate nature be reserved exclusively to the Head of State, as the body representing the unity of the Nation”, as well as the “*super partes* guarantor of the Constitution”, and therefore the “only body which may provide the guarantee of an impartial exercise of the power”.

In this context therefore, the Minister of Justice “is simply the 'competent' minister who works together with the Head of State throughout the various stages of the procedure, contributing to the realisation of the President's wishes within the ambit of the latter's specific powers”, which in essence amounts exclusively to “preliminary inquiries, assessments and executive acts”, without prejudice to the fact that, precisely on account of the “prevalently and essentially procedural role” of the Minister of Justice, in the absence of agreement “the representations made by the President of the Republic as the authority with the right to grant pardons must in any case prevail”.

1.3.2.- The recognition of the existence of “substantive powers” vested, in matters concerning pardons, in the Minister of Justice cannot on the other hand be based on the provisions of Article 89 of the Constitution, according to which “no act of the President of the Republic is valid unless it is countersigned by the ministers making the proposal, who assume the responsibility for such acts”.

This provision by no means introduces – on the one hand– the requirement *in subiecta materia* that the President's decision be preceded by a “ministerial proposal”, since – as has been clarified in case law – the reference contained in it to the expression 'ministers making the proposal' “rather than the more correct 'competent ministers'” is to be attributed to an “improper use of the term” (of which – according to the appellant – this court is also aware, since it “paraphrased the wording of Article 89 of the Constitution in relation to a pardon, referring to the 'competent minister' rather than the 'minister making the proposal'” in order No. 388 of 1987).

Accordingly, the Justice Minister's claim that he has the “exclusive right to make proposals” has no basis in constitutional law.

Secondly, the fact that the Minister must countersign the pardon cannot be used as a basis for an argument in favour of the "joint participation" of the Minister in the President's decision over whether to grant a pardon.

Whilst it may indeed be the case that, in relation to measures which are formally presidential but substantively governmental, the countersignature "plays the role of confirming the effective origin of the measure and the resulting acceptance of political responsibility" by the minister (since here the Head of State's role "is limited to a mere control of the legitimacy and origin" of the measure), the positions of the two constitutional organs by contrast appear to be "reversed with regard to formally and substantively presidential measures", which include the granting of pardons. In fact, in such cases "the countersignature by the Minister amounts to an institutionally required act as it has, so to speak, a notarial function", that is "a simple attestation of the origin of the measure from the Head of State, in addition to a control of its formal validity".

1.3.3.- Furthermore, the requirement that the granting of a pardon occur pursuant to a "collaboration" between the President of the Republic and the Minister of Justice cannot be justified on the basis of a constitutional convention to this effect.

On this point the appellant in the first place points out that such a convention has over time taken on "different forms and procedures" as a result of the well-known development of the provisions of the so-called "law governing incarceration"; thus the consistent identification of "new ways of re-socialising persons convicted of criminal offences" (in particular through "the use by the courts of alternative measures to incarceration") has, by re-endowing pardons with their strictly "humanitarian and equitable" role, had the result that the legal institution "has lost the prison policy-related goals which had previously characterised it" and which had justified the assertion of the existence of the convention of "collaboration" mentioned between the above branches of state.

Again in relation to the "conventional" relations existing in the issue before the court between the Head of State and the Minister of Justice, the appellant argues that the dis-continuation of the Minister's practice of "'filing' the relevant procedure without even informing the Head of State" in cases in which he considers the prerequisites for the granting of a pardon not to be fulfilled is not without significance. Indeed, following the transmission of the note of 15 October 2003 – in which the President of the Republic requested that he "be informed of the conclusion of all the preliminary inquiries pertaining to requests for pardons, in order that he may reach his decisions accordingly" (the note with which the Minister "immediately complied", as per his communication of

17 October 2003) – that practice previously adhered to which "ended up conferring on the Minister of Justice certain substantive decision making powers over such matters" must be regarded as having lapsed.

1.3.4.- The "exclusively presidential nature of the power to grant pardons" can finally be inferred – according to the appellant – from the case law of the Constitutional Court itself.

The appellant refers on the one hand to the principle confirmed by this court of the "necessary 'judicialisation' of the implementation of criminal sanctions", stressing that the declaration of unconstitutionality "of numerous provisions which provided for executive jurisdiction (and hence of the Minister of Justice) during the implementation stage of the penalty" (reference is made to judgments No. 274 of 1990; No. 192 of 1976; No. 114 of 1979; No. 204 and No. 110 of 1974) would risk being contradicted through a recognition that the Minister of Justice enjoys "full decision making powers in relation to the granting of pardons", since it "without doubt concerns the implementation of the penalty", albeit with reference to a legal institution "characterised by a highly specific rationale".

The appellant emphasises on the other hand that the view of the "exclusive presidential jurisdiction over the power to grant pardons" was "implicitly accepted" by this court in judgment No. 274 of 1990.

That judgment in fact declared Article 589(3) of the Code of Criminal Procedure of 1930 to be unconstitutional, a provision which conferred on the Minister of Justice (and not the Parole Board [*Tribunale di Sorveglianza*]) the power to suspend the sentence in cases provided for under Article 147(1) of the Criminal Code, that is where the person convicted of a criminal offence requested a pardon.

The appellant notes in particular that the judgment cited "openly disregarded the viewpoint contained in the Ministerial Report on the definitive draft of the Code of Criminal Procedure" of 1930, according to which the ministerial competence provided for stemmed from the requirement that the decision to grant a pardon be made "only by the body which under constitutional law practice exercises the power in question" to grant pardons. Having accepted the above arguments, and having further specified that there are in fact no "constitutionally relevant limits on the exercise of the power to grant

pardons by the President of the Republic", this court clearly precluded "the existence of any decision making power for the Minister of Justice".

1.4.- In the light of the above, the appellant points out that in the case before the court, the Minister of Justice "is certainly endowed with procedural powers", with the result that – in accordance with the principle of loyal collaboration – the opinion which he expressed to the President of the Republic makes it possible at most "to take a mutually acceptable measure", without prejudice to the fact that "in the event of a failure to reach such a shared view", it is beyond question that "the prevailing opinion and therefore the final decision can only be that of the holder of the constitutional power to grant pardons, i.e. the President of the Republic".

On this basis therefore, the appellant requested the court to rule "that the Minister of Justice has no right to refuse to act on the decision reached by the Head of State to pardon Ovidio Bompressi and in consequence to declare the act contained in the note of 24 November 2004 of the Minister of Justice" invalid.

2.- The present dispute was declared admissible by this court by order No. 354 of 2005, which ordered the appellant to notify the Minister of Justice of the appeal and of that order; notification occurred on 29 November 2005.

3.- The Minister of Justice has not entered an appearance.

Conclusions on points of law

1.- The dispute before the court arose from the refusal by the Minister of Justice to "act on the decision of the President of the Republic to pardon Ovidio Bompressi" contained in the note of 24 November 2004 sent by the Minister to the Head of State.

The appeal disputes – based on the claim that the power to grant pardons is reserved "expressly and exclusively to the Head of State by Article 87 of the Constitution" – the Justice Minister's refusal "to formulate a proposal for a pardon" and draft the relevant decree of pardon, in spite of the fact that the President of the Republic, in a note of 8 November 2004, had expressed his decision to pardon the interested party. This was argued to breach Articles 87 and 89 of the Constitution, insofar as the failure by the Minister to "formulate the proposal" amounted *de facto* to a claim to a power constitutionally reserved to the Head of State whereas, by contrast, both the drafting of

the decree as well as the subsequent countersignature by the Justice Minister should constitute "institutionally required acts".

In particular, it is argued in the appeal that the rationale behind a pardon is "humanitarian and equitable", its role being to "mitigate the application of the criminal law in all cases where it comes into conflict with higher sentiments of substantive justice". A "natural" consequence of this special aspect of the power to grant pardons, which are made in complete isolation from any assessment of a "political nature", is its "natural" attribution to the Head of State "as the as the body representing the unity of the Nation", as well as the "*super partes* guarantor of the Constitution".

2.- By order No. 354 of 2005 this court declared the dispute which gave rise to the present proceedings to be *prima facie* admissible and, without prejudice to any subsequent finding to the contrary in relation to its admissibility, ordered that notice be served on the Justice Minister.

3.- Given the above premises, whilst the capacity of the President of the Republic to initiate the dispute is not in doubt, it is on a procedural level necessary to confirm the capacity to be sued of the Justice Minister who – given his jurisdiction *ratione materiae* to carry out preliminary inquiries in relation to the pardon, to draft the relevant decree of pardon, to countersign it and to oversee its implementation – is the legitimate opposing party. It is in fact the Minister who issued the note of 24 November 2004, which laid claim to a substantive joint participation in the decision to grant or refuse the pardon, at the same time hence also implicitly limiting the scope of the Head of State's decision making autonomy. The capacity to be sued of the Minister of Justice is based directly on Article 110 of the Constitution since constitutional case law has consistently precluded the need for any "restrictive interpretation" of the powers contemplated under that provision (judgments No. 142 of 1973 and No. 168 of 1963). These powers must include all duties placed on the above minister pursuant to specific legislative provisions, provided that they are materially related to the functions "pertaining to the organisation and proper functioning of the administration of justice", hence including those concerning "the organisation of services ancillary to the implementation of sentences and custodial measures" (judgment No. 383 of 1993), and accordingly, insofar as of interest for our present purposes, also preliminary inquiries relating to

requests for pardons, along with the implementation of the relevant measures pursuant to the provisions of Article 681 of the Code of Criminal Procedure.

In the light of the above, it is necessary to reiterate the previous finding of this court, albeit with reference to a different set of facts, that the Minister of Justice must be considered to have capacity to act as a defendant in proceedings concerning jurisdictional disputes as the "direct holder of the powers set out in Article 110 of the Constitution", the exercise of which is regarded as grounds for a limitation of the competences of other state bodies (judgment No. 379 of 1992).

4.- Having thus resolved the issue of the capacity of the parties to participate in proceedings, it should be pointed out as a preliminary matter in relation to the precise identification of the *thema decidendum* that the question before this court does not concern which authority has the power to grant pardons, expressly attributed by the Constitution (Article 87, last sub-section) to the President of the Republic, but rather the specific manner of its exercise. It is argued in particular in the appeal that the Minister's role amounts to a duty to collaborate with the Head of State throughout the various stages of the procedure. In this way, as a mark of the loyal collaboration between branches of state, the Minister is called upon to contribute to the realisation of the President's wishes through activities which should be considered to be essentially "procedural" in nature.

5.- Having stated the above, the appeal must on the merits be considered to be well founded on the basis of the following considerations.

5.1.- The power to grant pardons, formerly the personal prerogative of absolute sovereigns, essentially maintained this characteristic even after the arrival of the constitutional monarchy, which gave particular authority and prestige to the figure of the monarch, since the power to set aside punishments is the most prominent hallmark of power.

It is accordingly, against this historical background – as far as Italy is concerned – that the King was recognised as having the power to "grant pardons and commute sentences", first in Article 5 of the Proclamation of 8 February 1848 (the act by which Charles Albert pre-announced the passing of the Statute), and subsequently in Article 8 of the Statute itself. This prerogative is clearly conceptualised as being closely related to the "inviolable" and "sacred" characteristics of the monarch in person. However, it is

significant that, whilst the exercise of the power in question was reserved to the "judicial" sphere in the first text cited (Article 5 in fact provided: "all justice emanates from the King and is administered in his name. He may grant pardons and commute sentences"), in the second text on the other hand this link was severed. Indeed, the provisions of Article 8 of the Statute ("the King may grant pardons and commute sentences") corresponded to the free-standing provisions of Article 68 (according to which "Justice emanates from the King, and is administered in his Name by such Judges as He shall appoint"), almost as if to underline the fact that the adoption of a pardon was already at that time regarded as the result of an equitable judgment entirely distinct from those made by the courts; this meant that the exercise of the power to grant pardons was not suitable for exercise by the judiciary, the task of which is to "do justice" by applying the law.

Therefore, from this perspective, it was not by chance that the first Code of Criminal Procedure of the Kingdom of Italy (of 1865) already provided – in Article 826 – that "entreaties for pardons for sentences handed down by the courts" be "addressed to the King and presented to the Minister of Grace and Justice", thus laying down a rule that, whilst not resolving the question of the nature of pardons (and the ability to grant them), nonetheless indicated the appropriate forum for their treatment, which was not to be before the courts.

5.2.- Following the change in the institutional framework with the passage from the Monarchy to the Republic, it is important to remember the key point of the debate held in the Constituent Assembly which led to the reconfirmation – in the text of the Constitution of 1948 – of the Head of State as the holder of a power closely connected, at least from a historical point of view, with the figure of the monarch. Article 87(11) of the Constitution, which contained a provision substantially identical to Article 8 of the Albertine Statute, in fact provided that the President of the Republic "may grant pardons and commute sentences".

Contemporary discussions on the implications of this choice laid particular emphasis on the known development – already under the practice of the Statute – of the institution in question. In particular, it was emphasised in the assembly session of 22 October 1947 that the power to grant pardons, originally one of the "residual competences of the rights enjoyed by monarchs (...), which were still personal in nature and not exercised in

concert with any other constitutional body", had gradually changed even within the strict confines of the monarchical regime. There was a gradual shift from the position that when "the King grants pardons, and does so in a personal capacity and not as a representative of the state", to the recognition that "the monarchical Head of State doe not, according to the Albertine Statute, have any personal power; all of his powers are exercised as the representative of the state and are all subject to the general principle of ministerial responsibility".

It was not by chance therefore that the same constitutional framework put in place in 1948 reiterated the requirement that all acts of the President of the Republic, as an essential prerequisite for their validity, be countersigned by the ministers "making the proposal" (as expression equivalent, according to prevailing subsequent interpretation, to that of "competent" ministers), with the Constituent Assembly rejecting the proposal – made during the course of the session on 22 October 1947 – to exempt presidential acts adopted "under the prerogative" from the requirement for countersignature.

6.- Following the above historical excursus into this institution, it is important to establish – in order to resolve the dispute before the court – which type of relationship exists between the Head of State, as the holder of the power to grant pardons, and the Minister of Justice who, on account of his responsibility for preliminary inquiries and hence by extension through his participation in the complex procedure to which the exercise of the power under examination is subject, is called upon to draft the decree which gives concrete form to the clemency measure, as well as to countersign it and subsequently to oversee its implementation.

On this point, as is known, a broad debate has developed leading to the emergence of various different lines of thinking which, depending on the arguments used (which differer significantly from one another) span from viewing the pardon as an act falling under the "presidential prerogative" to that of a "complex act", the perfection realisation of which should involve the two decisions of the President of the Republic and the Justice Minister on an equal footing, in addition to other distinct intermediate interpretative variants.

It is therefore important for the resolution of the question before the court to identify the inherent purpose of the power to grant pardons, in particular in the light of the practices

which have developed during the republican period in relations between the Head of State and the Minister of Justice.

6.1.- Accordingly, it should be pointed out that the exercise of the power to grant pardons furthers essentially humanitarian goals, which are to be assessed in relation to a range of factors (which cannot always be classified in theoretical terms) pertaining to the person convicted of a crime or in any case comprehensive considerations of an equitable nature which are capable of justifying the granting of an individual pardon, which in any case impinges upon the implementation of a valid sentence definitively imposed by an impartial body – the judiciary – with all the formal and substantive guarantees contained by the law of criminal procedure.

The purpose of the pardon is therefore ultimately that of giving form to the constitutional principles enshrined in Article 27(3) of the Constitution, guaranteeing above all the "sense of humanity" which must guide all penalties, also with a view to ensuring full respect for the principle contained in Article 2 of the Constitution, without compromising the "rehabilitative" aspect of penalties.

This particular functional aspect of the power to grant pardons moreover appears to be consistent with the findings of constitutional case law. When examining in particular the institution of the "conditional" pardon, this court has found that it performs a task that is "logically parallel with the personalisation of the sentence, enshrined as a principle in Article 133 of the Criminal Code", and which tends "to mitigate the rigours of the pure and simple application of the criminal law through an act which does not amount to mere clemency, but which, in harmony with the existing constitutional order, and in particular with Article 27, somehow favours the correction of the convicted individual and his reintroduction into the fabric of society" (judgment No. 134 of 1976).

It is also clear that – by conceptualising the exercise of the power to grant pardons as a derogation from the principle of the rule of law – its use must be constrained within strict limits and may take into account only exceptional requirements of a humanitarian nature. This makes it possible to resolve the doubt – to which the Minister of Justice essentially referred in his note of 24 November 2004, which gave rise to this dispute – that its exercise may be tantamount to a breach of the principle of equality enshrined in Article 3 of the Constitution.

6.2.- A close examination of the practice relating to the granting of pardons which developed following the arrival of the Republican Constitution throws into greater relief, on the basis of government statistical data, the existence of a further development of the institution, or more precisely of the ends furthered through its use.

Indeed, whilst up until the mid 80s of the last century particularly frequent recourse was made to this instrument, so much so as to legitimise the idea of its possible use for prison policy purposes, a reduction in its use occurred from 1986 onwards – at the same time, not by chance, as the entry into force of law No. 663 of 10 October 1986 (Amendments to the law governing incarceration and the implementation of measures which deprive or restrict personal freedom): a striking example of this can be found in the comparison between the 1,003 pardons granted in 1966 against the mere 104 granted in 1987, with the number falling even further over the following years, ending up as low as several dozen.

This change may be ascribed – as already noted – to the introduction of specific legislation governing prison conditions and the implementation of custodial sentences. This occurred in accordance with the view that the standard requirement for the sanctions applied to convicted criminals to be able to take into account the particular characteristics of individual cases – requirements previously satisfied almost entirely through the granting of pardons – should be satisfied through the use of the typical instruments provided for under criminal law, the law of criminal procedure and that governing incarceration (for example, release on parole, house arrest, community service orders, etc.), which was without doubt more appropriate given their exercise through the courts.

This meant that the institution of pardon was restored – correcting the practice, in some ways contrived, which had evolved during the course of the first decades in which Article 87(11) of the Constitution applied – to its role as an exceptional instrument intended to satisfy extraordinary needs of a humanitarian nature.

7.- The legislative development and evolution in practice mentioned above help to furnish a better definition of the respective roles of the President of the Republic and the Minister of Justice in the complex procedure culminating in the issue of the decree granting a pardon or commuting a sentence.

7.1.- In particular, once the pardon has reattained its purpose of mitigating or annulling a punishment on exceptional humanitarian grounds, it is clear – in accordance with Article 87(11) of the Constitution – that the Head of State must be recognised as having the right to exercise this power, as a *super partes* institution, "representing the unity of the Nation", who stands outside that which may be defined as the political-governmental "loop", and who is called upon to assess in an impartial manner the concrete existence of the humanitarian prerequisites which justify the granting of a pardon.

Finally, it must be pointed out that such a conclusion satisfies the additional requirement of avoiding the assessments of organs which form part of the executive from playing a role in the evaluation of the requirements for the adoption of a measure which has the effect of "quashing" a criminal court sentence.

An examination of the case law of the Court (judgments No. 274 of 1990, No. 114 of 1979, No. 192 of 1976, No. 204 & No. 110 of 1974) shows a now consolidated view that, through the implicit reference to the principle of the separation of powers, precludes any involvement by members of the government during the implementation stage of criminal sentences, by virtue of its 'judicialisation' and in accordance with the principle that only the courts may involve themselves in matters concerning the implementation of criminal sentences.

The aforementioned judgment No. 274 of 1990 is significant on this point, in which this court declared unconstitutional Article 589(3) of the Code of Criminal Procedure of 1930, which stipulated that "in cases provided for under Article 147(1) of the Criminal Code" (presentation of the request for a pardon) "the power to suspend the sentence" was vested "in the Minister of Justice and not the Parole Board [*Tribunale di Sorveglianza*]". This court ruled that the contested provision was unconstitutional on the basis of the finding that the eventuality contemplated under Article 147(1) of the Criminal Code was, together with other analogous provisions, "an expression of the same principle concerning the inability of the executive to intervene in decisions reserved to the courts after the issue of a definitive sentence", hence highlighting the need "for the residual ministerial powers over the suspension of custodial sentences" to be "remitted to the jurisdiction of the parole authorities".

7.2.- Having said this, it is still necessary – in order to resolve the present dispute – to clarify which tasks are reserved to the Minister of Justice within the ambit of the procedure leading up to the granting of a pardon.

As a preliminary matter, it must be pointed out that a pardon is the result of a full-scale procedure – and is thus classified in the same terms as the now repealed Article 595 of the Code of Criminal Procedure of 1930 – consisting of a range of official acts and stages. The constituent assembly was well aware of this procedure when drafting Article 87(11) of the Constitution which lists the power to grant pardons and commute sentences amongst those vested in the Head of State.

7.2.1.- The analysis of this complex procedure must be based on the wording of Article 681 of the Code of Criminal Procedure which provides, in the first place, that – unless the "proposal" is made by the chairman of the Disciplinary Board (sub-section 3) – the "request" may be made by the convicted individual or alternatively by a close relative, cohabitant, guardian, *curator bonis*, or by a lawyer who must sign the "request" for a pardon "addressed to the President of the Republic" and "submitted" to the Minister of Justice (sub-section 1).

Moreover, the same provision – introducing a significant amendment on the previous legislation contained in the Codes of Criminal Procedure of 1865 (Articles 826-829), of 1913 (Article 592), and finally of 1930 (Article 595) – also expressly recognised the possibility of a pardon being "granted even in the absence of a request or proposal" (Article 681(4) of the Code of Criminal Procedure). In any case, an initiative may be taken directly by the President of the Republic who has for some time been recognised as holding such powers.

Article 681 also clarified what had been taken for granted under the terms of the legislation previously in force, that is under the constitutional practice of the Statute: indeed, already at that time it was considered that the presentation of the request was not an indispensable prerequisite for the exercise of the royal prerogative provided for under Article 8 of the Statute, as otherwise ordinary legislation would have introduced a limitation incompatible with the nature of the legal institution.

7.2.2.- Accordingly, following the commencement of the procedure, the first stage involves the "preliminary inquiries", which under the terms of Article 681(2) of the Code of Criminal Procedure may follow for two different procedures, depending on

whether the individual convicted of a criminal offence is in custody or detained on psychiatric grounds.

In the former case, the Parole Board [*Magistrato di Sorveglianza*] collates all the relevant facts of the case and the observations of the Prosecutor General at the Court of Appeal with jurisdiction and transmits them to the Minister of Justice, together with a reasoned opinion.

In the latter eventuality on the other hand, the Prosecutor General himself transmits the relevant information along with his own observations to the Minister of Justice.

Everyday practice in relations between the Minister and the courts has resulted in a more precise clarification as to which "information" and which "facts of the case" are to be considered when deciding whether to grant a pardon in individual cases.

These elements also include – in addition clearly to those contained in the trial court's sentence, the individual's criminal record and any offences he has been charged with – declarations by the injured parties or close relatives of the victim concerning restitution for the harm caused and the granting of clemency along with, as part of an assessment of the individual's character, information pertaining to his family and financial circumstances, as well as the behaviour of the interested party. Finally, for individuals in custody, an extract from their personal file and the so-called behaviour report are also required.

7.2.3.- The assessment of the above information, and in particular the opinions expressed by the courts, is carried out by the Minister. On conclusion of the preliminary inquiries, the Minister decides whether to present a reasoned "proposal" for a pardon to the President of the Republic or whether to close the file. For some time now the Head of State has been regularly informed of the cases in which the file has been closed.

7.2.4.- Where the Minister of Justice presents a reasoned "proposal" for a pardon and provides a draft outline of the measure, this clearly demonstrates that he considers both the substantive and procedural requirements for the granting of a pardon to be fulfilled.

It will then be a matter for the President of the Republic to assess in full autonomy, on the basis of the facts transmitted by the Minister of Justice considered as a whole, the existence of the essentially humanitarian grounds which justify the exercise of the power in question. In the event of a positive assessment by the Head of State, the

Minister will then countersign the decree of pardon and oversee its executive implementation.

As far as the countersignature in particular is concerned, whilst it may be necessary in order to complete the procedure, it should be pointed out that it – generally speaking – takes on a different value depending on the type of procedure which it completes or, more precisely, for the validity of which it is a prerequisite. It is of course clear that the countersignature plays a substantive role when the act presented for signature by the Head of State is governmental in nature and therefore an expression of the powers vested in the Executive, whilst it must be recognised as having a merely formal value where the act is an expression of the powers vested in the President of the Republic, such as – for example – the right to send messages to the Houses of Parliament, and to appoint life senators or judges to the Constitutional Court. Such acts must be treated in the same way as the right to grant pardons, which Article 87 of the Constitution recognises only to the Head of State.

7.2.5.- Where on the other hand the Minister reaches a negative decision on the basis of the results of the preliminary inquiry and considers that the procedural and/or substantive requirements necessary for the granting of a pardon have not been fulfilled, the outcome of the procedure may vary, depending on the particular facts of the case.

Above all, as already mentioned, he may order the closure of the file. But where, following notification and/or after having become aware of the decision to close the file, the Head of State requests the completion of the preliminary inquiry, as the case may be on reception of a specific oral or written statement (the so-called “objective report”), the Minister has no powers to prevent the continuation of the procedure.

Where on the other hand the initiative is taken by the President himself, the Head of State may request the Minister to open the procedure for the granting of a pardon; also in this case the Minister of Justice is under a duty both to commence and conclude the requested preliminary inquiries, drafting the relevant proposal.

In the above cases, any refusal by the Minister would in essence preclude the exercise of the power to grant a pardon, with the resulting limitation of a power which the Constitution attributes – in relation to the final decision – to the Head of State.

Accordingly, where the President of the Republic has requested the conclusion of the preliminary inquiries or has directly taken the initiative to grant a pardon, the Minister

of Justice, who may not refuse to commence and conclude the preliminary inquiries, thereby brining about a procedural standstill, may only inform the Head of State of the procedural or substantive grounds which in his opinion stand in the way of the granting of the measure.

To accept that the Minister may either refuse to conclude the necessary preliminary inquiries or may in any case remain inactive would be tantamount to asserting that he enjoy an inadmissible power of constraint, or a kind of veto, in relation to the conclusion of the procedure leading to the emanation of the decree of pardon desired by the Head of State.

As far as the President of the Republic is concerned, in the eventuality described above in which the Justice Minister has sent a reasoned opinion against the granting of a pardon and where the former does not share it, he may directly issue the decree of pardon, setting out in the decree the reasons why he considers that a pardon should in any case be granted despite the opposition expressed by the Minister.

This means that, in view of the President's decision to grant a pardon, the countersignature of the decree of pardon by the Minister of Justice amounts to an act in which the Minister limits himself to confirming the completeness and regularity of the preliminary inquiries and the procedure followed.

It also follows from this that the political and legal liability of the countersigning minister is, pursuant to Article 89 of the Constitution, naturally limited to his level of participation in the procedure resulting in the granting of a pardon.

8.- On the basis of the above, applying these principles to the case before the court, it must accept the appeal lodged by the President of the Republic.

In particular, the Minister of Justice neglected to initiate the procedure for the granting of a pardon to Ovidio Bompressi, notwithstanding the fact that, by note of 8 November 2004, the appellant had communicated his own decision to grant a pardon.

The court therefore finds that the Minister of Justice was not entitled to prevent the continuation of the procedure instigated pursuant to the President's decision to grant a pardon, and therefore that the contested ministerial note of 24 November 2004 must be declared invalid.

on those grounds

declares, allowing the appeal, that the Minister of Justice was not entitled to prevent the continuation of the procedure instigated pursuant to the President of the Republic's decision to grant a pardon to Ovidio Bompressi and, therefore, declares invalid the contested ministerial note of 24 November 2004.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 May 2006.

Signed:

Annibale MARINI, President

Alfonso QUARANTA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the court registry on 18 May 2006.

The Director of the Registry

Signed: DI PAOLA