Corte costituzionale

ORDER NO. 121 OF 2009

Franceso AMIRANTE, President

Giuseppe FRIGO, Author of the Judgment

JUDGMENT NO. 121 YEAR 2009

In this case the Court considered a challenge to provisions which required that a prosecution be discontinued where the Court of Cassation had ruled to annul precautionary measures ordered on the grounds that there were no serious indications of guilt. The Court ruled the provision unconstitutional, holding that "the 'mandatory' request for discontinuation provided for under the contested provision ends up transforming itself into a kind of special penalty for inappropriate precautionary initiatives by the prosecution: this penalty is however unacceptable under constitutional law because it discriminates between the positions of the persons under investigation in relation to the conduct charged to them by the prosecution".

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 405(1-*bis*) of the Code of Criminal Procedure, introduced by Article 3 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals), commenced by the judge for the preliminary hearing of the *Tribunale di Forlì* in the criminal proceedings against L.R. and others, by the referral order of 22 November 2007, registered as No. 72 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 13, first special series 2008.

Having heard the Judge Rapporteur Giuseppe Frigo in chambers on 28 January 2009.

The facts of the case

By the referral order mentioned in the headnote, the judge for the preliminary hearing of the *Tribunale di Forlì* raised, with reference to Articles 3, 111(2) and 112 of the Constitution, the question of the constitutionality of Article 405(1-*bis*) of the Code of Criminal Procedure, introduced by Article 3 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals), according to which "on conclusion of the inquiries, the public prosecutor shall formulate a request for discontinuation of proceedings when the Court of Cassation has ruled that there are no serious indications of guilt pursuant to Article 273 and additional evidence against the person under investigation has not subsequently been obtained".

The referring court states that – within the context of a broader criminal prosecution, from which the proceedings before the lower court were derived following their separation from the main prosecution – the Court of Cassation, issuing four judgments between 21 June and 26 July 2005, had rejected the appeals by the public prosecutor against the orders of the *Tribunale di Bologna* which reversed during review proceedings, due to the lack of serious indications of guilt, the precautionary measures applied to certain persons under investigation. The appeals by the public prosecutor were dismissed, in each of the four cases, either because they were based on assessments pertaining to the merits, which are inadmissible before the Court of Cassation, or due to the fact that the challenges made against the reasons given for the contested measure were groundless, or again for both of the above reasons.

Since in all cases the Court of Cassation – confirming the decision of the review court – had "made a ruling regarding the absence of serious indications of guilt pursuant to Article 273" of the Code of Criminal Procedure, the public prosecutor, applying Article 405(1-*bis*) of the Code, introduced by Article 3 of law No. 46 of 2006, had formulated a request for discontinuation of proceedings: however, he asserted that in the absence of that provision he would have requested the committal for trial of the persons under investigation, also

claiming that the provision violated the principle of reasonableness laid down by Article 3 of the Constitution.

In the opinion of the referring court, Article 405(1-*bis*) of the Code of Criminal Procedure violates not only the constitutional principle invoked by the public prosecutor, but also Articles 111(2) and 112 of the Constitution.

The contested provision is claimed to cause, in the case before the Court, "an undue expansion […] of the evaluation of the serious indications of guilt which may be carried out before the Court of Cassation concerning precautionary measures". It is in fact settled case law that, when adopting individual precautionary measures, the evaluation of the evidence establishing the indications of guilt is a task reserved for the merits court and may be challenged, by appeal to the Court of Cassation, only with regard to the existence, adequacy and logical nature of the reasons given.

The provision under consideration is therefore claimed to disregard the fact that, with regard to the serious indications of guilt required under Article 273 of the Code of Criminal Procedure, the review by the Court of Cassation is always bound by the results of the investigation established by the merits court and the grounds for which are explained in the contested measure: this means that this form of review does not necessarily entail the consideration of all the evidence obtained during the course of the inquiries, since the merits court could have disregarded some of it in its reasoning. The public prosecutor cannot however be deprived of the opportunity to rely, at a later stage in the proceedings, on those results which were not considered, above all by requesting committal for trial or a summons to appear in court.

Furthermore, on different grounds, the rule laid down by Article 405(1-*bis*) of the Code of Criminal Procedure is stated not to take into account the difference between the reasons which justify the request for committal for trial or a summons to appear in court and the serious indications which justify the application of a precautionary measure. These serious indications – which must be capable of justifying, according to the case law of the Court of Cassation, a judgment that it is reasonably likely that the person under investigation is responsible for the offences of which he is suspected – are in fact stated to be a more

"delicate issue" than the former: this is true in consideration both of the different stage of the proceedings in which the precautionary measures are ordinarily applied (that is, "the initial stage of the preliminary investigations"), as well as the inherent seriousness of the measures themselves, which are applied without allowing the party concerned to make representations, as is typical in normal court proceedings.

For these reasons, the contested provision is therefore claimed to violate both the principles of reasonableness and equality laid down by Article 3 of the Constitution, as well as the principle of the mandatory nature of the criminal prosecution expressed by Article 112 of the constitution, insofar as it places undue limits on the autonomy of the public prosecutor when exercising such actions.

The fact that – in the opinion of the referring court – the contested provision does not in any case prevent the judge for the preliminary hearing from rejecting the request for discontinuation, and from accordingly ordering the "compulsory charging", is not sufficient to dispel the doubts of constitutionality. The "mandatory" request for discontinuation by the public prosecutor in fact involves "procedural steps" which may lack justification, in contrast with the requirements of procedural autonomy and with the principle of the reasonable length of trials, expressed by Article 111(2) of the Constitution: these steps include in the case before the Court the scheduling of the hearing provided for under Article 409(2) of the Code of Criminal Procedure, the compulsory charging or the specification of additional inquiries to be carried out. These steps are moreover directed exclusively at gathering "further evidence against the person under investigation" – in accordance with the requirements of the contested provision – with the resulting infringement also of the principle of the impartiality of the court, enshrined in Article 111(2) of the Constitution.

Conclusions on points of law

1. – The judge for the preliminary hearing of the *Tribunale di Forlì* questions the constitutionality, with reference to Articles 3, 111(2) and 112 of the Constitution, of Article 405(1-*bis*) of the Code of Criminal Procedure, introduced by Article 3 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals), which provides that "on conclusion of the inquiries, the public prosecutor shall formulate a request for discontinuation of proceedings when the Court of Cassation has ruled that there are no serious indications of guilt pursuant to Article 273 and additional evidence against the person under investigation has not subsequently been obtained".

In the opinion of the referring court, the contested provision disregards the fact that the review by the Court of Cassation of the serious indications, required pursuant to Article 273 of the Code of Criminal Procedure, is carried out through a consideration of the reasons given for the contested measure: therefore, the review of the Court of Cassation does not necessarily extend to all evidence obtained during the course of the inquiries, since the merits court may have disregarded some of them when setting out its arguments.

On different grounds Parliament is also claimed not to have taken into account the difference between the elements which justify the committal for trial or the summons to appear in court and those which justify the application of a precautionary measure. The latter – which must be capable of grounding the conclusion that it is reasonably likely that the person under investigation will be convicted – are in fact a more "delicate issue" than the former: this is due both to the different stage of the proceedings in which the precautionary measures are normally applied (that is, "the initial stage of the preliminary inquiries"), as well as the seriousness of the measures, which are applied without allowing the party concerned to make representations, as is typical in normal court proceedings.

For these reasons, the contested provision violates both the principles of reasonableness and equality laid down by Article 3 of the Constitution, as well as the principle of the mandatory nature of the criminal prosecution expressed by Article 112 of the Constitution, since it unduly limits the autonomy of the public prosecutor in his choices regarding the exercise of the said action.

The fact that – according to the interpretation accepted by the referring court – the contested provision does not in any case prevent the judge for the preliminary hearing from rejecting the request for discontinuation, and accordingly from drawing up the charge, is not sufficient to render the provision compatible with the Constitution. The obligation on the public prosecutor to request discontinuation is in fact stated to entail a duty on the judge to carry out acts which may prove to be unjustified, in contrast with the principle of the reasonable length of trials contained in Article 111(2) of the Constitution: such as the scheduling of the hearing provided for pursuant to Article 409(2) of the Code of Criminal Procedure, the compulsory charging or the indication of further supplementary inquiries which, on the other hand, are stated to be directed exclusively at gathering other "evidence against the person under investigation" – as stipulated by the contested provision – with the resulting violation also of the principle of the impartiality of the court expressed by Article 111(2) of the Constitution.

2. – The question is well founded with reference to Articles 3 and 112 of the Constitution.

3. – By introducing an entirely innovative legal limitation on the powers of the public prosecutor with regard to the exercise of prosecutions, the contested provision stipulates that the public prosecutor, "on conclusion of the inquiries", must formulate a request for discontinuation where two prerequisites are satisfied: the first, a positive requirement, consists in the fact that "the Court of Cassation has ruled that there are no serious indications of guilt" pursuant to Article 273 of the Code of Criminal Procedure; whilst the second, a negative requirement, consists in the fact that "additional evidence against the person under investigation has not subsequently been obtained".

It is clear from the parliamentary *travaux preparatoires* – and specifically from the report on the draft bill No. 5301, the contents of which were transposed into the amendment which introduced the provision into law No. 46 of 2006 – that the purpose of the provision was, contrasting a practice presumed to be widespread, to prevent the public prosecutor from "obstinately" commencing a criminal prosecution in relation to charges that have already been identified as inconsistent by the Court of Cassation when reviewing

precautionary measures, even where there had been no developments in the investigation. This essentially amounts to a preventive remedy directed, on the one hand, at lightening the workload of judges for the preliminary hearing and trial court judges, whilst on the other hand preventing suspects from being needlessly placed on trial in situations in which an aquittal would already be practically certain, given the ruling by the Court of Cassation that it is "reasonably likely" that there are no serious indications of guilt.

4. – In pursuing this objective, the contested provision establishes a rule which overturns the natural inter-relationship between interlocutory proceedings *de libertate* and the main prosecution.

Until the introduction of the new provision there had never actually been any doubt that the scope of a ruling issued at the precautionary stage, even though it amounted to the definitive outcome of an appeal, were strictly limited to the interlocutory proceedings *de libertate*, and could not be binding either on the public prosecutor, with regard to his decisions relating to the exercise of the prosecution, or on the judge for the preliminary hearing for the purposes of the committal for trial, or again on the trial court judge with regard to the decision on the merits of the case (see, in this regard, Court of Cassation, Joint Divisions, judgment No. 20 of 12 October 1993).

Interferences between precautionary proceedings and the main proceedings were considered to be admissible only in the opposite direction, on the basis of the so-called principle of extended effects [*principio di assorbimento*]: that is, the taking of certain decisions in the main proceedings was capable of having a preclusive impact – either positively or negatively – on the verification of whether it appears *prima facie* that an offence has been committed, required for the purposes of the application of individual precautionary measures (see on this point this Court's judgment No. 71 of 1996).

The principle of the "impermeability" of the main proceedings against the results of the precautionary proceedings has in effect a precise logical and systematic basis. It does not in fact result exclusively from the finding that the evaluation made in summary cognisance proceedings of an ancillary nature, such as those concerning precautionary measures, cannot logically condition the celebration of the full cognisance proceedings for which the

former plays an accessory role. This principle also represents above all the natural corollary of the adversarial structure of the current code of procedure, which reserves the decision on the responsibility of the accused for the trial stage. This structure today has an explicit constitutional anchor in the right to a "fair trial" expressed by Article 111 of the Constitution, and specifically the principle according to which evidence is discovered within proceedings where the parties have the right to make representations, except in the exceptional cases specified under Article 111(5).

The specification that precautionary proceedings may not condition the main proceedings in effect articulates, and safeguards, the distinction between the preliminary investigation stage – in which the principle that the accused has the right to make representations does not apply during the discovery stage, as it does not apply in general for the application of precautionary measures – and the trial stage. A significant confirmation of this requirement lies in the fact that the judge at the precautionary stage must be different from the judge called upon the pass judgment on the merits of the charge, in accordance with the arrangements governing incompatibility (Article 34 of the Code of Criminal Procedure, as in force following the interventions by this Court).

5. – With the contested provision on the other hand, Parliament confers on specific decisions issued during precautionary proceedings exclusionary effects for the main proceedings. More specifically, the provision confers a conditioning status on certain findings of "reasonable likelihood" made in so-called precautionary rulings (rulings of the Court of Cassation that there are no serious indications of guilt) which – far from being limited (according to the current position within case law of the aforementioned institute) to the mere bar on the re-proposal, *rebus sic stantibus*, of applications to the judge at the precautionary stage based on the reasons already placed before the court – ends up affecting the very possibility of initiating the prosecution, placing a bar on the decision to prosecute.

The location of the provision within those contained in Article 405 of the Code of Criminal Procedure governing the "commencement of the prosecution" is significant as regards the intention to establish a genuine preclusion.

On this issue it should be pointed out that, although the constitutionality of provisions which, in particularly difficult situations or with regard to particular aspects, have the affects described above cannot be excluded automatically and in absolute terms, it is however clear that the inversion of the ordinary relationship between precautionary proceedings and the main proceedings may only be applied within a rule which complies with consolidated principles of rationality with regard to its prerequisites and effects, and having specific regard to the foundation of that relationship, as pointed out above.

The requirement for rationality is moreover an even more pressing issue where the legislation translates, as in the situation under examination, into a provision which bars the exercise of the prosecution. As has been asserted on various occasions by this Court, the principle of the mandatory nature of the criminal prosecution, expressed by Article 112 of the Constitution, does not mean that the legal system may not subject the exercise of the prosecution to specific conditions (amongst others, judgments No. 114 of 1982 and No. 104 of 1974; order No. 178 of 2003).

However, in order for Article 112 not to be violated, such principles must be inherently rational and must not be liable to cause differences in treatment between similar situations; indeed, in view of the very foundation of the constitutional assertion of the mandatory nature of the criminal prosecution, this is a factor which contributes to guaranteeing – alongside the independence of the public prosecutor when exercising his functions – also and above all the equality of citizens before the criminal law (judgments No. 88 of 1991 and No. 84 of 1979).

6. – The rule laid down by Article 405(1-*bis*) of the Code of Criminal Procedure proves on the contrary to be inherently unreasonable for three reasons.

6.1. – The first and most fundamental of these lies in the difference between the procedural rules which govern precautionary cognisance and those which legitimise the exercise of the prosecution.

Within the ambit of precautionary proceedings, the evaluation of the "serious indications of guilt" in fact implies – according to the settled case law of the Court of Cassation and as also asserted on various occasions by this Court (judgments No. 131 of

1996 and No. 432 of 1995; order No. 314 of 1996) – a prognosis that there is a high likelihood of guilt, a judgment which is moreover "static" in nature since it is based only on the evidence already obtained by the public prosecutor and is essentially taken with reference to the purposes of the measure, that is the satisfaction of the precautionary requirements as things stand at that stage and during the trial.

On the other hand, in the light of Article 125 of the Code of Criminal Procedure as currently in force – according to which the public prosecutor must request the discontinuation on the grounds that the complaint that an offence has been committed is groundless when the evidence obtained "is not capable of supporting the prosecution" – the decision over whether to exercise the prosecution is based on an assessment of the utility of progressing to the trial stage: this assessment has a "dynamic" nature which takes account also of the evidence which may reasonably be discovered during the oral stage, as the stage institutionally preordained for the discovery of evidence in which the parties may make representations and, therefore, for a possible development in the evidence gathered during the investigation, which will used in order to make a decision on the merits of the case. In other words, the evaluation of these elements occurs "not in view of the result of the action, but with reference to whether or not the establishment of the facts by a court of law [and its principal objectives] is superfluous", representing "the application to the prosecution of the principle that the trial should not be of a superfluous nature" (judgment No. 88 of 1991; for a similar finding, see judgments No. 478 and No. 319 of 1993, order No. 252 of 1991).

Due to the diversity of the values in play – restrictions on personal freedom for precautionary purposes on the one hand, and the opening of the trial stage for the purposes of a judgment on the merits on the other – the requirement specified in Article 273 of the Code of Criminal Procedure for serious indications amounts to a criterion, the measure of evaluation of which is different from that of the solidity of the prosecution's case during the trial: in some senses it is even more stringent, whilst in others it is weaker, due both to the possibility that some of investigative evidence unilaterally obtained by the investigating police authorities or by the public prosecutor, and which was taken into account for the precautionary measure, may be inadmissible in the trial, as well as the eventuality that their

value and significance may yield or be transformed, in one of the other direction, through the debate accompanying the discovery of evidence in the presence of the parties.

The outcomes of the two evaluations (for the precautionary measures and for the trial) may indeed be the same in practice: however, there may also be situations in which the lack of serious indications does not imply that a trial is pointless, in the sense that the prosecution will not stand up in court; just as, by contrast, it may occur that the prognosis of guilt underlying the serious indications identified is not borne out by a conviction justified by the evidence discovered during the trial stage.

It was precisely for this reason that this Court (judgment No. 71 of 1996) struck down as unconstitutional, due to violation of Articles 3(1), 24(2) and 111(2) of the Constitution, Articles 309 and 310 of the Code of Criminal Procedure insofar as – according to the settled interpretation adopted at the time by the Court of Cassation – they prevented a court hearing a challenge to a precautionary measure (review or appeal) from ascertaining the existence of serious indications of guilt, when the indictment had been issued against the person affected by the measure. The Court in fact observed that the findings on which a committal for trial is based are different from the assessment of the seriousness of the evidence, and are not elaborated according to a prognosis of guilt or innocence, but pertain only to the "need for the merits hearing". The indictment cannot therefore be considered to "render moot" the evaluation of the serious indications of guilt: this means that the preclusion of the examination of the latter in challenges *de libertate* was equivalent to introducing into the system a limit which was "unreasonably discriminatory and… caused serious harm to the right to a defence".

This conclusion remains valid even after the enactment of law No. 479 of 16 December 1999: the expansion of the substantive scope of the preliminary hearing and the amendment of Article 425 of the Code of Criminal Procedure operated by that law (which also changed the prerequisites for access to summary proceedings, removing the requirement for the consent of the public prosecutor), does not in fact mean that the evaluation of the serious indications of guilt does not still have "a completely different qualitative and quantitative

consistency compared to the *regula iuris* specific to the committal for trial" (Court of Cassation, Joint Divisions, judgment No. 39915 of 30 October 2002).

The provision contested in the referral order mentioned in the headnote in essence reintroduced – "the other way round", so to speak – the same arrangements already contested in judgment No. 71 of 1996. It in fact requires the public prosecutor to request that proceedings be discontinued where the courts have ascertained, during proceedings concerning the precautionary measures, a factual situation based on the evidence – the absence of serious indications of guilt – which in itself does not necessarily oblige him not to take action.

The connection with Article 405 of the Code of Criminal Procedure, which seeks to change the procedural rules governing discontinuation and the exercise of prosecutions in such a way that they coincide with those governing precautionary proceedings, was enacted with a view to introducing a genuine modification to the system, which was liable to deprive of any significance the verification of the prosecution's case in open court and, therefore, the very basic structure of the 1988 Code of Criminal Procedure, in clear contradiction – in logical and systemic terms – with the provisions of Article 425 of the Code of Criminal Procedure and Article 125 of the Code of Criminal Procedure, as currently in force, which however were not affected by the reform.

6.2. – For a second reason, the contested provision proves to be contradictory in that it neglects the different nature – as an inherent natural possibility – of the evidentiary basis for the two evaluations concerned.

It is absolutely clear in fact that the public prosecutor enjoys a selective power with regard to the elements to be placed before the court when considering precautionary measures (except for those in favour of the accused: Article 291(1) of the Code of Criminal Procedure): the measure of the exercise of this power may be found in the comparative examination of the interests, which are at times conflicting, in obtaining the measure requested and, at the same time, in not prejudicing with a premature and broad disclosure of the evidence obtained, the inquiries already in progress, specially those concerning more than one suspect and multiple potential charges. On the contrary, the decisions pertaining to

the exercise of the criminal prosecution must be taken on the basis of all material from the investigation.

It follows that the decision *de libertate* of the Court of Cassation may be based on a body of evidence that is different from and more limited compared to that which must be placed before the trial court when controlling those findings. However, the fact that the public prosecutor was already in possession of other evidence, in addition to that considered during the review of the precautionary measures, that is capable of demonstrating – perhaps also in an evident manner – the well foundedness of the *notitia criminis*, would not have the effect of excluding, pursuant to the contested provision, the obligation in any case to request discontinuation: the provision is in fact absolutely unequivocal in stipulating that the judgment of the Court of Cassation remains devoid of preclusive effects only when the additional material of the prosecution has been obtained "subsequently" to it. This means that the selection of the material attached to the application for precautionary measures made by the public prosecutor, on the basis of an entirely discretionary assessment, risks – all specific facts being equal – having a decisive effect on whether or not the prosecution is brought.

6.3. – Thirdly, and finally, it should be observed that when the Court of Cassation rules on a precautionary measure, it does not directly ascertain the that an offence does not *prima facie* appear to have been committed. In view of the characteristics of proceedings before the Court of Cassation – which were not changed, insofar as is of interest here, by the expansion of the grounds for appeal implemented by law No. 46 of 2006 [new Article 606(1)(e) of the Code of Criminal Procedure] – the review *de libertate* of the Court of Cassation, principally regarding the question of serious indications of guilt, is exercised indirectly through a control over the reasons given for the contested measure (as moreover occurred in the proceedings before the lower court), and the situations in which the decision may have a direct impact on these serious indications, for example by ruling inadmissible one or more items of evidence relied on by the merits court, are by contrast entirely residual and in any case isolated.

This means that the annulment, where it occurs, of the contested measure does not automatically reveal the objective absence of the serious indications of guilt: some evidence, in spite of the fact that it has already been obtained, may not have been used as justification for the contested measure because it escaped the attention of the court making the precautionary ruling or because, more simply, the reasons given for the precautionary measure might have been insufficiently motivated. In this regard, it is essential not to lose sight of the fact that – at least as far as factual issues are concerned – the ruling on the appeal against precautionary measures is based on a verification of a summary nature made within the context of a procedure characterised (especially with regard to review proceedings) by particularly short time-limits.

7. – All of the considerations made above lead to the conclusion that the contested provision is unconstitutional, and it is of no consequence that it provides only that the public prosecutor is prevented from pursuing a prosecution without therefore binding – according to the current interpretation, shared by the referring court – the assessment of the court seized with the request for discontinuation, which accordingly – where it considers that the circumstances contemplated under Articles 408 and 411 of the Code of Criminal Procedure and Article 125 of the Code of Criminal Procedure as currently in force do not apply – retains the power to reject the request, and order that the public prosecutor carry out supplementary inquiries or draw up the charge, albeit according to the longer and mandatory time-scales of an anomalous and inappropriate procedure.

The provision in fact modifies the logic of the institution of discontinuation which, according to its traditional rationale and the manner in which it is regulated, presents itself as an instrument for control seeking to verify, with a view to guaranteeing compliance with the principle laid down by Article 112 of the Constitution, that the courts do not unduly fail to take criminal action (see in particular judgment No. 88 of 1991 of this Court, cited above), whereas on the other hand, within the perspective offered by the provision itself, that institution pursues the opposite objective of preventing the prosecution from being inappropriately exercised, in practice pre-empting the “filter” function which should be fulfilled by the preliminary hearing.

Parliament may obviously modify the structure and the function of procedural institutions. In the case before the Court however, in order to distort the institution of discontinuation to the different logic indicated above, the contested provision removes the minimal requirement of the consistency of any control mechanism – according to which the parameter for evaluation must be the same for the controlled subject and the controlling body – introducing an irrational discrepancy between the rules governing the request [for discontinuation] and the rules governing the proceedings. It in fact requires one of the parties to the trial – the public prosecutor – to seek a measure which denies his own power of action even when he is reasonably convinced, according to the same procedural rule applicable to the court, that this measure is not justified. In turn, the court seized of the request for discontinuation is entitled, in an equally paradoxical manner and according to the anomalous procedure cited above, to impose on that party precisely the course of action (the exercise of the prosecution) which the provision prohibits it from pursuing.

On the other hand, where the court – disregarding any "report" to the contrary (according to which, in the absence of a statutory preclusion, the public prosecutor would have pursued the prosecution) made to it (as in the case before the Court) by the prosecution in conjunction with the mandatory request for discontinuation – were in any case to order the discontinuation, the public prosecutor would be deprived of any remedy; in fact, any order for discontinuation issued on a summary basis could not in fact be challenged in any way.

This accordingly creates an unjustified difference in treatment between identical situations in substantive terms. All things being equal, the choices of the public prosecutor on the issue of precautionary initiatives (whether or not to request the measure, selection of material, exhaustion of the levels of appeal) and the reasons given for the measure *de libertate* may condition the scope of his powers to take action. Depending on the circumstances, even where the prosecution wishes to pursue the prosecution notwithstanding the unsuccessful "precautionary judgment", it will be required to request discontinuation, with no right to challenge in any way the measure taken by the judge ordering discontinuation; however, where it does not seek any precautionary measures, it

may pursue the prosecution without any impediment: this means that where the relevant offence is one for which direct summons is provided for, its decision to commence the prosecution will without doubt be successful; on the other hand, when the offence concerned is one for which a preliminary hearing is contemplated, it may in any case exercise the right to challenge any order to dismiss proceedings (Article 428 of the Code of Criminal Procedure).

Within this perspective, the "mandatory" request for discontinuation provided for under the contested provision ends up transforming itself into a kind of special penalty for inappropriate precautionary initiatives by the prosecution: this penalty is however unacceptable under constitutional law because it discriminates between the positions of the persons under investigation in relation to the conduct attributed to them by the prosecution.

8. – The Court therefore finds that – leaving aside any judgment on the appropriateness of the objective which Parliament set itself – this objective was in any case pursued using means that violated the principles expressed by Articles 3 and 112 of the Constitution.

The Court therefore finds that Article 405(1-*bis*) of the Code of Criminal Procedure is unconstitutional.

The remaining challenges by the referring court relating to Article 111(2) of the Constitution, exclusively regarding the principles of the reasonable length of trials and the impartiality of the court, are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 405(1-*bis*) of the Code of Criminal Procedure, introduced by Article 3 of law No. 46 of 20 February 2006 (Amendments to the Code of Criminal Procedure concerning the removal of the power to appeal against acquittals) is unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 20 April 2009.

Signed:

Francesco AMIRANTE, President

Giuseppe FRIGO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 24 April 2009.

The Director of the Registry

Signed: DI PAOLA