Corte costituzionale

JUDGMENT NO. 262 OF 2009

Francesco AMIRANTE, President

Franco GALLO, Author of the Judgment

JUDGMENT NO. 262 YEAR 2009

In this case the Court considered a reference from two criminal courts concerning the temporary immunity from prosecution (for the duration of one legislature) of the holders of the four highest offices of state. The Court struck down the legislation (law No. 124 of 2008) on the grounds that, insofar as it purported to regulate inherently constitutional matters, Parliament was not entitled to enact ordinary legislation but should have used the appropriate procedures for amending the Constitution. The Court decided the case on procedural grounds alone and did not consider the substantive merits of the legislation.

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, Paolo GROSSI,
gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1 of law No. 124 of 23 July 2008 (Provisions ordering the suspension of criminal proceedings against the high offices of state), commenced by the *Tribunale di Milano* by the referral orders of 26 September and 4 October 2008 and by the judge for preliminary investigations at the *Tribunale di Roma* by the referral order of 26 September 2008, respectively registered as No. 397 and No. 398 in the Register of Orders 2008, as well as No. 9 in the Register of Orders 2009 and published in the *Official Journal of the Republic* No. 52, first special series 2008 and No. 4, first special series 2009.

Considering the intervention by the President of the Council of Ministers and the entries of appearance by the honourable Silvio Berlusconi, as well as by the Public

Prosecutor [*Procuratore della Repubblica*] with the *Tribunale di Milano* and a deputy from the same office of the public prosecutor;

having heard the Judge Rapporteur Franco Gallo in the public hearing of 6 October 2009;

having heard the barristers Alessandro Pace for the Public Prosecutor with the *Tribunale di Milano* and a deputy from the same office of the public prosecutor, Niccolò Ghedini, Piero Longo and Gaetano Pecorella for the honourable Silvio Berlusconi, and the *Avvocato dello Stato* Glauco Nori for the President of the Council of Ministers.

The facts of the case

1. – By referral order of 26 September 2008 (referral order No. 397 of 2008), issued during the course of criminal proceedings in which the accused include, amongst others, the honourable Silvio Berlusconi, current President of the Council of Ministers, the *Tribunale di Milano* raised, with reference to Articles 3, 136 and 138 of the Constitution, questions regarding the constitutionality of Article 1(1) and (7) of law No. 124 of 23 July 2008 (Provisions ordering the suspension of criminal proceedings against the high offices of state).

1.1. – The contested Article 1(1) provides that: "Without prejudice to the cases governed by Articles 90 and 96 of the Constitution, any criminal proceedings against individuals which occupy the offices of President of the Republic, President of the Senate of the Republic, President of the Chamber of Deputies and President of the Council of Ministers shall be suspended from the time when the office or function is taken up until the end of the term in office. The suspension shall also apply to criminal proceedings for conduct prior to taking up the office or function". Sub-section 7 provides that: "The provisions of the present Article shall also apply to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force". The other sub-sections provide that: a) "The accused, or his representative endowed with a special power of attorney, may at any time waive the suspension" (sub-section 2); b) "The suspension shall not prevent the court, where the prerequisites are satisfied, from taking action pursuant to Articles 392 and 467 of the Code of Criminal Procedure, for the hearing of non deferrable evidence" (sub-section

3); c) the provisions of Article 159 of the Criminal Code shall apply and the suspension, which shall operate for the entire duration of the office or function, may not be repeated, except where the individual is re-appointed during the same legislature, nor shall it apply to cases involving the consecutive appointment to another of the offices or functions (sub-sections 4 and 5); d) "Where proceedings are suspended, the provisions contained in Article 75(3) of the Code of Criminal Procedure shall not apply" and, where a private party transfers the action to the civil courts, "the time limits for the entry of appearance, as governed by Article 163-*bis* of the Code of Civil Procedure, shall be reduced by half, and the court shall make a case management order giving precedence to the proceedings relating to the transferred action" (sub-section 6).

The referring court observes in the first place that the questions are relevant because the contested provisions, which require the suspension of criminal proceedings in progress against the President of the Council of Ministers, apply to the proceedings before the lower court.

1.1.1. – As regards the issue of non manifest groundlessness of the question raised with reference to Article 138 of the Constitution, the lower court states that a precedent for the said provisions is contained in Article 1 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), declared unconstitutional in Constitutional Court judgment No. 24 of 2004. According to the referring court, in that judgment the Court held that Parliament may make provision for the suspension of criminal proceedings "with the goal also of satisfying requirements external to the proceedings" and that the the suspension of criminal trials against the high offices of state aims to protect the substantial interest, external to the trial, in the untroubled performance of the relevant functions performed by them; this interest may be protected, provided that this occur "in harmony with the fundamental principles of the rule of law".

It follows from this judgment of the Court – again in the opinion of the lower court – "that legislative provisions governing the privileges, activities and other matters relating to the constitutional organs must be enacted in accordance with the procedures for amending the Constitution. This is because the fact that the operations of the said organs

are regulated through the provision for the suspension of criminal proceedings does not preclude the fact that they in reality concern not the regular functioning of the criminal trial, but rather the privileges of constitutional organs and in any case matters already reserved under the Constitution to legislation enacted in accordance with procedures to amend the Constitution". The referring court reaches this conclusion arguing that the contested provisions impinge upon "multiple further interests of constitutional significance, such as the reasonable length of trials (Article 111 of the Constitution) and the mandatory nature of criminal prosecution (Article 112 of the Constitution) which, whilst not entirely compromised, are in any case undermined, and therefore the balance between these interests must necessarily be struck through legislation with constitutional status".

The lower court emphasises that it can be inferred already from the *travaux preparatoires* of the Constituent Assembly that the exemption from liability to prosecution of the President of the Republic for offences committed outwith the ambit of official duties should have been provided for by a law with constitutional status. It also notes that the fact that the case before the court involves a "restriction on criminal prosecutions more far-reaching that the current arrangements is not relevant for the requirement to regulate the matter through constitutional legislation"; this is because "there can be no doubt that the matter in question is in any case reserved, pursuant to Article 138 of the Constitution, to legislation enacted in accordance with procedures to amend the Constitution, as is shown by the fact that all relations between the organs with constitutional significance and criminal trials are regulated by constitutional legislation".

In the opinion of the referring court, this conclusion is not precluded by Constitutional Court judgment No. 148 of 1983, concerning the provision under ordinary legislation that the votes cast and opinions expressed by the members of the Supreme Council of the Judiciary [*Consiglio Superiore della Magistratura*] may not be subject to review or challenge, because in that case the Court stated that "certainly the fact remains that the defence under examination was not contemplated under the Constitution, but rather under ordinary legislation enacted only in January 1981, many years after the establishment of the Supreme Council of the Judiciary". According to the

referring court, “in reaching this decision, the Court showed that it normally considers a constitutional law to be necessary where it impinges upon constitutional organs, so much so that in resolving this question it in no way asserted the principle that ordinary legislation is sufficient in similar situations, but reached the conclusion that it was constitutional on the basis of complex reasoning which in essence justified the recourse to ordinary legislation through the delay in the enactment and structuring of the legislation governing the Supreme Council of the Judiciary”. Only for the sake of completeness – the lower court continues – “it should be pointed out that judgment No. 148 of 1983 in any case involved a defence modelled around very general grounds for justification such as the exercise of a right and/or fulfilment of a duty, which thus *de facto* meant that the ambit of the privileges of a constitutional organ were not being subject to regulation”.

The need for a constitutional law in order to regulate the matter covered by the contested provisions is not placed in doubt – again according to the referring court – even by the consideration that, in the above judgment No. 24 of 2004, the Constitutional Court did not find that law No. 140 of 2003 breached Article 138 of the Constitution and that, in doing so, “the Court implicitly rejected this ground for unconstitutionality since, given that it was a prior issue to all other questions, the Court would have been required to rule on Article 138 should it have considered it necessary”. The lower court notes, on this point, that this argument is based on the premise that a question raised with reference to Article 138 of the Constitution has a preliminary status in technical and legal terms to those raised on the basis of other principles, and contests the validity of this presupposition, pointing out that such preliminary status cannot be inferred “from the overall reasons given for the judgment, since in finding the law to be unconstitutional with reference to Articles 3 and 24 of the Constitution, the Court expressly ruled “moot every other ground for unconstitutionality”, thereby suggesting that other questions could be raised on a sequential basis”.

Nor – according to the referring court – can the notes of the President of the Republic of 2 and of 23 July 2008 lead to any different conclusions, because the prerogatives conferred on the Head of State when authorising the presentation to the Houses of Parliament of a draft bill as well as during promulgation entail only an initial

examination of constitutionality, that is a control less thorough than that with which the ordinary courts in the first instance and subsequently the Constitutional Court are charged.

1.1.2. – As far as the questions raised in relation to Articles 3 and 136 of the Constitution are concerned, the lower court argues that the contested provisions violate both the ruling of the Constitutional Court as well as the principle of equality because, "by re-enacting the same legislation on this issue", they "again repeat the breach of the Constitution, already declared by the Court due to violation of Article 3". For the referring court in fact, they bring together "within one single provision different offices not only by virtue of the appointing body, but also the nature of the functions" and moreover unreasonably distinguish, "for the first time with reference to their equal treatment, in relation to the fundamental principles underlying court action, between the presidents [...] and the other members of the organs presided by them". The fact that the contested provisions, in contrast to Article 1 of law No. 140 of 2003, do not include the Chairman of the Constitutional Court amongst the high offices for which the suspension of proceedings operates is argued not to be sufficient to avoid the mooted unconstitutionality. In fact, this difference in the legislation – the referring court continues − is not capable of avoiding a violation of Article 136 of the Constitution, as interpreted by the Constitutional Court "in judgment No. 922 of 1988".

1.2. – The accused mentioned above entered an appearance, asking that the questions raised be declared irrelevant and, in any case, manifestly groundless.

1.2.1. – The representatives of the accused argue, with regard to the question raised with reference to Article 138 of the Constitution, that: a) contrary to the arguments of the referring court, Constitutional Court judgment No. 24 of 2004, which concerned Article 1 of law No. 140 of 2003, did not assert either than the suspension of criminal proceedings was a "privilege of constitutional organs" nor that the provision for such suspension must be enacted according to the procedures for amending the Constitution, pursuant to Article 138 of the Constitution; b) in that judgment, the Court held in fact that Parliament may lawfully make provision for the suspension of criminal proceedings due to requirements external to the trial – for example, as in the case before the court, in order to satisfy the substantial interest in the untroubled performance of the public

functions associated with the high offices of state − and "Parliament" must be understood as the body entitled to enact ordinary legislation, and not that with powers to amend the Constitution; c) the judgment ruled the legislation unconstitutional with reference to Articles 3 and 24 of the Constitution, expressly ruling moot all other grounds for unconstitutionality; d) the Court's declaration that any other grounds were moot referred only to aspects regarding the merits and not also the issue of the failure to approve the law according to the procedures for amending the Constitution because this last question, which is of a procedural and not a substantive nature, is logically prior to the acceptance of the question in relation to Articles 3 and 24 of the Constitution, and therefore cannot be moot; e) in conclusion, the judgment implicitly ruled groundless all questions raised in relation to Article 138 of the Constitution; f) this conclusion is not precluded by the reference made in the judgment to the requirement that the substantial interest in the untroubled performance of the public functions associated with the high offices of state be protected "in harmony with the fundamental principles of the rule of law, such protection being central to the optimal structure of these principles" because, according to the same judgment, they are those specified in Articles 3 and 24 of the Constitution and not that laid down in Article 138 of the Constitution; g) in the wake of the judgment of the Court, the lower court should have illustrated the special characteristics of the new contested legislation compared to that declared unconstitutional by the Court, specifying on what grounds the former, in contrast to the latter, breaches Article 138 of the Constitution.

1.2.2. – As regards the goals of the contested legislation, the representatives of the accused argue that: a) they aim not only to guarantee the untroubled performance of the functions pertaining to the high offices of state, but also to uphold the accused's right to a defence in the trial, which presupposes the ability to attend the hearings and to have the time necessary to arrange his own defence; b) the predominance of the need to protect the right to a defence over the requirement of the untroubled performance of the functions can be inferred from the provision for the ability to waive the suspension contained in Article 1(2) of law No. 124 of 2008, because had Parliament intended to establish "*in primis* […] an institutional privilege, it should have endowed the suspension with a mandatory status, on the presumption that institutional interests

transcend the interest of the accused, where appropriate, to stand trial immediately"; c) "this view is not precluded by the fact that the Constitutional Court declared law No. 140 of 2003 unconstitutional also because that law provided for the automatic suspension of criminal proceedings which could not be waived: this argument states that a legislative provision which suspended trials for the high offices of state, without giving the individuals concerned the right to waive the entitlement, could create serious problems of constitutionality within our legal order, but it cannot turn law No. 124 of 2008 into something that it is not, namely a privilege related to the fact that an individual carries out a particular function"; d) the description of the rationale of the contested provisions as being aimed at protecting the right to a defence of the office holder is confirmed by Article 1(5) of law No. 124 of 2008 – which provides that the suspension may not be repeated – because, "if the same person performs, during the same Parliament, the function of President of the Chamber of Deputies, with the resulting suspension of criminal proceedings against him, and in the subsequent legislature occupies the role of President of the Senate, without being able to benefit from the above suspension, one would be forced to admit that the Presidency of the Senate would be deprived of its institutional privilege for an entire Parliament, which would then be revived once a person came to occupy the role who had never benefited from the suspension"; e) from the perspective of the protection of the right to a defence, the duration of one mandate is the period of time which Parliament considered sufficient in order to allow the person occupying the office to make arrangements in order to deal simultaneously with the institutional duties of an eventual new appointment as well as the criminal trial; f) the rationale of the phrase "except where the individual is re-appointed during the same legislature", which introduces an exception to the non repeatability of the suspension, is to balance out "the exercise of the right to a defence, protected under Article 24 of the Constitution, with the exercise of the public office [*munus publicum*], protected under Article 51 of the Constitution"; g) "the mechanism by which a subjective status of the accused translates into an situation of objective difficulty in the trial being celebrated regularly is […] anything but new", because it applies also "for the suspension of trials against accused persons who are incapacitated, provided for under Article 71 of the Code of Criminal Procedure", which is an

institution aimed at protecting “the fact that the capacity of the accused to participate actively in the trial is an unswerving aspect of the right to a defence, without the effective exercise of which not trial is imaginable”; h) the institution of the legitimate impediment to attendance by the accused is also inspired by a similar rationale; i) the referring court's assertion that “all relations between the organs with constitutional significance and criminal trials are regulated by constitutional legislation” cannot be shared, because even prior to the entry into force of law No. 124 of 2008, when confronted with an institutional commitment, the merits courts recognised the inability of the accused to attend proceedings, despite the fact that the Constitution did not provide that the high offices of state had any right to the recognition of these legitimate impediments; l) in judgment No. 148 of 1983, the Court accepted that Parliament may regulate by ordinary legislation even a full-scale defence, such as the rule that the votes cast and opinions expressed by the members of the Supreme Council of the Judiciary may not be subject to review or challenge, which means that even a mere ground for suspension, such as that covered by contested provisions, may be regulated by ordinary legislation; m) the contested sub-sections strike a reasonable balance between the mandatory nature of criminal prosecution and the reasonable length of trials on the one hand, and the accused's right to a defence on the other.

1.2.3. – As regards in particular as the question raised by the lower court with reference to Article 136 of the Constitution, the private party argues that: a) contrary to the arguments of the referring court, the provision under examination did not re-enact the same legislation already declared unconstitutional by judgment No. 24 of 2004, “nor did it seek and obtain, even indirectly, outcomes corresponding to those already found to violate the Constitution”, but had an entirely different content, for example where it provided for the right to waive the a suspension of trials; b) the new legislation is different from the old provisions also with regard to the treatment of private parties to criminal proceedings and the fact that the duration of the suspension is not indefinite; c) the subjects to whom the suspension applies are not the same as those indicated in the legislation already declared unconstitutional and the difference in their treatment, “with reference to their equal treatment, in relation to the fundamental principles underlying court action, ...[compared to that of the] other members of the collective organs, is

justified by the new legislative arrangements as a whole, which in any case differ from those already declared unconstitutional", also because "the Constitution itself recognises the self-standing significance of the roles of the presidents of the two Houses of Parliament compared to the other members of Parliament (Articles 62(2), 86(1) and (2) and 88(1) of the Constitution)" and because "in the same way the President of the Council of Ministers performs functions entirely distinctive compared to those of the other members of the government, pursuant to Article 95(1) of the Constitution".

1.3. – The prosecution in the proceedings before the lower court, represented by the Public Prosecutor at the *Tribunale di Milano* and a deputy from the same office of the public prosecutor, entered an appearance.

1.3.1. – The public prosecutor argues, in the first place, that his entry of appearance is admissible, notwithstanding the contrasting interpretation by the Constitutional Court expressed in judgments No. 361 of 1998, No. 1 and No. 375 of 1996 and order No. 327 of 1995. According to the prosecutor, "the arguments against the standing of the public prosecutor are the following: 1) the distinct reference to the "public prosecutor" and the "parties" in the current legislation contained in law No. 87 of 11 March 1953 (Articles 20, 23 and 25); 2) the reference only to the "parties" in the provisions contained in the Supplementary rules for proceedings before the Constitutional Court (Articles 3 and 17 [now 16]); 3) despite the special nature of the institutional and procedural position of the public prosecutor, he must be recognised as having the status of a party in the proceedings before the lower court".

As far as Article 20 of law No. 87 of 11 March 1953 is concerned, the representative of the public prosecutor argues that, by limiting itself to the provision that "professional" representation is not required for the organs of state (which include the offices of the public prosecutor), it does not touch on nor amend the legislation governing the right to be a party to or intervene in proceedings.

Similarly, the arguments which may be inferred form Articles 23 and 25 of law No. 87 of 1953 are not decisive in precluding the standing of the public prosecutor to enter an appearance in proceedings before the Constitutional Court.

Article 23(4) provides that: "The court shall order that unless the order referring the case to the Constitutional Court is read out during oral proceedings in public, it shall be

notified by the court registry to the parties to the trial and to the public prosecutor where his intervention is mandatory". Article 25(2) in turn provides that: "Within twenty days of the notification of the referral order, pursuant to Article 23, the parties may examine the documents filed in the court registry and submit their arguments". According to the representative of the public prosecutor, Article 23(4) on the one hand does not expressly preclude the requirement that the order be served on the public prosecutor where he has been a party to the trial, whilst on the other hand requires notification of the public prosecutor, precisely because he is a "party"; and this is the case irrespective of whether his intervention is mandatory or not. This means that the public prosecutor may enter an appearance in proceedings before the Constitutional Court, both where he is a party to the principal proceedings, and also where he is obliged to intervene in those proceedings.

As regards Articles 3 and 17 of the supplementary provisions previously in force (currently Articles 3 and 16), the public prosecutor points out that they are limited to a reference to the "parties", and do not do "other than presuppose a concept determined elsewhere". They are not in fact a bar to the "(favourable) conclusions reached in the light of Articles 23 and 25 of law No. 87 of 1953".

With regard to the special nature of the institutional and procedural position of the public prosecutor, the representative argues that the fact that the public prosecutor, "according to the well-known formula contained in Article 73 of royal decree No. 12 of 30 January 1941, must oversee 'the compliance with the law, the prompt and regular administration of justice, the protection of the rights of the state, and of legal and incapacitated persons […]' is beyond discussion, but is an argument extraneous to the problem". In fact, "the institutional impartiality of the public prosecutor is one matter, whilst his functional partiality is quite another", and only the latter aspect is relevant in constitutional proceedings, in consideration of the fact that the constitutional principles of equality of the parties and of the equal right to make representations were unequivocally introduced into Italian law by constitutional law No. 2 of 23 November 1999, which entered into force following decisions of the Constitutional Court which denied the public prosecutor standing to enter an appearance. These principles – the representative of the public prosecutor continues – already existed under Italian law

previously, “but as is known, they were inferred within case law and the academic literature from Article 24 of the Constitution and therefore, as for all constitutional rights provided for under the Constitution, they were (and are) held by private individuals, and not public authorities. Accordingly, both the principle of equality of arms as well as the right to make representations worked only in one direction. They provided guarantees to the citizen, but not the public prosecutor in criminal proceedings, and not the public administrative in administrative proceedings”. It follows that only the new wording of Article 111 of the Constitution guarantees the public prosecutor full capacity as a party, with regard to his procedural equality and the equal right to make representations, with the result that the Constitutional Court could change the position in its case law cited above, precisely in the light of the changed constitutional setting.

It should be added to these considerations that in cases – such as that before the court – in which it was precisely the public prosecutor which raised the question of constitutionality before the lower court, is would be unreasonable to prevent him from participating in the proceedings before the Constitutional Court.

1.3.2. – On the merits, the public prosecutor requests that the questions proposed by the referring court be accepted.

1.4. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, arguing that: a) the question raised with reference to Article 136 of the Constitution is groundless, because there is no violation of a ruling of the Constitutional Court where, as in the case before the court, “the later legislative framework into which the new provision is inserted is different from that of the previous law declared unconstitutional”; b) the question proposed with reference to Article 138 of the Constitution is “inadmissible and in any case groundless” for the reasons set out in the notice of intervention in the proceedings commenced pursuant to referral order No. 398 of 2008.

1.5. – In a written statement filed shortly before the hearing, the private party requested that the entry of appearance by the public prosecutor in proceedings be ruled inadmissible, basing his request essentially on two arguments.

1.5.1. – The private party claims, in the first place, that the public prosecutor is not equivalent to the other parties to the proceedings before the lower court, arguing that: a) Article 20(2) of law No. 87 of 1953 must be interpreted as containing a general provision, aimed at regulating exclusively representation and defence in proceedings before the Constitutional Court; b) the object of proceedings before the Constitutional Court concerning an incidental question is whether a provision with the force of law is compatible with the Constitution or a law with constitutional status, and the right to make representations in such proceedings manifests itself as a "function […] of the subjective rights which that provision affected in the main proceedings, or which could be affected in relation to it" (as held in Constitutional Court judgment No. 163 of 2005); c) it follows from the linkage of the right to make representations with the "subjective rights" mentioned above that the public prosecutor is external to the proceedings, since the latter – also pursuant to Article 73 of royal decree No. 12 of 30 January 1941 – "by definition never represents a subjective right, where this expression is understood as an interest different from that […] of compliance with the law"; d) "the representative of the private party […] can never aver the unconstitutionality of a provision which would be favourable his client, for two reasons: first, because he would lack any interest to do so (but this is not relevant [in the present case] because it does not concern an appeal), and secondly because he be committing the offence of the wilful provision of inadequate assistance [*patrocinio infedele*] pursuant to Article 380 of the Criminal Code, as well as committing a serious breach of the lawyers' code of conduct punishable on disciplinary grounds"; e) the public prosecutor on the other hand, has the status of a public party and has "the right/duty to aver the unconstitutionality of a provision both to the advantage as well as to the detriment of any of the parties", including in private law proceedings; g) Articles 23 and 25 of law No. 87 of 1953 – as interpreted by Constitutional Court judgment No. 361 of 1998 – expressly distinguish between the parties and the public prosecutor, preventing the latter from entering an appearance in proceedings before the Constitutional Court.

1.5.2. – The private party's representatives also claim, secondly, that the principle of equality of the parties before the court enshrined in Article 111 of the Constitution does not apply to proceedings before the Constitutional Court, since the Court is not a

judicial organ, and assert, in support of this claim, that in constitutional proceedings: a) Article 111(6) of the Constitution does not apply, and the obligation to give reasons for the judgments of the Court results from Article 18(2) and (3) of law No. 87 of 1953; b) Article 111(2) also does not apply because "the ability of the parties to make representations before the Constitutional Court is governed, as is known, by law No. 87 of 11 March 1953 and the Supplementary Rules for proceedings before the Constitutional Court"; c) nor finally does the principle of third party status and impartiality of the judge enshrined in Article 111 of the Constitution apply, "because the judges of the Constitutional Court are by their very nature (for obvious reasons relating to their functions) always impartial third parties, so much so that they can never recuse themselves or be recused, in contrast to the arrangements necessarily in place for the judges in any other 'trial'".

1.6. – In a written statement filed shortly before the hearing, the public prosecutor in the proceedings before the lower court reiterated the request that the questions raised in the referral order be accepted, restating the arguments already set out in the written statement by which it entered an appearance.

2. – By referral order of 4 October 2008 (referral order No. 398 of 2008), during the course of criminal proceedings in which the accused include the honourable Silvio Berlusconi, current President of the Council of Ministers, the *Tribunale di Milano* raised, with reference to Articles 3, 68, 90, 96, 111, 112 and 138 of the Constitution, questions concerning the constitutionality of Article 1 of law No. 124 of 2008.

2.1. – Regarding the question of relevance, the referring court states that the contested article, which requires the suspension of criminal proceedings in progress against the President of the Council of Ministers, necessarily applies to the proceedings before the lower court.

As regards the non manifest groundlessness of the questions, the lower court observes that in judgment No. 24 of 2004, relating to law No. 140 of 2003, the Constitutional Court held that: a) the nature and function of the provision consisted "in the temporary interruption of the normal prosecution" of criminal trials and aimed "to satisfy requirements external to the proceedings […] of a different nature compared to those internal to the trial"; b) the requirement for suspension arose from the "status as accused

and simultaneous occupancy of one of the five highest offices of state"; c) the legal interest which the measure intended to protect consisted in "in the guarantee of the untroubled performance of the relevant functions inherent to those offices" and this legal interest was defined, in the first instance, as a "substantial interest, which may be protected in harmony with the fundamental principles of the rule of law, such protection being central to the optimal structure of these principles" and secondly as an expression of the "fundamental values with reference to which Parliament considered the need for the protection of the untroubled performance of the activities associated with the offices in question to be predominant"; d) precisely "given that the public interest in the performance of the activities associated with the high offices at the same time entails a legitimate impediment to appear before the court", Parliament intended to establish "an absolute presumption of a legitimate impediment".

According to the referring court, in that judgment the Court declared the provision unconstitutional on the grounds that the suspension under examination, which in itself "establishes differentiated arrangements for the exercise of court action, and in particular criminal law prosecutions", was "general, automatic and of indefinite duration": it was general because the suspension related to "trials on charges for all potential offences, committed at any time, which were not related to official functions, that is had nothing to do with the activities pertaining to the office"; it was automatic insofar as the suspension was ordered "in all cases in which the aforementioned simultaneous status" as accused and occupant of a high office "occurs, without any additional prerequisites, regardless of the charges and at any stage of proceedings, without any possibility of evaluating the special characteristics of the specific cases"; and it had indefinite duration insofar as the suspension, "being ordered as protection for the important functions mentioned above, and therefore associated with the office occupied by the accused", had a duration which was not affected by the "repetition of the appointments and in any case by the possibility of appointment to another of the five offices indicated".

Again in the opinion of the lower court, in judgment No. 24 of 2004 the Court held that: a) the right to a defence provided for under Article 24 of the Constitution had been violated, insofar as the accused "is given the alternative between continuing to execute

the high office under the weight of a charge which, in theory, could also involve serious and particularly ignominious offences, or resign from office held in order to obtain, through the continuation of the trial, a verdict from the court which he considers favourable to himself, renouncing the enjoyment of a right guaranteed under the Constitution (Article 51 of the Constitution)"; b) Articles 111 and 112 of the Constitution had been violated, because "the time-scale for the trial is not immaterial for the purposes of the effective prosecution"; c) Article 3 of the Constitution had been violated, because the legislation on the one hand brought together within one single provision "different offices not only by virtue of the appointing body, but also the nature of the functions" whilst on the other hand distinguished "for the first time with reference to their equal treatment, in relation to the fundamental principles underlying court action, between the presidents of the Houses of Parliament, of the Council of Ministers and of the Constitutional Court and the other members of the organs presided by them"; and d) Article 3 of constitutional law No. 1 of 9 February 1948 had been violated, which extended to all judges on the Constitutional Court the immunity granted under Article 68(2) of the Constitution to Members of Parliament.

The referring court argues that, by adopting the contested legislation – which provides for the suspension of any criminal proceedings against individuals who occupy the offices of President of the Republic, President of the Senate of the Republic, President of the Chamber of Deputies and President of the Council of Ministers – Parliament did not take into account the Court's findings in judgment No. 24 of 2004, also because it substantially reproduced the provisions of law No. 140 of 2003 concerning the suspension of the relevant period for the purposes of the time barring of the action pursuant to Article 159 of the Criminal Code, and the applicability of the provision also to criminal proceedings in progress, at every stage, state or instance.

2.1.1. – In view of these considerations, the court claims that the contested article breaches, in the first place, Article 138 of the Constitution, because the status "of the occupants of the highest offices of the Republic is in itself a typically constitutional matter, and the reason is clear: all provisions which limit or defer in time their liability are stated as exceptions to the general principle of the equality of all citizens before the

law provided for under Article 3 of the Constitution, a fundamental principle of the rule of law".

2.1.2. – Secondly, the lower court claims that Article 3 of the Constitution has been violated, because the "privileges granted to those who occupy institutional offices are necessary in order to protect the high-ranking functions exercised", with the result that the right to waive the procedural suspension granted to the holder of high office stands in contrast with the protection of the public office, in that it grants a "merely elective" discretion to the individual who benefits from it, rather than providing for those filters characterised by third party status and involving assessments of the special circumstances of individual cases which alone, according to judgment No. 24 of 2004, could provide an adequate remedy both for the generalised automaticity already censured by the Court as well as "the infringement of the right to take court action". The same constitutional principle has also been violated because "the contents of all the provisions at issue impinge upon a core value for our democratic order, namely the equality of all citizens before the criminal courts".

2.1.3. – The court thirdly claims that Articles 3, 68, 90, 96 and 112 of the Constitution have been violated, due to the difference in treatment between the legislation introduced for offences committed outwith the ambit of official duties and that, with constitutional status, governing offences committed whilst performing the official duties of the four high offices concerned. This difference is claimed to be unreasonable: a) due to the failure to specify Article 68 of the Constitution amongst the constitutional provisions expressly stated to be unaffected by law No. 124 of 2008; b) due to the fact that "the legal interest considered by the ordinary law, that is the regular performance of the high-ranking functions of the state, is the same as that which the Constitution protects for the President of the Republic under Article 90, and for President of the Council of Ministers and for ministers under Article 96"; c) due to the provision of a *ius singulare* for offences committed outwith the ambit of official duties in favour of the President of the Council of Ministers who, by contrast, the Constitution treats as equivalent to other ministers for offences committed whilst performing official duties as a consequence of his position as *primus inter pares*.

2.1.4. – The referring court considers, finally, that the contested provision violates Article 111 of the Constitution, concerning the requirement for the reasonable duration of trials, because: a) "by blocking proceedings at every stage and instance for a potentially very long period of time, a suspension formulated in [the terms used by the contested provision] results in a serious waste of procedural activity"; b) since no provision is made with regard "to the ability to use evidence already obtained" either within the context of the same criminal trial following conclusion of the period of suspension or in different proceedings to which a private party, if any, has decided to transfer his action, that party will be required "to sustain *ex novo* the burden of proof to its full extent".

2.2. – The aforementioned accused entered an appearance, presenting arguments in part similar to those set out in the written statement through which it entered an appearance in the proceedings commenced pursuant to referral order No. 397 of 2008 and observing, in particular, that the suspension provided for under the contested provision is not an immunity. According to the accused in fact, immunity is a defence which "exclusively protects, in a direct and immediate manner, the untroubled and free exercise of the function performed, guaranteeing autonomy from other branches of state", relating to conduct for which "all criminal liability is excluded which may not at any time arise either during the exercise of the function or subsequently". As regards offences committed outwith the ambit of official duties – the representatives continue – "there is certainly a revival of the theoretical liability to punishment on expiry of the mandate, both in cases involving immunity as well as cases of suspension. However, the rational for these two institutions is also clearly different, since the latter principally protects, in a direct and immediate manner, the celebration of a fair trial through the guarantee of the right to a defence, which is an indispensable condition for a fair trial, which is subject to a temporary interruption up until the time when the mandate ceases to be exercised, that is the grounds for the legitimate impediment to appear before the court".

2.2.1. – In relation to the principle of equality, the representatives of the private party claim that criminal law contains many cases in which a difference in treatment depends on subjective factors (such as, for example, offences committed by public officials or

military offences). With particular reference to the alleged violation of Articles 68, 90 and 96 of the Constitution, they claim that these principles have nothing to do with the contested article, because they are "exclusively aimed, in a direct and immediate manner, at protecting the untroubled performance of the functions against liability to prosecution, and therefore in order to protect an interest clearly external to the trial". In particular, Articles 68 and 90 of the Constitution provide for immunity of a functional nature, which "removes an individual from liability to prosecution since it entails the exclusion, which extends *ad infinitum*, of all criminal responsibility", whilst Article 96 of the Constitution "does not provide for immunity but a condition for procedural admissibility, that is "an additional element […] involving a definitive bar on the exercise of prosecutions, here resulting from an assessment by a political body where certain prerequisites have been fulfilled". On the other hand, the temporary suspension of criminal proceedings provided for under the contested legislation "is not an institution which precludes prosecution, and not even, where applicable, criminal responsibility, and does not protect in a direct and immediate manner an interest external to the trial, but an inviolable right internal to and inherent in the trial. Accordingly, proceedings are indeed suspended, but would clearly recommence at the time when the cause which precludes the inviolable right to a defence ceases to exist, namely the fact of holding office". The absolute irrelevance of the constitutional principles mentioned for the contested provision is moreover confirmed by the express provision that the legislation shall not apply to the "cases provided for under Articles 90 and 96 of the Constitution", which has the function of "accompanying the interpreting body in the direction diametrically opposed to that followed by the lower court, stipulating that the legal interests protected are not the same as those for which law No. 124/08 was approved, since there is no perfect overlap between the goals, and not even the rationales".

2.2.2. – As regards the principle of reasonableness, the private party points out that, since the contested legislation is intended to protect the accused's right to a defence, the difference in treatment between offences committed within and outwith the ambit of official duties is irrelevant, since every time the Constitutional Court "has ruled on the fundamental right of the accused to participate personally in his defence, it has never

drawn even the slightest distinction concerning the type of offence charged and not even its seriousness". Contrary to the arguments of the lower court, the President of the Council of Ministers and the ministers are not placed on the same level, since Article 95(1) of the Constitution is exclusively dedicated to the President of the Council of Ministers and his tasks, and provides that he "directs and is responsible for the general policy of the government. He ensures the unity of general political and administrative policies, promoting and coordinating the activities of the ministers", whilst Article 92(2) of the Constitution grants him the power to appoint and dismiss ministers. This is also confirmed by the fact that the electoral law in force provides for "the association of political parties with an individual who expressly stands as a candidate for the office of President of the Council of Minsters" as well as by the "international roles related with the Presidency of the Council of Ministers, such as for example the presidency of the G8 and G20, which involve a considerable number of engagements abroad on several consecutive days". A further confirmation of the special position of the President of the Council of Ministers under Italian law is derived from the provisions contained in law No. 400 of 23 August 1988 which, implementing the provisions of the Constitution, confers on the latter many powers which individual ministers do not have, such as amongst other things: the right of initiative to present motions of confidence before the Houses of Parliament; the convening of the Council of Ministers and the setting of the agenda; the notification to the Houses of Parliament of the composition of the government and every change made to it; the tabling of motions of confidence; the submission to the President of the Republic of laws for promulgation, draft bills for presentation to the Houses of Parliament, the texts of decrees with the status or force of law, government regulations and the other acts indicated by law for issue; the countersignature of the acts by which laws are promulgated as well as every act for which a resolution of the Council of Minsters has been made, acts which have the status or force of law and, along with the sponsoring minister, other acts indicated by law; the presentation to the Houses of Parliament of draft bills introduced by the government and, also through the minister expressly delegated thereto, the exercise of the government's functions pursuant to Article 72 of the Constitution; the exercise of the competences specified in law No. 87 of 1953, and the promotion of action required of

the government following decisions of the Constitutional Court; the formulation of political and administrative directives for ministers, implementing the resolutions of the Council of Ministers, as well as those under his own responsibility for directing the general policy of the government; the coordination and promotion of the activity of ministers in relation to acts which concern general government policy; the suspension of the adoption of acts by the competent ministers in relation to political and administrative questions, with their submission to the Council of Ministers at its next meeting; the deferral to the Council of Ministers of the decision regarding questions on which contrasting evaluations have been made by administrations with competence on different grounds; the coordination of government action relating to Community policies and the implementation of Community policies. From a political point of view on the other hand, "the President of the Council of Ministers is collectively responsible for all the acts of the Council of Ministers but, it cannot be forgotten, individually for those carried out when exercising the functions conferred upon him, on an exclusive basis, by the Constitution and ordinary legislation".

In conclusion, it would appear to be rational to the representatives of the private party that Article 96 of the Constitution, insofar as intended to guarantee the untroubled performance of executive powers, brings together within one single provision those who exercise the same power, albeit with different functions and in different positions. It would appear to be equally rational that the contested provision, insofar as intended to protect the inviolable right of a person to a defence in the trial, on the other hand takes into account "the provisions contained in the Constitution, and in ordinary legislation implementing the Constitution, which expressly confer highly significant political powers and duties on the President of the Council of Ministers for which he alone is responsible, accordingly evaluating, in an equally reasonable manner, that only his commitments may constitute an ongoing legitimate impediment to appear in proceedings aimed at ascertaining an exclusively personal legal responsibility". And this is also because – in the opinion of the private party's representatives – "the Constitution does not by contrast make any express conferral of powers or duties on ministers, but delegates regulation of this matter to ordinary legislation and political practice".

2.2.3. – The private party's representatives then move on to a specific treatment of the subjective element of the contested legislation, arguing that the President of the Republic, the presidents of the Senate of the Republic and of the Chamber of Deputies and the President of the Council of Ministers are "brought together by four characteristics: they occupy positions at the head of four constitutional organs, are holders of institutional functions of a political nature, are charged with complying with particular duties which the Constitution expressly imposes upon them and receive their mandate, whether directly or indirectly, from the will of the people". The position is different for the Chairman of the Constitutional Court, because he "does not receive his mandate from the will, either direct or indirect, of the people. It should be added that judgment 24 of 2004 pointed out that whilst law No. 140 of 2003 expressly provided that it was without prejudice to Articles 90 and 96 of the Constitution, it was silent on Article 3(2) of constitutional law No. 1 of 9 February 1948. For this reason, that judgment found serious elements of inherent unreasonableness".

According to the representatives of the accused, "the high offices specified in law No. 124 of 2008 are all in a distinctly different position compared to the other members of the bodies over which they preside". In particular, the President of the Chamber of Deputies: a) convenes Parliament in joint session and the regional delegates in order to elect the new President of the Republic (Article 85(2) of the Constitution); b) calls the election of the new President of the Republic (Article 86(2) of the Constitution); c) convenes Parliament in joint session to elect one third of the judges of the Constitutional Court (Article 135(1) of the Constitution); d) chairs the sittings of Parliament in joint session (Article 63(2) of the Constitution); e) represents the Chamber of Deputies and ensures its proper functioning; f) supervises the application of the House Regulations with all organs of the Chamber of Deputies and decides on the questions concerning their interpretation obtaining, where he considers it appropriate, the opinion of the House Regulations Committee, which he chairs; g) issues circulars and provisions interpreting the regulations; h) rules, in accordance with the criteria laid down in the regulations, on the admissibility of draft bills, amendments and orders of the day, official guidelines and parliamentary questions; i) oversees the organisation of the business of the Chamber of Deputies, convening the Assembly of Parliamentary

Group Leaders and setting, in cases where the majority required under the regulations is not reached, the parliamentary programme and calendar; l) chairs the Assembly and organs responsible for the organisation of the business and general direction of the Chamber of Deputies (Office of the President, Assembly of Parliamentary Group Leaders, House Regulations Committee); m) appoints the members of the internal institutional guarantee organs (House Regulations Committee, Elections Committee, Committee for the authorisations required pursuant to Article 68 of the Constitution); n) ensures the proper functioning of the internal administration of the Chamber of Deputies, directed by the Secretary General, who is answerable to the President. The President of the Senate of the Republic: a) acts as a substitute for the President of the Republic, pursuant to Article 86 of the Constitution, in any circumstances in which the latter is unable to fulfil them; b) is consulted, along with the President of the Chamber of Deputies, by the President of the Republic before dissolving both Houses or only one of them (Article 88 of the Constitution); c) represents the Senate; d) regulates the activity of all of its organs; e) directs and chairs discussions; f) puts questions; g) establishes the order of votes and declares the result; h) disposes of the powers necessary to maintain order and to ensure, on the basis of the internal regulations, the proper conduct of business.

In conclusion – the accused's representatives continue – “operating within the logic of respect for the provisions laid down by the Constitution, the implementing regulations and indications of the Constitutional Court, Parliament reasonably considered that only the duties of these specific high political offices can entail an ongoing legitimate impediment to appear in proceedings aimed at ascertaining an exclusively personal legal responsibility, and that the requirement to give specific protection to guarantee untroubled action arises in relation to them only”.

As far as the ability to waive the suspension provided for under the contested Article 1(2) of law No. 124 of 2008 is concerned, the private party claims that it “confirms that the objectivised rationale in this legislative provision is indeed that of protecting, indirectly, a political interest, but above all, directly and immediately, the inviolable right to a defence. Otherwise the right of waiver would not have been contemplated”. It follows that “there is therefore no need to provide for any additional prerequisite for the

protection of this primary right, because the legislation under examination amounts to a specific implementation of Articles 24 and 111 of the Constitution".

2.2.4. – As regards the question raised with reference to Article 138 of the Constitution, having invoked as a premise the arguments contained in the written statement filed in proceedings commenced pursuant to referral order No. 397 of 2008, the representatives of the accused move on to an examination of the grounds for suspension provided for under ordinary legislation and aimed at classes or at individuals specified according to function, qualification or status. They argue, on this point, that "it is absolutely clear and well-known that most conferrals of duties and clarifications in this area have always been enacted through ordinary legislation", also because the reservation of a matter to constitutional law must be expressly provided for under the Constitution. There are in fact – the representatives continue – numerous grounds for the suspension of trials provided for under ordinary legislation "and directed at specific classes or specific individuals according to function, qualification or status, some of which are intended to protect rights inherent to the trial, and others to protect exclusively external interests", such as for example: under the Code of Criminal Procedure "Articles 3, 37, 41, 47, 71, 344, 477, and 479, as well as Articles 159 and 371-*bis* in the Criminal Code"; in the area of tax law, "the multitude of converted decree-laws which, in relation to the amnesties [*condoni*] provided for under the same, order an extremely long procedural suspension"; Article 243 of the Wartime Military Criminal Code, "where the suspension is related to the requirement that the individual be a member of mobilised units"; "Article 28 of presidential decree No. 448 of 22.9.1988 concerning proceedings against minors", in which "the suspension even operates *ad personam* where the court considers that it must take into account the personal characteristics of the minor".

2.2.5. – Turning to the nature of the "grounds for suspension resulting from the existence of immunity under international law", the representatives argue that these are not covered by Article 10 of the Constitution, because they are provided for under international law treaties implemented through ordinary legislation and not by the "generally recognised norms of international law". They also argue that they are "typically subjective, i.e. strictly related to the function performed by the interested

individual", such as for example that provided for under Article 31(1)(ii) of the Vienna Convention on Diplomatic Relations of 18 April 1961 and Article 43(1) of the Vienna Convention on Consular Relations of 24 April 1963. Finally, they argue that these forms of immunity relate both to offences committed within as well as outwith the ambit of official duties, in that they cover "all acts carried out as a private individual or as a public official by the individual with immunity, irrespective of whether those carried out as a private individual occurred prior to or at the same time as their status as a high representative of the state", as recognised in the case law of the International Court of Justice and the Court of Cassation, and confirmed in the academic literature.

2.2.6. – As regards the principle enunciated in Article 112 of the Constitution, the representatives of the accused claim that: a) the position of the Constitutional Court that the right to defend oneself must be considered predominant over the right to stand trial accords perfectly with the suspension provided for under the contested provision; b) Article 112 of the Constitution does not require an absolute continuity in the prosecution of the criminal action once it has been commenced, since it is well possible that certain objective or subjective conditions for procedural admissibility may cease to apply; c) "the mandatory nature of criminal prosecution does not flow from the simple fact of conduct in breach of the law, but from the same conduct where it is subject to prosecution *ex officio*, or where a private party presses charges" and "the public prosecutor is indeed under an obligation to prosecute criminal actions, but always provided that there are not any bars to proceeding or grounds for suspending the action, which may be set freely by Parliament, provided that they do not breach the principles of equality and reasonableness"; d) Italian law provides for the pressing of charges and the withdrawal of charges, in addition to institutions such as immunity or extradition, in which prosecution is precluded "totally or partially, temporarily or definitively", as well as situations in which "certain offences, despite being subject to the requirement of prosecution and despite their unlawful status, may be prosecuted only on request by the Minister of Justice" or "if the individual perpetrator is present in Italy, for offences committed abroad" (Articles 8, 9 and 10 of the Criminal Code); e) Article 260 of the Peacetime Military Code provides that a significant range of offences may be prosecuted on request by the corps commander; f) Article 313 of the Criminal Code

“provides that for a long list of offences, some of which are certainly more than moderately serious, prosecution shall be subject even to authorisation by the Ministry of Justice” and this legislation was held to be compatible with the Constitution in judgment No. 22 of 1959, in which the Court held that “the institution of authorisation for prosecution is grounded in the same public interest protected by the criminal law, in relation to which a criminal prosecution could on certain occasions cause damage more serious than the offence itself”; g) in the case under examination, “contrary to the arrangements under Article 313 of the Criminal Code, the constitutionality of which has been upheld, there is no definitive block on criminal prosecution, but rather only a temporary suspension of the trial”, with the result that “the prosecution may then effectively be carried forward”.

2.2.7. – As far as the violation of Article 111 of the Constitution is concerned, averred by the referring court with reference to the requirement for the reasonable duration of trials, the representatives of the accused note that: a) the contested provision “follows to the letter the indications given by this Court in judgment No. 24 of 2004, because it prevents the interruption of the trial from protracting itself for an indefinite and indeterminable period of time, whilst at the same time expressly providing that suspensions may not be repeated”; b) the case law of the European Court of Human Rights and of the Constitutional Court have recognised the relevance of the principle of the reasonable length of trials, clarifying however that it “is not an absolute value, to be pursued at all costs”; c) in particular, in order No. 458 of 2002, the Constitutional Court asserted that: “the principle of the reasonable length of trials may not have the result of thwarting the other constitutional values in play, including *in primis* the right to a defence, which Article 24(2) proclaims to be inviolable at every stage and degree of proceedings”; d) again, in order No. 204 of 2001 the Court held that: “the principle of the reasonable length of trials [...] must be read − in the light of the reference to the requirement of 'reasonableness', which appears in the legislative formula − in tandem with the other guarantees provided for under the Constitution, starting from that relating to the right to a defence (Article 24 of the Constitution)”.

More specifically, as regards the referring court's argument that “by blocking proceedings at every stage and instance for a potentially very long period of time, a

suspension formulated in these terms results in a serious waste of procedural activity", the private party notes that "as far as the position of the accused is concerned, the hearings for the taking of evidence have by no means been concluded, as the court still has to hear the technical expert appointed by the accused, as well as numerous witnesses".

Turning now to the lower court's assertion that "the provision [...] is silent on the ability to use evidence already obtained, which could be entirely lost where, on conclusion of the potentially long period of suspension [...], it were impossible to reconvene the same bench of judges", the accused's representatives argue that this is "an entirely theoretical and future hypothesis", with the result that the related question of constitutionality is inadmissible, due to lack of relevance. In any case – the accused's representatives continue – is is not clear "for which reasons it can be asserted by the referring court that it will not be possible to reconvene the same bench of judges", considering that "the continuing activity in the same court for the maximum duration of the appointment of a President of the Council of Ministers is certainly not infrequent, and indeed, on the contrary it is always possible to reconvene the court through the appropriate measures". If the same court, in its current composition, continues to try the co-accused and reaches a verdict, "the resulting situation will be absolutely incompatible with that provided for under the Code of Criminal Procedure, regardless of its verdict". The renewal of the evidential stage "will not in any way have the effect of invalidating the activity carried out up until that point, which will by contrast be included in the new preliminary stage special evidence file [*fascicolo del dibattimento*]" and it will "then be the parties which decide whether to request the performance of all or part of the requirements pertaining to the oral proceedings, without prejudice to the contents of the preliminary stage special evidence file".

Finally, as regards the failure to make provision regulating the ability to use evidence already presented in criminal proceedings before the civil courts, the representatives of the accused claim that the suspension does not entail any prohibition on the ability to use such evidence since the general rules apply, "and accordingly the civil courts may, in full autonomy, use and assess it as simple indications or as exclusive evidence of its own findings".

2.3. – The prosecution in the proceedings before the lower court entered an appearance, represented by the Public Prosecutor with the *Tribunale di Milano* and a deputy from the same office of the public prosecutor.

The public prosecutor claims that his entry of appearance in the proceedings is admissible and requests, on the merits, that the questions proposed by the referring court be accepted, presenting arguments similar to those contained in the written statement filed in proceedings commenced pursuant to referral order No. 397 of 2008.

2.4. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*.

2.4.1. – The state representative argues, in the first place, that the question proposed with reference to Article 138 of the Constitution is inadmissible and in any case groundless" because the contested provision has the function of protecting the untroubled performance of the relevant functions pertaining to the high offices of state and the "area of law, considered in itself, is not precluded from regulation through ordinary legislation", as is confirmed by the fact that the other cases involving suspension are regulated by the Code of Criminal Procedure. "The fact that certain 'privileges' of the constitutional organs may be found in the Constitution" – continues the *Avvocatura Generale* – "does not mean that other privileges cannot be introduced through ordinary legislation, but only that the former amount to exceptions from principles or provisions set out in the Constitution itself and that therefore exceptions to them may only be found in the Constitution". Besides – according to the *Avvocatura Generale* – "in order to establish the requirement for a constitutional law it would have been necessary to indicate the incompatible interest, guaranteed by the Constitution, from which the provision was to constitute an exception", whilst the referring court did not indicate any constitutional principles other than Article 138 of the Constitution, "because in actual fact no such principles are available". This conclusion is claimed to be confirmed by judgment No. 24 of 2004, concerning law No. 140 of 2003, in which the Constitutional Court implicitly precluded its relevance, since it did not confront the question of the "legislative form to be used".

2.4.2. – Secondly, the state representative claims that the question raised with reference to Article 112 of the Constitution "is inadmissible on the grounds that it is not

fully supported by reasons (and in any case is manifestly groundless since, clearly, the mere suspension of the trial […] does not impinge upon the mandatory nature of criminal prosecution by the public prosecutor in the sense that it limits it), as is also the case for the question raised with reference to Article 68 of the Constitution (since the grounds mentioned in the referral order are not fleshed out, also with regard to its relevance in proceedings before the lower court)".

2.4.3. – Thirdly, as far as the averred violation of the principle of equality of citizens before the criminal courts is concerned, the *Avvocatura Generale* claims that the "provision under discussion contemplates a particularly favoured position for the high offices, taking into account the potential detriment to the performance of the high-ranking functions reserved to the same also on account of the unavoidable resonance, also through the media and on a scale not limited to a domestic level, of the celebration of criminal trials against them during the period in which the same functions are exercised". The exemption from liability to prosecution provided for under the contested provision is moreover claimed to be "proportionate to and adequate for the goal pursued, given the provision for a pre-determined and non-repeatable duration of the suspension […], the possibility of the interested party to waive it […] as well finally as the effective and 'immediate' protection of the rights of any private parties to such trials".

2.4.4. – Fourthly, again in the opinion of the state representative, the contested provision is not unreasonable because "under a logic resulting from a weighing and balancing of the interests 'in play', it is certainly not arbitrary for the subjection of the President of the Council of Ministers to prosecution for offences committed during the exercise of his functions to be constitutionally guaranteed by the requirement for parliamentary authorisation, which is hence called upon to evaluate on a preliminary basis whether the conduct deserves to be subject to the attention of the criminal courts, before which the possibility for the rapid prosecution of the offences committed during the exercise of institutional functions is justified by the predominant institutional importance of the interests of a general nature involved in and affected by the conduct charged (importance which, contrary to the arguments of the referring court, should not be assessed only in terms of the resulting sentence). On the other hand, the same

requirement is not in any case applicable to "common" offences for which the trial is initiated by the public prosecutor, without any requirement for a prior "political filter", and for which only its suspension – temporary and pre-determined – is provided for, taking into account the reasonable and marked "detriment" of its prosecution on the exercise of the institutional functions pertaining to the high office". It would not by the same token be unreasonable were the "suspension to be limited, amongst the governmental organs, to the President of the Council of Ministers alone […], since the constitutionally distinct position of the former compared to the other members of the government is beyond question, it being a matter for the President of the Council of Ministers (Article 95 of the Constitution) to direct the general policy of the government, which falls under his responsibility, and to maintain the unity of political and administrative policies, promoting and coordinating the activity of the ministers".

2.4.5. – Fifth, nor is there any violation of the principle of the reasonable length of trials pursuant to Article 111 of the Constitution, as averred, because: first, "the provision through ordinary legislation of grounds which entail, either for objective or subjective reasons, the temporary interruption of the normal prosecution of criminal trials […] does not throw the above principle of reasonable duration into crisis; secondly, the temporary suspension of trials, as set out and manifested as above through the provision under discussion, is appropriately and reasonably intended to avoid the risk that the correct and untroubled exercise of the pre-eminent public functions with which the high offices mentioned therein are charged be jeopardised".

2.4.6. – Sixth, "the additional argument contained in the referral order which points to the lack of an express provision regarding the ability to use evidence already obtained in subsequent stages of the trial" does not appear decisive to the state representative because "the provision concerned does not make any express provision on this matter" and it will be a matter for the lower court "to select, giving reasons, a non precluded and hence possible interpretation of Article 511 of the Code of Criminal Procedure which, taking into account the "special nature" of the arrangements laid down by the provision under discussion, in any case permits […] the use of evidence already obtained during the previous stage".

2.5. – By written statement filed shortly before the hearing, the private party requested that the entry of appearance by the public prosecutor be ruled inadmissible, submitting arguments similar to those contained in the written statement filed shortly before the hearing in proceedings commenced pursuant to referral order No. 397 of 2008.

2.6. – By written statement filed shortly before the hearing, the public prosecutor in the proceedings before the lower court reiterated the request that the questions raised in the referral order be accepted, restating the arguments already set out in the written statement by which it entered an appearance.

3. – By referral order of 26 September 2008 (referral order No. 9 of 2009) during the course of criminal proceedings in which the accused include, amongst others, the honourable Silvio Berlusconi, current President of the Council of Ministers, the judge for preliminary investigations at the *Tribunale di Roma* raised, with reference to Articles 3, 111, 112 and 138 of the Constitution, questions concerning the constitutionality of Article 1 of law No. 124 of 2008.

3.1. – Regarding the facts of the case, the referring judge states that: a) "on 4 July 2008 the public prosecutor submitted a request for the extension of the time-limits for the expiry of the preliminary investigations (Article 406 Code of Criminal Procedure) for a period of six months, within the ambit of proceedings registered as No. 1349/08 in the Register of Offences Reported"; b) "on expiry of the period of suspension of time-limits for the annual holiday period pursuant to law No. 742 of 1969, the court was required to notify the public prosecutor's request to the persons under investigation, in view of the commencement of the stage in which the parties may make representations in writing [*contraddittorio cartolare*] pursuant to Article 406(3) of the Code of Criminal Procedure which may, as may be the case, be started before the relevant decision"; c) on 23 July 2008 Parliament approved the contested provision, sub-section 1 of which required the general and automatic suspension of any criminal proceedings against individuals who occupy the offices of President of the Republic, President of the Chamber of Deputies and of the Senate of the Republic and the President of the Council of Ministers from the time when they take up office until the end of the term in office,

and also for criminal trials relating to events prior to their taking up the office or function.

As far as the relevance of the questions raised is concerned, the referring judge observes that, whilst the term "criminal trials", used in the contested sub-section 1, "would appear to imply that the law does not apply to stages prior to the trial *stricto sensu*, i.e. as celebrated with oral proceedings in public", a careful analysis of the legislative provision does not permit such a narrow interpretation. This is because – the referring judge continues – sub-section 7 provides that "the provisions of the present Article shall also apply to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force". According to the referring judge, "whilst it is certainly conceivable that a trial, understood as proceedings which have reached the stage of public oral proceedings, may pass through different *instances* (first instance, appeal, Court of Cassation) and whilst it is certainly possible to identify different phases within these instances (for instance the acts preliminary to these oral proceedings at first instance (Articles 465-469 of the Code of Criminal Procedure) and at second instance (Article 601 of the Code of Criminal Procedure); acts following the passing of the judgment at first instance (Articles 544-548 of the Code of Criminal Procedure); acts prior to the decision on an appeal to the Court of Cassation (Article 610 of the Code of Criminal Procedure)), a *stage* other than that which the proceedings have arrived at is not on the other hand legally possible for oral proceedings". This is stated to demonstrate "the non-technical nature of the phraseology used (trial) which in actual fact covers – as moreover expressly stated – every stage, state or instance of proceedings", also because otherwise the statutory provision would lack any "legislative, regulatory or even only interpretative" relevance. An additional literal argument in favour of the applicability of the contested legislation also to the stage of preliminary investigations is stated to be found in the provisions of the contested sub-section 3, which provides that the suspension shall not prevent the court, where the prerequisites are satisfied, from taking action pursuant to Articles 392 and 467 of the Code of Criminal Procedure for the hearing of non deferrable evidence. This provision entails – again according to the referring judge – two necessary implications: a) the suspension also covers the stages preceding the trial understood as oral proceedings

held in public, since recourse to the obtaining of evidence in advance by special procedures is only permitted during the course of preliminary investigations and the preliminary hearing; b) during the preliminary investigation stage the obtaining of evidence is, in general terms, forbidden and it is necessary to have recourse to the special procedures in order to enable the celebration of the future trial which could take place on expiry of the period of time in office of the individuals concerned. In particular, the referring judge notes that, "had […] Parliament wished to consent to […] the obtaining of evidence also during the preliminary investigation stage, it would not have made any provision on this matter, whilst it by contrast considered itself obliged expressly to specify the exceptions […] to the principle […] that any discovery of evidence in proceedings against the individuals who occupy the public offices is prohibited".

3.1.1. – On a comparative level, the referring judge notes that the contested provision constitutes "an unique case" compared to the provisions made under other legal systems and recalls that "only the Constitutions of a small number of states (Greece, Portugal, Israel and France) make provision for temporary immunity for common offences; it is moreover limited to the position of the President of the Republic, who represents the unity of the nation". By contrast – the referring judge continues – the same rule does not not apply to the presidents of the houses of Parliament, nor less for the head of the executive, for which immunity has "never extended to common offences" and "subsists by virtue of the protection conferred by the membership of Parliament which is almost always […] held by the prime minister, taking the form of authorisations to proceed granted by parliamentary organs (Spain), constitutional courts (France) or the ordinary courts (United States)". The same logic is also stated to underlie the legislative solutions adopted by those constitutional systems "which provide for special fora or special conditions for procedural admissibility (in general, again: authorisation to proceed by the House of which the individual is a member) for the prosecution of criminal actions against certain high offices of state both for common offences as well as those associated with the exercise of the office's functions (such as for example in Spain for the head of government and the ministers), maintaining in any case the constitutional court's ability to review a refusal, if made, by Parliament".

3.1.2. – Having made the above premises, the referring judge asserts that the contested provision violates, in the first place, Article 138 of the Constitution because "the exception from the principle of equality before the courts and the law was […] introduced through ordinary legislation, which within the hierarchy of sources is evidently located on a lower level than a constitutional law, and which […] has itself already been held to be incapable of modifying one of the defining features of the legal order of the state expressed by that principle".

The referring judge claims that, "Parliament has had recourse to the instrument of constitutional legislation (constitutional law No. 1 of 16 January 1989), as an exception, amongst other things, precisely to Article 96 of the Constitution, also where it only intended to regulate the prosecution of individuals occupying the offices of ministers (including the President of the Council of Ministers) in relation to offences committed when exercising their relative functions". The fact that judgment No. 24 of 2004, which concerned a similar provision to law No. 140 of 2003, was silent on this point cannot "operate as a precedent in favour of the constitutionality of the choice of the legislative instrument adopted then as now, since the effects of judgments which declare the statutory provisions under review to be unconstitutional are those expressly provided for under Articles 27 and 30 of law No. 87 of 11 March 1953, and do not also extend to questions that could merely have been averred".

3.1.3. – The referring judge claims, secondly, that Article 3(1) of the Constitution has been violated, arguing that the legislation creates "'different arrangements for criminal prosecution' (Constitutional Court judgment No. 24 of 2004)", thereby breaching "one of the fundamental principles of the modern state governed by the rule of law, consisting in the equal status of citizens before the courts, in turn manifested through the principle of formal equality before the law".

In the opinion of the referring judge, in the aforementioned judgment No. 24 of 2004, the Constitutional Court affirmed, "in clear and precise terms, albeit quantitatively limited compared to the body of reasons given", that "no constitutional law, not to mention no ordinary law, may subvert one of the fundamental principles of the modern state governed by the rule of law, consisting in the equal status of citizens before the courts, in turn manifested through the principle of formal equality before the law". The

absolute status of the principle is stated to be such as to clear the field of the possible objection that “the differences which may be found between the single article of law No. 124 of 2008 and Article 1(2) of law No. 140 of 2003, along with the removal of the further grounds for contrast with other constitutional provisions which characterised that legislation (infringement of the accused's right to a defence and sacrifice of the rights of the private party, if any, participating in proceedings with reference to Article 24 of the Constitution; generalised operation of the suspension and indefinite interruption of the time-scale for the trial with reference again to Article 24 and Article 111 of the Constitution; unreasonableness resulting from the provision for uniform arrangements for offices of state different by virtue of the appointing body and nature of the functions, and unreasonableness between arrangements providing for the exemption from prosecution for the high-ranking offices of state compared to the members of the constitutional organs to which they belong or other subjects performing similar functions, with reference to Article 3(2) of the Constitution) can establish the constitutionality of the provision contested in this forum”.

3.1.4. – Thirdly, Article 3 of the Constitution has been violated, due to the inherent unreasonableness of the legislation deriving from the absence of any possibility to challenge the right to waive the suspension “since if the stated interest pursued by Parliament is that of ensuring the untroubled performance of functions during the time in office (Constitutional Court judgment No. 24/2004), the subjects concerned should have no right to interfere with the suspension of proceedings, in order to ensure its full efficacy”.

3.1.5. – Fourthly, the contested article is claimed to violate Article 111(2) of the Constitution, because it breaches “an inherent corollary of the principle of the reasonable length of trials, consisting in the concentration of procedural stages, in the sense that within the ambit of criminal prosecutions, the stage during which evidence is obtained must be followed within a reasonable time by its verification in public oral proceedings, in order to ensure that a fair judgment may be issued by the court”.

3.1.6. – Finally, the referring judge claims that the contested provision breaches Articles 3 and 112 of the Constitution on the grounds that it violates the principles of the mandatory nature of criminal prosecution and substantive equality, due to the

unreasonableness of the exception from ordinary law contained in the contested legislation, since the provision does not apply to offences committed during the exercise of institutional functions, but offences committed outwith the ambit of official duties "committed without distinction by any of the subjects mentioned therein, of any nature or seriousness, even before taking up public office".

In the opinion of the referring judge, the Constitution permits exceptions from the principle of the mandatory nature of criminal prosecution "only [for] offences committed when exercising institutional functions are which are inherently bound up with the performance of the same (Articles 68, 90, 96 and 122(4) of the Constitution), a situation which establishes the reasonableness also of the exception from the ordinary arrangements for the prosecution of offences". The contested unreasonableness – the referring judge concludes – would be thrown into yet sharper relief in cases in which the suspension actually intervened to block, albeit temporarily, proceedings for serious offences, "with the unintended result of transforming the taking up of public office, entailing the generalised temporary immunity, into a moment of objective disrepute for the inherent prestige of the office".

3.2. – The aforementioned private party entered an appearance presenting, on the merits, arguments similar to those contained in the written statement through which it entered an appearance in the proceedings commenced pursuant to referral orders No. 397 and No. 398 of 2008 and observing, on the issue of admissibility, that the questions proposed by the referring judge are inadmissible because the contested provision does not apply during the preliminary investigations stage. That is, the accused's representatives do not share the argument of the referring judge – seized with a request from the public prosecutor to extend the time-limits for the expiry of inquiries – according to which, since the term "trial" exclusively relates to proceedings which have reached the stage involving oral proceedings in public within which it is not possible to identify different stages, the term "stage" used in Article 1(7) of law No. 124 of 2008 could have legal meaning exclusively with reference to the proceedings as a whole, including obviously the preliminary investigations stage.

In the opinion of the representatives of the accused, this argument is mistaken, first because "various stages can be identified also in the 'trial': before the order made

commencing oral proceedings pursuant to Article 492 of the Code of Criminal Procedure there is the stage which stretches from the entry of appearance by the parties (Article 484 of the Code of Criminal Procedure) to the ruling on preliminary questions (Article 491 of the Code of Criminal Procedure); this is then followed by the stage governed by Articles 493, 494 and 495 of the Code of Criminal Procedure; thereafter the stage of oral proceedings concerning substantive matters [*istruzione dibattimentale*] starts (Articles 496-515 of the Code of Criminal Procedure) which may include the stage involving new arraignments (Articles 516-522 of the Code of Criminal Procedure); this is followed by the final discussion stage and the closure of oral proceedings; finally there is the stage in which the court withdraws to deliberate its verdict"; the above are genuine stages and not mere fragments of the trial, because they are regulated by specific rules and each is characterised by specific rights, options and time limits.

Secondly, it is not "legally tenable [to argue] that the 'trial' arises, as the referring judge believes, only when the proceedings reach the stage of the oral proceedings in public. Indeed, nobody doubts that one may and must speak of a trial with the commencement of the criminal action which under Italian law, as is widely known, arises with the bringing of charges or request for indictment by the public prosecutor identified, *ratione temporis*, under Article 405(1) of the Code of Criminal Procedure".

The representatives of the private party then criticise the referring judge's argument that the fact that the contested provision permits the court to obtain non deferrable evidence pursuant to Articles 392 and 467 of the Code of Criminal Procedure means that the suspension of the trial must necessarily be understood as the suspension also of the proceedings, "since recourse to the obtaining of evidence in advance by special procedures is only permitted only during the course of the preliminary investigation […] and preliminary hearing stage". According to the representatives, "the preliminary hearing is a fully fledged element of the trial since the prosecution has already been commenced during this stage with the filing of the request for indictment pursuant to the combined provisions of Articles 405(1) and 416(1) of the Code of Criminal Procedure", with the result that the legislative provision referred to by the referring

court regarding the obtaining of non deferrable evidence may indeed apply also during the court of the trial.

The interpretation given by the referring court is moreover contradicted both by the *travaux preparatoires* – "during which the extent of the application of the provision was made clear with exclusive reference to the 'trial' understood precisely in the technical legal sense as that stage commenced following the bringing of charges or request for indictment" – as well as by the Office of the Public Prosecutor for Rome which – according to the assertions of the private party's representatives – requested in the proceedings before the lower court "the termination of proceedings" [*sic*: the extension of the time limits for preliminary investigations] also with regard to the aforementioned accused.

3.3. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, referring to the arguments already made in its interventions in proceedings commenced pursuant to referral orders No. 397 and No. 398 of 2008 and submitting that "the questions raised be ruled inadmissible and groundless".

4. – Shortly before the hearing, the President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, filed a single written statement with reference to proceedings commenced pursuant to referral orders No. 397 and No. 398 of 2008 and No. 9 of 2009, in which it restated the points already made in its intervention and argued, in particular, that: a) since the President of the Republic and the presidents of the Houses of Parliament "are not parties to proceedings in which the referral orders were made, the requirement of relevance for the examination of the questions which could arise in relation to them is not fulfilled", with the result that the questions are inadmissible; b) the questions relating to Article 1(7) of law No. 124 of 2008 are inadmissible, "because no self-standing grounds are proposed in the application in this regard and, in any case, it does not contain any arguments in support"; c) Parliament may, at its discretion, take action in order to coordinate the personal interests of the accused in defending himself in the trial with the general interest in the "efficient exercise of their public functions"; d) "since the detriment was caused by the fact that the functions were being exercised at the same time as the trial

were pending, it could not be eliminated other than by eliminating this concurrence" since moreover "any form of reduction or suspension" of the functions was precluded, since it "would have been detrimental for the inexorable interest in those functions being exercised on an ongoing basis"; e) Parliament's inaction would have "entailed the tolerance of a situation already in itself not compatible with the Constitution"; f) the suspension ordered under the contested provision is also justified by the large resonance throughout the media which the criminal trials for offences committed outwith the ambit of official duties against the President of the Council of Ministers have; g) the provision for the suspension of trials by ordinary law is also justified by the need to modify the related legislation easily should "the actual circumstances change in such a way as to entail a different balancing of the interests".

5. – By order read out in the public hearing, the Constitutional Court ruled inadmissible the entry of appearance by the Public Prosecutor and by the deputy Public Prosecutor at the *Tribunale di Milano* in the proceedings commenced pursuant to referral orders No. 397 and No. 398 of 2008.

Conclusions on points of law

1. – The *Tribunale di Milano* (referral order No. 397 of 2008) questions, with reference to Articles 3, 136 and 138 of the Constitution, the constitutionality of Article 1(1) and (7) of law No. 124 of 23 July 2008 (Provisions ordering the suspension of criminal proceedings against the high offices of state). The same court (referral order No. 398 of 2008) questions the constitutionality of the whole of Article 1 of law No. 124 of 2008, with reference to Articles 3, 68, 90, 96, 111, 112 and 138 of the Constitution. The judge for preliminary investigations at the *Tribunale di Roma* (referral order No. 9 of 2009) questions, with reference to Articles 3, 111, 112 and 138 of the Constitution, the constitutionality of Article 1 of law No. 124 of 2008.

The contested Article 1(1) provides that: "Without prejudice to the cases governed by Articles 90 and 96 of the Constitution, any criminal proceedings against individuals which occupy the offices of President of the Republic, President of the Senate of the Republic, President of the Chamber of Deputies and President of the Council of Ministers shall be suspended from the time when they take up the office or function

until the end of the term in office. The suspension shall also apply to criminal proceedings for conduct prior to taking up the office or function". The other sub-sections provide that: a) "The accused, or his representative endowed with special power of attorney, may at any time waive the suspension" (sub-section 2); b) "The suspension shall not prevent the court, where the prerequisites are satisfied, from taking action pursuant to Articles 392 and 467 of the Code of Criminal Procedure, for the taking of non deferrable evidence" (sub-section 3); c) the provisions of Article 159 of the Criminal Code shall apply and the suspension, which shall operate for the entire duration of the office or function, may not be repeated, except where the individual is re-appointed during the same legislature, nor shall it apply to cases involving the consecutive appointment to another of the offices or functions (sub-sections 4 and 5); d) "Where proceedings are suspended, the provisions contained in Article 75(3) of the Code of Criminal Procedure shall not apply" and, where a private party transfers the action to the civil courts, "the time limits for the entry of appearance, as governed by Article 163-*bis* of the Code of Civil Procedure, shall be reduced by half, and the court shall make a case management order giving precedence to the proceedings relating to the transferred action" (sub-section 6); e) the article applies "also to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force" (sub-section 7).

The questions proposed by the referring bodies may be classified under groups in relation to the principle invoked.

1.1. – Article 136 of the Constitution is invoked as a general principle by the *Tribunale di Milano* (order No. 397 of 2008), which observes that Article 1(1) and (7) of law No. 124 of 2008 "again repeat the breach of the Constitution, already declared by the Court" in judgment No. 24 of 2004 "by re-enacting the same legislation on this issue".

1.2. – Article 138 of the Constitution is invoked by all the referring bodies.

The *Tribunale di Milano* (referral order No. 397 of 2008) asserts that the contested sub-sections 1 and 7 of Article 1 of law No. 124 of 2008 violate this constitutional principles, because they make provision in an "area of law reserved […] to legislation enacted in accordance with procedures to amend the Constitution, as is shown by the

fact that all relations between the organs with constitutional significance and criminal trials are regulated by constitutional legislation".

In relation to Article 1 as a whole, the *Tribunale di Milano* (referral order No. 398 of 2008) claims that "the legislation governing the status of the occupants of the highest institutional roles of the Republic is in itself a typically constitutional matter, and the reason is clear: all provisions which limit or defer in time their responsibility count as exceptions to the general principle of the equality of all citizens before the law provided for under Article 3 of the Constitution, a fundamental principle of the rule of law".

According to the judge for preliminary investigations at the *Tribunale di Roma*, the contested Article 1 breaches the principle invoked because "the exception from the principle of equality before the courts and the law was […] introduced through ordinary legislation, which within the hierarchy of sources is evidently located on a lower level than a constitutional law".

1.3. – Three of the questions raised concern the principle of equality, laid down in Article 3 of the Constitution, on the grounds of the unreasonable difference in treatment before the courts.

In referral order No. 397 of 2008, the *Tribunale di Milano* claims that Article 1(1) and (7) of law No. 124 of 2008 violate this principle, since they bring together "within one single provision different offices not only by virtue of the appointing body, but also the nature of the functions", and moreover unreasonably distinguish, "for the first time with reference to their equal treatment, in relation to the fundamental principles underlying court action, between the Presidents of the Houses of Parliament and the President of the Council of Ministers [...] and the other members of the organs presided by them".

In referral order No. 398 of 2008, the *Tribunale di Milano* complains that this principle has been violated, because "the contents of all the provisions at issue impinge upon a core value for our democratic order, namely the equality of all citizens before the criminal courts".

The judge for preliminary investigations at the *Tribunale di Roma* bases his challenge on the consideration that the provision "establishes differentiated arrangements for the exercise of [criminal] court action", thereby breaching "one of the fundamental principles of the modern state governed by the rule of law, consisting in the equal status

of citizens before the courts, in turn manifested through the principle of formal equality before the law".

1.4. – Article 3 of the Constitution was also invoked with regard to the principle of reasonableness.

According to the *Tribunale di Milano* (referral order No. 398 of 2008), Article 3 has been violated because the "privileges granted to those who occupy institutional offices are necessary in order to protect the high-ranking functions exercised", with the result that the right to right to waive the procedural suspension recognised to the occupant of the high office stands in contrast with the protection of the public office, in that it grants a "merely elective" discretion to the individual who benefits from it, rather than providing for those filters characterised by third party status and involving assessments of the special circumstances of individual cases which alone, according to judgment No. 24 of 2004, could provide an adequate remedy both for the generalised automaticity already censured by the Court as well as "the infringement of the right to take court action".

In the opinion of the judge for preliminary investigations at the *Tribunale di Roma*, the inherent unreasonableness of the contested legislation results from the absence of any possibility to challenge the right to waive the suspension, since " since if the stated interest pursued by Parliament is that of ensuring the untroubled performance of functions during the time in office (Constitutional Court judgment No. 24/2004), the subjects concerned should have no right to interfere with the suspension of proceedings".

1.5. – The *Tribunale di Milano* formulates a detailed question with reference to Articles 3, 68, 90, 96 and 112 of the Constitution, based on the claim that the contested provision creates a difference in treatment between the legislation introduced for offences committed outwith the ambit of official duties and that, with constitutional status, governing offences committed whilst performing the official duties of the four high offices concerned. This difference is claimed to be unreasonable: a) due to the failure to specify Article 68 of the Constitution amongst the constitutional provisions expressly stated to be unaffected by law No. 124 of 2008; b) due to the fact that "the legal interest considered by the ordinary law, that is the regular performance of the high-

ranking functions of the state, is the same as that which the Constitution protects for the President of the Republic under Article 90, and for President of the Council of Ministers and for ministers under Article 96"; c) due to the provision of a *ius singulare* for offences committed outwith the ambit of official duties in favour of the President of the Council of Ministers who, by contrast, the Constitution treats as equivalent to other ministers for offences committed whilst performing official duties as a consequence of his position as *primus inter pares*.

1.6. – The judge for preliminary investigations at the *Tribunale di Roma* claims that the combined provisions of Articles 3 and 112 of the Constitution have been violated, with regard to the mandatory nature of criminal prosecution and substantive equality. In the opinion of the referring judge, the contested legislation introduces an unreasonable exception from the ordinary arrangements, because it does not apply to offences committed during the exercise of institutional functions, but offences committed outwith the ambit of official duties "committed without distinction by any of the subjects mentioned therein, of any nature or seriousness, even before taking up public office".

1.7. – Both referral order No. 398 of 2008, as well as referral order No. 9 of 2009 invoke the principle contained in Article 111(2) of the Constitution, concerning the requirement for the reasonable duration of trials.

For the *Tribunale di Milano*, the principle has been violated because the contested provision blocks "proceedings at every stage and instance for a potentially very long period of time" and results in "a clear waste of procedural activity", above all making no provision "regarding the ability to use evidence already obtained", either within the context of the same criminal trial following conclusion of the period of suspension, or in different proceedings to which the private party has decided to transfer his action, that party, with the resulting requirement for that party "to sustain *ex novo* the burden of proof to its full extent".

The judge for preliminary investigations at the *Tribunale di Roma* claims that the contested provision stands in contrast with "an inherent corollary of the principle of the reasonable length of trials, consisting in the concentration of procedural stages, in the sense that within the ambit of criminal prosecutions, the stage during which evidence is

obtained must be followed within a reasonable time by its verification in public oral proceedings, in order to ensure that a fair judgment may be issued by the court".

2. – In view of the partial overlap between the object of and reasons for the questions raised, the proceedings must be joined for joint treatment and decision.

3. – As a preliminary matter it is necessary to examine the objection made by the representatives of the private party averring the inadmissibility, on the grounds of irrelevance, of the questions raised by the judge for preliminary investigations at the *Tribunale di Roma* (referral order No. 9 of 2009), since the contested provision does not apply during the preliminary investigations stage. The representatives challenge the argument of the referring judge, according to which the term "stage" used in Article 1(7) of law No. 124 of 2008 could have legal meaning exclusively with reference to the proceedings as a whole, including obviously the preliminary investigations stage.

The objection is well founded.

3.1. – In order to justify the application of the contested provision also to the preliminary investigations, the referring judge presents arguments based on a literal and a systematic interpretation.

Adopting a literal interpretation, the referring judge asserts in the first place that the term "criminal trials" (contained in Article 1(1) of law No. 124 of 2008) cannot be interpreted in a technical sense, in such a way as to refer narrowly only to oral proceedings. In this case Parliament in fact used a generic term, capable of embracing within the concept of "trial" also the preliminary investigations stage. Moreover, he argues that − in order to have a plausible legal meaning − the term "stage" (contained in Article 1(7)) can only refer to the preliminary investigations stage, since "a *stage* other than that which the proceedings have arrived at is not on the other hand legally possible for oral proceedings".

Adopting a systematic interpretation, the referring judge asserts that − by providing that "The suspension shall not prevent the court, where the prerequisites are satisfied, from taking action pursuant to Articles 392 and 467 of the Code of Criminal Procedure, for the taking of non deferrable evidence" − Article 1(3) necessary implies that the suspension also covers the stages preceding the trial "understood as proceedings held in public", since recourse to the obtaining of evidence in advance by special procedures is

only permitted during the course of preliminary investigations and the preliminary hearing. Article 392 governs cases in which evidence is taken by special procedures, whilst Article 467 refers to Article 392 in order to regulate the taking of non deferrable evidence. The referring court infers from the joint reference to these articles that there is a bijective function between special procedures for taking evidence and preliminary investigations.

3.2. – None of these arguments justifies the conclusion reached by the referring judge, that is that the suspension also applies to preliminary investigations. In fact, it is contradictory to evoke – as the referring judge does – the linguistic rigour within the legislative text inconsistently: such rigour is on the one hand excluded with reference to the term "criminal trial", whilst on the other hand it is asserted in relation to the term "stage". Moreover, it should be pointed out that the term "stage" − which is not precisely defined within the system of the law of criminal procedure − may denote, in a broad sense and within common usage, a point or stage of proceedings, indiscriminately related both to the "stages of the proceedings", as well as those of the trial. Nor does the reference which the contested provision makes to Articles 392 and 467 of the Code of Criminal Procedure necessarily entail that the suspension extends to the stages preceding the trial. In reality – in accordance with the case law of this Court (judgment No. 77 of 1994) – there is no preclusion on the taking of evidence by special procedures during the preliminary hearing, which amounts to a stage of proceedings distinct from that of the preliminary investigations. The reference to the legislation governing the special procedures for the taking of evidence, and the taking of non deferrable evidence – far from establishing a mutual implication between such institutions and preliminary investigations – serves only to state the necessary prerequisite for the taking of such evidence, namely the requirement of urgency.

3.3. – Further considerations support an interpretation different from that of the referring judge.

In fact, leaving aside the unequivocal intention expressed by Parliament, which may be derived from the *travaux preparatoires* (for example, the comments made by the Minister of Justice during the morning session of 22 July 2008 of the Senate Assembly), the argument concerning the unreasonable consequences which would result from any

different interpretation is decisive in excluding the preliminary investigations stage from the suspension mechanism. In fact, if the suspension were applied right from the preliminary investigations stage, a serious detriment would be caused to the exercise of prosecutions, because they would not only be deferred but substantially undermined, due to the extreme difficulty in the discovery of evidence a number of years later. If interpreted in this manner, the contested provision would entail the risk of a definitive loss by the accused of liability to prosecution, even after the end of the term in high office.

This interpretation would also have the paradoxical and unreasonable effect – also on the right to a defence of the person under investigation – of not permitting the performance of preliminary investigations even in cases in which other procedural measures to which the suspension provided for under the contested provision (such as, for example, the application of pre-trial supervision measures and the mandatory arrest *in flagrante delicto*) had already been carried out.

3.4. – The Court therefore finds that the interpretation of the referring judge contrasts with the literal wording of the provision and leads to results which contrast with the constitutional principle of reasonableness. It follows from this that the questions raised in referral order No. 9 of 2009 by the judge for preliminary investigations at the *Tribunale di Roma* are inadmissible due to lack of relevance, because the referring judge need not apply the provision, the constitutionality of which is doubted.

4. – The *Avvocatura Generale dello Stato* averred the inadmissibility on the grounds of irrelevance of all the questions raised, insofar as they concern provisions which do not apply to the President of the Council of Ministers, on the grounds that only the holder of this office is accused in the main proceedings, and not the holders of the other offices of state to which the contested article refers.

The objection is groundless.

It must be pointed out that the contested provisions, on an objective level, lay down unitary arrangements, which apply without distinction to the high offices of state provided for therein, with the result that a hypothetical declaration of unconstitutionality limited to the provision regarding only one of these offices would aggravate the unconstitutionality of the legislation, creating additional grounds for unequal treatment.

Therefore, were this Court to identify elements of unequal treatment in the contested legislation which regarded all the high offices of state, the declaration of unconstitutionality would necessarily have to extend to all of the contested provisions.

It should be added to these considerations that judgment No. 24 of 2004 implicitly – but clearly − found that the legislation could not be treated separately, as described above, with regard to the high offices of state because, in a similar case, it declared unconstitutional the whole of Article 1 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), with reference to all of the offices of state mentioned in that article, in spite of the fact that the main proceedings involved only the President of the Council of Ministers.

5. – It is now necessary to move to an examination of the merits of the questions raised.

The *Tribunale di Milano* (referral order No. 397 of 2008) challenges Article 1(1) and (7) of law No. 124 of 2008, with reference to Article 136 of the Constitution, due to violation of the ruling of the Constitutional Court in judgment No. 24 of 2004. The referring court complains that the contested sub-sections have "re-enacted the same legislation" contained in law No. 140 of 2003, declared unconstitutional in the said judgment.

The question is groundless.

As this Court has held on various occasions (*inter alia*, judgments No. 78 of 1992 and No. 922 of 1988), in order for a ruling of the Constitutional Court to be violated it is necessary that a provision restore or preserve the efficacy of a provision already declared unconstitutional.

In the case before the court, Parliament introduced a provision which did not re-enact another provision declared unconstitutional, nor did it refer to it. By contrast, the provision contains significant legislative innovations, such as for example the right of waiver and the non-repeatability of the suspension of criminal trials (sub-sections 2 and 5), as well as specific provisions to protect the position of any private parties (sub-section 6), thereby demonstrating that it had taken into consideration, albeit partially, judgment No. 24 of 2004. Moreover, the notes of the President of the Republic –

referred to both by the referring court as well as the parties – which accompanied both the authorisation to submit the draft bill concerning criminal trials against the high offices of state to the Houses of Parliament, as well as the subsequent promulgation of the law, were based on the recognition of these new provisions. Nor can it be argued that, in the case before the Court, the violation of the ruling of the Constitutional Court results from the fact that some of the provisions of Article 1 – such as the contested sub-sections 1 and 7 – reproduce the provisions already declared unconstitutional. On the contrary, the Court in fact finds that the review of the said violation must take into account the provisions as a whole which are enacted at different moments in time, and that the coincidence, if any, of individual legislative provisions is not relevant.

6. – In the two referral orders cited above, the *Tribunale di Milano* also raises questions of constitutionality, invoking as principles, at some points jointly and at others separately, the constitutional provisions in the area of privileges (Articles 68, 90 and 96 of the Constitution) and Articles 3 and 138 of the Constitution. Leaving aside their more or less precise wording, these questions must be classified under two different groups, depending on the actual content of the complaints: a) a first group is proposed with reference to the violation of the combined provisions of Articles 3(1) and 138 of the Constitution, regarding the constitutional provisions governing privileges, with reference to equal treatment before the courts, both in general as well as in relation to the high offices of state; b) a second group is proposed also with reference to Article 3 of the Constitution, on the grounds however of the inherent unreasonableness of the contested legislation. These different groups must be treated separately.

7. – As far as the first of the above group of questions is concerned, the referring court starts from the premise that the Constitution regulates relations between constitutional bodies (or those with constitutional significance) and the criminal courts, making provision, in order to protect the functions carried out by these organs, for a closed list of privileges creating exceptions from the principle of equality before the courts. On the strength of this premise, the lower court infers that the contested provision at the same time breaches both Article 3 of the Constitution, because – with reference to the constitutional provisions concerning privileges – it introduces an unjustified exception from the above principle of equality before the courts, as well as

Article 138 of the Constitution, because this exception should have been introduced, if at all, by legislation with constitutional status.

7.1. – In relation to the same group of questions, the *Avvocatura Generale* avers that it is inadmissible due to the failure to specify adequately the principle invoked and asserts, as support for this objection, that the invocation by the referring court only of Article 138 of the Constitution – which is limited to regulating the procedures for the adoption and approval of laws amending the Constitution and other constitutional laws – is not sufficient in order to identify the other constitutional provisions from which the interest which the lower court considers to be incompatible with the contested provision can be inferred.

The objection is groundless.

As observed above, both of the referral orders are not limited to contesting the violation of Article 138 of the Constitution as a mere consequence of the violation of some other article of the Constitution. In fact, they are not based on the consideration – of a generic and formal nature – that, in this case, only a source with constitutional status would have been able (provided that it in turn did not violate the supreme principles not susceptible to constitutional amendment) to preclude a violation of the Constitution. By contrast, the referring court raises a specific question of a substantive nature by challenging – through an adequate indication of the principles – the violation of the principle of equality with express reference to the privileges of the constitutional organs.

7.2. – The representatives of the private party and the *Avvocatura Generale* claim moreover that questions substantively identical to those relating to Article 138 of the Constitution at issue in the present constitutionality proceedings have already been reviewed and ruled groundless by this Court in judgment No. 24 of 2004, concerning Article 1 of law No. 140 of 2003, which was entirely similar on this point to the contested Article 1 of law No. 124 of 2008. On this matter, the above representatives assert that, when declaring unconstitutional Article 1 of law No. 140 of 2003 due to violation only of Articles 3 and 24 of the Constitution, judgment No. 24 implicitly rejected the question relating to Article 138 of the Constitution, even though it had been raised, regarding the inability of ordinary legislation to order the suspension of

prosecutions commenced against the high offices of state. In particular, the above representatives argue that this last question is a preliminary issue for the decision on legal and logical grounds and, accordingly, could not have been a moot point within the declaration of unconstitutionality due to violation of other principles. From this perspective, it is also observed that where the above judgment No. 24 of 2004 asserts that: a) it is legitimate for "Parliament" to provide for a suspension of prosecutions for requirements external to the proceedings, this must be interpreted as providing that also "Parliament enacting ordinary legislation" may order the suspension of prosecutions against the high offices of state; b) that the "substantial public interest" in "ensuring the untroubled performance of the functions" pertaining to the high offices of state must be protected "in harmony with the fundamental principles of the rule of law", this must be understood as providing that ordinary legislation may indeed be adopted in this area of law, even though it must strike a balance with the principles laid down in Articles 3 and 24 of the Constitution. For the above reasons, the representatives of the private party and the Avvocatura *Generale* claim that orders No. 397 and No. 398 of 2008 do not raise new issues or issues different from those already implicitly evaluated by the Court, with the result that the questions referring to the combined provisions of Articles 3 and 138 of the Constitution, with reference to the constitutional provisions in the area of privileges, are inadmissible or manifestly groundless.

This objection is also groundless.

First, there is no doubt that the Court has not made any ruling on this point. In fact, judgment No. 24 of 2004 did not examine at any stage the question of the inability of ordinary legislation to introduce the aforementioned procedural suspension.

Secondly, the Court finds that this judgment did not contain an implicit ruling on this point. This is because, where a case involves mutually self-standing questions, since none is a preliminary issue with regard to the others, it falls within the powers of this Court to establish, also on the grounds of procedural economy, the order in which to confront them in the judgment and to rule the others moot (judgments No. 464 of 1992 and No. 34 of 1961). In this case, the acceptance of any one of the questions, which results in the contested provision being struck down, is in fact sufficient in order to settle the entire constitutionality proceedings and does not imply any ruling on other

questions, but only simply that they are moot. This was the case in judgment No. 24 of 2004, cited above, which, applying the said principles in relation to questions proposed in the same terms, privileged the examination of the fundamental issues of equality and reasonableness and declared "moot every other ground for unconstitutionality", thereby omitting to rule on the question concerning Article 138 of the Constitution. The violation of fundamental principles and rights, which was particularly emphasised by the referring court in those proceedings – such as the right to a defence, equality between constitutional bodies and reasonableness – in fact emerged directly and unequivocally from an analysis of the mechanism by which the benefit was conferred, thereby rendering unnecessary any further analysis with regard to the other questions raised and, therefore, also to those concerning the appropriateness of the source, whether it have the status of constitutional law or ordinary legislation.

Thirdly, the failure to consider the question in any case means that the referring court may propose a question similar to that already raised in the proceedings concluded by No. 24 of 2004. In fact, the principle elaborated in case law that questions of constitutionality may be proposed a second time on grounds different from those examined by the Court in rulings rejecting them (*inter alia*: judgments No. 257 of 1991 and No. 210 of 1976; orders No. 218 of 2009, No. 464 of 2005 and No. 356 of 2000) applies in this case. It follows that the question concerning Article 138 of the Constitution, posed by the *Tribunale di Milano*, cannot be resolved by the mere reference to judgment No. 24 of 2004, but must be comprehensively reviewed by this Court, especially since the said question concerns different legislative provisions.

7.3. – The referring court argues that the contested violation of Articles 3 and 138 of the Constitution subsists on the basis of the following two propositions: a) all the privileges of constitutional organs must be created by legislation with constitutional status, since they create exceptions from the principle of equality; b) the contested provision introduces the possibility of the suspension of criminal trials, which amounts to a privilege, because it is aimed at safeguarding the regular functioning not of the trial, but of certain constitutional organs.

Each of these arguments requires a specific examination by this Court.

7.3.1. – The first, concerning the requirement that privileges be regulated under constitutional law, is correct.

On this point it should be pointed out that constitutional privileges (or immunity *sensu lato*, as they are often termed) are classified under the category of institutions aimed at protecting the performance of the functions of the constitutional organs by protecting the holders of the offices associated with them. They manifest themselves – according to a view over which there is a settled and general consensus within the traditional constitutional case law and academic literature – as specific protection for the persons endowed with constitutional status, thereby removing them from the application of the ordinary rules. The privileges indicated may take on various forms and designations in practice (acts which may not be subject to challenge [*insindacabilità*]; defences in general or substantive immunity; inviolability; merely procedural immunity, such as special courts, conditions for prosecution or other favourable procedural mechanisms; exceptions from ordinary formalities) and may relate both to the acts inherent to their function (so-called acts committed whilst performing official duties) as well as acts unrelated to it (so-called acts committed outwith the ambit of official duties), but in any case display the dual characteristic of being aimed at guaranteeing the exercise of the functions of constitutional organs and of creating exceptions to the ordinary arrangements governing court action. They are therefore institutions which confer particular protective status on the members of the organs, and are institutions which are, at the same time, inherent aspects of the proper functioning of the state and which create exceptions from the principle of equality between citizens.

The problem of identifying the quantitative and qualitative limits of the privilege takes on a particular importance for the rule of law because, on the one hand, as this Court has already held, “the principle of equal treatment before the courts stands at the origin of the formation of a state governed by the rule of law” (judgment No. 24 of 2004) and, on the other hand, the institutions providing protection mentioned do not only necessarily imply an exception to the said principle, but are also aimed at striking a delicate yet essential balance between the different branches of state, since they may have an impact on the political functioning of the various organs. This overall

institutional architecture, inspired by the principles of the separation of powers and their equilibrium, means that the legislation governing the privileges contained in the text of the Constitution must be understood as a specific legislative system, which is the fruit of a particular balancing and structuring of constitutional interests; and Parliament is not permitted to change this system either *in peius* or *in melius* through ordinary legislation.

Therefore, this conclusion does not result from the recognition of an express reservation of the matter to constitutional law, but from the fact that the above privileges are systematically governed by legislation with constitutional status. These include, for example, provisions concerning functions associated with the high offices covered by the contested Article, such as: Article 68 of the Constitution, which lays down certain substantive and procedural privileges relating both to offences committed whilst performing official duties (sub-section one) as well as offences committed outwith the ambit of official duties (sub-sections two and three) for members of Parliament (and therefore also for the presidents of the Houses of Parliament); Article 90 of the Constitution, which provides that the President of the Republic shall not be held liable for acts carried out when exercising his functions, except for high treason or the attempt to change the Constitution by unlawful means; Article 96 of the Constitution, which provides that the President of the Council of Ministers and the ministers, including those who are no longer in office, shall be subject to the jurisdiction of the ordinary courts for offences committed when exercising their functions, according to procedures to be specified under constitutional law.

In accordance with the above framework, this Court has clearly and constantly affirmed, in numerous judgments issued both before as well as after judgment No. 24 of 2004, the principle – which should be reiterated here – that Parliament may enact ordinary legislation in the area of privileges (i.e. immunity *sensu lato*), only in order to implement on a procedural level the provisions contained in constitutional law, and it is precluded form supplementing or extending such provisions in any manner. On this issue, the Court has held that: “constitutional provisions stipulate, on an exceptional basis, the exceptions from the principle of the mandatory nature of criminal prosecution” (judgment No. 4 of 1965); Parliament is not competent to enact ordinary legislation governing immunity (judgment No. 148 of 1983); there is a “consensus

within case law, the academic literature and Parliament itself that Article 68(2) of the Constitution cannot be supplemented through ordinary legislation, or in any case the enactment of a provision establishing similar privileges" capable of creating exceptions to Article 112 of the Constitution (judgment No. 300 of 1984); Article 3 of law No. 140 of 2003, insofar as it amounts to the implementation of Article 68(1) of the Constitution, does not violate the Constitution because it does not entail "an undue expansion of the guarantee of immunity contained in the constitutional provision", but "may be regarded as the implementation of the provisions of Article 68(1) of the Constitution, therefore aimed at rendering it immediately and directly operative on a procedural level" (judgment No. 120 of 2004); Article 3 of law No. 140 of 2003 is a provision aimed "at guaranteeing, on a procedural level, the effective and correct functioning of the parliamentary privilege" laid down in Article 68(1) of the Constitution (judgment No. 149 of 2007, which refers to the above judgment No. 120 of 2004).

Nor can it be objected that the privileges can be introduced also through ordinary legislation, as is the case for diplomatic immunity provided for under international conventions which, according to the representatives of the private party, are not covered by Article 10 of the Constitution, since they are provided for not under "generally recognised norms of international law", but international law treaties implemented by ordinary legislation. In this regard, it should be pointed out that the question placed before this Court for examination exclusively concerns the privileges of the members and presidents of constitutional bodies, and not diplomatic immunity, which moreover is contemplated under ordinary legislation that reproduces, or in any case implements, generally recognised norms of international law, and is therefore covered by Article 10 of the Constitution (on the classification of diplomatic immunity provided for within international conventions under the category of generally recognised norms of international law see, *inter alia*, judgment No. 48 of 1979). Also the special provisions governing the privileges of the President of the Council of Ministers and of the ministers in relation to offences committed by them whilst performing official duties and by co-defendants, provided for under ordinary law No. 219 of 5 June 1989, No. 219 (New provisions governing ministerial offences and offences provided for under Article 90 of the Constitution) – also invoked by the private party in support of its arguments –

constitutes, moreover, the mere implementation of constitutional law No. 1 of 16 January 1989 (Amendments to Articles 96, 134 and 135 of the Constitution and constitutional law No. 1 of 11 march 1953, and provisions relating to procedures for offences governed by Article 96 of the Constitution) and is therefore covered by constitutional law.

Moreover, it is not possible to invoke in support of the argument that ordinary legislation is capable of establishing the privileges of bodies with constitutional significance judgment No. 148 of 1983, in which this Court upheld the constitutionality of an ordinary law providing that the votes cast and opinions expressed by the members of the Supreme Council of the Judiciary when exercising their functions and regarding matters placed before it for discussion may not be subject to review or challenge. This judgment asserted the principle that Parliament does not have competence to regulate the question of immunities through ordinary legislation, because they "require a specific foundation, rooted in the Constitution or other constitutional laws". In this judgment, the Court in fact held that ordinary legislation is capable of regulating the immunity in question only in consideration of the fact that the matter was specifically covered under constitutional law, and it was "strictly limited … only [to] expressions of opinions pertinent to the exercise of the rights and duties vested under constitutional law in the members of the Supreme Council" of the Judiciary and strikes a "reasonable balance between the constitutional values in play".

Finally, the fact that, even before the entry into force of the contested provision and in the absence of a specific constitutional rule establishing a privilege, the holder of another high office could aver a legitimate impediment to appear in criminal proceedings in view of his institutional duties is irrelevant. Contrary to the arguments of the private party, this does not at all show that the argument that the privileges of the members and presidents of institutional organs must be established by legislation with constitutional status is mistaken. The right to invoke a legitimate impediment to appear in criminal proceedings does not in fact amount to a constitutional privilege, because it applies irrespective of the nature of the activity which legitimises the impediment, is of general application and therefore does not constitute an exception to the principle of equal treatment before the courts. It therefore amounts to a procedural instrument

created in order to protect the right to a defence of any accused, and as such is lawfully established under ordinary legislation, namely the Code of Criminal Procedure, even though in practice the use of this instrument is tailored in line with the extent of the accused's commitment (judgments mentioned above under paragraph 7.3.2.1.).

7.3.2. – The referring court continues its argumentation in support of its challenge to the provisions' constitutionality raised, also arguing, as mentioned above, that the contested provision is a privilege because it introduces, through ordinary legislation, the possibility of the suspension of criminal trials which consists in an exception from the principle of equality.

This argument is also correct.

In order to reach this conclusion it is necessary in the first place – as pointed out both by the referring courts as well as the *Avvocatura Generale* and the representatives of the accused – to identify the rationale for the contested provision and, secondly, assess whether the contested unequal treatment exists. In relation to both of these issues, it is necessary to take as a starting point judgment No. 24 of 2004, cited above, which – in spite of the fact that it limited its examination of Article 1 of law No. 140 of 2003, similar to Article 1 of law No. 124 of 2008, only to the aspects concerning the violation of the right to a defence, unreasonableness and equality between constitutional organs (as pointed out above under paragraph 7.2.) – provides important and precise indications on this matter.

7.3.2.1. – As regards the identification of the rationale, it must be pointed out that, with reference to Article 1 of law No. 140 of 2003, this Court's judgment No. 24 of 2004 clarified that: a) the suspension of criminal trials provided for under this provision for the high offices of state (characterised by general application, automaticity and indeterminate duration) is intended to "satisfy requirements external to the proceedings"; b) these requirements consist in the "protection of the untroubled performance of the activities associated with the offices in question", that is in the "substantial interest" in ensuring "the untroubled performance of the relevant functions inherent to those offices"; c) the said interest is to be protected in harmony with the fundamental principles of the "rule of law, such protection being central to the optimal structure of these principles"; d) the suspension is therefore "provided for […] in order

to protect the important functions mentioned above"; e) were it to be found (on the basis of "a different, but not opposing, understanding of the prerequisites for and goals of the provision"), taking into account the "public interest in the performance of the activities associated with the high offices", that Parliament considered that this amounted to "a legitimate impediment to appear before the court" and therefore "intended to establish an absolute presumption of a legitimate impediment", the extent of the procedural suspension would "appear to be directed at the protection of the function […] also in this regard".

The corollary of these unequivocal assertions is that the procedural suspension provided for under law No. 140 of 2003 has the rationale of protecting the exercise of public functions, guaranteeing to the holders of high offices the untroubled performance of their functions (and, indirectly, of those of the organ to which they belong) through the conferral or a specific protected status. Therefore, the psychological aspect, which is individual and contingent, of the subjective peace of mind of the individual state office holder does not come into consideration, but only the objective protection of the regular performance of the activities associated with the office. A further corollary also follows from the assertions cited above that it is incorrect to argue that the institution of the procedural suspension and that of the constitutional privilege are mutually incompatible. In fact, even a procedural suspension may be provided for within our legal system in order to satisfy the requirement external to the trial to protect the performance of the functions of a constitutional organ, and therefore may amount to a specific constitutional privilege.

Since these conclusions related to the suspension provided for under Article 1 of law No. 140 of 2003 may also be considered valid for the suspension provided for under the contested provision, it is however necessary to consider whether the two provisions have the same rationale.

In the opinion of the private party's representatives, the differences between the regulation of the suspension pursuant to law No. 140 of 2003 and that under law No. 124 of 2008 mean that the respective rationales are fundamentally different. On this matter, the representatives emphasise that, in contrast to the previous arrangements, the contested legislation provides for the right to a waiver and that the suspension of trials

may not be repeated, with the result that the said legislation has the goal of protecting (as its exclusive or principal goal) not simply the intrinsic function of the office, but also the accused's right to a defence guaranteed under the Constitution, and therefore of satisfying requirements internal to the trial. By virtue of the *ratio legis* identified in these terms, the private party argues that the contested provision does not introduce a full-scale constitutional privilege and asserts that therefore the procedural suspension under examination was lawfully introduced through ordinary legislation. As confirmation of the *ratio legis* indicated above, the private party observes that the goal of protecting the accused's right to a defence is not contradicted by the principle that the suspension may not be repeated in cases where a new office is taken up, because the law considers the taking up of public office as a legitimate impediment only for "the duration of one mandate", which represents "a period of time […] sufficient […] to deal with the institutional duties from an eventual second appointment and the criminal trial at the same time".

This account of the goals of the provision cannot be shared, for a series of reasons.

It must in the first place be pointed out that the very report on the draft bill AC 1442 (which then became law No. 124 of 2008) expressly identifies the rationale for the suspension as the requirement to protect the principles of "continuity and regularity in the exercise of the highest public functions" and not in the satisfaction of the requirements of the defence.

Secondly, the Court finds that the contested provision cannot have the goal, either prevalent or exclusive, of protecting the right to a defence of accused persons, because in this case – given the general nature of this right, expressly provided for under Article 24 of the Constitution as regards the principle of equality – it should have applied to all accused who, in view of their own activities, have difficulties in participating in criminal trials. Moreover, it would be inherently unreasonable and disproportionate compared to the above goals to provide for an absolute legal presumption of a legitimate impediment resulting from the sole fact of occupying a public office. This unrebuttable presumption (*iuris et de iure*) would in fact prevent any verification of the actual existence of an impediment to appear in proceedings and would render the procedural suspension operative also in cases in which there is no impediment, and

therefore in which there is no actual requirement to protect the right to a defence. The choice of Parliament to take exclusive account of certain high institutional offices and to provide for the automatic suspension of the trial, without any verification of the impediment on a case by case basis, therefore underscores the view that the only rationale compatible with the contested provision is precisely the protection of the functions associated with the "high office".

Thirdly, it should also be observed that the legitimate impediment to appear in proceedings can already be invoked within criminal trials and the contested provision was not necessary in order to protect the defence of an accused on this basis where he is prevented from appearing in proceedings for reasons inherently related with the high office occupied by him. As this Court has already held, the suspension of trials on the grounds of legitimate impediment to appear ordered pursuant to the Code of Criminal Procedure strikes a balance between the right to a defence and the requirements of the exercise of the prosecution, privileging the procedural position of the member of a constitutional organ only insofar as strictly necessary, without any automatic or generally applying mechanism (judgments No. 451 of 2005, No. 391 and No. 39 of 2004 and No. 225 of 2001). And since the requirement to protect the right to a defence has already been adequately satisfied in general terms under Italian law through the institution of legitimate impediment, this can only mean that the right to waive the suspension as a basis for identifying the rationale of the provision is also irrelevant.

Fourthly, it must finally be emphasised that also the characteristic of the suspension that it may not be repeated in cases where a new high office is taken up by the same natural person is not a feature capable of identifying the rationale of the contested provision because it is inconsistent with both of the other rationales mooted. In fact, both the requirement for the accused's right to a defence to be protected, as well as that for the function [of the high office] to be protected would remain also in cases where a new high office is taken up. Moreover, the contested legislation only sets a maximum limit for the duration of the benefit and does not at all guarantee – contrary to the assertions of the private party – a minimum period in order to prepare the defence, nor no less does it guarantee the minimum period equal to the "duration of one mandate" (consider, for example, a case in which criminal proceedings are commenced against the

holder of an office shortly before the end of the term in office and the same individual takes up a new office shortly afterwards).

The Court therefore concludes that the rationale of the contested provision, as was the case for the provision at issue in judgment No. 24 of 2004 of this Court, consists in the protection of the functions of certain constitutional organs, created through the introduction of a special suspension of criminal trials.

7.3.2.2. – Having clarified that the rationale of the contested provision consists in the protection of the public function, it is now necessary to ascertain whether the suspension governed by the provision in question has the additional characteristic of the privileges, that is of establishing an exception to the principle of equality through the creation of a difference in treatment.

The answer to this question must be affirmative.

In judgment No. 24 of 2004, cited above at various points, this Court held, albeit with reference to Article 1 of law No. 140 of 2003, that the procedural suspension for accused who occupied high offices "establishes differentiated arrangements for the exercise of court action […]", arrangements which are to be measured against the principle – also referred to in the above judgment – of equal treatment before the courts, laid down in Article 3 of the Constitution

There is no doubt that these arguments also apply for the contested Article 1 of law No. 124 of 2008. In fact, the contested suspension creates an exception from the ordinary procedural arrangements, because it applies only in favour of the holders of four high offices of state, with reference to trials commenced against them, on charges relating to all possible offences committed at any time and, in particular, to offences committed outwith the ambit of official duties, that is which had nothing to do with the intrinsic activities of the office. In particular, the derogation results in a clear difference in treatment of the high offices compared to all other citizens who also carry on activities which the Constitution considers to be equally demanding and essential, such as those associated with public offices or functions (Article 54 of the Constitution) or, again more generally, those which citizens have the duty to carry out in order to participate in the material or moral progress of society (Article 4(2) of the Constitution).

It may well be true that the principle of equality requires that, whereas equal situations require equal treatment, different situations may require different arrangements. However, according to the case law of this Court cited in paragraph 7.3.1., it must be reiterated that, in cases in which the difference in treatment before the courts relates to the president or a member of a constitutional organ and the requirement to protect the functions of that organ are cited as justification for it, it is necessary that such a *ius singulare* have precise coverage under constitutional law. It has in fact been seen that the overall system of the aforementioned privileges is regulated by provisions with constitutional status, since it impinges upon the equilibrium between the branches of state and contributes to fashioning the constitutional identity of the legal order.

7.3.2.3. - The certified violation of the principle of equality certainly also occurs with specific reference to the high offices of state contemplated under the contested provision: first, with regard to the difference in treatment between the presidents and the members of the constitutional organs, and second with regard to the equal treatment of offices that are dissimilar to one another.

7.3.2.3.1. - As far as the first aspect is concerned, it should be pointed out that the albeit significant differences which exist on a structural and functional level between the presidents and the members of the said organs are not non sufficient to transform the overall intentions of the Constituent Assembly, which were to attribute to the Houses of Parliament and to the government, and not their presidents, the functions of respectively enacting legislation (Article 70 of the Constitution) and pursuing political and administrative policies (Article 95 of the Constitution). In fact, no pre-eminence is designated for the President of the Council of Ministers over the ministers, because he is not the only figure responsible for government policy, but his role is rather limited to maintaining its unity, promoting and coordinating the activity of ministers, and therefore occupies a position traditionally defined as *primus inter pares*.

Also the constitutional regulation of ministerial offences confirms that the President of the Council of Ministers and the ministers are placed on the same level. The system laid down under Article 96 of the Constitution and constitutional law No. 1 of 1989 in fact provides for the same regime of privileges for these offices, limited to offences committed whilst performing official duties; these arrangements have been modified by

the provision for the suspension of trials for offences committed outwith the ambit of official duties only for the President of the Council of Ministers. This is irrespective of the additional breach of Article 3 of the Constitution resulting from the fact that the contested legislation – as also that already declared unconstitutional by judgment No. 24 of 2004 – continues to provide, in relation to all offences committed outwith the ambit of official duties, for a general and automatic mechanism suspending trials, which cannot be reasonably justified by the supposed greater disrepute of offences committed within the ambit of official duties compared to all other offences without distinction.

Similarly, there is no significant pre-eminence of the presidents of the Houses of Parliament over other members, because all members of Parliament participate in the exercise of legislative functions as representatives of the Nation and, as such, are subject to the uniform provisions laid down in Article 68 of the Constitution.

These principles were already set out by this Court in judgment No. 24 of 2004, where it asserted, in relation to Article 1 of law No. 140 of 2003, that "The Court holds that, Article 3 of the Constitution is violated by the contested provision also on other grounds. This provision in fact […] distinguishes, for the first time with reference to their equal treatment, in relation to the fundamental principles underlying court action, between the presidents of the Houses of Parliament, of the Council of Ministers and of the Constitutional Court and the other members of the organs presided by them". Nor can these conclusions be countered – as attempted by the representatives of the private party – by the argument that the President of the Council of Ministers took on a position constitutionally distinct compared to that of the ministers pursuant to law No. 270 of 21 December 2005 (Amendments to the rules governing the election of the Chamber of Deputies and the Senate of the Republic), which introduced Article 14-*bis* into presidential decree No. 361 of 30 March 1957 (Approval of the consolidated law containing rules governing the election of the Chamber of Deputies), according to which during elections it is necessary formally to indicate in advance the head of the political party or coalition. It should in fact be pointed out that this law, as a piece of ordinary legislation, is not capable of modifying the constitutional position of the President of the Council of Ministers.

7.3.2.3.2. - In relation to the addition point concerning the equal treatment of dissimilar offices, the Court's finding in judgment No. 24 of 2004 must be restated, namely that the lack of similarity results both from the “appointing body” as well as the “nature of the functions”.

This conclusion is not blocked by the opinions expressed during the course of the passage through Parliament of the contested article in which it was observed that the element which brings together these offices is the fact that all “are legitimated – directly or indirectly – by the will of the people” and the “political nature” of the function exercised. In contrast however, the Court finds that “popular legitimation” and the “political nature of the functions” are too generic elements, because they are shared also with other organs, both on a state and a sub-state level (such as for example the individual members of Parliament or ministers, or presidents of the regional councils or the regional councillors), and are therefore incapable of establishing a degree of similarity between the situations which justifies an equal treatment with regard to privileges.

7.3.3. – On the basis of the observations set out above, the Court concludes that the procedural suspension provided for under the contested provision is aimed essentially at protecting the functions of the members and presidents of certain constitutional organs and, at the same time, creates a clear difference in treatment before the courts. Therefore, both of the prerequisites for constitutional privileges are satisfied, which means that that matter is not susceptible to regulation through ordinary legislation. In particular, the contested legislation confers on the holders of four high institutional offices an exceptional and innovative protected status, which cannot be inferred from the constitutional provisions on privileges and which therefore is not covered under constitutional law. Therefore, it does not constitute a source of law of an appropriate level to make provision over this matter.

8. - The Court therefore declares that Article 1 of law No. 124 of 2008 is unconstitutional due to violation of the combined provisions of Articles 3 and 138 of the Constitution, in relation to the arrangements governing privileges contained in Articles 68, 90 and 96 of the Constitution.

The questions relating to the inherent unreasonableness of the contested legislation, mentioned under paragraph 6, letter b), and any other question not examined, are moot.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

declares that Article 1 of law No. 124 of 23 July 2008 (Provisions ordering the suspension of criminal proceedings against the high offices of state) is unconstitutional;

rules that the questions concerning the constitutionality of Article 1 of law No. 124 of 2008, raised by the judge for preliminary investigations at the *Tribunale di Roma*, with reference to Articles 3, 111, 112 and 138 of the Constitution, by referral order No. 9 of 2009 as mentioned in the headnote, are inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 October 2009.

Signed:

Francesco AMIRANTE, President

Franco GALLO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 19 October 2009.

The Director of the Registry

Signed: DI PAOLA

Appendix:

order read out in the hearing of 6 October 2009

ORDER

Whereas:

the Public Prosecutor and the deputy Public Prosecutor at the *Tribunale di Milano*, entered an appearance in the constitutionality proceedings concerning an incidental question commenced by the *Tribunale di Milano* pursuant to the referral orders of 26 September 2008 (referral order No. 397 of 2008) and of 4 October 2008 (referral order No. 398 of 2008) by written statements filed on 7 January 2009;

according to the case law of this Court (judgments No. 361 of 1998, No. 1 and No. 375 of 1996; order No. 327 of 1995), the entry of an appearance by the public prosecutor in constitutionality proceedings concerning an incidental question is inadmissible;

the arguments contained in the case law are essentially based on provisions regulating proceedings before the Constitutional Court (Articles 20, 23 and 25 of law No. 87 of 11 March 1953; Articles 3 and 17 of the Supplementary rules for proceedings before the Constitutional Court of 16 March 1956 as subsequently amended; Articles 3 and 16 of the Supplementary rules for proceedings before the Constitutional Court of 7 October 2008) which, in the first place, do not expressly provide for the entry of an appearance by the public prosecutor in constitutionality proceedings concerning an incidental question and, secondly, consistently distinguish between the "public prosecutor" and the "parties" and grant only to the latter the right to enter an appearance in the said constitutionality proceedings, thereby precluding any expansive or similar interpretation aimed at conferring the same right on the public prosecutor;

these conclusions must be maintained with regard to the current wording of Article 111(2) of the Constitution, as replaced by constitutional law No. 2 of 23 November 1999, which provides that "in all trials the parties shall have the right to make representations under conditions of equality";

in fact, this Court has on various occasions specified that the equality between the prosecution and the defence asserted under the above constitutional principle − which has granted self-standing status to a principle, that of equality between the parties, which was "already clearly implicit within the previous system of constitutional values" (orders No. 110 of 2003, No. 347 of 2002 and No. 421 of 2001) − does not necessarily entail, within criminal trials, the guarantee of the same procedural rights to the public prosecutor and the accused, and a difference in treatment may "be justified, within the limits of the reasonable, by the special institutional position of the public prosecutor as well as the functions with which he is charged and the requirements associated with the correct administration of justice" (judgment No. 26 of 2007; orders No. 46 of 2004, No. 165 of 2003 and others; as well as, on the basis of the text of Article 111 of the

Constitution previously in force: judgments No. 98 of 1994, No. 432 of 1992 and others);

all the more so, the constitutional principle of equality of the parties – which it is necessary to qualify in view of the specific nature of the positions of the various subjects involved in proceedings, as well as the special nature of the proceedings and the special requirements of the various proceedings (in this case, proceedings before this Court) – does not necessarily imply that the rights of the public prosecutor should be the same as those of the parties within proceedings before the Constitutional Court;

therefore, in accordance with these principles and with reference to the public prosecutor, the Court finds that "the discretionary choice by Parliament to distinguish between this organ and the parties to the proceedings before the lower court, and not to grant it the right to enter an appearance in proceedings before the Constitutional Court, is not unreasonable" (judgment No. 361 of 1998).

on those grounds

THE CONSTITUTIONAL COURT

rules the that the entry of an appearance by the Public Prosecutor and the deputy Public Prosecutor at the *Tribunale di Milano* in the proceedings commenced pursuant to the referral orders registered as No. 397 and No. 398 of 2008 is inadmissible.

Signed: Francesco AMIRANTE, President