REPUBLIKA SLOVENIJA

USTAVNO SODIŠČE

U-I-18/93

Concurring Opinion of Judge Dr Zupančič

In the case in question, I voted in favour of the Operative Provisions of the Decision and the reasoning behind it, given that I agree with them both – to the extent of what they covered. In my opinion, however, they both fell short of what they should have covered.

I have listed seven reasons for this position, which in my opinion represent a broader frame of reference, within which we should also examine the issue of detention in terms of the risk of recidivism.

First, it is evident that the Constitution does not support primarily inquisitorial, so-called "mixed" criminal proceedings, but instead supports an adversarial system, which the National Assembly also supported when adopting the currently valid Criminal Procedure Act (hereinafter referred to as the CrPA). It is quite evident from a series of constitutional provisions that the required constitutional concept in criminal proceedings is adversarial (accusatorial).

Here, I must first bring attention to the provision of Article 23 of the Constitution, which grants every individual the right that the charges brought against him or her are decided on by an impartial court. The notion of impartiality is essentially epistemological in nature. As is already evident from the term "impartiality" itself, this implies, in particular, the absence of bias (prejudice). Since the era of Francis Bacon, the lawyer, prosecutor, and father of epistemology, it has been clear that every instance of research, even empirical and scientific research (in legal terminology: "investigation"), is subject to initial bias. This early bias is derived inevitably from the urgency of creating a working hypothesis that serves as the foundation for every research study and investigation. However, this inevitable bias of the researcher in

empirical sciences is ultimately neutralised through scientific experiment, which through the language of objective reality either confirms or dismisses the working hypothesis. Since empirical sciences deal with repetitive events, given that they study natural laws that are permanent, objective and experimental verification is possible in science, thus providing a final verification of the scientific hypotheses.

However, the subject of legal assessment does not cover natural laws that would be permanent and thus could be subject to experimental verification.

The subject of legal assessment is a one-time (historical) event.

Historical events cannot be repeated through an experiment and as such also cannot be demonstrated in experimental terms.

The sole guarantor of legal impartiality (objectivity) is the objectivity (impartiality) of a court. The latter ultimately decides the accuracy of this or that hypothesis. If a court lacks objectivity, then there is also no other feedback that would ensure that a case would produce an objectively determined truth. Judicial bias is therefore a completely essential element of a state's rule of law (Article 2 of the Constitution).

So what is the constitutionally presumed bias of the courts? Epistemological findings clearly indicate that bias is a protracted susceptibility to information, and in legal situations, susceptibility to evidence from both parties to a dispute. This also proceeds from a Slovene proverb that states that the truth can only be learned through the sound of both bells.

Even bias, as the term itself indicates, is no different than (1) a premature and excessive susceptibility to the arguments of one party and as a result of this (2) non-susceptibility to the other party's arguments in the dispute. The Slovene term "*pred-sodek*" (pre-judging) similarly points to the core issue when it implies that bias prematurely disconnects the communication flow that provides information in conflict with prejudice (evidence).

Judicial impartiality is thus a protracted (in)decision – until the court's final decision is made – in a dispute.

Throughout the legal history of Western civilisation it has been shown that legal impartiality (objectivity, undecidedness) is the product of a focused confrontation of two biases. As a result, procedural adversity is nothing but an exchange of the actual burden of proof of both parties in a dispute (the principle of free disposition) which (1) makes the court ambivalent (thus even indecisive), as it lingers between the evidence presented by one or the other party, and which (2) frees the court of its active involvement in the investigation of the criminal case, as it forces it into a passive role.

The court's ambivalence and passiveness are therefore constitutive elements of judicial impartiality.

It is apparent that there are two leading principles of, in large part, inquisitorial (mixed) criminal proceedings: the *ex officio* principle (in contrast to the principle of free disposition) and the inquisitorial principle – in direct contrast to the constitutionally premised impartiality of courts. How is a criminal court supposed to be impartial, without even mentioning the investigating (so-called) "judge", insofar as the court acts on its own initiative (the *ex officio* principle) and insofar as it is committed to independently investigating the magnitude of the criminal case in question (the inquisitorial principle)?

In both aspects of its work, a criminal court in Slovene criminal proceedings is bound by its initial working hypothesis regarding the defendant's guilt. Without this hypothesis of guilt, the criminal court itself (according to the *ex officio* principle and the inquisitorial principle) would have no grounds for action. The constitutionally defined presumption of innocence (Article 27), which must include three procedural implications (the burden of proof on the prosecutor, the risk of failing to provide proof that lies with the prosecutor, and *in dubio pro reo*), thus cannot find sufficient expression in our, i.e. Slovene proceedings.

However, even more crucial for the impartiality of a criminal court is the procedural requirement presented before the criminal court indicating that the criminal courts themselves must bear the burden of proof, as they are responsible for the complete

and accurate determination of the facts. This systemically forces them into active identification with the initial hypothesis (regarding guilt) and systemically excludes the possibility of their protracted undecidedness (until the end of the main hearing) until a final judgement of acquittal or conviction is reached. I therefore believe that (1) the term "investigating judge" is a *contradictio in adjecto,* as such an actively involved investigator cannot be unbiased by nature but is literally paid to act from a constitutionally largely problematic hypothesis (presumption, assumption) regarding the guilt of the defendant. The ordering of detention by such an investigator systemically inevitably leads to bias to the detriment of the defendant. This is, *inter alia*, illustrated in detail by the large number of constitutional complaints in detention cases.

In a situation where detention is being decided upon, a completely adversarial hearing should be conducted, at which the burden of proof and the risk of failing to provide proof regarding the substantive criteria associated with the danger the defendant poses to society would be borne by the prosecutor. The court should be in a position to be able to apply the presumption of innocence whenever doubt arises. This is even more true in this case, given that it involves aleatory speculation with regard to some future (not historic) event as to whether the defendant will indeed (or not) repeat the criminal offence, carry out the attempted criminal offence, or in fact commit the offence he is threatening to commit, in the future.

(2) As much as the main criminal hearing is merely a re-enactment of what was established by the investigator during the criminal investigation, and insofar as the criminal court conducting the hearing is committed to the *ex officio* principle and the inquisitorial principle, it is impossible to raise questions about the impartiality of the criminal court conducting the hearing. Despite certain adversarial additions in the current CrPA, the criminal court conducting the hearing has been placed in a role in which it alone bears the "burden of proof" and the "risk of failing to provide proof" – meaning vis-à-vis an appellate court, the latter mostly acting *ex officio* (Article 383 of the CrPA).

Secondly, the adversarial criminal proceedings concept is the only one alongside the constitutionally presumed equality of arms in a dispute between the state and an individual (Article 29 of the Constitution) that satisfies the legality requirement in the sense in which this legality is also imposed on the state by Article 2 of the Constitution. On the other hand, this entails that primarily inquisitorial proceedings are by nature not

only unlawful, but also conceal the unlawfulness of repression in the tradition of an undemocratic police state.

The unlawfulness of primarily inquisitorial proceedings increases proportionately to the pressures making the suspect or defendant an object of court proceedings – instead of being the subject of a legal dispute based on equality, as is prescribed by Article 29 of the Constitution. The sole reason a defendant in criminal proceedings is made an object of proceedings (in contrast to, for example, the subjectivity of a procedural party to civil proceedings), is precisely the alleged danger attributed to the defendant, which is also the reason for his prior detention. All those who, on account of the alleged danger of the perpetrator, draw the conclusion that it would be impractical, unrealistic, etc., to speak of criminal proceedings as a dispute of equal parties despite the unambiguous constitutional provision, implicitly renounce the legality of criminal proceedings itself. Why? Since the era of Hobbes, the fundamental postulate of the rule of law has been the prevention of arbitrariness (using one's own force) as an instrument to resolve disputes. The purpose of law in general, the legality of a state, the rule of law, etc., is to substitute the power of logic for the logic of power. The main function of each specific legal process and of the rule of law in general lies in this relocation of the brute dominance of the superior party (also the state) to the level of the lawful (logical) processing of disputes. This is self-evident in private law, as that is the venue where two equally vulnerable parties confront each other as equals before the law and the court.

However, when the plaintiff is the state, such as in criminal proceedings, some start pointing to the *raison d'état*; they suddenly overlook that the basic condition of any legality should never be changed. If a party to a civil dispute were to prevail over the other party by imposing restrictions on that party's freedom, thus forcing it, for example, to testify to its own detriment, this would be deemed completely unacceptable to that party. But when this occurs during criminal proceedings, this profound inconsistency is often justified by the need to determine the truth in criminal proceedings – albeit at the price of the most serious interferences with an individual's personal integrity, dignity, and privacy. Hobbes already understood that this "truth" in substantive criminal law is mainly an expression of the same predominance of the state, which by way of criminal laws establishes the major premise of criminal liability, and that this "truth" is relative, with no more profound significance than that pursued by the legislature, noting that crimes cease once the laws labelling them as crimes cease to exist (civil laws ceasing, crimes also cease.)

However, precisely on account of this "truth", which often only serves as a veil for the blatant (and unlawful) predominance (of the power) of the state (as a party) in criminal proceedings, some remain unwilling to see this most fundamental inner absurdity of criminal proceedings that contaminates the legitimacy and legality of criminal proceedings.

Criminal proceedings, where the stakes are the highest - namely a person's liberty as a disputed subject is at stake, have a highly visible symbolic significance in society and in the state. The unlawful contamination of criminal proceedings on account of "effectiveness", "the truth", etc., in the long term compromises the exact same normative integration (general prevention) that is the sole profound moral and social meaning of a society's punitive practice.[1] Thirdly, in light of the two standpoints mentioned above, it is evident that the state (the executive branch) has no legitimate right to interfere with the privacy, dignity, and personal integrity of citizens in general, if it fails to prove beforehand in a determined, articulated, and specific manner that the citizen in question violated the laws of the state.

Taking action against an individual merely on the premise of a reasonable suspicion is seen as some sort of sanction in advance and is clearly contrary to the aforementioned "complete equality" (Article 29 of the Constitution). The state, as a party, is not only given the right to act in criminal proceedings, but also the priority right to actually interfere with the integrity of a citizen.[2] Therefore, it is no coincidence that constitutional courts in democratic states already devote attention to reasonable suspicion as the threshold for the commencement of such interferences.[3] In Slovenia, the term reasonable suspicion, as determined in the Constitution and the CrPA, is still an empty abstraction without the specified positions in the case law of the ordinary courts or the Constitutional Court. If constitutions allow the prior interference of the state with an individual's integrity, then that is a major exception from the above-mentioned principle of the aforementioned reciprocity between the detriment to an individual or to the state. Whenever detention is at issue, this detriment is much worse than when investigations, seizures, and the temporary deprivation of liberty (arrest) are implemented, even though they all require an articulated, specific, and concrete reasonable suspicion.

Fourthly, this means that (a) the state gains the right to punish a citizen only when (1) the facts have been correctly and fully established, (2) the substantive legality principle has been strictly adhered to, and (3) the constitutional rights of the citizen have been

adhered to during the proceedings – the citizen's criminal liability has been demonstrated before an impartial and independent court. However, the state gains the right to the preventive deprivation of liberty solely on account of an explicit constitutional provision. This detention is restricted to the grounds of jeopardising public safety.

Fifthly, this logically results in the prior deprivation of liberty (detention) on grounds of the risk of recidivism only being a very exceptional advance version of the final punishment.

All the correctness and completeness in determining the factual issues, all the substantive legal criteria, and all the constitutional procedural guarantees to which a suspect and defendant are entitled in the process of determining a person's final criminal liability should be *a fortiori* provided at a time when it is still not even finally resolved that such person is guilty of anything and when an interference with their freedom, dignity, privacy, and civic integrity is ordered against such person based on pure speculation that that person might (or may not) repeat in the future something that has yet to be proven was even committed by this person, carry out an attempted criminal offence for which his liability has yet to be demonstrated, or commit an act that was merely threatened.

Sixthly, this anticipation of punishment and the ensuing detention as its immediate legal consequence represent an anomaly and contradiction in the constitutional dimensions of criminal proceedings. Since the Constitution explicitly states (in its Article 20) that a person reasonably suspected of having committed a criminal offence may be detained only when this is absolutely necessary for reasons of public safety, this anomalous exception should be accepted. A discussion could be initiated as to whether this constitutional provision collides with some other provisions – even, for example, with the presumption of innocence determined in Article 27. However, precisely for that reason, it is clear that a prior interference with the integrity of the accused citizen requires just the opposite logic than that characterising the provisions of the CrPA in question (regarding detention) and as a result the majority of case law based thereupon.

Since detention for the person concerned, regardless of the refinements in legal terminology, is punishment in the present for something he has not committed, and on

the basis of criminal liability, which still needs to be, if at all, determined, such (1) determination of reasonable suspicion regarding criminal liability for some act, as well as (2) the determination of the likelihood that the person could possibly commit another criminal offence, should be subject to that much more accurate substantive law and procedural regulation. Since it does not specify special adversarial proceedings and does not specify (*lex certa*) in which cases detention is permitted, the valid CrPA essentially does not separately regulate this type of determination. A provision in the second paragraph of Article 202 best characterises this segment, as it merely requires that a "brief explanation" be provided by the investigating "judge" for the detention order.

Seventhly, I strongly believe that such problems in the valid CrPA are symptomatic of the authoritative and police-centred conception of criminal proceedings. Similarly, I am deeply convinced that this and the same kind of concept of criminal proceedings is completely incompatible with the Constitution.[4]

As mentioned above, the Constitution requires the impartiality of the courts (Article 23), while the investigating "judge" and the court ruling on the matter both adhere to the *ex officio* principle and the inquisitorial principle, which are both incompatible with the notion of court impartiality.[5] In Article 29, the Constitution requires the complete equality of parties (between the state and the individual) to criminal proceedings. However, the drafter of the CrPA satisfied this required equality of parties merely formally, despite the National Assembly expressly requesting the drafting of a systemically adversarial criminal procedure during the adoption of this Act. What is the point of speaking of party equality if the CrPA systemically puts the court itself in a biased inquisitorial position that opposes that of the defendant? This also applies to the detention order. Here, the defendant and the investigating "judge", and not the defendant and the prosecutor, as is normally the case, are put on opposing sides.

There is no wording in the Constitution indicating that criminal proceedings have to be primarily inquisitorial, thus mostly oriented towards the effectiveness of criminal repression. On the contrary, the Slovene Constitution dedicates at least twelve articles (Articles 17, 18, 19, 20, 21, 23, 24, 27, 28, 29, 30, and 31) to the rights of the defendant. The tenor of these provisions is clear and *in favorem defensionis*.

Since the aforementioned provisions include the achievements of Western civilisations from the Magna Carta (1215) to the present day, they cannot be considered merely in the grammatical and exegetical sense.

In that respect the Constitution represents a hermeneutical top of the spiral of civilisation.

The phrases noted in individual constitutional provisions evoke countless and extremely complicated aspects of a person's freedom. Dozens of principles, hundreds of doctrines, and thousands of rules covering a specific branch of law hide behind the constitutional syntagmas. For example, behind the following sentence in Article 28 of the Constitution: "No one may be punished for an act which had not been declared a criminal offence under law or for which a penalty had not been prescribed at the time the act was performed.", there lies hidden criminal substantive law that is comprehensive, complex, systemic, and, in its details, highly complicated. Therefore, through its understanding and when assessing the constitutionality of individual statutory provisions, including those covering detention, it is the Constitutional Court's task to identify the purpose of the Constitution as an advancement of civilisation and to assess the specific constitutional beginnings in light of the whole from which they originated.

If the majority were able to see this whole in the case in question, I strongly believe that the present biased context of the inquisitorial ordering of detention would at a minimum be abrogated as it contravenes the constitutional intention. The legislature would thus be given a clear message as to the constitutional inadmissibility of not only such regulatory framework for ordering detention, but also of the primarily inquisitorial conception of the valid Criminal Procedure Act in general. The aforementioned explicit instruction of the National Assembly is one more reason to support such a decision.

The ignominious tradition of a police state, which, after all, is characterised as prioritising the repression of criminal acts over the protection of citizen's subjectivity, which the Slovene Constitution explicitly specifies as its fundamental postulate, would thus be terminated.

Judge Dr Boštjan M. Zupančič

Endnotes:

[1] For more on this, see *Prvine pravne kulture* [Elements of Legal Culture], *Proces* [Procedure], Ljubljana 1995, pp. 179-206.

[2] See part of the extensive foreign case law regarding this issue in *Ustavno kazensko procesno pravo* [Constitutional Criminal Procedural Law of the Republic of Slovenia), Ljubljana 1995, the chapter entitled *Preiskave in zasegi* [Searches and Seizures], pp. 377-324.

[3] See part of the extensive foreign case law regarding this issue in *Ustavno kazensko procesno pravo* [Constitutional Criminal Procedural Law of the Republic of Slovenia], Ljubljana 1995, the chapter entitled *Preiskave in zasegi* [Searches and Seizures], pp. 377-324.

[4] For more on this, see *Med državo in posameznikom: Privilegij zoper samoobtožbo* [Between the State and the Individual: Privilege against Self-incrimination], Pravnik, No. 1-3/96, p. 19.

[5] For more on this, see the paper *Prispevek k teoriji kontradiktornosti v kazenskem procesu* [A Contribution to the Theory of Adversarial Procedure in Criminal Proceedings), *Kazensko procesno pravo* [Criminal Procedural Law of the Republic of Slovenia], Official Gazette RS, Ljubljana 1991, pp. 285-310. Here, in particular, the epistemological findings regarding impartiality should be emphasised – with regard to the fact that the person investigating an issue alone (the inquisitorial principle, the *ex officio* principle), thus the one who formulates the initial and working hypothesis, cannot be impartial. This initial hypothesis for the court can only be a hypothesis of the guilt of the defendant under the current legislation on criminal proceedings. The formulation of this hypothesis of guilt should be completely shouldered by the prosecutor's office (the burden of proof), instead of burdening the court via this systemic bias!