REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-18/93
11 April 1996

D E C I S I O N

At a session held on 11 April 1996 in proceedings to review constitutionality initiated upon the petitions of Hermej Gobec, Ivo Turnšek and Srečo Seršen, all Ljubljana, Ervin Dokič, Piran, Simon Horvat, Nožice, represented by Miro Senica and Barbara Menart Senica, attorneys in Ljubljana, Darko Zupan, Velenje and Matevž Jenko, Ljubljana, represented by Ervin Dokič, an attorney in Piran, the Constitutional Court

decided as follows:

1. The following provisions of the Criminal Procedure Act are abrogated:

- The first paragraph of Article 201 and the first paragraph of Article 361
– the part of the second paragraph of Article 202 which reads as follows: "a brief statement specifically explaining the grounds for detention".

2. Point 3 of the second paragraph of Article 201 of the Criminal Procedure Act and point 2 of the first paragraph of Article 432 of the Criminal Procedure Act are inconsistent with the Constitution.

3. The Criminal Procedure Act is inconsistent with the Constitution insofar as it does not provide any milder measures for the prevention of the risk of recidivism.

4. The provisions of the Criminal Procedure Act governing the decision-making procedure for ordering, extending and releasing an individual from detention are inconsistent with the Constitution.

5. The National Assembly must remedy any established inconsistency with the Constitution within one year.

6. The petition to initiate proceedings to review the constitutionality of points 1 and 2 of the second and third paragraphs of Article 201 of the Criminal Procedure Act is dismissed.

Reasoning

A.

1. The petitioners Hermej Gobec, Ivo Turnšek, and Srečo Seršen challenge the provision of point 3 of the second paragraph of Article 191 of the Criminal Procedure Act (Official Gazette of the Socialist Federal Republic of Yugoslavia, nos. 4/77, 14/85, 26/86, 57/89 and 3/90 – hereinafter referred to as the CrPA-77).

2. The petitioners state that the reason for detention due to the risk of recidivism as determined in the challenged provision is imprecisely and abstractly defined and, as such, allows the courts to use it frequently, often without any substantiated reasoning. In the opinion of the petitioners, these grounds for detention cannot be based on Article 20 of the Constitution, pursuant to which detention is allowed only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. Detention due to the risk of recidivism is also allegedly contrary to Article 27 of the Constitution since during preliminary proceedings it assumes guilt for future acts and offences not yet committed. The petitioners point out that detention should be an extraordinary measure, as the personal liberty of detainees is even more restricted than that of persons convicted by way of a final judgment and serving their sentence. They argue that using the risk of recidivism as grounds for detention represents a violation of human rights and fundamental freedoms pursuant to the third paragraph of Article 15 of the Constitution.

3. In an extensive supplement to his petition, Hermej Gobec emphasises that the risk of recidivism is not in any way related to ensuring that criminal proceedings are conducted smoothly. He draws attention to the differences between the continental and Anglo-Saxon systems of criminal law, and makes references to specific cases of detention orders being issued due to the risk of recidivism, which in his opinion point to unlawful judicial practice. The majority of detainees are kept in detention due to the risk of recidivism. The usual justification for a detention order is merely the fact that the defendant has already committed several criminal offences within a short period of time, that the criminal offences are extremely serious, and that the offender is unemployed or with no means of support. He was unable to find a single case where a court justified a detention as required by the first paragraph of Article 20 of the Constitution. As a state governed by the rule of law, Slovenia should protect the individual, even when that individual is in detention. Given its function, the Constitutional Court should enforce this principle and guide the case law of the ordinary courts accordingly.

4. The petitioner Hermej Gobec maintains that the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, International Agreements, No. 7/94 – hereinafter referred to as the ECHR) – referring to the

provision of point (c) of the first paragraph of Article 5 – only determines the risk of recidivism in relation to arrest, but not detention.

5. All three petitioners propose the challenged provision be abrogated.

6. The petitioner Ervin Dokič challenges the provision of point 3 of the second paragraph of Article 201 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 − hereinafter referred to as the CrPA). He maintains that the legal definition, particularly the reference to "special circumstances", allows for detention orders to be decided upon arbitrarily, which in his opinion is contrary to Article 2 of the Constitution. The challenged provision is allegedly also contrary to point (c) of the first paragraph of Article 5 of the ECHR, pursuant to which detention may be ordered only if it would prevent a criminal offence that is already being prepared, or for which individual preparatory steps have been taken, from being committed. He proposes the abrogation of the challenged provision.

7. The petitioners Simon Horvat and Matevž Jenko submitted petitions that are identical in content. They challenge the provision of Article 201 of the CrPA in its entirety. Pursuant to Article 20 of the Constitution, detention is allegedly only permitted in exceptional circumstances. It should therefore first be established whether detention is absolutely necessary in each case. Therefore the provision of the first paragraph of Article 201 which envisages obligatory detention is allegedly contrary to the Constitution. It is allegedly unclear from the provision of the second paragraph of Article 201 that detention may only be used as a last resort, and only when there are no other means to ensure the smooth conduct of criminal proceedings or for reasons of public safety. The statutory provision allegedly requires only an evaluation of the grounds for detention and not whether the same result could be achieved by granting bail. This, the petitioners claim, is especially the case regarding grounds for detention based on the risk of absconding.

8. The petitioners Horvat and Jenko argue that the most questionable aspect from a constitutional perspective is detention due to the risk of recidivism. The risk of repeating a criminal offence allegedly has no connection with ensuring the proceedings are conducted smoothly; and the only logical connection with ensuring public safety is with those criminal offences that could represent a threat thereto. They claim that the statutory provision allowing a detention order on the grounds of risk of recidivism is contrary to the presumption of innocence determined by Article 27 of the Constitution. They claim that the assumption that a new criminal offence will certainly be committed on the basis of a reasonable suspicion that a criminal offence has already been committed cannot be allowed. By ordering detention due to the risk of recidivism, a court presumes guilt for a future action for which not only has guilt not been established, but the said offence has not even been committed. The petitioners believe that, in a society which embraces the principle of the state governed by the rule of law,

liberty should be the rule and the deprivation of a person's liberty only a strictly limited exception. They propose the abrogation of the challenged provisions.

9. The petitioner Darko Zupan challenges the provision of point 3 of the second paragraph of Article 201 of the Criminal Procedure Act. He believes that the Criminal Procedure Act provides for a narrowing of the conditions for detention compared to Article 20 of the Constitution. The contested provision allegedly allows a court to neither evaluate nor state the reasons for the degree of real danger to the public and property that is required for a detention order to be issued. Since it allegedly permits a court to decide on a detention order without taking into consideration the provision of the first paragraph of Article 15 of the Constitution, the challenged provision is allegedly also contrary to Article 2 of the Constitution. He proposes the abrogation of the challenged provision.

10. In its reply, the National Assembly states that detention represents a profound interference with human rights and fundamental freedoms, that the basic provisions are already determined by the Constitution itself, and that the contested provision merely expands upon Article 20 of the Constitution in more detail. In this case, it argues that the challenged provision does not assume the guilt of the defendant, but that this is merely one of the presumptions made to ensure the smooth conduct of criminal proceedings and appropriate public safety. In the opinion of the National Assembly, the challenged provision of the CrPA-77 is not contrary to Articles 15, 20 and 27 of the Constitution. The National Assembly took the same view in its reply to the Constitutional Court's decision to accept the petitions and commence the proceedings to review the constitutionality of the challenged provision of the CrPA- 77.

B-I

11. With Order No. U-I-18/93, dated 13 July 1993, the Constitutional Court accepted the petitions lodged by Hermej Gobec, Ivo Turnšek and Srečo Seršen and commenced the proceedings to review the constitutionality of point 3 of the second paragraph of Article 191 of the CrPA-77 which, pursuant to the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Official Gazette RS, No. 1/91-I), was applied *mutatis mutandis* as a Slovene regulation insofar as it was not contrary to the legal order of the Republic of Slovenia. The Constitutional Court decided to review whether the challenged statutory provision, pursuant to which a court may order the detention of a defendant due to the risk of recidivism, is consistent with Articles 20 and 27 of the Constitution.

12. The CrPA-77 (including the challenged provision) ceased to be in force when the new CrPA entered into force, i.e. on 1 January 1995. Pursuant to Article 47 of the Constitutional Court Act (Official Gazette RS, No. 15/94 − hereinafter referred to as the CCA), if an act ceases to be in force during the proceedings and the consequences of

its unconstitutionality are not remedied, the Constitutional Court shall decide that the challenged provision is not consistent with the Constitution. Even if the Constitutional Court held that the challenged provision of the CrPA-77 was unconstitutional, this would not have had any consequence for the petitioners. Therefore, the Constitutional Court did not rule explicitly on the challenged provision of the CrPA-77. Since the provision of point 3 of the second paragraph of Article 191 of the CrPA-77 is completely identical in terms of substance to the provision of point 3 of the second paragraph of Article 201 of the new CrPA, this reasoning also applies to the challenged provision of the CrPA-77.

13. The petitioners Ervin Dokič, Simon Horvat, Darko Zupan, and Matevž Jenko challenge the provisions of the new CrPA. The Constitutional Court joined all the cases under petition No. U-I-18/93.

14. The petitioner Ervin Dokič did not demonstrate legal interest with regard to the challenged provision of the second paragraph of Article 201 of the CrPA, and the petitioners Simon Horvat and Matevž Jenko did not demonstrate legal interest with regard to the first paragraph, points one and two of the second paragraph, and the third paragraph of the aforementioned CrPA provision.

15. Pursuant to the provisions of Article 24 of the CCA, legal interest must be demonstrated when a petition to initiate proceedings is lodged. Legal interest is deemed to be demonstrated if a review of a regulation has been requested by the petitioner and this directly interferes with his rights, legal interests, or legal position.

16. The petitioner Ervin Dokič demonstrated his legal interest simply by claiming that the challenged provision could be applied to him as a citizen of the Republic of Slovenia. Since its Decision No. U-I-330/94, dated 2 February 1995 (OdlUS IV, 7), the Constitutional Court has repeatedly ruled that in claiming such the petitioner does not demonstrate that there has been direct interference with his rights, legal interests or legal position − and the same holds true for this case.

17. The petitioners Simon Horvat and Matevž Jenko demonstrated their legal interest by the fact that their detention was ordered and extended on the basis of the challenged statutory provision. The Constitutional Court holds that the petitioners were kept in detention on the basis of point 3 of the second paragraph of Article 201 of the CrPA. Therefore they only demonstrate direct interference with their rights or legal position in connection with this provision.

18. In the remaining part, the Constitutional Court accepted the petitions to review the constitutionality of point 3 of the second paragraph of Article 201 of the CrPA and proceeded to decide on the merits of the case on the basis of the fourth paragraph of Article 26 of the CCA.

19. Pursuant to Article 30 of the CCA, and for the reasons described below, the Constitutional Court also decided on the constitutionality of the first paragraph of Article 201 of the CrPA, the first paragraph of Article 361 of the CrPA, point 2 of the first paragraph of Article 432 of the CrPA, and the provisions of the CrPA governing the decision-making process for ordering, extending or being released from detention.

B-II

20. The concept of the state governed by the rule of law as determined in Article 2 of the Constitution contains elements of procedural and substantive law. The rule of law is therefore not only enshrined in the laws of the state − despite trust in the independence and impartiality of the judiciary in principle, it is nevertheless the principle of legality that prevails in criminal procedure and criminal substantive law – but also in its institutions (courts, administration, etc.), and primarily in the manner these institutions actually apply the law in their procedures. Trust in the judiciary, originating from the *habeas corpus* logic of the first paragraph of Article 20 of the Constitution and described below, does warrant a certain measure of discretion, to which independent, impartial courts that are constituted by law are certainly entitled (Article 23 of the Constitution). However, this increased level of constitutional trust in the judiciary (compared to the executive branch of power), and with it the judicial right to discretionary assessment, is not justified merely by a different personal composition of the judiciary. Pursuant to Article 23 of the Constitution, the right to judicial protection is a result of the legally enshrined, genuine independence and impartiality of the courts.

21. Criminal proceedings are not just a means to enforce substantive criminal law. The provisions of the criminal procedure represent a separate issue concerning the principle of the state governed by the rule of law in that they specify substantive constitutional provisions concerning the constitutional rights of an individual against arbitrary, malicious or similar use of executive and judicial power in the state. In terms of constitutional law, criminal proceedings are regarded as a procedure of substantive importance in the decisions of constitutional courts. The subject of criminal proceedings determined by law are the substantive constitutional rights of the individual.

22. Within the context of criminal proceedings, a state governed by the rule of law does not treat the procedural rights of an individual arbitrarily and is not willing to sacrifice these rights in the interest of the efficient application of substantive criminal law. Substantive criminal law may not be enforced through a violation of human rights, whether this takes the form of torture or an unfounded deprivation of liberty. The price would be too high.

23. By respecting human rights as imposed by the Constitution and with an effective and professional police force, a state governed by the rule of law must strive to enforce the provisions of substantive law. To ignore a violation of the constitutional rights of an individual in the name of the effectiveness of criminal law enforcement therefore runs contrary to the rule of law. Policing by the state must not compromise the constitutionally protected integrity of an individual in order to be effective.

24. The provisions of the Constitution are explicitly restrictive in nature. Therefore, the fundamental value of the Constitution, which must serve as the basis for matters of this nature, is to protect the individual from any interference with his integrity within the context of the criminal proceedings.

B-III

25. The Constitutional Court's decision is based on two key premises, both of which are contained in the second paragraph of Article 19 of the Constitution.

26. The Constitution first establishes the general rule that everyone has the right to personal liberty; in the second paragraph of the same article, two general conditions are provided under which this right may be restricted: "No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law."

27. These two premises are described in more detail in subsequent provisions of the Constitution. The first premise, regarding detention, is stipulated in the first paragraph of Article 20 of the Constitution, providing that a person (a) reasonably suspected of having committed a criminal offence may be detained only (b) on the basis of a court order (c) when this is absolutely necessary for the (ca) course of criminal proceedings or for (cb) reasons of public safety.

28. The framework for the second premise represent the provisions of Articles 22 (Equal Protection of Rights), 23 (Right to Judicial Protection), 25 (Right to Legal Remedies), 27 (Presumption of Innocence) and 29 (Legal Guarantees in Criminal Proceedings).

29. The Constitution distinguishes between three types of interference with personal liberty in the context of criminal law, with all three involving interference with the same constitutionally-protected human right to personal liberty. (1) Reference is made in the third paragraph of Article 19 of the Constitution to deprivation of liberty (arrest). The concepts of arrest and deprivation of liberty refer to temporary interference by the executive branch of power with the freedom of an individual. Already for an arrest to be constitutionally permissible, the Constitution requires this interference to be made in accordance with a procedure determined by law and in cases determined by law. (2) Reference is made in Article 20 of the Constitution to detention as being an extended

deprivation of liberty which may only be ordered by the judiciary. (3) Article 28 of the Constitution makes reference to a person being punished, which taking into consideration Articles 17 and 18 means that such a person may be sentenced to a custodial sentence (imprisonment) in the worst case scenario.

30. The most important point is that the general provision of Article 19 of the Constitution, which states that no person may be deprived of his liberty except in cases and pursuant to such procedures as provided by law, clearly refers to arrest, as stated in the following paragraph, and even more so to detention (Article 20) and custodial sentences (Article 28), since in these cases the duration of the interference is even longer.

31. The following is clear from the wording of Article 19. Firstly, it follows from the subtitle "Protection of Personal Liberty" that this article contains a general provision concerning this aspect of the Constitution. Secondly, the first paragraph of Article 19 of the Constitution is concise and explicit in stating that: "Everyone has the right to personal liberty". This categorical prescriptive norm is one of the greatest achievements of post-feudal European civilisation. And since, thirdly, Article 17 prohibits the capital punishment and Article 18 prohibits corporal punishment, torture etc., interference with personal liberty is the gravest possible intrusion by the state into the personal integrity of an individual.

32. The second paragraph of Article 19 of the Constitution then goes on to set out two key ideas.

The first is that "no one may be deprived of his liberty". The Constitution therefore differentiates between freedom and liberty.[*] No one may be deprived of his freedom; it may only be restricted temporarily through deprivation of liberty. The dependent clause that follows provides in general terms that a person may be deprived of liberty but only if this is foreseeable and determined by substantive and procedural law. The third paragraph of Article 19 then deals with deprivation of liberty, and it follows from the remaining wording and context of Article 19 that this applies to arrest etc. (within the meaning this provision has for the criminal procedure).

33. The general nature of the provision of the second paragraph of Article 19 of the Constitution, i.e. that it explicitly refers to every restriction (deprivation) of liberty, be it arrest (the third paragraph of Article 19), detention (Article 20) or a custodial sentence (the first paragraph of Article 28), can be concluded as stated in (a) the subtitle of Article 19 (“Protection of Personal Liberty”), (b) the general nature of the provision of the first paragraph of Article 19 (“Everyone has the right to personal liberty.”) and (c) the general wording of the second paragraph of Article 19 itself ("No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law").

34. It follows logically that the provision of the third paragraph of Article 19 (arrest, deprivation of liberty), all of Article 20 (detention) and the provision of the first paragraph of Article 28 of the Constitution (custodial sentence) − as special provisions relating to the general nature of the provision of the second paragraph of Article 19 − should be interpreted in the light of the specific prescriptive and categorical requirements of the second paragraph of Article 19.

35. More specifically, this means that every arrest, detention and custodial sentence must be carried out in accordance with the principle of legality (*lex certa*), and procedural guarantees provided by the Constitution must exist for each of the three types of intrusion into personal liberty that are determined by the Constitution.

36. The Constitution says least about custodial sentences, which is the longest and therefore the most serious interference with the personal liberty. The reason for this, of course, is that all substantive law guarantees are contained in the concept of the "Principle of Legality" (the subtitle of Article 28), and in the exact same expression ("as provided by law") which the Constitution uses in the general provision of the second paragraph of Article 19.

37. The decisive wording in the Constitution in both cases is that it is provided by law. The Constitution explicitly obliges the legislature not only to regulate every subject of interference with liberty by law, but to do so precisely and unambiguously. Any possibility of a public authority making an arbitrary decision must be excluded. The measures and conditions under which they may be ordered must be foreseeable. Legal certainty (*lex certa*) is a primary element of the rule of law (Article 2 of the Constitution) and would apply as an imperative constitutional starting point even if the Constitution did not explicitly refer to it. All the laws are therefore part of a legal system and subordinate to the Constitution, and every constitution is a part of the civilisation order, which is reflected *inter alia* in international acts.

38. It is therefore logical that the higher the stakes in legal proceedings, the higher level of emphasis must placed on the requirement of legal certainty, which is a constituent element of lawfulness. Since human liberty (the highest stake) is at issue in criminal proceedings, much emphasis in criminal law is placed on the principle of legal certainty (principle of legality, *lex certa*). The criminal courts are thus required to interpret the law strictly.

39. In the context of the Slovene Constitution, the principle of legality regarding the state's right to punish is explicitly determined in Article 28 of the Constitution; Article 19 is even more explicit in its demands for determinability (*lex certa*) for all those forms of interference with the personal liberty of an individual by the executive branch of power or judiciary even before the presumption of innocence is upended (from Article 27 of

the Constitution). If, in accordance with the first paragraph of Article 39 of the Criminal Code of the Republic of Slovenia (Official Gazette RS, No. 63/94 − hereinafter referred to as the CC), the principle of *nulla poena sine lege praevia* applies for a sentence of, for example, fifteen days, then it is entirely unacceptable from a constitutional perspective that the principle of legality that is at least as strict would not apply to detention which may last sixty times longer, i.e. two and a half years, pursuant to the provision of the second paragraph of Article 20 of the Constitution and the fifth paragraph of Article 207 of the CrPA.

40. With regard to detention, the general nature of the provision of the second paragraph of Article 19 is the reason why Article 20 of the Constitution contains no such explicit legal limitation. If it was not interpreted in the light of the second paragraph of Article 19, it would result in the impossible conclusion that the Constitution intended to regulate the subject of detention by itself and exhaustively in Article 20.

41. That the Constitution had no intention of exhaustively regulating the subject by itself is clear from the third sentence of the second paragraph of the same Article 20, providing: "Detention may last only as long as there are legal reasons for such […]". The legal reasons must therefore precisely specify that which is stated in the first paragraph of Article 20 of the Constitution.

42. This precision is substantive in nature ("No one may be deprived of his liberty except in such cases as are provided by law.") and procedural in nature ("No one may be deprived of his liberty except pursuant to such procedures as are provided by law."). Neither in respect of the first nor the second does the Constitution differentiate between the various degrees of legal certainty (substantive and procedural) for deprivation of liberty, detention or custodial sentences. The same absolute constitutional requirement of prior definition exists for all three forms of intrusion into personal liberty for cases where a person may be deprived of liberty and that there is a legal determination of the specific procedure following which a person’s liberty may be restricted and deprived before the conviction becomes final.

B-IV

43. Since this is an extraordinary and preventive interference with personal liberty, the constitutions of most democratic countries stipulate in great detail the conditions under which such interference is possible at all. The first paragraph of Article 20 of the Slovene Constitution stipulates three conditions under which detention may be ordered: (1) a court order; (2) reasonable suspicion; and (3) absolute necessity for the course of criminal proceedings or for reasons of public safety.

44. The fact that the Constitution specifies that a person may be detained only on the basis of a court order means that an explicit constitutional requirement is laid down that this person be delivered to the judiciary through a temporary restriction of liberty carried out by the executive branch of power after the deprivation of liberty (arrest). This is the Slovene version of an ancient human freedom, originally derived from the English Habeas Corpus Act (*ad subjiciendum*) from 1679. Only the judiciary has the right to order anything more than just a temporary deprivation of liberty. Accordingly, the Slovene Constitution must be seen as the heir to the values of our civilisation.

45. The emphasis that detention may only be based on a court order shows that this is a case of *habeas corpus*, as opposed to the third paragraph of Article 19 which refers to a "competent body" in the impersonal (passive) form. Hence it follows, and this is also common in other constitutional systems, that temporary "deprivation of liberty" (deprivation of liberty, arrest) falls within the remit of the executive branch of power.

46. From (1) the differentiation between the constitutional concept of "deprivation of liberty" (third paragraph of Article 19), which is complete and temporary, and the constitutional concept of "detention" (Article 20), which is incomplete and may last longer, and (2) (a) from the provision of the third paragraph of Article 5 of the ECHR, according to which anyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and (b) from Article 23 of the Constitution, pursuant to which anyone deprived of their liberty has the right to have a decision made on the deprivation of liberty "without undue delay" by an independent, impartial court constituted by law, i.e. not the executive branch of power, it follows that anyone deprived of their liberty must be delivered by the executive branch of power to the judiciary "without undue delay".

47. Consequently, the executive branch of power (the police) must bring the person deprived of liberty, albeit the deprivation being entirely in accordance with the Constitution and the law, promptly (without undue delay) to the judiciary. As to whether the provisions of the CrPA governing the deprivation of liberty itself are consistent with the Constitution is a separate issue which had to be resolved in this case.

48. The second condition for ordering detention is a reasonable suspicion that a certain person has committed a criminal offence. The provision of Article 20 of the Constitution only applies where there is a high probability that a person has committed a specific criminal offence for which decision opening the investigation has already been issued. The assumption that a person will repeat a specific criminal offence may actually only be made on the basis of the constitutionally required and actually established reasonable suspicion that the person in question has already committed such an offence. The "recidivism" can only be inferred from something that has already happened. This is, to the extent to which the Constitution allows such a decision at all,

based on an incomplete induction and if it is absolutely necessary for the public safety, then the major premise of this conclusion is restricted at least to the reasonable suspicion that the person did commit a specific criminal offence. It is therefore not the Constitution that gives the court general authorisation to deduce that detention is necessary for public safety, but instead the risk that may result from a reasonable suspicion that a specific criminal offence has already been committed. When ordering detention, the Constitution allows for such danger to the public to be deduced only if the danger is causally connected to a criminal offence which is reasonably suspected of having been committed.

49. The constitutional implication here is that the right of the judiciary to order that such a person be detained originates solely in the reasonable suspicion that he has already committed the criminal offence, i.e. in the probability, demonstrated beforehand, that this person, by allegedly committing a criminal offence, infringed the specific constitutionally-protected interest of a particular subject being protected in case of specific criminal offence. If this was not the case, the ascertainment of the reasonable suspicion that a person has, for example, committed the criminal offence of tax evasion determined by Article 254 of the CC would give the court a blanket right to conclude, for example, that there is a risk that the defendant will commit a criminal offence against life and body, as determined in Chapter XV of the CC. Such conclusion, which goes beyond the constitutionally imposed major premise of reasonable suspicion, would have no constitutional foundation arising from the right of the state to interfere with the right to personal liberty only to the extent to which the defendant infringed a subject protected by the criminal law and if a reasonable suspicion exists for such infringement. The mere ascertainment of a reasonable suspicion that a person has committed a specific criminal offence shall not give full right to the court to order detention due to any danger to the public because the right of the judiciary to assess criminal liability and to order a far more severe interference with personal liberty, i.e. imprisonment, is limited solely to the act which is reasonably suspected to have been committed.

50. This substantive link between the reasonable suspicion for the decision opening the investigation to be issued against the defendant, and the conclusion reached regarding the risk of the defendant repeating or carrying out a criminal offence for which a reasonable suspicion has already been demonstrated, arises from the current provision of point 3 of the second paragraph of Article 201 of the CrPA. The question here is whether this link should also apply to the third concern referred to in this provision, i.e. that the defendant will commit a criminal offence he has threatened to commit. This substantive link will exist every time a perpetrator who is reasonably suspected to have committed a violent criminal offence threatens to carry out the same kind of offence. The current provision of the CrPA describes the natural regression from recidivism to an attempt, and from an attempt to a threat as the precursor to an attempt or the perpetration of the same kind of criminal offence as that for which a

reasonable suspicion has already been demonstrated. It is certainly possible for a person charged with a non-violent criminal offence to make a serious threat against a hostile witness.

However, such a threat can be dealt with in the context of the risk of obstruction of the proceedings.

51. In addition to the quantitative element of probability, which must first be demonstrated (reasonable suspicion), the Constitution prescribes the qualitative element of a substantive link between the specific criminal offence for which a reasonable suspicion has already been demonstrated and the presumption of an act with which the defendant is allegedly endangering public safety.

52. Article 20 of the Constitution refers to further detention as being "absolutely necessary for the course of (criminal) proceedings or for reasons of public safety". The expression "course of proceedings" refers mainly to ensuring the presence of the defendant. Since ensuring the presence of the defendant is the first procedural requirement in any legal order and because the first requirement of the legal order is that the parties submit themselves to a legal – and not illegal – solution to the dispute, practically all legal orders regulate the problem of the risk of absconding in one way or another.

53. The part of the provision which refers to "public safety" serves as the foundation for the legislature's definition of detention due to the risk of recidivism. The Constitutional Court takes the view that the constitutional expression "protection of society" does not refer only to immediate danger to the life and body of an individual. Life and body are at the very centre of the concentric circles forming an individual's privacy, but public safety may also be endangered by an assault on those objects of criminal law protection that protect other broader aspects of their privacy and safety. This does not concern, for example, just theft turned into robbery as a combined assault on property and body, but an act where the object of protection (also) involves an individual, human rights and freedoms, the individual's health or the health of community, and similar. Public safety lacks credibility if, in practice, the state only guarantees protection against assault on life and body but not against assault on other objects that are subject to criminal law protection.

54. This constitutional norm which, by permitting detention as an exception, restricts the right of the defendant to personal liberty must be understood also as a constitutional norm ensuring respect of the constitutional right of others to safety, which (in addition to personal dignity) is guaranteed by Article 34 of the Constitution. Too strict an interpretation of the concept "public safety" determined by Article 20 of the Constitution could result in an excessively strict interpretation of the concept of "everyone’s safety“ referred to in Article 34 of the Constitution, this term no longer

being an element of a norm restricting a right but instead now an element of a norm guaranteeing a right. For instance, offences against property cannot be precluded in advance and in general from the concept of "public safety" on the grounds that they cannot endanger the public safety in any way. On the other hand, this also means that the risk of recidivism for criminal offences against property cannot as a rule outweigh the interference with personal liberty unless the criminal offences are serious and interfere with the most important, constitutionally-protected interests of others.

55. The Constitution provides an additional restriction: detention must be absolutely necessary for reasons of public safety. Article 20 expressly introduces the principle of proportionality into the Constitution, which is also otherwise recognised as a general constitutional principle deriving from the principle of the state governed by the rule of law. As a result, when determining the conditions for ordering detention, the legislature is required to provide the courts with the option, on the one hand, to assess whether intervention is necessary because there are no milder measures available to achieve the desired objective. On the other hand, it imposes upon the legislature the obligation to restrict the possibility of ordering detention for cases where such intervention is reasonably proportionate to the objective, i.e. the interests that are to be protected by such intervention, and with the reasonably anticipated effects thereof.

56. At the declaratory level, the legislature embraced the principle that, when deciding which measures to apply in order to ensure the presence of the defendant and in order to successfully carry out the criminal proceedings, the competent body must abide by the conditions that apply to specific measures and ensure that a measure stricter than necessary is not used if the same purpose may be achieved by applying a milder measure (Article 192 of the CrPA).

57. The legislature did not follow this principle when legally defining these measures. In the chapter entitled "Measures to ensure the presence of the defendant and for the successful conduct of criminal proceedings", it actually did define several possible measures for the enactment of these procedural requirements, from the mildest (summons) to the most severe (detention), and explicitly provided that specific stricter measures, in addition to the general provision of Article 192, are to be applied in a subsidiary manner if the same aim could not be achieved with the aforementioned milder measures.

58. The chapter referred to also covers the issue of detention due to the risk of recidivism. Systemically, these grounds for detention do not belong to the chapter on measures to ensure the presence of the defendant and for the successful conduct of criminal proceedings. While this erroneous classification of the challenged provision is not unconstitutional in itself, in terms of content it means that the provision of Article 192 of the CrPA is not applicable in relation to this measure because neither this

chapter nor any other provision of the CrPA provides the court with any milder measure for the same purpose, i.e. eliminating or reducing the risk of recidivism.

59. The legislature therefore violated the principle of proportionality that requires that, when pursuing a constitutionally permitted aim (in this case, public safety), the legislature chooses measures to interfere with human rights that are based on the proportional criteria of absolute necessity. An assessment made in accordance with the principle of absolute necessity requires that the legislature makes available those alternative measures that are known to legal professionals that are in compliance with the principle of proportionality and suitable for achieving a specific legislative objective. In so doing, it is required to establish whether the desired aim can be achieved by applying milder measures, thereby restricting personal liberty as little as possible. The milder measures that could be used in certain cases to ensure public safety and, at the same time, interfere to the least extent possible with the personal liberty of the defendant, are widely known in theory and enacted in certain other legal orders. These include the obligation to report to the police, a ban on leaving town without the court's permission, a restraining order, supervision and assistance by a body appointed by the court, house arrest and other measures which can reduce the risk of recidivism but at the same time interfere less with the liberty of the defendant than being detained.

60. The legislature did not make any of these measures available to the courts. In terms of public safety, it provided only the measure that interferes the most with the personal liberty of the defendant. In so doing, it violated the principle of proportionality.

61. Furthermore, the CrPA does not give sufficient guarantees that the courts may order (or extend) detention only in cases where the threat to public safety resulting from the release of the defendant would represent such a serious interference with the right to safety that it would outweigh the interference with the right of the defendant to personal liberty, even though it has not yet been proven that he has actually committed the alleged criminal offence nor can it be "predicted" with certainty that he will repeat such an offence once free. Pursuant to the provision of point 3 of the second paragraph of Article 201 of the CrPA, detention may be ordered if special circumstances justify the concern that a specific person will actually repeat a criminal offence, carry out an attempted criminal offence or commit a criminal offence he has threatened to commit.

In its decisions on constitutional complaints against detention orders based on the cited provision, the Constitutional Court has already stated that the actual circumstances must be established from which the court may, from experience, draw a conclusion about whether there is a real danger – and not just a concern – that the individual concerned will repeat a specific criminal offence (Decision No. Up-75/95, dated 7 July 1995). In Decision No. Up 123/95, dated 6 October 1995, the Constitutional Court stated that the circumstances and gravity of the alleged criminal

offence do not justify such a conclusion in themselves. This conclusion may only be drawn after the personality of the defendant, the environment and the circumstances in which he lives as well as his previous way of living allow a reliable and specific conclusion to be reached as to the existence of the necessary degree of danger. In Decision No. Up 160/95, dated 26 February 1996, the Constitutional Court stressed that in cases in which there is a risk of repeating criminal offences representing a serious danger to public safety (the case at issue involved the sale of explosives), a lower probability threshold that the criminal offence will be repeated is necessary than in cases in which public safety is not so seriously jeopardised.

62. The challenged statutory provision of point 3 of the second paragraph of Article 201 of the CrPA is contrary to the constitutional requirement that cases where detention may be ordered due to the risk of recidivism shall be determined by law (*lex certa*). Since the Constitution does not prohibit detention due to the risk of recidivism, the Constitutional Court, based on Article 48 of the CCA, established that the challenged provision of the CrPA was unconstitutional and gave the legislature a deadline for this to be remedied. In place of the current formulation, which is not consistent with the Constitution ("special circumstances that justify the concern [...]"), and in accordance with the Constitution, the legislature will have to require that the courts establish the actual risk of such a criminal offence being repeated and, where there is a real risk that it will be committed, justify in the case in question the interference with the defendant's personal liberty (in accordance with the principle of proportionality and taking the specific circumstances into account). It will have to precisely specify criminal offences, not merely in terms of the length of the prescribed sentence but also by other criteria, for which it will find that they are of such nature that in an abstract manner they meet the constitutional requirement of danger to public safety – and thereafter the court will have to assess in each case whether, in accordance with the principle of proportionality, such interference is justified. It will be required to stipulate alternative preventive measures that allow the courts to strike a balance between ensuring public safety and ordering less severe interferences with the personal liberty of a suspect or defendant.

63. While reviewing the constitutionality of point 3 of the second paragraph of Article 201 of the CrPA, the Constitutional Court also reviewed the constitutionality of point 2 of the first paragraph of Article 432 of the CrPA (Article 30 of the CCA). Both provisions regulate detention due to the risk of recidivism, the difference being that the first applies to regular procedures while the other to fast-track procedures. In determining the degree of the risk of recidivism of criminal offences that must exist in order for a court to order detention, both provisions use the same wording of "if special circumstances justify the concern". For the reasons referred to in the above paragraphs of this reasoning, the Constitutional Court established that the provision of point 2 of the first paragraph of Article 432 of the CrPA was unconstitutional. Accordingly, the legislature will be required to redefine the conditions for ordering (and

extending) detention due to the risk of recidivism in the fast-track procedure in accordance with the above.

B-V

64. The Constitutional Court rejects the petitioners' allegation that the ECHR does not permit detention due to the risk of recidivism. In point (c) of the first paragraph of Article 5, the ECHR specifies the possibility of ordering detention in cases "when it is reasonably considered necessary to prevent the defendant from committing an offence". Numerous examples from the case law of the European Court of Human Rights show that detention due to the risk of recidivism is not contrary to the Convention – provided, of course, that the other conditions are met, which are also defined in the Constitution.

65. The Constitutional Court also rejects the petitioners' allegation that the ordering of detention is contrary to the presumption of innocence referred to in Article 27 of the Constitution. Despite the general assumption that preventive deprivation of liberty is contrary to the presumption of innocence, this is actually true to a much lesser extent than expected. This neglects the role of presumptions in law in general.

66. In particular, the purpose of legal presumption is to allow the court to make a decision even in circumstances when the facts are not yet clear. Since the law normally deals with historical events, which are by definition part of the past and therefore not scientifically accessible (through an experiment), it is clear that in certain circumstances a court cannot completely eliminate all remaining doubts concerning the relevant facts.

67. The fundamental presumption in criminal proceedings is of the innocence of the suspect, the defendant or the accused. It has its origins in the old (enlightened) guideline for the legislative-political decision-making, which avers that it is better to acquit ten guilty people than to sentence one innocent person. However, the presumption of innocence does not primarily entail that everyone is regarded as positively innocent in an absolute manner and actually outside the scope of the criminal law and procedure. If that were true, then it would be impossible to even instigate criminal proceedings against anyone because, due to the presumption of innocence, it would be impossible to talk about a "reasonable suspicion" that the person committed a criminal offence. This reasonable suspicion would be a logical contradiction to the principle of innocence if the latter were interpreted as a static actual state and not as a dynamic procedural transfer of the burden of proof. It is however true that Article 27 of the Constitution states that any person charged with a criminal offence shall be presumed innocent (*praesumptio iuris*) unless found guilty by way of a final judgment. The presumption of innocence therefore applies to guilt under criminal law and encapsulates three concepts: the first is that the burden of proof (*onus*

probandi) rests with the plaintiff (the state) and not the defendant. The second is that the state, as the plaintiff, carries the risk of failing to provide proof: "*Actore non probante reus absolvitur*". And thirdly, which is identical in terms of meaning, is the principle of *in dubio pro reo*, meaning that when in doubt a court must always acquit the accused.

B-VI

68. The second constitutional condition for the deprivation of liberty originates in the second part of the provision of the second paragraph of Article 19 of the Constitution: "No one may be deprived of his liberty except pursuant to such procedures as are provided by law". Therefore, as is the case when determining the substantive conditions for ordering and extending detention, here the Constitution also defines the framework of the legislative regulation.

69. The first restriction is determined by the provision of the first paragraph of Article 20, pursuant to which detention is only permitted on the basis of a court order. The notion of a court order necessarily includes the guarantees provided by the right to judicial protection determined by Article 23 of the Constitution: only an independent, impartial court constituted by law may decide on detention. A court may be deemed impartial only if prior to making a decision on detention it hears the views of both parties, i.e. when deciding on detention, it must hear the prosecutor and the person whose detention is being decided upon.

70. The requirement of a judicial decision also encompasses the constitutional provisions on the equal protection of rights (Article 22 of the Constitution) and legal guarantees in criminal proceedings (Article 29). The provision of Article 22 guarantees the equal protection of the rights of all in any proceedings before a court. Pursuant to Article 29, anyone charged with a criminal offence must be guaranteed (1) the right to have adequate time and facilities to prepare his defence; (2) the right to be present at his trial and to conduct his defence; (3) the right to produce all evidence to his benefit; (4) the right not to incriminate himself or his relatives or those close to him, or to admit guilt.

71. The provision of Article 22 guarantees a person whose detention is being decided upon by a court the same rights as those enjoyed by the opposite party in the proceedings, i.e. the prosecutor. A minimum level of rights is guaranteed by Article 29. In accordance with the Constitution, the person concerned has the right to be heard and thereby the right to prove (1) the nonexistence of a reasonable suspicion that he has committed the alleged criminal offence; (2) that detention is not absolutely necessary for reasons of public safety, and (3) that in order to ensure public safety, a milder measure of restricting liberty would suffice. The person must be given the opportunity to reply to the evidence presented against him, and submit evidence to

support his statements. In order to make this possible, he must be given the opportunity to familiarise himself with the facts and evidence against him.

72. The Constitutional Court stresses in particular that the person concerned is not obliged to prove anything. Under the provision of Article 27 of the Constitution, a court is also subject to restrictions when deciding on detention. The wording of this provision does indeed state that a person must be found guilty in order to overturn the presumption of innocence. However, if the presumption of innocence applies to criminal offences that have already been committed, then it must apply *a fortiori* in respect of criminal offences that the person concerned may commit at some point in the future. A different interpretation of the provision of Article 27 would imply that the state presumes in advance that someone will commit a criminal offence. The burden of proving the existence of a reasonable suspicion as an absolute necessity for detention because of public safety concerns must rest with the prosecutor. If in doubt, the court must rule that the conditions for detention have not been met.

73. The Constitution guarantees the right to legal remedies for a person against whom detention has been ordered (Article 25). In this regard, note must be made of the provision of the second paragraph of Article 20 of the Constitution which, in relation to the detention order in particular, specifies that a detained person must be provided with the written court order with a statement of reasons, against which he may appeal. In case No. U-I-98/91, dated 10 December 1992 (OdlUS I, 101), the Constitutional Court took the view that the purpose of the provision of Article 25 of the Constitution is not merely to give the person concerned the possibility to file a legal remedy. It is primarily to enable the person concerned to effectively defend his rights or legal interests. The right to legal remedy against a detention order may only be effective if the court decision is explained point by point in a precise (and not general or abstract) manner, thereby enabling an assessment to be made as to whether the state has sufficiently met all the requirements imposed by the aforementioned statutory provisions regarding the burden of allegation and the burden of proof. In view of the requirements that must be met in order to comply with this Decision of the Constitutional Court, the right to effective legal remedy cannot be guaranteed if the detention order only contains the elements explicitly prescribed by the provision of the second paragraph of Article 202 of the CrPA. This provision, in addition to elements of an entirely formal nature, merely requires "a brief statement specifically explaining the grounds for detention" in relation to the substantive elements. Apart from the elements listed therein, a decision to deprive a suspect or an accused person of his liberty due to a risk of recidivism must include a justification as to why the deprivation of liberty is absolutely necessary for reasons of public safety, and list the specific circumstances on the basis of which it is possible to conclude that the suspect or accused person will repeat the criminal offence, carry out an attempted criminal offence or commit an offence he is threatening to commit, and why the court considers this act to represent a danger to public safety.

74. The Constitutional Court finds that the provisions of the CrPA do not provide these procedural guarantees to a person whose detention is being decided by a court. The court may order and extend detention without giving the person concerned the right to be heard and without giving him the opportunity to familiarise himself with the facts and evidence against him (provisions of Articles 202, 203, 205, 207 and 361 of the CrPA). The person concerned has the right to inspect the file only once the investigation has been initiated (fifth paragraph of Article 128 in conjunction with Article 144 of the CrPA); in the event he has a defence counsel, the defence counsel may then inspect the file after the prosecutor has lodged a request for criminal prosecution (Article 73 of the CrPA). In the detention order the court is required only to provide a brief statement specifically explaining the grounds for detention (second paragraph of Article 202 of the CrPA). The state prosecutor always has the option to state his opinion on the matter before the court of second instance adopts its decision; however, the detainee is not informed of that opinion (first paragraph of Article 377 in conjunction with first paragraph of Article 403 of the CrPA).

75. Since the proceedings for deciding on the ordering, extension and release from detention due to the risk of recidivism for a person whose detention is being decided upon do not provide guarantees provided by the Constitution, they are not consistent with the Constitution. Abrogation of those provisions of the CrPA governing the proceedings for deciding on detention – with the exception of the second paragraph of Article 202 of the CrPA – would mean that the courts could no longer order detention. Based on Article 48 of the CCA the Constitutional Court therefore only found that these provisions are unconstitutional and it set a deadline within which the legislature must remedy the aforementioned unconstitutionality. However, it abrogated that part of the provision of the second paragraph of Article 202 of the CrPA that defines the content of the statement of reasons for a detention order.

76. The Constitutional Court takes the view that, from a procedural law perspective, the legislature must regulate this subject-matter so that, with regard to the risk of recidivism, a special hearing will be provided by law where the judge will adjudicate between the statements made by the state prosecutor and the defence, and where there is doubt, the judge will rule that there is no risk of recidivism. The abrogated provision of the second paragraph of Article 202 of the CrPA can be replaced by defining the content of the detention order in accordance with the views expressed in this decision. The legislature will regulate the procedural subject-matter in detail and, in this regard, the Constitutional Court draws attention to the constitutional requirement that, firstly, every interference with the right to personal liberty must be determined by procedural law and, secondly, that all constitutional guarantees apply in this procedure as they stem from the fact that the person is given over to the judiciary precisely in order to benefit from judicial guarantees which cannot be provided by the executive branch of power (second paragraph of Article 20 of the Constitution). This *habeas corpus* logic would be meaningless if the judicial branch followed the same logic as the

executive branch, i.e. predominantly based on the principle of efficiency and not observing the procedural guarantees.

B-VII

77. When considering point 3 of the second paragraph of Article 201 of the CrPA, the Constitutional Court, in accordance with Article 30 of the CCA, also considered the issue of the constitutionality of the first paragraph of Article 201 and the first paragraph of Article 361 of the CrPA. Since in its review of constitutionality the Constitutional Court is not bound by the proposal of the applicant or petitioner, and it judged the provisions of the first paragraph of Article 201 and the first paragraph of Article 361 of the CrPA to be related to the constitutional review of point 3 of the second paragraph of Article 201 of the CrPA, it abrogated these two provisions as well.

78. The first paragraph of Article 201 of the CrPA provides for the obligatory detention of a person reasonably suspected to have committed a criminal offence for which a sentence of imprisonment of more than twenty years is prescribed by law. A court may decide that "reasonable grounds exist" for it not to order detention, but the paragraph implies that the legislature provided a presumption that there is a risk of absconding, risk of obstruction of the proceedings or risk of recidivism in all cases when the defendant is facing twenty years of imprisonment. From a criminal procedural law perspective, such presumption is unacceptable and indicates the legislature's supplementary motivation to allow detention to be ordered due to public disturbance, which is not permitted by the Constitution. Such a presumption also presupposes a constitutional assumption that, in cases which are punishable by twenty years of imprisonment, detention is absolutely necessary either for the course of the criminal proceedings or public safety.

79. In order to establish the legal presumption that it is absolutely necessary for a person who might be sentenced to twenty years of imprisonment to be detained for the criminal proceedings or for reasons of public safety is contrary to the first paragraph of Article 20 of the Constitution. This provision requires a specific court order.

The Constitution here builds on the assumption that the legislature will prescribe such legal grounds that allow the court to make a specific decision in each case as to whether such grounds (still) exist. The general legal presumption for the necessity of detention is also constitutionally unacceptable because it does not allow for an assessment of whether detention is really absolutely necessary in each case. This problem is somewhat mitigated, however, by the statutory provision that a court may decide not to order detention if reasonable grounds exist – presumably grounds that would refute the aforementioned general legislative presumption. However, the latter presumption is not even specified, as the first paragraph of Article 201 does not state whether it applies to the risk of absconding, the risk of proceedings being obstructed,

the risk of recidivism, or whether it really is just a matter of "public disturbance". Therefore it is also unclear what, in the legislature's opinion, would constitute "reasonable grounds" that could refute such a presumption. And because this is not clear, then such provision is contrary to the constitutional right to legal remedies determined by Article 25 of the Constitution; in such circumstances it is not possible for the defence to know what should be stated as "reasonable grounds" for the court to decide not to order detention. Moreover, the CrPA gives the impression that the burden of proof (a mirror image of the legislative presumption) is placed on the investigative judge or the three judge panel for pre-trial appeals, being required to state the "reasonable grounds" that would refute the legislative presumption of the necessity for detention. In reality, the burden of proof is, naturally, on the defence contrary to Article 27 of the Constitution. Reference has already been made to the fact that this article does not exactly introduce actual innocence, but it certainly unequivocally demands that the burden of proof in criminal matters be borne by the prosecution. There is no reason why this basic constitutional and procedural logic should not apply to detention orders. For these reasons the Constitutional Court abrogated the first paragraph of Article 201 of the CrPA.

80. The first paragraph of Article 361 of the CrPA provides that, if the accused is not already in detention, a court may order detention if it imposes a sentence of imprisonment of five or more years. The legislature does not determine the rules for assessing whether detention should be ordered. This decision is left to the court. This provision is clearly contrary to the first paragraph of Article 20 of the Constitution, which demands a court order that must establish the absolute necessity for the course of criminal proceedings or public safety. The Constitutional Court therefore also abrogated the first paragraph of Article 361 of the CrPA.

C

81. The Constitutional Court adopted this decision pursuant to Articles 30, 43 and 48 of the Constitutional Court Act, composed of: Dr Tone Jerovšek, President, and Judges Dr Peter Jambrek, Mag. Matevž Krivic, Mag. Janez Snoj, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude, and Dr Boštjan M. Zupančič. The decision was reached unanimously. Judges Krivic, Ude, and Zupančič gave concurring separate opinions.

President
Dr Tone Jerovšek

[*] Translator's note: In the Slovene language, the Constitution actually differentiates between the two: *svoboda* (freedom) and *prostost* (liberty).