REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-248/96
30 September 1998

D E C I S I O N

At a session held on 30 September 1998 in proceedings to adjudicate on the request of the General State Prosecutor, the Constitutional Court

d e c i d e d:

The provisions of the Act on the Punishment of Crimes against the Slovenian National Honor (Official Gazette SNOS and NVS, No. 7/45) were at the time of their adoption and application inconsistent with the general legal principles recognized by civilized nations, insofar as they were, because of their vagueness, the basis for an arbitrary application of statute.

To this extent, which follows from the reasoning of this decision, their application in today's court proceedings is unconstitutional.

R e a s o n i n g:

A.

1. The General State Prosecutor challenged the Act on the Punishment of Crimes against the Slovenian National Honor (hereinafter: ZSNČ) by a request filed on 5 April 1994, and supplemented on 24 February 1995. He opined in the request that ZSNČ was consistent neither with the then legal order nor with the present one. ZSNČ had not allegedly been adopted or promulgated by a legislative body determined by the (then or present) constitution following a constitutionally prescribed procedure, thus it did not become a binding statute but a revolutionary decree. By ZSNČ a special Court of the Slovenian National Honor was established, which was determined to adjudicate on the "crimes against the Slovenian national honor committed during the enemy's occupation or in connection with it". This special court allegedly had all the characteristic of an extraordinary court, which was allegedly inconsistent with Art. 126 of the Špresent] Constitution. No legal guaranties determined in Art. 29 of the Constitution allegedly applied to the proceedings of this court, which was allegedly also contrary to the general legal principles recognized by civilized nations. According to Art. 10 of ZSNČ, to institute proceedings it was allegedly enough that merely a notice by the public prosecutor, the Department for National Security, the National Liberation Committee, or by any individual, was given. There was no appeal against the decisions of this court.

2. ZSNČ was promulgated on 9 June 1945. Its provisions were allegedly determined to have retroactive effect for, according to Art. 1 of ZSNČ, the courts were given jurisdiction to try the crimes committed during the enemy's occupation or in connection with it. Such a provision was allegedly contrary to Art. 155, Para. 1 and Art. 28 of the Constitution. The text of Art. 2 of ZSNČ allegedly allowed analogy in criminal substantive law. The descriptions of criminal offenses were allegedly vague and contrary to the principle of legality in prescribing criminal offenses, as adopted by civilized nations.

3. The petitioner stated that ZSNČ had never explicitly been abrogated; by the Act on the Abolition of the Court of the Slovenian National Honor (Official Gazette SNOS, No. 49/45 - hereinafter: ZUSNČ) the special court Šestablished by ZSNČ] was abolished. ZSNČ was confirmed by the Act of 24 February 1948 (Official Gazette LRS, No. 10/48). According to the order of pardon of the persons sentenced under this Act, these convicts were entirely released from the punishment of light or hard

labor, and the legal consequences of the punishment imposing on them the divestment of their national honor were limited to (only) divesting them of their political and civil rights.

However, all confiscations of property remained to apply and certain actions of individuals are still considered the violations under the said statute. The Act is still applied when the courts adjudicate on in the proceedings of extraordinary legal remedies. The Supreme State Prosecutor enclosed with his request copies of the requests filed for the protection of legality against judgements rendered under ZSNČ, and also two Supreme Court judgements in which the judges have already decided on his requests. By judgement No. I Ips 76/92, dated 24 June 1992, the Supreme Court, proceeding ex officio, had partially annulled the challenged judgement, and remanded the case to the lower court, and partially changed the judgement concerning the defendant's guilt and the punishment imposed. By judgement No. I Ips 78/92 dated 25 May 1992 the Supreme Court granted a request for the protection of legality releasing the convict, on the behalf of whom the request had been filed, from charges.

4. The request was sent to the National Assembly, which did not reply to it.

B. - I.

5. Firstly, adjudicating on the request, the Constitutional Court had to establish whether procedural requirements were met in order to begin with the review of the constitutionality of ZSNČ. ZSNČ in Art. 2 defined "crimes against the Slovenian national honor" the crimes for which courts may have pronounced the punishment of divesting someone of their national honor, the punishment of light or hard labor or the complete or partial confiscation of someone's property. In Art. 6 ZSNČ provided that the crimes against the Slovenian national honor did not fall under statutes of limitations. ZSNč has never explicitly been annulled. However, pursuant to ZUSNČ the special court envisaged by ZSNČ, which was under Art. 1 of ZSNČ empowered to adjudicate on the actions committed under Art. 2 of ZSNČ, was abolished. From this it may be inferred that ZSNČ in fact ceased to apply after ZUSNČ had come into force.1 Nevertheless, some of ZSNČ provisions were undoubtedly abrogated by the Introductory Statute to the Penal Code (Official Gazette FLRY, No. 11/51) taking effect. This Statute inter alia provided that by the Penal Code becoming effective penal provisions provided in the statutes of People's Republics2 ceased to apply insofar as they were in conflict with Penal Code provisions. This Statute was the basis on which Art. 6 of ZSNČ, providing that the crimes against the Slovenian national honor did not fall under statutes of limitations, ceased to apply. According to Art. 10 of the Introductory Statute to the Penal Code, by the introduction of the Penal Code Arts. 80 to 82 of this Code also began to apply to the rights to persecution or the execution of penalties providing their falling under statutes of limitations, if the criminal offense had been committed or the judgment pronounced before the Penal Code came into force, except in case where the persecution or the execution of the penalty had already fallen under statutes of limitations by the time of the Code's introduction. Thus, the persecution of criminal offenses according to ZSNČ fell under statutes of limitations in twenty years after the criminal offense had been committed (Art. 80, Para. 1, It. 3 and Art. 81, Para. 6 of the said Code). Merely because of this, after a certain time had elapsed the persecution of criminal offenses "committed during the time of the enemy's occupation or in connection with it" was not anymore possible, which means that after a certain time had elapsed ZSNČ ceased to apply, because of its being superseded by another statute. Therefore, it cannot be held that ZSNČ became part of the legal system of the Republic of Slovenia at the time of its gaining independence.

6. Irrespective of the above-mentioned, it should be established that the Constitutional Court has jurisdiction to review this statute under Art. 416 of the Code of Criminal Procedure (Official Gazette RS, Nos. 63/94, 25/96 - dec.CC, 39/96 - dec.CC and 5/98 - dec.CC - hereinafter: ZKP). In Art. 161, Para. 1 the Constitution provides that the Constitutional Court abrogates a statute in whole or in part if it determines that that statute is unconstitutional. It also provides that such abrogation takes effect immediately or within a period of time determined by the Constitutional Court. In Art. 162, Para. 1 the Constitution provides that the proceedings before the Constitutional Court are regulated by statute. The Constitutional Court Act (Official Gazette RS, No. 15/94 - hereinafter: ZUstS) in Art. 44 provides that a statute or its part abrogated by the Constitutional Court does not apply to relations that had been established before the day such abrogation came into effect, if by that day such relations had finally been adjudicated. In contrast, Art. 416 of ZKP provides for the right to request the modification of a final judicial decision pursuant to the decision of the Constitutional Court by which the Court

abrogated or abrogated ab initio the regulation on the basis of which the final judgement of conviction had been passed. In these proceedings the ZKP provisions on reopening of criminal proceedings are sensibly applied. Thus, Art. 416 of ZKP is in relation to Art. 44 of ZUstS lex specialis, with regard to the determination of effects of constitutional judicial review on the constitutionality of statute. Art. 28, Para. 2 of the Constitution requires from the criminal court to determine the criminal offense and pronounce the penalty according to the statute that was in force at the time the action in question was performed (save where a new statute prescribes a milder penalty), that is according to the statute which may not anymore be applied during the trial. Art. 416 of ZKP imposes on the Constitutional Court, at the request of a rightful party to constitutional court proceedings, to review any regulation which prescribes or has prescribed criminal offenses although if it does not apply anymore at the time of its review. The jurisdiction of the Constitutional Court to review ZSNČ is thus given.

7. The procedural condition that a request be filed by a rightful person was fulfilled. The State prosecutor may file the request only when the question of constitutionality and legality arises in connection with the proceedings they conduct (Art. 23, Para. 1, Subpara. 5 of ZUstS). Requested by the Constitutional Court, the General State Prosecutor submitted copies of the requests already filed for the protection of legality that refer to the challenged statute, and copies of those Supreme Court judgements which have already adjudicated on these requests.

8. The Constitutional Court already answered to the question of which criteria should have been followed in order to review the constitutionality of pre-constitutional regulations when it adjudicated on the Decree on Military Courts (Decision No. U-I- 6/93 dated 1 April 1994, DecCC III, 33). They are to be reviewed form the point of their consistency with the then applicable constitutional and general legal principles which were recognized by civilized nations, and, concerning their application in new trials, also from the point of their consistency with the Špresent] Constitution.

9. The view of the petitioner that ZSNČ had not been adopted by a competent body, and that during the trial it was not a valid statute but a revolutionary decree, is not well-founded. ZSNČ was adopted by the Presidency of the Slovenian National Liberation Council (SNOS). SNOS, or during its sessions the Presidency of SNOS, was a body of Slovenian State authorities, which also had a legislative function, like it was in the former Yugoslavia the case of AVNOJ, and, during its sessions, the Presidency of AVNOJ. In Point II, 10 of the Resolution of the Association of Delegates of the Slovenian Nation on the Representation and Leadership of the Slovenian National Liberation War and on Temporal Bodies of People's Power of the Slovenian Nation during the Time of War, dated 3 October 1943 (Slovenian Reporter, Vol. IV, No. 24 a dated 18 October 1943), it was determined that during the time between sessions of the Slovenian National Liberation Committee (SNOO) all rights that pertain to SNOO were exercised by its presidency. Under Point II, 6 and 7 of this Resolution, SNOO exercised the legislative and executive power of the Slovenian nation in the framework of Yugoslavia. SNOO was by the resolution on renaming SNOO, dated 19 February 1944 (Slovenian Reporter, Vol. V, Ljubljana Edition, No. 4, March 1944), renamed SNOS. Orders and statutes adopted by SNOS or its presidency were confirmed by the decision of the Constitutive Assembly of PRS dated 20 November 1946. Therefore, it must be borne in mind that the challenged statute was adopted by a body which was at that time competent to carry out the legislative function in Slovenia.

B. - II.

10. The General State Prosecutor challenged ZSNČ in whole, which seems logical if we take the viewpoint of the objections taken to the legal nature of the challenged act which are dismissed in the previous point of this reasoning. But, as to the contents of the request, his objections refer to Art. 2 of ZSNČ, which included a substantive-law definition of criminal offenses, and to Art. 1 of ZSNČ, in which a special court was established. Thus, the Constitutional Court limited its review to the said statutory provisions.

11. Art. 1 of ZSNČ read as follows: "A special court to adjudicate on the crimes against the Slovenian national honor (the Court of the Slovenian National Honor) is established, which shall according to the provisions of this statute punish the crimes against the Slovenian national honor committed in the whole territory of Slovenia during the time of occupation or in connection with it."

12. The petitioner's assertions that this ZSNČ provision created an extraordinary court are not well-founded. The court was created by statute and could be described as a type of a special court for adjudicating issues arising under this statute. ZSNČ in Art. 14 prescribed the application of general penal provisions insofar as they did not contradict the provisions of ZSNČ. Thus, on the basis of the above-mentioned, in these proceedings also the provisions of the Code of Judicial Criminal Proceedings for the Kingdom of Serbs, Croats and Slovenes, dated 16 February 1929, were to be applied (for example, also the provisions on appeal against lower court decisions for such appeal was not excluded by ZSNČ provisions). 2 On the basis of statutory regulation itself this court could not have been considered an extraordinary court in the sense of the present constitutional prohibition under Art. 126 of the Constitution.

13. Art. 2 of ZSNČ read as follows: "Crimes against the Slovenian national honor are considered to be those actions intentionally performed which otherwise cannot be characterized as treason or an assistance to the enemy to perpetrate war crimes, but which have compromised or could compromise the reputation or honor of the Slovenian nation and its resistance, including particularly:
a) political, propagandist, cultural, artistic, business, legal or administrative collaboration with the enemy or domestic traitors, like, for example, participation in traitorous political or military organizations or supporting them; lecturing and writing or signing, publishing, printing, spreading books, booklets, articles, proclamations or pamphlets in order to justify occupation, or to accuse or discredit a national liberation war; an indirect or direct denouncement which could have dangerous consequences for the person denounced; giving a business company at the enemy's disposal or supporting the enemy through such a company; important operations carried out in a business department or a firm that has been used by the enemy; deliveries carried out on enemy's account; representing enemy's benefits before the court; serving as a policeman or official at a place which is of special interest for the enemy; profiting by the distress of members of the national liberation movement and insulting them on account of their conviction or activities; putting pressure on them with the intent to change their belief or persuade them to stop their activities; acting against the unity and brotherhood of the Yugoslav nations and inciting to hatred between them;
b) friendly relations with members of the occupier's army and authorities;
c) acting in responsible positions in 1941, which led to an infamous defeat and capitulation of Yugoslavia.

14. By ZSNČ, adopted on 5 June 1941, the actions which had been performed before its coming into force were criminalized. In Art. 1 of ZSNČ it was explicitly provided that the Court of the Slovenian National Honor judged the "crimes committed at the time of the enemy's occupation, or in connection with it". The Constitutional Court already in the cited decision No. U-I-6/93 found the retroactive application of the Decree on Military Courts allowed insofar as consistent with the general legal principles recognized by civilized nations. It compared the Decree's retroactivity with the retroactive effect of the London Agreement reached on 8 August 1945, on the basis of which Nuremberg trials for war crimes had been carried out. The retroactivity of that time was legitimate due to the fact that during World War II such delicta were committed which could not have been imagined, nor even envisaged, by previous legislatures. For these very reasons the departure form the prohibition of the retroactive effect of criminal laws should be allowed and legitimate also in the case of ZSNČ. Therefore, such regulation was not merely for the sake of its retroactivity inconsistent with the legal principles recognized by civilized nations at the time when ZSNČ came into force.

15. It is necessary to consider that ZSNČ provisions were not entirely retroactive. It is namely impossible to overlook the fact that certain actions criminalized in ZSNČ had been determined criminal offenses already by the Penal Code of the Kingdom of Yugoslavia, dated 27 January 1929.3 In these cases ZSNČ provisions cannot be viewed as retroactive for they did not determine anew criminal offenses which had not been prohibited before, but here only the question concerning the application of a milder penal regulation could arise since the penal regulation has changed from the time of the perpetration of these criminal offenses until the time of their trial.

16. Trials due to the violations against national honor were also carried out in other countries of Western Europe after World War II. Thus, for example, also in France,4 where in 1953 amnesty was granted for such criminal offenses. However, on this point it is to be borne in mind that the achievements of the anti-fascist resistance all over democratic Europe were reflected in the

breakdown of the totalitarian system and its violence against the people, this entailing a free democratic system to be begun on the basis of European legal culture and civilization. New authorities in Western European countries respected the foundations of a free democratic society. These foundations, according to the viewpoint of the Constitutional Court already accepted in Decision No. Up-301/96 (Official Gazette RS, No. 13/98), could only be respected by a system which, by excluding any kind of violence and arbitrariness, represents the social order of a State governed by the rule of law, which is grounded on the self-determination of its people respecting the will of majority, freedom and equality. In the basic principles of such an order at least the following key presuppositions should be included: respect for the human rights determined in the Constitution, the right of the individual to life, the inviolability of personal rights, the sovereignty of people, the separation of powers, the independence of courts, the multiparty political system and equal opportunities for all political rights including the right to form opposition and participate in it according to the Constitution. They were already expressed in Item 5 of the Declaration on Independence adopted by the first Slovenian multiparty parliament on 25 June 1991 (Official Gazette RS-I, No. 1/91). In the countries where these conditions had not been met even the liberation from such a horrible and unjust regime, as German Nazi regime, could not by itself lead to real liberation. In Slovenia, the new authorities were ready to enforce their power by also using violence, by violating law in criminal proceedings and by systematically and severely violating human rights. Statutes were not only applied with the intent to punish the collaborationists, but also to destroy the class enemy, to assume power and to consolidate the totalitarian system. A free social system was established not until 1990, after the first free elections to the multiparty parliament had been held.

17. The abuses of law which, as newer historical researches prove, undoubtedly occurred Šunder the previous system] do not already mean by themselves that also the law of that time itself (in this case the penal provision which defines a criminal offense) was inconsistent with the then applicable general legal principles recognized by civilized nations. The Constitutional Court already in case No. U-I-6/93, in which it reviewed the constitutionality of the Decree on Military Courts, emphasized that a fixed definition of a criminal offense (lex certa) was one of the basic guaranties in criminal substantive law, and that it was derived from a broader definition of the principle of legality. The principle of legality in defining criminal offenses was already at the time of the adoption and application of ZSNČ recognized by civilized nations as one of legal principles. Even today, the application of provisions that would contradict this principle is also in view of Art. 28 of the Constitution not allowed in court proceedings.

18. Criminal offenses in Art. 2 of ZSNČ were defined by an introductory clause that defined them actions which had "harmed or could have harmed the reputation and honor of the Slovenian nation" and "which could not be characterized as treason or an assistance offered to the occupier to perpetrate war crimes".

This matter obviously concerned a delineation from criminal offenses defined in Arts. 13 and 14 of the said Decree on Military Courts.5 According to Art. 5 of ZSNČ, the special court, if it had found that a "heavier criminal offense had been committed for which a military or other court had had jurisdiction", would have had to declare its lack of jurisdiction and sent the case to the competent court. In addition to the introductory clause, each criminal offense also included in its definition concrete forms of perpetration enumeratively listed, in which it could have been perpetrated.

This means that Šin order to determine the existence of a criminal offense under Art. 2 of ZSNČ] the court must have established in every particular case whether the individual's action fulfilled all the elements included in the introductory clause and also some of the elements from Items a to c. The definitions of particular criminal offenses from Items a to c of Art. 2 of ZSNČ, the contents of which could have embraced an indefinitely broad circle of particular actions, did not fulfill the criterion of definiteness concerning the criminalization of certain individual's actions. But it is not possible to assert this in the case of those actions whose forms of perpetration were precisely enough defined, as, for example, in the case of a "direct denouncement which might have entailed dangerous consequences for the person denounced", or in the case of "giving a business company at the service and aid of the occupier". In these cases the statutory provision itself did not violate the principle of legality.

19. Given such a legal structure of Art. 2 of ZSNČ, the Constitutional Court cannot already in the proceedings of the review of a regulation finally determine to which extent particular constitutive parts

of this provision were consistent with the rule lex certa, and to which extent they were not. For these reasons the Constitutional Court adjudicating on the constitutionality of ZSNČ provisions used the same technique of decision making as it had applied in case No. U-I-6/93. This means that courts in the case of possible renewed proceedings will have to, on the basis of Art. 416 of ZKP, establish in every case separately whether the provision which was the basis for the judgement of conviction was consistent with the rule lex certa. Such a Constitutional Court decision does not deny individuals constitutional protection. If they opined that the court had used Art. 2 of ZSNČ in conflict with the above-said, they would be able in constitutional-complaint proceedings to assert the violation of the principle of legality in criminal law.

C.

20. The Constitutional Court reached this decision on the basis of Art. 40, Para. 1 of ZUstS, composed of: Dr. Lovro Šturm, President, and Justices: Dr. Miroslava Geč-Korošec, Dr. Peter Jambrek, Dr. Tone Jerovšek, Mag. Matevž Krivic, Franc Testen, Dr. Lojze Ude, Dr. Dragica Wedam-Lukić and Dr. Boštjan M. Zupančič. The decision was reached unanimously. Concurring opinions were given by Justices Šturm and Ude.

P r e s i d e n t:
Dr. Lovro Šturm

Notes:
1) Various data prove that in the territory of Slovenia these criminal offenses have continuously for sometime been tried by district courts. Dr. Jera Vodušek - Starič in her article The Background of Judicial Proceedings in Slovenia in the First Post-War Year (Contributions to Newer History XXXII, 1991, p. 147) states that the Supreme Court appointed at the end of September immediately after its appointment emphasized that district national courts should proceed with the work of courts of national honor. Although this ruling had been contrary to federal instructions, the Supreme Court revoked it not until the beginning of 1946.
2) Translator's note: The federation of the former Yugoslavia consisted of five republics: Croatia, Bosnia and Herzegovina, Serbia, Macedonia and Slovenia.
3) Pursuant to Art. 2 of the Decree on the Abrogation and Voidness of All Legal Regulations Adopted by the Occupiers and their Assistants at the Time of Occupation, on the Binding Effect of the Decisions Reached during that Time; on the Revocation of Legal Regulations Applying during the Enemy's Occupation (Official Gazette DFY, No. 4/45).
4) Thus, for example, the following actions were criminalized by this Code: - Article 105 (1) A citizen of the Kingdom of Yugoslavia who takes during the war against the kingdom or it allies a job in the enemy's army or remains unforcibly in this job, shall be punished by imprisonment of up to fifteen years. (2) If such a citizen participates in the war as a combatant, they shall be punished by death penalty or life imprisonment. - Article 106 (1) Anyone who assists the enemy during the war against the Kingdom of Yugoslavia, or its allies, by rendering their services to the enemy, or providing the enemy with anything, shall be punished by imprisonment of up to ten years, and, may also be fined. (2) If the perpetrator's assistance was in that they voluntarily signed the shares thus subscribing to a loan to the benefit of an enemy country, they shall be imprisoned and fined to the extent of the amount of the loan subscribed. - Article 111 (1) Anyone who spreads false information during a danger of war, mobilization or war, and thereby impedes the operation of military companies or the enforcement of military decrees, or who exposes them to danger, shall be punished by imprisonment of up to ten years or by severe imprisonment of at least one year. (2) If such a prohibited act is perpetrated by negligence, the perpetrator shall be imprisoned or fined.
5) This is described in more detail by Robert Aron in: Histoire l'epuration, Fayard, Paris 1969.
6) During the time of the operation of the special court pursuant to ZSNČ the Decree on Military Courts had still applied; the Act on Crimes against the State (Official Gazette DFY, No. 66/45) came into force on 1 September 1945.