*Luka Vavken**

Original scientific paper
UDK 343.13:342.7(497.4
DOI: https://doi.org/10.25234/pv/34059
Paper received 4 December 2024
Paper accepted 10 June 2025

THE (IN)ADEQUACY OF THE REGULATION OF EXTENDING PRE-TRIAL DETENTION BY THE SUPREME COURT OF THE REPUBLIC OF SLOVENIA

Summary: *At the normative and practical level, the article analyses the regulation of Article 20 of the Constitution of the Republic of Slovenia, which vests in the Supreme Court of the Republic of Slovenia the power to extend pre-trial detention during the criminal investigation phase for a maximum of three months. From the perspective of comparative law, this is a Slovenian peculiarity. The author argues that the current regulation is systemically inadequate, and fails to guarantee the highest level of human rights protection for the detained individual. The following objections support this thesis: the Supreme Court's power to extend pre-trial detention is inconsistent with the fundamental role of this court; the arrangement prevents the defendant from filing a comprehensive legal appeal; it does not enhance the perception of impartiality in trials or trust in the judiciary; and it is unnecessary for developing case law in the area of deprivation of liberty. The article proposes alternative solutions that would better align with the Supreme Court's role and adhere more closely to the original intent of ensuring the highest level of human rights protection in pre-trial detention decisions.*

Keywords: *pre-trial detention, ordering and extending detention, Supreme Court, constitutional amendment, right to appeal*

1. INTRODUCTION

The discussion on the adequacy of the constitutional regulation of the extension of pre-trial detention should be highly topical. Namely, in recent years, the number of individuals detained in the Republic of Slovenia has surged, primarily due to a rise in criminal offences related to illegal border or territorial crossings. This trend places a significant strain on the Slo-

* Luka Vavken, PhD, Judicial Advisor at the Supreme Court of the Republic of Slovenia, Tavčarjeva ulica 9, 1000 Ljubljana, Slovenia. E-mail address: vavken.luka@gmail.com. ORCID: https://orcid.org/0009-0006-4013-0020.

venian criminal justice system, which frequently encounters procedural situations in pre-trial detention cases that have not previously been addressed in the case law of the courts of first instance.

However, Slovenian legal doctrine has regrettably not yet devoted particular attention to the question of extending pre-trial detention.[1] More broadly, it may be said that the procedural law on pre-trial detention is neglected in Slovenian professional and academic discourse, remaining in the shadow of quintessential procedural issues such as the admissibility of evidence, the right to be heard, the privilege against self-incrimination, the right to use one's own language in criminal proceedings, representation by counsel, and similar matters.

Detention is the most severe form of state interference with an individual's freedom. In decisions regarding pre-trial detention, two fundamental tendencies upon which modern criminal procedure is based converge to the highest degree: the tendency to protect fundamental human rights and freedoms on the one hand, and the efficiency of criminal proceedings or the protection of society against crime on the other.[2] Consequently, when adopting the Constitution of the Republic of Slovenia,[3] the framers chose to precisely specify the duration of detention within the highest legal act of the country. Additionally, the power to extend detention during the criminal investigation phase for up to three additional months was vested in the country's highest judicial body, the Supreme Court.

The central focus of this article is the constitutional regulation that permits the Supreme Court, acting as a court of first instance, to extend detention. This arrangement raises crucial questions: is it appropriate for protecting the rights of detained persons, and does it accord with the Supreme Court's role within the Slovenian legal system? These key issues will thread through every section of the discussion and be examined on two levels: the statutory law, encompassing constitutional and legal regulations, and the practical application, as evidenced by the Supreme Court's decisions over the years. The Slovenian legal framework will be compared with the rules on extending pre-trial detention in the successor states of the former Yugoslavia. The aim of the discussion is twofold. First, to provide a comprehensive analysis of the constitutional and legal frameworks. Second, through an examination of specific decisions by the Supreme Court, to determine whether the Court's decisions on the motions from the State Prosecutor's Office to extend detention are routine or mechanical, or if they involve a thorough assessment of each case, driven by the goal of ensuring the highest possible level of human rights protection.

The discussion will progress from a broad analysis of the existing regulation on both a normative and practical level to its core: arguments that demonstrate the inadequacy of the constitutional regulation from the perspective of the fundamental role and task of the Supreme Court, which concurrently fails to safeguard the human rights of the detainee at the highest possible level. Finally, instead of a traditional conclusion, alternative solutions will be

1 The only scholar to draw attention to the question of extending detention at Supreme Court level is Luka Vavken, in 'Odločanje o priporu v novejših odločbah Ustavnega in Vrhovnega sodišča RS: med zaščito svobode posameznika in učinkovitostjo kazenskega postopka oziroma varnostjo družbe pred kriminalom' (2025) 27 *Odvetnik*, 17.

2 Stanko Bejatović, 'Mere obezbeđenja prisustva okrivljenog u krivičnom postupku (pojam, ratio legis predviđanja, vrste, opšta pravila primene i iskustva u primeni država regiona)', *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena*, (Misija OEBS-a u Srbiji, 2019) 21.

3 Official Gazette of the Republic of Slovenia, No. 33/91.

proposed, which can be categorised into two groups: one that necessitates amending Article 20 of the Constitution, and the other that could be implemented through legal reforms, without requiring constitutional changes.

2. CONTEXTUALISING DETENTION REGULATIONS WITHIN THE CONSTITUTIONAL FRAMEWORK

The Slovenian Constitution, in contrast to those of the former Yugoslavia[4]—which not only established the basis of the state and social order but also included many ideological-political and programmatic-declarative norms—focuses on classical constitutional issues.[5] It is a modern constitution that particularly comprises three fundamental sections: the form of the state, fundamental rights and freedoms, and the state system.[6]

In the Slovenian Constitution, significant emphasis is placed on respect for human rights and freedoms. The extent of this respect, as guaranteed by the Constitution, can only be diminished through constitutional amendments, which must align with Slovenia's existing international obligations. The Constitution ensures that the level of protection does not decrease upon Slovenia's entry into international organisations or defence alliances. A substantial portion of the constitutional text is dedicated to human rights and freedoms, primarily encompassed within Chapter II, although they are also addressed in other sections, particularly Chapter III, which pertains to economic and social relations. The positioning of the chapter on human rights and freedoms immediately following the preamble and general provisions underscores their critical importance. Human rights serve as the foundational substantive criteria of the Constitution, with human dignity at the core. This common value forms the basis from which the entire constitutional structure is derived.

Article 15(1) of the Slovenian Constitution establishes that the provisions concerning human rights are binding law, directly effective, and applicable. This means they can be invoked by natural and legal persons in proceedings before courts, other state bodies, local community bodies, and public authorities. Consequently, all power holders are obligated to fully acknowledge these provisions. Human rights are relevant both in decision-making procedures concerning individual and concrete matters and in abstract legal regulation processes, such as the drafting of laws and bylaws.[7]

In its decision Up 965/11 of 9 May 2013, the Constitutional Court of the Republic of Slovenia underscored that judges must always consider the provisions on human rights and fundamental freedoms when performing their judicial duties, as these provisions are to be directly implemented based on Article 15(1) of the Constitution. Furthermore, in the earlier decision U-I-25/95 of 27 November 1997, the Court clarified that human rights provisions are

4 These are the Yugoslav constitutions from 1947 (Official Gazette of the FPRY, No.10–54/1946), 1963 (Official Gazette of the SFRY, No. 14/1963) and 1974 (Official Gazette of the SFRY, No. 9/1974).

5 See Franc Grad, Igor Kaučič and Saša Zagorc, *Ustavno pravo* (Pravna fakulteta, Univerza v Ljubljani, 2018) 112.

6 Thus Marijan Pavčnik, *Argumentacija v pravu* (GV Založba, 2013) 391.

7 Erika Kerševan, *Komentar Ustave Republike Slovenije* (Nova univerza, Evropska pravna fakulteta, 2019) 125.

not merely binding instructions for legislators but are directly applicable guarantees for every individual. This ruling addressed the question of whether constitutional human rights provisions constituted directly applicable law or merely general legal principles requiring further operationalisation in lower-order legal sources. In this decision, the Constitutional Court also noted that the constitutional provisions safeguarding human rights are distinctly restrictive in nature, emphasising the fundamental constitutional value of protecting an individual's integrity against interference.

The prominent emphasis on human rights in the Slovenian Constitution is undoubtedly a response to the severe violations of fundamental human rights that occurred under the previous socialist regime. During this period, the law was frequently used—or rather, abused—to settle scores with political opponents through staged court proceedings, illegal deprivation of liberty, and restrictions on freedom of speech. In forming the new state, the framers of the Constitution aimed to prevent such practices and ensure the utmost protection of human rights.

Therefore, the provision of Article 20 of the Slovenian Constitution, which transfers issues of deprivation of liberty to the jurisdiction of the judicial branch,[8] should be seen as reflective of the Constitution's approach to protecting human rights. This provision, detailed in the second paragraph, specifically addresses the short, specified periods of detention pending the filing of an indictment. It also grants the constitutional authority to the Supreme Court to extend detention up to the maximum allowable duration. This framework underscores a commitment to ensuring judicial oversight and protecting individual freedoms within legally defined limits.

The framers of the Slovenian Constitution made a deliberate choice to specify the duration of detention pending the filing of an indictment within the country's highest legal document, and entrusted the authority to extend such detention at this stage of the criminal proceedings—for a maximum of an additional three months—to the highest judicial body, the Supreme Court.[9] This decision was guided by two primary objectives. Firstly, to ensure the highest possible level of human rights protection for the defendant during the early phase of the (pre)trial proceedings, particularly when the most severe restrictive measure is ordered. Modern studies have found that detainees are in a significantly worse position compared to individuals serving prison sentences due to a stricter regime.[10] They have more limited access to educational, work, and recreational activities, lack temporary leave from the institution where they are detained, and so forth. In addition to infringements of their fundamental rights (especially the presumption of innocence), detainees suffer numerous negative social, economic, and psychological consequences and inequalities. Secondly, detailing these regulations in the

8 See Boštjan Marija Zupančič, *Komentar Ustave Republike Slovenije* (Fakulteta za podiplomske državne in evropske študije, 2002) 224.

9 Article 20(2) of the Constitution stipulates that the detainee must be served with a written, reasoned decision upon detention, but no later than 24 hours after it. The detainee has the right to appeal against this decision, which the court must decide on within 48 hours. Detention may only last as long as there are legal grounds for it, but no more than three months from the day of deprivation of liberty. The Supreme Court may extend the detention for a further three months.

10 In more detail, *e.g.* Chaterine Heard and Helen Fair, *Pre-Trial Detention and Its Overuse: Evidence from Ten Countries* (Birkbeck University of London, 2019) and E Baker 'The crisis that changed everything: Reflections of and reflections on COVID-19' (2020) 4 *European Journal of Crime, Criminal Law and Criminal Justice*, 311.

Constitution prevents the legislature from enacting any laws that could specify the duration of detention in a manner less favourable to the person deprived of liberty.

In granting the Supreme Court the special jurisdiction to extend detention, the framers of the Slovenian Constitution clearly based their decision on the belief that the judicial functions at this court are carried out by the most experienced jurists. These jurists are deemed best qualified to determine whether, in a specific case, a continued reasonable suspicion exists during the criminal investigation phase; whether, after three months of detention, the justifications for detention remain valid; and crucially, whether extending the detention is still unavoidably necessary and proportionate to the gravity of the alleged criminal offence and the investigative actions that are yet to be undertaken.

This arrangement is a direct response to the severe abuses of criminal procedure under the previous undemocratic regime, where the deprivation of an individual's liberty was often used as a convenient method for their removal from social life. By involving the highest echelon of the regular judiciary— which had not been part of the initial decision-making process during the first three months[11]— in the ordering and extending of detention, the aim is to minimise such impermissible deviations.

3. IMPLEMENTATION OF THE PROVISIONS OF ARTICLE 20 OF THE CONSTITUTION AT THE STATUTORY LEVEL

The Criminal Procedure Act (hereinafter CPA)[12] is founded on the constitutional principle that detention, as the most invasive form of personal restraint, cannot be imposed wholesale for the entire duration of a case, much less for the maximum possible period. Instead, the duration of detention must be determined incrementally, with each decision fulfilling a control function. The court is required to assess whether the conditions justifying detention continue to exist and whether the duration of detention remains necessary and proportionate.

The duration of detention during the preliminary procedure—from the moment the defendant's liberty is deprived until the indictment is filed—is regulated by the formula 1+2+(3). Initially, if the investigating judge of the district court does not concur with the prosecutor's motion to order detention, the decision to impose detention for up to one month falls to the pre-trial panel. Subsequently, the district court's pre-trial panel is empowered to extend detention for an additional two months. Appeals against this extension are decided by the higher court. In exceptional circumstances, the panel of the Supreme Court may authorise a further extension of detention for a maximum of three months for more serious criminal offences, specifically those carrying a potential prison sentence of more than five years. Should an in-

11 In practice, when the Supreme Court receives a motion for the extension of detention, it is typically already familiar with the specific case, having often previously adjudicated on it as part of an extraordinary legal remedy—a request for protection of legality filed against the detention order. However, where the law allows for an extraordinary legal remedy against a final court decision, this creates a "super-standard" that surpasses the rights set out in Article 25 of the Constitution. This article merely ensures the right to an appeal or another legal remedy but does not guarantee the right to an extraordinary legal remedy, such as a request for protection of legality. *Cf., e.g.*, the judgment of the Supreme Court of the Republic of Slovenia in case I Ips 18120/2015 of 15 March 2018, and the decision in case XI Ips 10906/2018 of 30 March 2018.

12 Official Gazette of the Republic of Slovenia, No. 176/21.

dictment not be filed by the end of these periods, the accused must be released, irrespective of whether the investigation has concluded, whether the conditions for detention still exist, or the severity of the alleged criminal offence.[13]

The Supreme Court engages in the processes of ordering or extending detention in accordance with the provisions of the Criminal Code on several occasions:

- Under Article 420(4) of the CPA, an extraordinary legal remedy—a request for protection of legality—can be filed against a final decision on ordering detention, and against a final decision on the extension of detention. This is permissible only if the extension decision was made by the panel of the Supreme Court (Article 205(2) of the CPA) or following the filing of an indictment (Article 272(2) of the CPA);
- The Supreme Court panel may extend detention for a maximum of three months during the criminal investigation phase, if the defendant is being prosecuted for a criminal offence for which the law prescribes a prison sentence of more than five years;
- Exceptionally, the Supreme Court can also order detention. This procedural situation arises when the Supreme Court, acting as the appeals court in accordance with Article 398(1) of the CPA, decides on an appeal filed against the judgment of the second-instance court. This authority is derived from Article 394(4) of the CPA: if the conditions for ordering detention as stipulated in Article 361(1) of the CPA are met following the confirmation or amendment of the judgment of the first-instance court, the appeals court may decide on the state prosecutor's motion to order detention. It can then order detention against the accused. Following such a decision by the Supreme Court to order detention, a special appeal to the Supreme Court is permitted as a result of the Constitutional Court's decision U-I-12/2015 of 28 September 2016, which is decided by a five-member panel of the Supreme Court. However, no extraordinary legal remedy—a request for protection of legality—is allowed against the decision on the appeal.

The key competence of the Supreme Court, as stipulated in Article 205(2) of the CPA, is its authority to extend the detention of an accused who has already been in custody for three months during an investigation. This extension can be for a maximum of an additional three months, provided that the proceedings concern a criminal offence punishable by imprisonment of more than five years under the law. This statutory provision, derived directly from Article 20(2) of the Constitution, represents its legislative implementation. However, it does not merely transcribe the constitutional text verbatim. Instead, it reduces the maximum possible duration of detention specified in the Constitution, which favours the accused. The statutory provision further narrows the scope of constitutional authorisation by limiting the extension of pre-trial detention to only those accused who are reasonably suspected of committing serious criminal offences with higher potential prison sentences. This limitation is not apparent in the text of Article 20(2) of the Constitution, which implies a broader scope, permitting the extension of detention for another three months for all criminal offences, not just those punishable by at least five years' imprisonment.

13 See Zvonko Fišer, *Zakon o kazenskem postopku s komentarjem* (Lexpera, 2023) 110.

4. THE SLOVENIAN PECULIARITY

The arrangement whereby the Supreme Court decides on pre-trial detention in the role of a court of first instance is a Slovenian peculiarity among the countries of the former Yugoslavia, which emerged from a shared, third legal tradition.[14]

A similar arrangement can only be found in Montenegro, where, before the filing of an indictment, the panel of the Supreme Court can extend detention for serious criminal offences by an additional three months.[15] In Serbia, pre-trial detention during investigation can last a maximum of six months. The last three months can be extended by the non-trial panel of the higher court if there are "important reasons."[16] In Bosnia and Herzegovina, pre-trial detention before the indictment is decided by the preliminary proceedings judge. For serious criminal offences, detention can be extended twice for three months. An appeal against this decision is decided by a panel of the second-instance court.[17] In Macedonia, according to the Constitution, pre-trial detention during investigation can last a maximum of 180 days. For criminal offences punishable by at least four years' imprisonment, detention can be extended by the panel of the higher court for an additional maximum of 90 days.[18]

The Constitution of the Republic of Croatia[19] regulates the basic rules on restricting freedom in Article 24, which stipulates, *inter alia*, that no one shall be arrested or detained without a written, judicial, and lawful warrant.[20] Unlike the Slovenian Constitution, it does not specify the jurisdiction of the Supreme Court in relation to detention.

In 2008, Croatia adopted a new Criminal Procedure Act, which aimed to increase the efficiency of criminal proceedings. Following the example of other European countries, it abandoned the judicial criminal investigation and newly regulated issues related to deprivation of liberty. The most significant terminological and substantive changes occurred concerning arrest (*zadržavanje*), detention (*pritvor*), and investigative custody (*istražni zatvor*). The previous term "detention" was replaced with the new concept of "investigative custody."[21]

14 On features of third or the Mediterranean legal tradition see, in more detail, Alan Uzelac, 'Survival of the Third Legal tradition?' (2010) 49 *Supreme Court Law Review*, 377.

15 See, in more detail, Drago Radulović, 'Pritvor i druge mjere za obezbeđenje prisustva okrivljenog i nesmetano vođenje krivičnog postupka u krivičnoprocesnom zakonodavstvu Crne Gore (norma i praksa)' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 178.

16 See, in more detail, Milan Škulič, 'Pritvor kao mera obezbeđenja prisustva okrivljenog u krivičnom postupku (krivičnoprocesno zakonodajstvo Srbije – norma i praksa' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 67.

17 See, in more detail, Miodrag N Simović, 'Krivično procesno zakonodavstvo BIH i mjere obezbjeđenja prisustva osumnjičenog, odnosno obtuženog u krivičnom postupku (norma i praksa)' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 125.

18 See, in more detail, Vlado Kambovski and Todor Vitlarov, 'Mera pritvora u makedonskom krivičnom postupku' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 147.

19 Official Gazette of the Republic of Croatia, No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

20 See, in more detail, Berislav Pavišić *et al.*, *Kazneno postupkovno pravo, 4. izdanje* (Dušević & Kršovnik, 2011) 172

21 See, in more detail, Ivo Josipović, 'Istražni zatvor vs. pritvor: reforma ili restauracija' (2008) 15 *Hrvatski ljetopis za kazneno pravo i praksu*, 915.

Under Article 127 of the Croatian Criminal Procedure Act,[22] investigative custody shall be ordered by the investigating judge upon the motion of the state attorney. It can last one month from the deprivation of liberty. Unless otherwise provided by law, the extension of investigative custody shall also be decided by the investigating judge upon the state attorney's motion. It may initially be prolonged for no more than two months, and thereafter—for offences within the jurisdiction of the County Court, or where a special statute so provides—for a further period of up to three months.[23] If the investigation is extended, for criminal offences under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime (USKOK), investigative custody can last up to a total of 12 months until the filing of the indictment.[24]

An appeal against the decision on ordering or extending detention can be lodged within three days, which does not suspend the execution of detention. A panel of the Higher Court shall decide the appeal within three days.[25]

The continuation of this discussion will show that, in the field of pre-trial detention, the Slovenian Supreme Court enjoys an excessively broad remit. The opposite is true of the Supreme Court of the Republic of Croatia: on 1 January 2021 the High Criminal Court[26] began operating, with the result that the Croatian Supreme Court lost most of its powers in criminal proceedings, including jurisdiction to hear appeals against detention orders.[27]

The establishment of the High Criminal Court—onto which the whole of the Croatian Supreme Court's appellate jurisdiction was transferred—met with sharp criticism from the professional community. It was branded an unnecessary, ill-considered and precipitous normative and organisational measure that strengthens post-socialist, authoritarian mechanisms for the unification of case-law, mechanisms unknown to Western democracies. The main objection was that the Supreme Court had been deprived of its authority to ensure the uniform application of the law and equality of citizens in criminal matters.[28]

The new arrangement was subjected to constitutional review. The Constitutional Court of the Republic of Croatia ruled that the creation of the High Criminal Court would not affect the position of the Croatian Supreme Court as the highest court responsible for ensuring the uniform application of the law and equality before the law.[29] The decision was not unanimous: Constitutional Court judges Lovorka Kušan and Goran Selanec voted against it. In their separate opinions they argued that setting up a new appellate-level court and removing the Supreme Court's appellate function in criminal cases would sow confusion. Because of the increase in extraordinary legal remedies, the Supreme Court would in practice assume the role of the Constitutional Court, examining violations of fundamental rights and freedoms, while the

22 Official Gazette of the Republic of Croatia, No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019, 130/2020, 80/2022, 36/2024.

23 Provision of Article 130 of the Croatian Criminal Procedure Act.

24 V Provision of Article 130(3) of the Croatian Criminal Procedure Act.

25 Article 130(1) of the Croatian Criminal Procedure Act.

26 „Visoki kazneni sud".

27 See Article 19e of the Croatian Criminal Procedure Act.

28 *Cf.* Đurđević Zlata, 'Dekonstitucionalizacija Vrhovnog suda RH u kaznenim predmetima i jačanje autoritarnih mehanizama za ujednačavanje sudske prakse: propuštena prilika Ustavnog suda RH' (2020) 27 *Hrvatski ljetopis za kaznene znanosti i praksu*, 417.

29 Odluka i Rješenje Ustavnog suda Republike Hrvatske broj: U-I-4658/2019 i U-I-4659/2019 od 3. studenoga 2020.

Constitutional Court would be relegated to a second-instance body that, on a constitutional complaint, would review whether the Supreme Court itself had infringed basic human rights.[30]

5. EXTENSION OF DETENTION BY THE SUPREME COURT ON A PRACTICAL LEVEL

To gain a deeper understanding of the (ab)usefulness of the Supreme Court's regulation of detention extensions, it is essential to move beyond the normative framework and examine the concrete instances of the Supreme Court's decisions on the State Prosecutor's motions to extend detention during the criminal investigation phase.

5.1. METHODOLOGY OF THE RESEARCH

For the empirical part of the research the chosen instrument was the analysis of existing written sources. The data were gathered by manually examining the so-called "II Kr files" kept in the archives of the Supreme Court of the Republic of Slovenia. The sample covers every decision extending pre-trial detention made by that Court over a five-year span, from 2019 to 2023. Unfortunately, the information could not be retrieved from electronic databases.

The study's primary objective is to identify the trend in the number of detention extensions before the Supreme Court of the Republic of Slovenia within the specified period and to measure the success rate of applications submitted by the State Prosecutor's Office.

A descriptive approach was adopted, its main purpose being to portray the existing situation. The content of each decision was analysed line by line, and every target data category was assigned an appropriate value. This procedure enabled the extraction of the greatest possible quantity of information and categories from the decisions, providing a solid foundation for both the qualitative and quantitative phases of the research.[31]

5.2. TABLE

The table provided illustrates the number of decisions regarding detention extensions over a five-year period and analyses the success rate of the prosecutor's motions to extend detention before the Supreme Court.[32]

30 *Cf*. Izdvojeno mišljenje u odnosu na odluku i rješenje Ustavnog suda Republike Hrvatske u predmetima broj: U-I-4658/2019, U-I-4659/2019 od 3. studenoga 2020.

31 The empirical section relied on the following source: Jasna Mažgon, Boris Kožuh and Zdenko Medveš, *Razvoj akcijskega raziskovanja na temeljnih podatkih kvalitativne metodologije* (2008) Ljubljana: Scientific Research Institute of the Faculty of Arts.

32 The shortcoming of the research is that in the section "The prosecution's motion was granted to extend detention, but not regarding the sought duration of the measure" there is no quantitative analysis of the discrepancy between the sought extension of detention and the time for which the Supreme Court extended the detention.

	2019	2020	2021	2022	2023
Number of decisions to extend detention	23	25	38	40	38
The prosecution's motion was fully granted	13 (57%)	16 (64%)	22 (58%)	28 (70%)	25 (66%)
The prosecution's motion was granted to extend detention, but not regarding the sought duration of the measure	6 (26%)	7 (28%)	14 (28%)	8 (20%)	9 (24%)
Prosecution motion rejected/dismissed/case resolved in another way	4 (17%)	2 (8%)	2 (5%)	4 (10%)	4 (10%)

5.3. QUANTITATIVE ANALYSIS OF DECISIONS ON DETENTION EXTENSION

The table provides a numerical analysis of the Supreme Court's decisions regarding detention extensions over the past five years. The key finding is that the annual number of motions filed by the state prosecution to extend detention has been steadily increasing. In 2019, there were only 23 such motions, which increased to 40 by 2022. Although the number of motions in 2023 decreased by two from the previous year, it is premature to conclude that this represents a reversal of the previous upward trend.

The table analyses the number or percentage of state prosecution's motions for the extension of detention that the Supreme Court fully upheld. This includes cases where not only was the detention against the accused extended, but the sought duration of the extension was also granted. Additionally, the table examines the number or percentage of motions that the Supreme Court partially granted, where the detention was extended but for a shorter period than requested. The table further details the number or percentage of motions for the extension of detention that were unsuccessful at the Supreme Court, meaning the motions were either rejected, dismissed, or resolved in another manner, such as being referred back to the court of first instance via a letter.

From the data presented, it is clear that in 2019, the Supreme Court received 23 motions for the extension of detention. It fully granted 57% of these motions, partially granted 26%, and 17% were unsuccessful. In 2020, the Court received 25 motions, fully granting 64%, partially granting 28%, and rejecting or dismissing 8%. In 2021, 38 motions were received, with 58% fully granted, 37% partially granted, and 5% unsuccessful. In 2022, the Court received 40 motions; 70% were fully granted, 20% partially granted, and 10% were rejected or dismissed. In 2023, the Court received 38 motions, fully granting 66% of them and extending the detention for the duration sought; it partially granted 24% of the motions, thereby extending detention for a shorter period than requested, and rejected or dismissed 10% of the motions.

The presented data indicates that the performance of the State Prosecutor's Office has remained consistent over the past five years. In most cases, the Supreme Court fully granted the motion for the extension of detention, in terms of both the extension and the duration requested. Over the last five years, the partial success rate of the petitioner has varied between 20% and 37%, when the Supreme Court granted an extension of detention for a shorter period than requested. The smallest proportion of motions was rejected, dismissed, or resolved otherwise, ranging from 5% to a maximum of 17% in individual years.

5.4. SUBSTANTIVE ANALYSIS OF DECISIONS TO EXTEND DETENTION

The data presented make it immediately clear:

- Firstly, deciding on motions for the extension of detention poses a significant challenge for the Supreme Court. It should be noted that decisions regarding detention extensions vary widely in scope and complexity, ranging from individual cases to those involving multiple accused persons, sometimes exceeding single-digit numbers. Typically, these cases, which concern detention extensions, are more comprehensive and demand substantial evidential support, particularly when investigations cannot be concluded within three months.
- Secondly, the Supreme Court does not automatically adhere to the prosecutor's motions for detention extensions but instead evaluates each case carefully and provides thorough reasoning.

The standard of reasoning for reasonable suspicion is contingent upon the finality of the order to initiate an investigation. In decisions regarding the extension of detention issued after the order has become final, the Supreme Court typically relies on the conclusions reached in that decision, provided there have been no significant changes in circumstances thereafter.[33] When deciding on the extension of detention, it is not necessary to reiterate the detailed list of the accused's alleged actions or to recapitulate all the evidence, which has been adequately summarised in the final investigation order.

It is crucial that the Supreme Court reassesses the reasonable suspicion, as the primary condition for the extension of detention, especially considering any new circumstances that have emerged during the proceedings which might affect the required standard of proof. The Court must provide its decisions with reasoning that both allows the defence to understand the grounds for the extension of detention and ensures a robust foundation for subsequent legal reviews of its validity.[34]

Since the extension of detention is not a legal remedy by its nature, there are no impediments to the Supreme Court being satisfied with the arguments presented in prior final decisions regarding ordering or extending detention, or in the order for an investigation. This assumes, of course, that there are no new pieces of evidence at the time the decision on the extension of detention is made. By referring to previous decisions, rigorously assessing any procedural novelties, and addressing the submissions with which the defence responds to the proposal for extending detention, the principle of adversarial proceedings is fully upheld, and the criterion that the extension of detention remains a measure of last resort is satisfied.[35]

Irrespective of whether the order for investigation is final, the Supreme Court consistently scrutinises the proportionality of the measure when extending detention for an addi-

33 *Cf.*, *e.g.*, decision of the Supreme Court in case II Kr 23821/2022 of 10 October 2022.

34 Thus, the judgment of the Supreme Court in case XI Ips 25329/2021 of 30 September 2021. In the cases I Ips 23071/2014 of 7 February 2018 and XI Ips 19156/2021 of 9 September 2021, the Supreme Court explicitly emphasised that the criminal procedure is not intended for some cyclical, even ritualistic repetition of arguments from final decisions with which certain relevant questions have already been tested.

35 See, in more detail, Luka Vavken, 'Aktualne procesnopravne dileme odreditve in podaljšanja pripora' (2022) 41 *Pravna praksa*, II.

tional three months. Over time, the level of detail in evaluating this substantive condition for extending detention becomes inversely proportional to the precision with which reasonable suspicion and the grounds for detention are assessed. Indeed, as time progresses, the precision in assessing the proportionality of extending detention increases. Consequently, in its orders concerning the extension of detention, the Supreme Court explicitly identifies and evaluates those circumstances of the specific case that, in its view, justify the continued imposition of detention.[36]

From the perspective of safeguarding human rights, decisions in which the Supreme Court has rejected or dismissed the motion for the extension of detention are particularly noteworthy.

A substantive review of the Supreme Court's decisions on the extension of detention over a five-year period reveals that the court did not reject any motion for extension on the grounds of a lack of reasonable suspicion that the accused committed the alleged criminal offence. However, in two cases, it found that, based on the evidence obtained during the investigation, the grounds for detention no longer existed. In three cases, the motion was rejected because the formal condition for extending detention was not met. Specifically, none of the acts attributed to the accused carried a prison sentence of more than five years; alternatively, according to the prosecution's motion, during the period of extended detention, evidence would only be collected concerning criminal offences punishable by less than five years' imprisonment, despite the accused being reasonably suspected of such offences.[37] Furthermore, in three cases, the motion for the extension of detention was rejected because it was submitted prematurely: the formal condition for the Supreme Court to extend detention had not yet arisen, as the accused had not been in detention by order of the investigating judge and the non-trial panel for a total of three months. In other words, the jurisdiction to extend detention still rested with the pre-trial panel, even if only for a very short period, such as one day.[38] In one case, the Supreme Court rejected the motion for an extension because it found that detention during the investigation had not been extended for an additional two months, as the appellate court had annulled the order extending detention. In another case, the Supreme Court rejected the motion for extension because it determined that the accused had committed the act as a minor, and therefore, special rules on juvenile detention were applied, which stipulated a maximum duration of three months.[39]

In two cases, the Supreme Court rejected the motion to extend detention because the prosecution sought to extend house arrest, which falls outside the jurisdiction of the Supreme Court to decide.[40] In one case, it rejected the motion because it found that the exten-

36 Since detention infringes not only on the human right to personal liberty but also on other constitutionally and legally protected values—such as the right to family life, freedom of economic initiative, and similar—when the accused's defence in the procedure for extending detention asserts an infringement of any of these other protected values, the Supreme Court also assesses these circumstances. It then weighs the proportionality of extending detention from the standpoint of these other legally protected values.

37 *Cf*. the Supreme Court decisions in cases II Kr 52340/2018 of 6 February 2019, II Kr 174/2022 of 28 March 2022 and II Kr 69280/2022 of 23 January 2023.

38 *Cf*. Supreme Court decisions in cases II Kr 55320/2018 of 20 February 2019, II Kr 14214/2023 of 31 May 2023, and II Kr 53718/2020 of 24 December 2020.

39 *Cf*. the Supreme Court decision in case II Kr 61646/2020 of 15 February 2021.

40 See the Supreme Court decisions in cases II Kr 53972/2020 of 23 December 2020 and II Kr 9458/2022 of 15 September 2022.

sion of detention had already been decided.[41] In one case, however, it ruled that it did not have jurisdiction and referred the motion for the extension of detention to the court of first instance.[42]

From a substantive perspective, the Supreme Court decision in case II Kr 32662/2023 of 7 August 2023 is particularly significant. In this ruling, the Supreme Court adjudicated on a motion to extend the detention of a defendant for an additional three months, due to a reasonable suspicion that the individual had committed the criminal offence of terrorism under Article 108(1) of the Criminal Code (KZ-1)[43]. The Court rejected the motion to extend the detention, in part because it deemed such an extension neither reasonable nor proportionate. It outlined the criteria to be considered when assessing the reasonableness of the length of detention, which include: (1) the length of detention, (2) the comparison between the length of detention and the nature of the criminal offence, (3) the consequences of the detention for the defendant, (4) the defendant's contribution to the duration of the detention, and (5) the complexity of the case and the conduct of both the prosecution and the judiciary.

In the case at hand, it was found that from the time of the defendant's liberty deprivation until the Supreme Court's decision, aside from the defendant's questioning, only one investigative action had been carried out.[44] Moreover, there was a significant delay between the filing of the request for an investigation and the issuance of the decision to initiate said investigation. The Supreme Court considered the exceptionally active defence mounted by the accused,[45] which did not appear to be an attempt to delay the proceedings. In its rationale for extending detention, the investigating judge failed to provide an expected timeline for the completion of the remaining investigative actions. Furthermore, in assessing the reasonableness and proportionality of the measure, the Supreme Court noted that although the defendant had indeed been charged with the criminal offence of terrorism—which carries a prescribed prison sentence of three to fifteen years—the nature of this charge equates the actual execution of the act with merely the threat of its execution. This was precisely the accusation levelled against the defendant in the case under review. It was unclear from the information in the criminal file whether the defendant had taken any steps towards actualising the threatened actions; his conduct had remained at the level of mere threats. Consequently, the Court concluded that the balance between the sought length of detention and the nature of the criminal offence did not justify granting the motion for the extension of detention.

41 See the Supreme Court decision in case II Kr 49986/2023 of 11 October 2023.

42 See the Supreme Court letter in case II Kr 50240/2018 of 22 January 2019.

43 Criminal Code, Official Gazette of the Republic of Slovenia, No. 50/12, 54/15, 6/16, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP, 16/23 in 107/24 – odl. US.

44 An expert opinion from the psychiatric profession was ordered and the report and opinion of the expert was obtained.

45 He was defended by as many as four defenders.

6. THE CRUX OF THE PROBLEM—IS THE ARRANGEMENT FOR THE SUPREME COURT EXTENDING THE DETENTION APPROPRIATE WHILE ENSURING OPTIMAL HUMAN RIGHTS PROTECTION FOR THE DEFENDANT?

The fundamental conclusion of the previous section is that the Supreme Court diligently performs its constitutional duty by extending detention for a maximum of an additional three months during the criminal investigation phase. This is based on the principle that detention represents a significant infringement of the defendant's human rights and should therefore last only as long as is absolutely necessary for the investigating judge and the public prosecutor to gather the remaining relevant evidential material. Hence, the established practice of the Supreme Court is such that the maximum extension period of three months does not represent a "blank cheque" for the public prosecutor's office and the investigating court to rely upon in every case where the defendant is in custody.

At first glance, it appears that the constitutional arrangement for extending detention by the Supreme Court is appropriate, as it aims to provide defendants with the highest degree of human rights protection. Additional arguments in support of the existing arrangement could be, first, that applications to extend detention are decided by the most experienced judges, whose integrity is beyond question; secondly, that the involvement of the Supreme Court helps to forge consistent case-law; and thirdly, that stripping the Court of this jurisdiction after more than three decades might, in the eyes of the profession—and still more of the lay public—be seen as a retrograde step in the protection of human rights. In particular, the fact that it is the Supreme Court that authorises detention up to the statutory maximum has a symbolic resonance: the country's highest court watches over the gravest interference with individual liberty.

On a principled level, the constitutionally mandated involvement of the Supreme Court in the process of extending detention for a maximum of an additional three months is undeniably legitimate. However, as will be discussed further, this arrangement has shortcomings that do not necessarily favour the protection of the defendant's position.

The following objections may be raised against it: it is incompatible with the Supreme Court's fundamental role; the only remedy available against a Supreme Court decision is a request for the protection of legality, which does not allow any review of the facts; the present arrangement does not enhance the appearance of judicial impartiality or public confidence in the courts; and it is not strictly necessary for achieving uniform case-law.

6.1. THE POWER TO EXTEND DETENTION IS INCONSISTENT WITH THE SUPREME COURT'S FUNDAMENTAL ROLE

The Constitution provides only limited information about the Supreme Court. It simply states that the Supreme Court is the highest court in the country, responsible for deciding on both regular and extraordinary legal remedies, as well as performing other duties specified by

law.[46] The Courts Act (ZS)[47] offers more detail; in addition to outlining the Supreme Court's jurisdiction, which focuses on protecting the interests of the parties involved, it also mandates that the Supreme Court ensure the uniformity of the case law.[48] The tasks of the Supreme Court include adjudicating cases, creating consistent case law, monitoring the jurisprudence of international courts, issuing principled legal opinions on issues crucial for the uniform application of laws, initiating the adoption or amendment of legislation, and determining the method for monitoring case law in lower courts. This framework reveals that the operation of the Supreme Court serves two primary objectives: safeguarding the legality of individual decisions made by lower courts (i.e., ruling on regular and extraordinary legal remedies) and establishing and managing precedents.

In legal dogmatics, it is widely accepted that the Supreme Court's most important tasks are ensuring the uniform application of the law and promoting the development of jurisprudence. This represents a public function that takes precedence over the private function of deciding on regular and extraordinary legal remedies.[49] The Supreme Court assumes a public role when the sole criterion for access to the court is the objective significance of the case in terms of legal development and the maintenance of uniform case law—in other words, for the legal order as a whole. This occurs when the decision in a case has implications that transcend the individual matter at hand. Some authors even contend that the individual benefit of the appellant is merely incidental.[50]

By adjudicating cases, the Supreme Court ensures equality of citizens before the law, while also creating case law that enables lower courts to make quicker and higher-quality decisions. This, in turn, significantly contributes to the greater efficiency of the judiciary, enhances its reputation, strengthens its position within the system of separation of powers, and, most importantly, ensures legal certainty. However, the Supreme Court cannot equally and effectively perform both tasks simultaneously—that is, protect both the public and private interests—because this is not feasible in practice.[51] The concurrent performance of both tasks leads to judicial backlogs; therefore, priority must be given to protecting the public interest.[52] Ensuring both public and private interests cannot be achieved in a world of limited resources. For the Supreme Court to effectively fulfil its role, it is essential that appropriate legislative solutions allow it to resolve only the most complex cases. Cases whose resolutions do not add value to the legal system should not be brought before the Supreme Court, except in instances where there are serious errors in lower court decisions that significantly disrupt the functioning of the judiciary and undermine public confidence in it. The correction of such judgments is, therefore, also in the public interest.[53]

46 Provision of Article 106 of the Courts Act.

47 Courts Act, Official Gazette of the Republic of Slovenia, No. št. 94/07 ,45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12, 63/13, 17/15, 23/17, 22/18, 16/19 – ZNP-1, 104/20, 203/20 – ZIUPOPDVE, 18/23 – ZDU-1O in 42/24 – odl. US.

48 The provision of Article 109(1) of the Courts Act.

49 *Cf*. Jacobs Matthias, *Zivilprozessordnung-Kommentar* (22. Aufl, Mohr Siebeck, 2013).

50 See Nina Betetto, 'Kako preprečiti, da Vrhovno sodišče postane vir neenotne sodne prakse' (2015) 41 *Podjetje in delo*, 986.

51 *Cf*. Stürner H Rolf in Murray L Peter, *German Civil Justice* (Carolina Academic Press, 2004) 386.

52 See, in more detail, Aleš Galič, *A Civil Law Perspective on the Supreme Court and its Functions* (2019) Warsaw University Press, 44.

53 Jan Zobec, 'Od individualnega do javnega (precedenčnega) namena Vrhovnega sodišča: ustavnopravni vidik' (2015) 41 *Podjetje in delo*, 930.

The best proof that the "wide-open doors" model—under which the Supreme Court deals without restriction with every case put before it—is unsatisfactory comes from the practice of the supreme courts in the former communist countries of Eastern and Central Europe. In those states the supreme courts ruled substantively on an enormous number of cases, but this did nothing to improve legal certainty or the predictability of decisions: the sheer volume of "case production" meant that even the supreme courts themselves could not keep track of their own jurisprudence, let alone use it to guide the lower courts.[54]

Given the above, it is contrary to the fundamental role of the Supreme Court to have a system in which it still acts as a court of first instance in certain cases.[55] While it may be understandable that the Supreme Court decides on the legality of acts by electoral bodies, this cannot be said for its competence to rule on the extension of detention after the expiry of three months during the investigation phase, as mandated by the Constitution. In this context, the Supreme Court acts as a *iudex facti*, which, from the perspective of the hierarchy of judicial decision-making, represents a peculiar anomaly. Evaluating facts is a competence typically reserved for courts of first instance, and, to some extent, second instance courts, not for a court at the apex of the regular judiciary.

In practice, this competence means that the Criminal Division of the Supreme Court receives, as a rule, several boxes of documents just a few days before the expiry of detention—or even on the very last day. It must then examine these documents and, on that basis, establish the factual situation regarding the existence of reasonable suspicion that the accused committed the alleged criminal offence and the grounds for detention.[56] The usual work of the reporting judge, related to deciding on extraordinary legal remedies, is brought to a complete halt for several days. A Supreme Court judge who, just the day before, was dealing with the most demanding legal issues in relation to extraordinary legal remedies, is suddenly placed in the role of a first-instance judge. This judge must, often under time pressure, assess the factual situation of a case with which they have not previously been familiar. This is unacceptable from the perspective of protecting the rights of the parties and, particularly, inappropriate from the standpoint of the position of the Supreme Court.

Statistical data indicate that the Criminal Division of the Supreme Court resolves roughly 750 cases each year.[57] At first glance, deciding on no more than forty extensions of detention might seem a negligible extra burden. In fact, it is not. First, the overall figure includes many insignificant and entirely straightforward matters that require no substantive consideration.[58] Secondly—as already noted—applications to extend detention generally involve very voluminous, evidentially demanding cases with numerous defendants drawn from the sphere of organised crime, encompassing trafficking in illicit drugs, weapons or human beings, or else the gravest offences against life or sexual integrity.

54 *Cf.* Bobek Michael, 'Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe' (2009) 57 *American Journal of Comparative Law*, 44.

55 Thus, also Mile Dolenc, 'Vrhovno sodišče kot prvostopenjsko sodišče' (2011) 30 *Pravna praksa*, 6.

56 See Luka Vavken, *Položaj sodstva v sistemu delitve oblasti* (2022) doctoral thesis, University of Ljubljana, 92.

57 In more detail, see *Letno poročilo o poslovanju sodišča za leto 2022 in Letno poročilo o poslovanju sodišča za leto 2023*, <https://www.sodisce.si/vsrs/osnovne_informacije_o_sodiscu/pomembni_dokumenti/> accessed 20 February 2025.

58 For example, various procedural orders or replies to defendants' letters.

6.2. THE REGULATION OF EXTENDING DETENTION BY THE SUPREME COURT FAILS TO PROVIDE A COMPLETE LEGAL REMEDY

The constitutional regulation of the right to a legal remedy, as one of the fundamental human rights, is comparatively rare in legal systems. According to Article 2 of Protocol No. 7 to the European Convention on Human Rights (ECHR), the right to a legal remedy is guaranteed only in criminal matters, and even then, it is much more narrowly defined than in Article 25 of the Slovenian Constitution.[59] This constitutional provision ensures that everyone has the right to an appeal or other legal remedy against, *inter alia*, court decisions that determine an individual's rights, duties, or legal interests.[60] The legislature may exceptionally exclude an appeal as an ordinary legal remedy against court decisions, but it must simultaneously provide another equally effective legal remedy. The substitution of an appeal with another legal remedy must provide a scope of protection and effects comparable to those of an appeal. Any interference with the right to appeal must undergo a strict test of proportionality. Such interference is permissible only if it is necessary to protect the rights of others, specifically those rights that must take precedence over the unimpeded exercise of a constitutional right.[61]

An appeal against the Supreme Court's decision to extend detention is excluded under Article 399(4) of the CPA.[62] The legislature had the authority for such regulation in Article 25 of the Constitution, which allows for the substitution of an appeal with another legal remedy. This legal remedy is the request for protection of legality, which is decided upon by a panel of five judges at the Supreme Court and is considered an extraordinary legal remedy. However, the issue arises because the request for protection of legality does not fully mirror the effectiveness, legal protection, and impact of an appeal. Specifically, a request for protection of legality cannot be filed due to an erroneous or incomplete establishment of the factual situation. In practice, this means that the Supreme Court, when examining a request for protection of legality, is constrained by the factual situation as established by the lower courts in their final decision.[63]

The consequence of this legal framework is that the accused is effectively largely deprived of an effective legal remedy against the decision to extend detention made by the Supreme Court. Typically, decisions on the extension of detention do not involve complex legal issues but rather revolve around assessing the factual circumstances, which determine the presence of reasonable suspicion and the grounds for detention. They also involve determining the additional time required to gather evidence during the criminal investigation phase. This is precisely why the request for protection of legality is considered a "hollow legal remedy". The accused or their defence cannot successfully challenge the core aspect of the Supreme Court's decision to extend detention—the assessment of the factual situation—through a request for protection of legality. From the perspective of the right to an effective legal remedy, the regulation that allows the

59 See Aleš Galič, *Komentar Ustave Republike Slovenije* (Nova univerza, Evropska pravna fakulteta, 2019) 238.

60 Provision of Article 25 of the Constitution.

61 See Tone Jerovšek, *Komentar Ustave Republike Slovenije* (Fakulteta za podiplomske državne in evropske študije, 2002) 274.

62 According to this provision, an appeal against the decision of the Supreme Court is allowed only when it orders detention or when it imposes a criminal fine for an offensive statement.

63 See, *e.g.*, judgments of the Supreme Court in cases I Ips 463/2006 of 25 January 2007, I Ips 346/2009 of 18 March 2010, I Ips 1278/2012 of 24 October 2013 and many others.

Supreme Court to extend detention for up to an additional three months, and against which no appeal is permitted but only an extraordinary legal remedy, does not afford the accused the maximum protection of human rights as intended by the constitutional legislator when it involved the Supreme Court in the regulation of extending detention.

6.3. THE CURRENT REGULATION DOES NOT CONTRIBUTE TO STRENGTHENING THE APPEARANCE OF IMPARTIALITY IN TRIALS AND TRUST IN THE JUDICIARY

A regulation allowing a court to review its own previous decisions within the context of legal remedies is neither unusual nor contrary to Article 6 of the European Convention on Human Rights (ECHR) and Article 23 of the Constitution. Both articles ensure the right to a hearing before an independent, impartial, and lawfully established court. In such cases, impartiality is safeguarded by the recusal of judges who were involved in the contested decision.

However, the jurisprudence of the European Court of Human Rights and the Constitutional Court of the Republic of Slovenia emphasises the importance of the appearance of impartiality in trials. It is not sufficient for a judgment to be fair and impartial; it must also be perceived as such.[64] Public confidence in an independent judiciary relies on this appearance of impartiality. Should the court's decision-making in a specific case fail to convey impartiality, it could erode public trust in the court's impartiality broadly, as well as the parties' confidence in the fairness of their specific trial.[65]

A regulation allowing the Supreme Court to review the legality of its own decision to extend detention, even if by a different, expanded panel, might give the impression to a legally uneducated accused person that a legal remedy would be unsuccessful. This concern arises because judges, who are reviewing a decision made by their colleagues within the same court, might not base their judgement solely on legal criteria. Instead, to maintain good collegial relationships, they may strive to uphold the challenged decision at all costs.[66]

6.4. THE CURRENT REGULATION IS NOT NECESSARILY NEEDED FOR THE DEVELOPMENT OF CASE LAW

Deciding on the extension of detention does not align with the primary role of the Supreme Court, which is to ensure uniformity in case law and promote the development of a living judicial law. When addressing requests for protection of legality, filed against orders for detention or its extension post-indictment, the Supreme Court has ample opportunity to guide the case law of lower courts on significant legal issues related to detention. Notably, most of the Supreme Court's critical positions concerning detention have been established while de-

64 *Cf*. the decisions of the ECtHR in the cases of *Poppe v. the Netherlands* of 24 March 2009 and *Micallef v. Malta* of 15 October 2009.

65 *Cf*. the judgment of the Constitutional Court Up-879/14 of 20 April 2015.

66 In the sense of the proverb "Dog does not eat dog".

liberating extraordinary legal remedies, rather than in proceedings where the Supreme Court acts as a court of first instance to decide on the extension of detention.

7. INSTEAD OF A CONCLUSION—ALTERNATIVE SOLUTIONS?

To summarise, the fundamental conclusion from the preceding discussion is that the current practice, whereby the Supreme Court extends pre-trial detention while acting as a court of first instance, is inappropriate from the perspective of judicial decision-making hierarchy. This arrangement fails to ensure that the accused or their defence have access to an effective legal remedy, particularly in cases involving the extension of pre-trial detention—a measure that profoundly infringes upon other constitutionally protected rights of the individual. Moreover, although the present arrangement undeniably offers certain advantages—for example, pre-trial detention decisions are taken by the most experienced judges; the Supreme Court's involvement has symbolic weight, since the highest court in the land adjudicates the gravest encroachment on personal liberty; and the system is long-standing and well-entrenched—it does not reinforce the appearance of judicial impartiality. In any event, when ruling on the extraordinary remedy of a request for the protection of legality, the Supreme Court already enjoys sufficient scope to guide lower-court jurisprudence on pre-trial detention.

Consequently, there arises the question of what alternative solutions might be more consistent with the fundamental role of the Supreme Court, while also enhancing the level of human rights protection afforded to the accused. These alternative solutions can be categorised into two basic groups:

a) Solution Involving Amendment of Article 20(2) of the Constitution

Amending the constitutional provision to remove the Supreme Court's authority to extend pre-trial detention for up to an additional three months during the criminal investigation phase would pave the way for new statutory regulations governing the extension of pre-trial detention. Authority for extending pre-trial detention during this phase, particularly for the most serious criminal offences, could be delegated to a pre-trial panel of the district court, with the option to appeal its decision to a higher court. Given the invasive nature of such measures on the accused's constitutional rights, it would be prudent to allow for the filing of an extraordinary legal remedy—a request for protection of legality—to the Supreme Court.

This solution is undoubtedly the most appropriate and constitutionally unassailable, for it would be anchored in an amendment to the Constitution itself. It would give the defendant a full and effective right of appeal, enabling him also to rely on errors or omissions in the establishment of the facts, while reserving to the Supreme Court above all the task of assessing whether the court, in the contested final order, had provided reasonable grounds regarding the proportionality of the extended measure's duration. Nor would the Supreme Court be entirely removed from the process of extending detention. Under the revised scheme both facets of the highest court's role—its "private" function of redressing individual injustice and its "public" function of shaping the law—would be preserved: when ruling on the extraordinary remedy, the Supreme Court would eliminate unlawful, especially arbitrary, decisions, yet would still fos-

ter the development of the law and the uniformity of judicial practice. Indeed, the reasoning in its judgments could become more thorough and of higher quality, because the order extending detention would already be final; the Supreme Court would no longer have to decide, as it does under the current regime, under the time pressure of an imminent expiry of detention.

Unfortunately, the practical likelihood of implementing such a solution is minimal, as achieving professional, let alone political, consensus for this sensitive constitutional amendment is nearly impossible. Immediate criticisms would likely arise from political quarters and some segments of the professional community, arguing that removing this competence from the Supreme Court could potentially lower the level of human rights protection.

b) Solution Within the Existing Framework of Article 20 of the Constitution

The key issue is whether it is feasible to enhance the statutory regulation of the Supreme Court's role in extending detention without amending Article 20 of the Constitution. Interpreting Article 20(2) as mandating the involvement of the highest court to ensure fairness in the procedure of extending detention for an additional three months prior to indictment filing leads to two potential solutions:

First Solution: The pre-trial panel at the district court level would decide on detentions exceeding three months during the investigation phase, with the accused having the right to directly appeal to the Supreme Court. The advantage of this approach is that it grants the accused a full right to appeal. However, a notable disadvantage is that the Supreme Court, even as an appellate body, would still need to engage with factual matters, which could be less efficient and detract from its primary functions.

Second Solution: Implement a mandatory review process, whereby the Supreme Court reviews all cases in which detention has been extended for up to an additional three months before an indictment was filed, subsequent to decisions by the pre-trial panel and the higher court on appeal. This method would maintain the Supreme Court's involvement in the detention extension process, focusing its assessment primarily on the proportionality of the duration of the ordered measure in terms of time.

A statutory solution where the Supreme Court *ex officio* reviews the legality of extending detention may initially appear unusual and contrary to the principle of dispositiveness, which is increasingly significant in Slovenian criminal procedure. However, the current CPA already provides for situations where the appellate court examines the legality of a lower court's decision without an appeal having been lodged. For example, Article 527(1) of the CPA stipulates that if the pre-trial panel determines the legal conditions for extradition are not met, it must send the order refusing the extradition request to the appellate court *ex officio*. The appellate court then has the authority to confirm, annul, or modify such an order.

By granting similar competence (within the context of obligatory review) to the Supreme Court concerning decisions on extending detention by an additional three months during the investigation phase before an indictment is issued, the necessity for the right to submit an extraordinary legal remedy—a request for the protection of legality—would be rendered unnecessary.

It is currently impossible to predict whether such a statutory solution would withstand constitutional scrutiny under Article 20. However, two points can be ascertained: firstly, the

Supreme Court would maintain ultimate authority in decisions regarding the extension of pre-trial detention before an indictment is issued against individuals suspected of criminal offences punishable by more than five years' imprisonment. Secondly, the level of human rights protection for the detained individual would be enhanced due to the opportunity to file a comprehensive legal remedy. This improvement aligns with the objective that the constitutional framers sought to achieve—albeit not entirely successfully—over three decades ago with the constitutional regulation of pre-trial detention.

BIBLIOGRAPHY

1. Baker E, 'The crisis that changed everything: Reflections of and reflections on COVID-19' (2020) 4 European Journal of Crime, Criminal Law and Criminal Justice 311
2. Bejatović S, 'Mere obezbeđenja prisustva okrivljenog u krivičnom postupku (pojam, ratio legis predviđanja, vrste, opšta pravila primene i iskustva u primeni država regiona' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 9
3. Betetto N, 'Kako preprečiti, da Vrhovno sodišče postane vir neenotne sodne prakse' (2015) 41(6-7) *Podjetje in delo* 970
4. Bobek M, 'Quantity or Quality Reassessing the Role of Supreme Jurisdictions in Central Europe', (2009) 57 *American Journal of Comparative Law* 33
5. Dolenc M, 'Vrhovno sodišče kot prvostopenjsko sodišče' (2011) 30(19) *Pravna praksa* 6
6. Đurđević Z, 'Dekonstitucionalizacija Vrhovnog suda RH u kaznenim predmetima i jačanje autoritarnih mehanizama za ujednačavanje sudske prakse: propuštena prilika Ustavnog suda RH' (2020), 27 *Hrvatski ljetopis za kaznene znanosti i praksu* 417
7. Fišer Z, *Zakon o kazenskem postopku s komentarjem* (Lexpera, 2023)
8. Galič A, *Komentar Ustave Republike Slovenije* (Nova univerza, Evropska pravna fakulteta, 2019)
9. Galič A, *A Civil Law Perspective on the Supreme Court and its Functions* (Warsaw University Press, 2019)
10. Garačić A and Novosel D, *Zakon o kaznenom postupku u sudskoj praksi, Knjiga prva (Glava I. - Glava XIX)* (Libertin naklada, 2018)
11. Grad F, Kaučič I and Zagorc S, *Ustavno pravo* (Pravna fakulteta, Univerza v Ljubljani, 2018)
12. Matthias J, *Zivilprozessordnung-Kommentar*, 22. Aufl (Mohr Siebeck, 2013)
13. Jerovšek T, *Komentar Ustave Republike Slovenije* (Fakulteta za podiplomske državne in evropske študije, 2002)
14. Josipović I, 'Istražni zatvor vs. pritvor: reforma ili restauracija' (2008) 15(2) *Hrvatski ljetopis za kazneno pravo i praksu* 915
15. Kambovski V and Vitlarov T 'Mera pritvora u makedonskom krivičnom postupku' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 139
16. Kerševan E, *Komentar Ustave Republike Slovenije* (Nova univerza, Evropska pravna fakulteta, 2019)
17. Mažgon, J, Kožuh, B and Medveš, Z *Razvoj akcijskega raziskovanja na temeljnih podatkih kvalitativne metodologije* (Ljubljana: Scientific Research Institute of the Faculty of Arts, 2008)
18. Pavčnik M, *Argumentacija v pravu* (Ljubljana: GV Založba, 2013)

19. Pavlović Š, *Zakon o kaznenom postupku, 2. izdanje* (Libertin naklada, 2014)
20. Pavišić B *et al*. *Kazneno postupkovno pravo, 4. izdanje* (Dušević & Kršovnik, 2011)
21. Pavišić B, *Komentar Zakona o kaznenom postupku, Drugo izdajanje* (Dušević & Kršovnik, 2013)
22. Radulović D, 'Pritvor i druge mjere za obezbeđenje prisustva okrivljenog i nesmetano vođenje krivičnog postupka u krivičnoprocesnom zakonodavstvu Crne Gore (norma i praksa)' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 161
23. Simović MN, 'Krivično procesno zakonodavstvo BIH i mjere obezbjeđenja prisustva osumnjičenog, odnosno obtuženog u krivičnom postupku (norma i praksa)' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 109
24. Stürner HR and Murray LP, *German Civil Justice* (Carolina Academic Press, 2004)
25. Škulič M, 'Pritvor kao mera obezbeđenja prisustva okrivljenog u krivičnom postupku (krivičnoprocesno zakonodajstvo Srbije – norma i praksa' in *Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku: međunarodni pravni standardi, regionalna zakonodavstva i primena* (Misija OEBS-a u Srbiji, 2019) 39
26. Uzelac A, 'Survival of the Third Legal tradition?' (2010) 49 *Supreme Court Law Review* 377
27. Vavken L, 'Aktualne procesnopravne dileme odreditve in podaljšanja pripora' (2022) 41(48) *Pravna praksa* II
28. Vavken L, *Položaj sodstva v sistemu delitve oblasti* (Doctoral thesis, University of Ljubljana, 2022)
29. Vavken L, 'Odločanje o priporu v novejših odločbah Ustavnega in Vrhovnega sodišča RS: med zaščito svobode posameznika in učinkovitostjo kazenskega postopka oziroma varnostjo družbe pred kriminalom' *(2025) 27 Odvetnik* 15
30. Zobec J, 'Od individualnega do javnega (precedenčnega) namena Vrhovnega sodišča: ustavnopravni vidik' (2015) 41(6-7) *Podjetje in delo* 919
31. Zupančič BM, *Komentar Ustave Republike Slovenije* (Fakulteta za podiplomske državne in evropske študije, 2002)

REGULATIONS AND DOCUMENTS

1. The Constitution of the Republic of Slovenia, Official Gazette, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a in 92/21 – UZ62a (SLO)
2. The Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014 (HR)
3. The Criminal Procedure Act, Official Gazette, No. 176/21, 96/22 – odl. US, 2/23 – odl. US, 89/23 – odl. US in 53/24 (SLO)
4. The Criminal Code, Official Gazette of the Republic of Slovenia, No. 50/12, 54/15, 6/16, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP, 16/23 in 107/24 – odl. US. (SLO)
5. The Criminal Procedure Act, Official Gazette, No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019, 130/2020, 80/2022, 36/2024 (HR)
6. The Courts Act, Official Gazette of the Republic of Slovenia, No. 94/07 ,45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12, 63/13, 17/15, 23/17, 22/18, 16/19 – ZNP-1, 104/20, 203/20 – ZIUPOP-DVE, 18/23 – ZDU-1O in 42/24. (SLO)

JUDGMENTS AND OTHER DECISIONS

1. The European court of Human Rights, Poppe v. the Netherlands, No. 3227/04 (24 March 2009)
2. The European court of Human Rights, Micallef v. Malta, No. 17056/06 (15 October 2009)
3. The Constitutional Court of the Republic of Slovenia, U-I-25/95 (27 November 1997) (SLO)
4. The Constitutional Court of the Republic of Slovenia, Up 965/11 (9 May 2013) (SLO)
5. The Constitutional Court of the Republic of Slovenia, U-I-12/2015 (28 September 2016) (SLO)
6. The Constitutional Court of the Republic of Slovenia, Up-879/14 (20 April 2015) (SLO)
7. The Supreme Court of the Republic of Slovenia, I Ips 463/2006 (25 January 2007) (SLO)
8. The Supreme Court of the Republic of Slovenia, I Ips 346/2009 (18 March 2010) (SLO)
9. The Supreme Court of the Republic of Slovenia, Ips 1278/2012 (24 October 2013) (SLO)
10. The Supreme Court of the Republic of Slovenia, I Ips 23071/2014, (7 February 2018) (SLO)
11. The Supreme Court of the Republic of Slovenia, I Ips 18120/2015 (15 March 2018) (SLO)
12. The Supreme Court of the Republic of Slovenia, XI Ips 10906/2018 (30 March 2018) (SLO)
13. The Supreme Court of the Republic of Slovenia, II Kr 50240/2018 (22 January 2019) (SLO)
14. The Supreme Court of the Republic of Slovenia, II Kr 52340/2018 (6 February 2019 (SLO)
15. The Supreme Court of the Republic of Slovenia, II Kr 55320/2018 (20 February 2019) (SLO)
16. The Supreme Court of the Republic of Slovenia, II Kr 53972/2020 (23 December 2020) (SLO)
17. The Supreme Court of the Republic of Slovenia, II Kr 53718/2020 (24 December 2020) (SLO)
18. The Supreme Court of the Republic of Slovenia, II Kr 61646/2020 (15 February 2021) (SLO)
19. The Supreme Court of the Republic of Slovenia, XI Ips 19156/2021 (9 September 2021) (SLO)
20. The Supreme Court of the Republic of Slovenia, XI Ips 25329/2021 (30 September 2021) (SLO)
21. The Supreme Court of the Republic of Slovenia, II Kr 174/2022 (28 March 2022) (SLO)
22. The Supreme Court of the Republic of Slovenia, II Kr 9458/2022 (15 September 2022) (SLO)
23. The Supreme Court of the Republic of Slovenia, II Kr 23821/2022 (10 October 2022) (SLO)
24. The Supreme Court of the Republic of Slovenia, II Kr 69280/2022 (23 January 2023) (SLO)
25. The Supreme Court of the Republic of Slovenia, II Kr 14214/2023 (31 May 2023) (SLO)
26. The Supreme Court of the Republic of Slovenia, II Kr 32662/2023 (7 August 2023) (SLO)
27. The Supreme Court of the Republic of Slovenia, II Kr 49986/2023 (11 October 2023) (SLO)
28. The Constitutional Court of the Republic of Croatia, U-I-4658/2019 i U-I-4659/2019 (3 November 2020) (HR)

INTERNET SOURCES

1. Heard C and Fair H, *Pre-Trial Detention and Its Overuse: Evidence from Ten Countries* (2019) Birkbeck University of London, <https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf> accessed 20 February 2025
2. *Letno poročilo o poslovanju sodišča za leto 2022 in Letno poročilo o poslovanju sodišča za leto 2023*, <https://www.sodisce.si/vsrs/osnovne_informacije_o_sodiscu/pomembni_dokumenti/> accessed 20 February 2025

*Luka Vavken**

(NE)ADEKVATNOST REGULACIJE PRODUŽENJA PRITVORA OD STRANE VRHOVNOG SUDA REPUBLIKE SLOVENIJE

Sažetak

Na normativnoj i praktičnoj razini, u radu se analizira uređenje članka 20. Ustava Republike Slovenije, koji daje Vrhovnom sudu Republike Slovenije ovlast produljiti pritvor tijekom faze kaznene istrage za najviše tri mjeseca. Iz perspektive komparativnog prava, ovo je slovenska osobitost. Autor tvrdi da je važeće uređenje sistemski neadekvatno i ne jamči najvišu razinu zaštite ljudskih prava pritvorene osobe. Sljedeći prigovori podupiru ovu tezu: ovlast Vrhovnog suda da produži pritvor nije u skladu s temeljnom ulogom ovog Suda; uređenje sprječava okrivljenika da podnese sveobuhvatnu pravnu žalbu; ne poboljšava percepciju nepristranosti u suđenjima niti povjerenje u pravosuđe i nepotrebno je za razvoj sudske prakse u području lišavanja slobode. Članak predlaže alternativna rješenja koja bi se bolje uskladila s ulogom Vrhovnog suda i više pridržavala izvorne namjere osiguranja najviše razine zaštite ljudskih prava u odlukama o pritvoru.

Ključne riječi: *pritvor, određivanje i produljenje pritvora, Vrhovni sud, ustavni amandman, pravo na žalbu*

* Dr. sc. Luka Vavken, sudski savjetnik na Vrhovnom sudu Republike Slovenije, Tavčarjeva ulica 9, 1000 Ljubljana, Slovenija. E-adresa: vavken.luka@gmail.com. ORCID: https://orcid.org/0009-0006-4013-0020.