Constitutional judgment 3-4-1-16-10

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-4-1-16-10
Date of judgment	21 June 2011
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Ivo Pilving, Priit Pikamäe, Jüri Põld, Harri Salmann, Tambet Tampuu
Court Case	Review of the constitutionality of § 87^2 of the Penal Code.
Basis of proceeding	The Harju County Court judgment of 28 October 2010 in criminal matter no. 1-10-7650
Hearing	Written proceedings
DECISION	**To declare § 87^2(2) of the Penal Code to be unconstitutional and invalid.**

FACTS AND COURSE OF PROCEEDINGS

1. Valmar Koemets was charged with that he, as a person who has previously committed an offence against sexual self-determination, tried on 20 January 2010 to have sexual intercourse with a minor against the latter's will. In the statement of charges the act of Valmar Koemets was qualified as an attempted rape of a person of less than eighteen years of age committed by a person who has previously committed a criminal offence against sexual self-determination (Division 7 of Chapter 9 of the Penal Code (PC)), i.e. on the basis of § 141(2)1) and 6) – § 25(2) of the PC.

2. The Harju County Court convicted V. Koemets on 28 October 2010 pursuant to § 141(2)1) and 6) – § 25(2) of the PC and sentenced him to seven years' imprisonment.

3. The prosecutor requested the court to apply to V. Koemets detention after service of the sentence provided for in § 87^2 of the PC because the prosecutor found that the grounds indicated in § 87^1(2) of the PC exist.

4. It appears from the introduction of the Harju County Court judgment of 28 October 2010 that V. Koemets had been previously punished pursuant to criminal procedure on five occasions. The Harju County Court stated in the judgment that V. Koemets, being repeatedly punished for sexual offences, is likely to be dangerous to the society also after release from service of the sentence. However, the court held that §§ 87^2 and 87^3 of the PC are in contradiction with § 20 of the Constitution, pursuant to which no one shall be deprived of his or her liberty except in the cases and pursuant to procedure provided by law. The Harju County Court did not apply § 87^2 of the PC to V. Koemets and declared § 87^2 of the PC to be in contradiction with the Constitution.

[Paragraphs 5–39 not translated]

PROVISIONS DECLARED UNCONSTITUTIONAL IN THE HARJU COUNTY COURT

40. The Harju County Court declared § 87^2 of the Penal Code to be in contradiction with the Constitution:
„§ 87^2. Detention after service of sentence
(1) Detention after service of the sentence is a non-punitive sanction, main objective of which is to prevent commission of new criminal offences by a person convicted of a criminal offence seriously endangering or damaging another person's physical, mental or sexual inviolability, and in regard to who there is reason to believe that when at large he or she may commit new similar criminal offences.

(2) In addition to the punishment the court shall impose detention after service of the sentence if:
1) a person is convicted of an intentional criminal offence provided for in Division 1, 2, 6 and 7 of Chapter 9, Division 2 of Chapter 11 or Division 1 and 4 of Chapter 22 of this Code, or of an intentional criminal offence, elements of which constitute use of violence, provided for in another Chapter, and he or she is punished by at least two years' imprisonment without probation pursuant to § 73 or 74 of this Code;
2) a convicted offender has been previously punished on at least two occasions for acts specified in clause 1) of this subsection, and each time by at least one year's imprisonment, and
3) taking account of the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences, there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences specified in clause 1) of this subsection.

(3) The court may apply detention after service of the sentence to a person who has previously not been punished if:
1) a person is convicted of a criminal offence specified in clause 1) of subsection (2) of this section, maximum term of punishment for which is at least ten years' imprisonment or life imprisonment;
2) a person has committed at least three criminal offences specified in clause 1) of this subsection;
3) the court punishes the person by at least six years' imprisonment, and
4) taking account of the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences, there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences specified in clause 1) of this subsection.

(4) The court may apply detention after service of the sentence to a person who has previously been punished by imprisonment on one occasion if:
1) a person is convicted of a criminal offence specified in clause 1) of subsection (2) of this section, maximum term of punishment for which is at least five years' imprisonment or life imprisonment, and for which the court sentences the person to at least three years' imprisonment;
2) a convicted offender has been previously punished by imprisonment on one occasion for a criminal offence specified in clause 1) of this subsection and the person has actually served at least one year of the imprisonment, and

3) taking account of the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences, there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences specified in clause 1) of this subsection.

(5) Detention after service of the sentence shall not be applied to a person who at the time of the commission of the last criminal offence was less than eighteen years of age.

(6) Detention after service of the sentence shall be executed after the service of the imprisonment."

OPINION OF THE SUPREME COURT *EN BANC*

41. The Supreme Court *en banc* decides whether detention after service of the sentence as provided by § 87^2 of the PC is in conformity with the Constitution.

42. In this constitutional review matter the Supreme Court *en banc* holds that § 87^2(2) of the PC is the relevant provision (I). Detention after service of the sentence is a punishment in the substantive sense and the requirement for specification arising from § 23(1) of the Constitution extends to it (II). Detention after service of the sentence infringes personal liberty provided for in § 20 of the Constitution and in the opinion of the Supreme Court *en banc* is not sufficiently specified for the purposes of § 23(1) of the Constitution (III). Infringement of personal liberty requires a constitutional justification arising from § 20(2) of the Constitution (IV). The Supreme Court *en banc* is of the opinion that deprivation of liberty in the form of detention after service of the sentence provided for in § 87^2(2) of the PC is not permitted on the basis of § 20(2)1) of the Constitution (V) nor § 20(2)3) of the Constitution (VI). Finally, the Supreme Court *en banc* explains what effect declaring detention after service of the sentence provided for in § 872(2) of the PC unconstitutional and invalid has on legal order (VII).

I The relevant provision is § 87^2(2) of the PC

43. According to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (CRCPA), the Supreme Court may assess in a concrete norm control proceeding initiated by a court judgment the constitutionality of a provision if the provision was relevant upon adjudication of the matter. Relevant is a provision that is of decisive importance in adjudication of the matter (as of the Supreme Court *en banc* judgment of 22 December 2000 in matter no. 3-4-1-10-00, paragraph 10). A provision is of decisive importance if in case of its unconstitutionality the court would decide differently than in case of its constitutionality (as of the Supreme Court *en banc* judgment of 28 October 2002 in matter no. 3-4-1-5-02, paragraph 15).

44. Upon the adjudication of the criminal matter in the Harju County Court the prosecutor found that in regard to Valmar Koemets the prerequisites for detention after service of the sentence provided for in § 87^2 (2) of the PC have been fulfilled, and requested the county court to impose detention after service of the sentence on Valmar Koemets under that provision. In the judgment of 28 October 2010 the Harju County Court did not impose detention after service of the sentence on Valmar Koemets, but declared § 87^2 of the PC to be in contradiction with the Constitution and commenced a constitutional review court procedure.

45. In the assessment of the Supreme Court *en banc*, relevant in this matter is not the entire § 87^2 of the PC. Subsection (1) of that section provides the legal definition of detention after service of the sentence. § 87^2 (2)–(4) of the PC provide various legal grounds for application of detention after service of the sentence. Relevant is the provision comprising a basis for detention after service of the sentence, prerequisites for which were in the court's assessment fulfilled in the matter.

46. From the Harju County Court judgment appears the court's conclusion that considering all the circumstances, the court had to, at the request of the prosecutor, impose detention after service of the sentence on Valmar Koemets on the basis of § 87^2(2) of the PC. Consequently, the court found that the prerequisites for detention after service of the sentence provided for in § 87^2(2) of the PC were fulfilled. In order not to impose detention after service of the sentence on V. Koemets, the court had to declare that

provision of the Penal Code unconstitutional.

47. Therefore the Supreme Court *en banc* finds that § 87^2(2) of the PC was the relevant provision in the adjudication of the matter in the Harju County Court for the purposes of § 14(2) of the CRCPA.

II Requirement for specification in § 23(1) of the Constitution

48. Next, the Supreme Court *en banc* forms an opinion on the conformity of the prerequisites for the application of detention after service of the sentence provided for in § 87^2(2) of the PC with the requirement for specification arising from § 23(1) of the Constitution.

49. Pursuant to § 23(1) of the Constitution, no one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed. § 23(1) of the Constitution expresses the most important principle of the penal law of a state based on the rule of law which is *nullum crimen nulla poena sine lege* – an act cannot be considered an offence and a person cannot be punished for committing such an act if it does not constitute an offence under the law.

50. From § 23(1) of the Constitution arises the requirement for specification applicable in penal law (*nullum crimen nulla poena sine lege certa*). According to that both the act for which the law prescribes a punishment and the punishment shall be clearly specified. The specification of a penal norm guarantees that everyone is able to foresee which behaviour is forbidden and punishable and what punishment awaits, so they could adjust their behaviour accordingly.

51. The Supreme Court *en banc* is of the opinion that detention after service of the sentence is a punishment in the substantive sense regardless of the fact that § 87^2(1) of the PC refers to the measure as a "non-punitive sanction". How the legislator has classified a measure in the Penal Code does not determine the measure's definition for the purposes of the Constitution. Otherwise the legislator might, if it wishes, preclude the application of constitutional guarantees in regard to a punishment in case of any measure considered as a punishment due to its nature.

52. In its judgment of 12 June 2008 in matter no. 3-1-1-37-07 the Supreme Court *en banc* found that "the question of whether a coercive measure of the state could be deemed a punishment for the purposes of § 23(3) of the Constitution cannot be answered solely on the basis of what is provided for in the Penal Code. It needs to be checked whether a coercive measure which is not considered a punishment in the formal penal law could still be deemed a punishment by nature, i.e. in the substantive sense. The fundamental rights must be guaranteed even upon imposition of such state coercive measures which are not provided for as punishments in the formal penal law but which can be regarded as such in the substantive sense". The Supreme Court *en banc* decided that confiscation of an object used to commit an offence (§ 83(1) of the PC), which is deemed as another sanction in the Penal Code, is a punishment in the substantive sense.

53. Detention after service of the sentence does not differ by nature from imprisonment which is a punishment both in the formal and substantive sense. Detention after service of the sentence does not differ from imprisonment also by the assistance which is offered to a person for decreasing the danger he or she is posing. The European Court of Human Rights (ECHR) has emphasised that provision of such assistance is particularly important during detention after service of the sentence (e.g. the ECHR judgment in Case *M. v Germany*, paragraph 129). Pursuant to § 1041 of the Imprisonment Act (IA), a person detained after service of sentence is assisted in preparing for return to society.

However, it does not appear from any legal act how a prison should perform that task and which services it should provide. The general obligation to assist a person in detention in return to society applies also in case of imprisonment. According to § 6(1) of the IA, the objective of imprisonment is to help prisoners lead law-abiding life and to defend public order.

54. The Supreme Court *en banc* finds that considering the aforementioned, detention after service of the sentence shall be deemed a punishment in the substantive sense and the requirement for specification arising

from § 23(1) of the Constitution extends to it.

III Detention after service of the sentence infringes personal liberty provided for in § 20 of the Constitution and is not sufficiently specified

55. Pursuant to § 20(1) of the Constitution, everyone has the right to liberty and security of person. § 20 of the Constitution protects everyone's physical liberty against arbitrary deprivation of liberty. Personal liberty is one of the most substantial ones among fundamental rights and freedoms guaranteed by the Constitution.

56. The subject matter of detention after service of the sentence is deprivation of liberty from a person and thus, detention after service of the sentence infringes personal liberty guaranteed in § 20(1) of the Constitution. The Supreme Court *en banc* describes hereunder how detention after service of the sentence is regulated in applicable law and how it infringes personal liberty guaranteed in § 20 of the Constitution.

57. According to the Penal Code, detention after service of the sentence is not a punishment, but a non-punitive sanction. Detention after service of the sentence is not deemed a punishment for a committed criminal offence, but a person's liberty is restricted due to the danger he or she is posing. Pursuant to § 87^2 (1) of the PC, the main objective of detention after service of the sentence is prevention of commission of new criminal offences by a person convicted of a criminal offence seriously endangering or damaging another person's physical, mental or sexual inviolability, and in regard to who there is reason to believe that when at large he or she may commit new similar criminal offences. It can be concluded from the explanatory memorandum of the draft Act that the objective of detention after service of the sentence is restriction of personal liberty for ensuring the safety of the society and for preventing the commission of possible future criminal offences.

58. Detention after service of the sentence is imposed by a court in a judgment in which it convicts a person of committing a criminal offence specified in 87^2(2)1) of the PC and sentences him or her to at least two years' actual imprisonment. Conviction of a person and punishing him or her are two formalities which shall be fulfilled for the application of detention after service of the sentence. The third formality is a requirement that a person in regard to who detention after service of the sentence is wished to be applied has been sentenced at least on two occasions for acts specified in § 87^2(2)1) of the PC to at least one year's imprisonment each time (§ 87^2(2)2) of the PC).

59. The substantive prerequisite for imposing detention after service of the sentence is establishment of the danger the person is posing. According to § 87^2(2)3) of the PC, the court shall impose detention after service of the sentence if taking account of the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences, there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences. The person's criminal tendency and the danger to society expressed in it is proceeded from in application of detention after service of the sentence. The court's judgment on the person's criminal tendency is a prediction orientated towards the future and based mostly on the person's previous behaviour.

60. Detention after service of the sentence is executed only after the service of imprisonment – a punishment imposed by a court judgment (§ 87^2(6) of the PC). Detention after service of the sentence can be applied until the danger the person is posing ceases to exist (the first sentence of § 87^3(1) of the PC) but generally not for more than ten years. On an exceptional basis, detention after service of the sentence can be applied for more than ten years if a person is convicted of a criminal offence specified in § 87^2(2)1) of the PC for which the maximum term of punishment is at least ten years' imprisonment or life imprisonment, and there is great danger that the person, when at large, might commit new similar acts (§ 87^3(2) of the PC).

61. The court shall terminate detention after service of the sentence when the danger the person is posing ceases to exist. The verification of the reasons for and the termination of detention after service of the sentence is regulated in § 426^2 of the Code of Criminal Procedure (CCP). The judge in charge of execution of detention after service of the sentence shall verify the reasons for detention after service of the sentence at least once in two years at his or her own initiative. The danger the person is posing shall be verified for the

first time upon the release of the person from service of the sentence (imprisonment). The person himself or herself may request the verification of the reasons for detention after service of the sentence one year after the commencement of the execution of detention after service of the sentence and then one year after the review of the previous request. Further, the head of the agency applying detention after service of the sentence may, at any time, request the verification of the reasons for detention after service of the sentence. The judge in charge of execution shall make a ruling on the reasons for detention of service of the sentence, against which an appeal may be filed with a higher court (§ 387(2) of the CCP).

62. Upon termination of detention after service of the sentence, supervision of the conduct of a person conditionally released from a sentence is applied to the person pursuant to § 75 of the PC (§ 87^3(1) of the PC). If based on the behaviour of the person conditionally released from detention after service of the sentence there is reason to believe that he or she may commit new criminal offences specified in § 87^2(2)1) of the PC, the court shall reimpose detention after service of the sentence (§ 87^3(4) of the PC).

63. Execution of detention after service of the sentence is regulated by the Imprisonment Act and the provisions of execution of imprisonment are generally applied to detention after service of the sentence. The law requires that upon detention after service of the sentence a person shall be assisted in preparing for return to society. The cell and its furnishing must help a prisoner to organise his or her life reasonably in a custodial institution and also prevent the harmful effects of long-term imprisonment, and personal needs of a prisoner shall be taken into account to the extent possible. Persons in detention after service of the sentence shall be allowed to receive long-term visits at least twice every six months. Persons in detention after service of the sentence shall be allowed to have personal items necessary for the spending of leisure time (a radio, television set, video or audio tape recorder or other), unless use of such items contradicts the security considerations of the prison, violates the internal rules of the prison or disturbs other people, and also wear personal clothing and use personal bed linen. At the same time, also regular persons in detention may use personal items for the spending of leisure time and wear personal clothing with the permission of a prison officer.

Consequently, there are no substantial differences between execution of detention after service of the sentence and execution of imprisonment. Most likely persons in detention do not perceive a significant difference whether they are imprisoned or held in detention after service of the sentence.

64. Considering the aforementioned, the Supreme Court *en banc* is of the opinion that detention after service of the sentence infringes very intensively personal liberty provided for in § 20(1) of the Constitution. Detention after service of the sentence is in applicable law one of the most serious infringements of the right to liberty.

65. Detention after service of the sentence is deprivation of a person's liberty with the aim to prevent commission of new criminal offences. The criminal offence, commission of which a person is convicted by a court judgment, and also previous criminal offences are only formal prerequisites for the application of detention after service of the sentence.

The substantive prerequisite for the application of detention after service of the sentence, i.e. for which reason it is applied, is the danger which the person is posing and which is established by a prediction. Deprivation of liberty from a person merely on the grounds of a prediction casts in additional doubt the constitutionality of detention after service of the sentence as a very intensive infringement of personal liberty.

66. Based on the requirement for specification, the prerequisites for and the consequence of the application of detention after service of the sentence shall be specified sufficiently clearly. The significance of the requirement for specification grows depending on which fundamental right and how intensively it is being infringed. In case of detention after service of the sentence the requirement for specification is very important because detention after service of the sentence infringes intensively a person's right to liberty.

67. The Supreme Court *en banc* finds that the prerequisites for the application of detention after service of

the sentence are not specified sufficiently in § 87^2(2) of the PC for the purposes of § 23(1) of the Constitution. Regarding specification, § 87^2(2) of the PC has many shortcomings concerning both formal and substantive prerequisites (criminal tendency) for the application.

68. The scope of application of detention after service of the sentence, i.e. criminal offences commission of which may result in detention after service of the sentence, is not specified sufficiently clearly. § 87^2(2) of the PC lists criminal offences, commission of which may result in the application of detention after service of the sentence: intentional criminal offences provided for in Division 1, 2, 6 or 7 of Chapter 9, Division 2 of Chapter 11 or Division 1 or 4 of Chapter 22 of the PC, or intentional criminal offences, elements of which constitute use of violence, provided for in another Chapter of the PC.

69. The scope of application of detention after service of the sentence is actually more restricted. The actual scope of application is determined by the formal prerequisites for detention after service of the sentence which are provided for in § 87^2(2)1) and 2) of the PC. The actual scope of application depends on for which criminal offences listed in § 87^2(2)1) of the PC at least two years' imprisonment can be imposed (§ 87^2(2)1) of the PC) and for which previously committed criminal offences at least one year's imprisonment was possible to impose (§ 87^2(2)2) of the PC). The delimitation of the scope of application by means of a long list of elements of criminal offences and many characteristics restricting the list complicates the establishment of the relevant provision.

70. The connection of the scope of application with the formal prerequisites requires for the prerequisites to be clearly worded and unambiguous. There is a lot of questionableness regarding the formal prerequisites for detention after service of the sentence. First, it is not unambiguously clear whether by at least two years' imprisonment specified in § 87^2(2)1) of the PC and by at least one year's imprisonment specified in clause 2) of the same subsection is meant a punishment imposed for only one criminal offence or also an aggregate punishment (§ 63(2) of the PC). Second, concerning § 87^2(2)2) of the PC it is not clear whether there have to be two separate convictions and services of sentence or is a conviction for two different criminal offences by one previous court judgment enough. It is also unspecified whether the previous punishment for the purposes of § 87^2(2)2) of the PC will have to have taken place prior to the commission of the criminal offence, in a proceeding concerning which detention after service of the sentence is imposed.

71. As a substantive prerequisite for the application of detention after service of the sentence, the judge imposing the detention after service of the sentence shall establish the criminal tendency of the convicted person. The Supreme Court *en banc* found above (paragraph 59) that criminal tendency and the danger expressed with it is the only substantive prerequisite for the application of detention after service of the sentence and for the restriction of personal liberty.

72. Upon punishment for a criminal offence, the basis for the punishment is a committed criminal offence. Criminal tendency is not an act. Therefore, no punishment can be imposed for it. Establishment of criminal tendency is the court's prediction. Such a prediction is due to its orientation towards the future inevitably hypothetical. Also previously committed criminal offences do not give a definite reason for stating that a person will pose a danger in the future. The vagueness of the prediction increases the risk of unjustified deprivation of liberty. Due to the intensity of the infringement, the regulatory framework which constitutes the basis for the prediction shall be clearly specified. Next, the Supreme Court *en banc* assesses whether the regulatory framework for the establishment of criminal tendency provided for in § 87^2(2) of the PC is specified sufficiently.

73. § 87^2(2)3) of the PC formulates criminal tendency as follows: "[---] there is reason to believe that due to criminal tendency the person, when at large, will commit new criminal offences specified in § 87^2(2)1) of the PC". In establishing criminal tendency, account shall be taken of "the convicted offender's personality, including his or her previous course of life and living conditions and circumstances of the commission of criminal offences" (§ 87^2(2)3) of the PC).

74. It is noted in the explanatory memorandum of the draft Act (XI Riigikogu's draft Act 382 SE) that in

establishing criminal tendency, account shall be taken, above all, of "the person's previous criminal behaviour – e.g. the nature of the acts, but also the volume of punishments and how shortly after the service of the sentence the person has resumed commission of criminal offences. [---] It shall also be considered how young the person was when he or she started to commit criminal offences. The person's personality and intelligence, general behaviour, and also family and acquaintances shall be considered in addition". The explanatory memorandum describes also the previous criminal record in the context of the establishment of criminal tendency: "A person need not have committed acts corresponding to the same elements of an offence, but in order to apply detention after service of the sentence, between various acts there has to be a connection, a common factor which would give a reason to talk about a tendency to commit certain types of acts". The Supreme Court *en banc* notes that the text of the Act does not reflect the statement in the explanatory memorandum that previous punishments shall have "a connection, a common factor"; however, it would be a significant fact in regard to the application of the regulatory framework.

75. The Supreme Court *en banc* finds that § 87^2(2) of the PC does not specify criminal tendency nor regulate the establishment thereof sufficiently. According to § 87^2(2)3) of the PC, the court should assess a convicted person's criminal tendency based on his or her personality. The legislator has not determined exactly which circumstances characterising a person shall be taken into account, and has provided three general characteristics (previous course of life, living conditions and circumstances of the commission of criminal offences). The thorough explanatory memorandum of the draft Act does not eliminate the shortcomings of the regulatory framework. The Supreme Court *en banc*emphasises that it is a regulatory framework which enables on the basis of a prediction to deprive a person from liberty for a long period of time and thus, there have to be steep demands on the specification of the regulatory framework.

76. Based on the aforementioned, the Supreme Court *en banc* finds that the prerequisites for the application of detention after service of the sentence provided for in § 87^2(2) of the PC are not sufficiently specified and that § 87^2(2) of the PC is in contradiction with § 23(1) of the Constitution.

77. Notwithstanding that in the opinion of the Supreme Court *en banc* § 87^2(2) of the PC is in contradiction with § 23(1) of the Constitution, the Supreme Court *en banc* deems it necessary to assess whether the imposition of such a measure is in conformity with § 20 of the Constitution.

IV Grounds for restricting personal liberty

78. § 20(2) of the Constitution lists exhaustively the cases when deprivation of liberty from a person is allowed. Basically the same list of grounds for deprivation of liberty is provided for in paragraphs a)–f) of Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The state shall guarantee the protection of fundamental rights at least on the Convention level. The Constitution and the practice of its application may, however, guarantee a stronger protection of fundamental rights and freedoms than the Convention.

79. By providing the grounds for deprivation of liberty, § 20(2) of the Constitution and Article 5(1)a)–f) of the Convention also set limits on the deprivation of personal liberty. The European Court of Human Rights (ECHR) has repeatedly stated that only the restricted interpretation of the grounds for deprivation of liberty is in conformity with the objective of Article 5 of the Convention and with the concept of protecting everyone against arbitrary deprivation of liberty (e.g. the Grand Chamber of the ECHR judgment of 29 March 2010 in Case Medvedyev and others v France, paragraph 78 and the case-law referred to therein). Also § 20(2) of the Constitution cannot be interpreted broadly to the detriment of the bearer of fundamental rights. Consequently, among the various interpretations of grounds for deprivation of liberty provided for in § 20(2) of the Constitution, the one which interferes with liberty the least has to be chosen.

80. The Supreme Court *en banc* is of the opinion that it shall be verified whether detention after service of the sentence provided for in § 872(2) of the PC could be permitted under § 20(2)1) or 3) of the Constitution. If § 20(2)1) or 3) of the Constitution do not enable the establishment of detention after service of the sentence, the Supreme Court *en banc* is of the opinion that there is no objective permitted by the Constitution for restricting personal liberty and the provision under dispute is in contradiction with § 20 of

the Constitution.

V Detention after service of the sentence is not justified by § 20(2)1) of the Constitution

81. Pursuant to § 20(2)1) of the Constitution, personal liberty may be deprived to execute a conviction or detention ordered by a court. According to the applicable penal law, detention is imprisonment for the commission of an offence.

The part "to execute [---] detention ordered by a court" of § 20(2)1) of the Constitution therefore justifies the deprivation of liberty for the commission of an offence. Detention after service of the sentence cannot be applied for the commission of misdemeanours and consequently, the Supreme Court *en banc* does not address that part of the sentence and the issues regarding punishments for misdemeanours. The Supreme Court *en banc* assesses whether detention after service of the sentence is justified by the part "to execute a conviction" of § 20(2)1) of the Constitution.

82. The part "to execute a conviction" of § 20(2)1) of the Constitution requires first that the deprivation of liberty shall take place on the basis of a court judgment. The Supreme Court *en banc* finds that in that regard the detention after service of the sentence provided for in § 87^2(2) of the PC corresponds to the requirements of the Constitution – detention after service of the sentence is imposed by a court judgment.

83. Second, from § 20(2)1) of the Constitution arises the requirement that a person can be deprived of liberty only if a court has convicted the person. A court can convict a person only if it has been established without a doubt that the person has committed a specific criminal offence. The part "to execute a conviction" of § 20(2)1) of the Constitution justifies the deprivation of personal liberty which arises directly from a conviction of a person for the commission a specific criminal offence.

84. The Supreme Court *en banc* holds that the part "to execute a conviction" of § 20(2)1) of the Constitution does not give grounds for detention after service of the sentence provided for in § 87^2(2) of the PC. Detention after service of the sentence provided for in § 87^2(2) of the PC lacks the connection with a person's conviction for the commission of a criminal offence required by § 20(2)1) of the Constitution. Detention after service of the sentence provided for in § 87^2(2) of the PC is not applied strictly for the commission of a specific act as a result of a conviction. Detention after service of the sentence is imposed in addition to the punishment for a specific criminal offence, based on the person's criminal tendency. Detention after service of the sentence has a substantive connection only with the prediction about the danger the person is posing. The danger arising from a person's criminal tendency is the only fact which the court has to assess substantively upon applying detention after service of the sentence. Similarly, only when the danger the person is posing ceases to exist the court may decide to terminate detention after service of the sentence. Contrary to the aforementioned, deprivation of liberty to execute a conviction terminates with the service of the sentence or it is terminated beforehand in the cases provided by law (release on parole). § 20(2)1) of the Constitution does not provide grounds for deprivation of liberty from a person only due to the danger he or she is posing. Only a formal connection with the commission of a criminal offence and conviction does not suffice for the fulfilment of the requirements in § 20(2)1) of the Constitution.

VI Detention after service of the sentence is not justified by § 20(2)3) of the Constitution

85. Based on § 20(2)3) of the Constitution, liberty may be deprived pursuant to the procedure and in the cases provided by law to combat a criminal or administrative offence, to bring a person who is reasonably suspected of such an offence before a competent state authority, or to prevent his or her escape. The Supreme Court *en banc* analyses whether detention after service of the sentence is justified by § 20(2)3) of the Constitution in the part which concerns combating a criminal offence.

86. Upon providing § 20(2)3) of the Constitution, a provision with a similar content in the Convention was followed – Article 5(1)c) (Põhiseadus ja Põhiseaduse Assamblee [Constitution and the Constitutional Assembly]. Tallinn, 1997, p 1023). Therefore, the Supreme Court*en banc* takes the Convention and its application practice into account upon interpreting § 20(2)3) of the Constitution. Pursuant to § 5(1)c) of the Convention, liberty may be deprived for the lawful arrest or detention of a person effected for the purpose of

bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

87. The Supreme Court *en banc* concedes that both § 20(2)3) of the Constitution and Article 5(1)c) of the Convention provide grounds for deprivation of personal liberty to combat a criminal offence. The ECHR has found that Article 5(1)c) of the Convention gives the state the right to combat a specific criminal offence if there is a risk of commission thereof. However, Article 5(1)c) of the Convention does not justify detention of a person, who is dangerous due to his or her criminal tendency, on vague preventive considerations. In the opinion of the ECHR, a contrary interpretation would contradict the objective of Article 5 of the Convention to prevent an arbitrary deprivation of liberty (see the ECHR judgment of 17 December 2009 in Case M. v Germany, paragraph 89 and the case-law referred to therein).

88. In addition to the aforementioned, it shall be considered that on the basis of Article 5(1)c) of the Convention, liberty may be deprived only with the aim to bring a person before the competent legal authority (the case-law of the ECHR as of the judgment of 1 July 1961 in Case Lawless v Ireland, paragraph 14). Article 5(1)c) is interpreted together with Article 5(3) which requires that everyone detained in accordance with the provisions of Article 5(1)c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Also § 20(2)3) of the Constitution ties detention to bringing a person before the competent state authority, and this provision shall be read together with § 21 of the Constitution which guarantees the procedural rights of persons in custody.

89. Based on the aforementioned, the Supreme Court *en banc* holds that § 20(2)3) of the Constitution justifies only the detention or arrest of a person as an urgent reaction to the risk of commission of a specific criminal offence. § 20(2)3) of the Constitution does not provide grounds for deprivation of liberty for vague preventive or punitive purposes. Consequently, the part "to combat a criminal offence" of § 20(2)3) of the Constitution does not justify deprivation of personal liberty in the form of detention after service of the sentence provided for in § 87^2(2) of the PC. A contrary interpretation would be a broad interpretation of § 20(2)3) of the Constitution and would contradict the concept of the provision.

90. The Supreme Court *en banc* finds that detention after service of the sentence provided for in § 87^2(2) of the PC is not justified by § 20(2)1) or 3) of the Constitution or by any other ground for deprivation of liberty provided for in § 20(2) of the Constitution. Based on the aforementioned, the Supreme Court *en banc* is of the opinion that there is no constitutional cause for detention after service of the sentence provided for in § 87^2(2) of the PC, and that the provision under dispute is in contradiction with § 20 of the Constitution and shall be declared invalid.

VII Effect of the judgment on legal order

91. The Supreme Court *en banc* emphasises that what is stated in this judgment does not affect the application of § 56 of the PC. The declaration of invalidity of detention after service of the sentence provided for in § 87^2(2) of the PC does also not mean that it would not be possible to respond to the risk arising from dangerous offenders with criminal tendencies by advancing the existing system of sanctions and other measures. In order to increase general safety, the state shall prescribe measures decreasing the danger a person is posing already in the course of the imprisonment imposed on the person, as is enabled by Division 6 "Social Welfare in Prison" of Chapter 2 "Execution of imprisonment" of the Imprisonment Act.

92. The Supreme Court *en banc* notes that upon restricting fundamental rights, the principle of *ultima ratio* shall be proceeded from. Measures intensively restricting fundamental rights are justified only if the objective cannot be reached by less restricting means. Detention after service of the sentence could be a very effective measure for reducing the danger arising from repeaters, but at the same time it restricts personal liberty very intensively. In the opinion of the Supreme Court *en banc*, the safety of the society can be increased effectively enough also by infringing personal liberty less.

93. § 87^1 of the PC provides supervision of conduct after service of the sentence, terms of which can be specified and, if need be, also made stricter compared to the applicable law, considering specific types of criminal offences and criminal offenders. Regarding sexual offenders (above all convicted persons pursuant to §§ 141 and 142 of the PC) as one of the most important targets of detention after service of the sentence it is possible to consider e.g. implementation of restrictions upon choice of residence, establishment of a registry, in some cases notification of risk-prone organisations about a person's place of residence and work. In certain cases mandatory participation in treatment or therapy (e.g. in case of mental and addictive disorders) or electronic surveillance are not excluded.

A dissenting opinion of the justice of the Supreme Court Ivo Pilving on the Supreme Court *en banc* judgment of 21 June 2011 in constitutional review matter no. 3-4-1-16-10

1. I concur with the decision of the judgment of the Supreme Court *en banc* and the opinion of the majority that the prerequisites for the application of detention after service of the sentence are not sufficiently specified (paragraph 76 of the judgment). In my opinion this conclusion is drawn, above all, based on the fact that § 87^2(2) of the PC [Penal Code] prescribes detention in case of unacceptably wide range of elements of criminal offences. This has granted the persons implementing the Act too extensive right of discretion. The legislator should determine more precisely the cases when detention after service of the sentence is applicable. I also concur with the opinion of the majority that § 20(2)3) of the Constitution does not justify detention after service of the sentence (paragraphs 85–90 of the judgment).

2. Unlike the majority of the Supreme Court *en banc* I find that § 20(2)1) of the Constitution may justify detention after service of the sentence. The different opinion of the majority is based on three presumptions (paragraphs 57–59, 65, 67, 84):
- commission of previous criminal offences is merely a formal prerequisite in application of detention after service of the sentence;
- detention after service of the sentence has no substantive connection with previous criminal offences; and
- § 87^2(2) of the PC enables to deprive of liberty solely due to the danger a person is posing.
These prerequisites have not been convincingly justified.

3. Conviction has been deemed in the judgment a formality solely because establishment of a conviction is not a matter of assessment. I am of the opinion that the lack of room for assessment does not make any fact a formality. Conviction for criminal offences with certain characteristics is a substantive law prerequisite of critical importance in the application of the provision under dispute. Lack of the said prerequisite excludes detention after service of the sentence under § 87^2(2) of the PC completely no matter how great of a danger the person is posing.

Conviction has been provided for as a direct prerequisite for detention after service of the sentence and not through any additional facts or characteristics. Consequently, § 87^2(2) of the PC does not allow detention of a person solely due to danger, and there is a direct and substantive connection between conviction and detention after service of the sentence.

The fact that in addition to conviction the danger a person is posing is also assessed upon the application of detention after service of the sentence does not eliminate the said connection.

A dissenting opinion of the justice of the Supreme Court Priit Pikamäe on the Supreme Court *en banc* judgment in matter no. 3-4-1-16-10

1. I concur with the Supreme Court *en banc* judgment that the prerequisites for the application of detention after service of the sentence provided for in § 87^2(2) of the PC [Penal Code] as a sanction have not been

specified and it is therefore in contradiction with the requirement for specification arising from § 23(1) of the Constitution. However, I do not agree with all of the justifications pointed out in the judgment.

2.1 I do not share the opinion of the majority of the Supreme Court *en banc* that in addition to what is stated, the establishment of detention after service of the sentence in our penal law is excluded by the lack of a corresponding basis in § 20(2) of the Constitution. I find that detention after service of the sentence is in principle justified by § 20(2)1) of the Constitution which allows to deprive of liberty to execute a conviction or detention ordered by a court. The interpretation of the Supreme Court *en banc* of this provision of the Constitution is unjustifiably narrow. I am of the opinion that § 20(2)1) of the Constitution allows to deprive of personal liberty to execute all such legal consequences which have been imposed on a convicted offender by a court judgment. Based on § 23(1) and the second sentence of § 146 of the Constitution, a court judgment on conviction and punishment may be based only on the law. The legislator has been granted by the Constitution an extensive discretion in determining the principles of the system of sanctions, including the types and content of sanctions (see also the Constitutional Review Chamber of the Supreme Court judgment of 25 November 2003 in matter no. 3-4-1-9-03, paragraph 21). Thus, § 20(2)1 of the Constitution does not dictate the types of punitive sanctions to the legislator but merely gives a basis for legitimation of such deprivations of liberty which accompany execution of legal consequences imposed by a judgment of conviction. I find that the provision in question is highly abstract as appropriate for a constitutional norm and by the reference to the execution of a judgment of conviction, § 20(2)1) of the Constitution gives the legislator a free hand to form such a system of sanctions of the penal law which the latter deems necessary to respond to violations of social principal values.

2.2 It is erroneously noted in the Supreme Court *en banc* judgment that detention after service of the sentence provided for in § 87^2(2) of the PC is not applied strictly for the commission of a specific act as a result of a conviction (paragraph 83 and the following). It unambiguously arises from § 87^2(2) of the Penal Code that detention after service of the sentence is a legal consequence following commission of a criminal offence – the direct basis for the application thereof is the last criminal offence committed by a convicted offender and the need for the application thereof shall be determined by the court in the same proceeding with other issues resolved in the course of imposing a punishment.

The fact that the legislator has systematically placed detention after service of the sentence in the system of sanctions among non-punitive sanctions does not mean that it lacks a connection with the conviction of a person for a criminal offence. The comprehension of the majority of the Supreme Court *en banc* that legal consequences following a criminal offence are only sanctions which are formally defined as punishments by the legislator and not other sanctions, including non-punitive sanctions, constitutes assumption of the role of the legislator by the judicial power which is not in conformity with the second sentence of § 146 of the Constitution, pursuant to which the courts shall administer justice in accordance with the law.

2.3 It cannot be ignored that having already formed an opinion that detention after service of the sentence as provided for in § 87^2(2) of the PC is in contradiction with § 20(2) of the Constitution, the Supreme Court *en banc* had no need to weigh its conformity with the requirement for specification prescribed in § 23(1) of the Constitution. If the shortcomings in specifying sanctions within the meaning of § 23(1) of the Constitution may be eliminated by the legislator, then the lack of a basis for deprivation of a relevant personal liberty in § 20(2) of the Constitution precludes altogether the establishment of such a legal consequence in our penal law.

3. Although I share the opinion of the Supreme Court *en banc* that detention after service of the sentence provided for in § 87^2(2) of the PC does not comply with the requirement for specification provided for in § 23(1) of the Constitution in terms of the bases for its application, I do not support all of the arguments presented to justify the opinion. I do not agree that the contradiction of § 87^2(2) of the PC with the requirement for specification should also be seen in the fact that the scope of application of detention after service of the sentence has been specified through a long list of criminal offences and several supplementary conditions (paragraphs 67–70 of the judgment). This being not the most successful legislative technique in wording of a legal provision of the penal law does not mean that it is in contradiction with the requirement

for specification. The vagueness of the wording of § 87^2(2) of the PC pointed out by the Supreme Court *en banc* can be overcome by interpreting the provision in question, a more restricted interpretation of the provision of the Penal Code is not precluded in any case. In conclusion, it appears from the Supreme Court *en banc* judgment that the Supreme Court *en banc* has still come to an understanding, on the basis of this analysis, regarding the extent of the scope of application of § 87^2(2) of the PC insofar as in paragraph 69 of the judgment a conclusion is drawn that it is actually narrowly defined.

4. All in all, I still fully concur with the opinion of the majority of the Supreme Court *en banc* that detention after service of the sentence under § 87^2(2) of the PC is in contradiction with the requirement for specification provided for in § 23(1) of the Constitution because the legislator has not been able to regulate the substantive prerequisites for the application of this sanction, mentioning only the "criminal tendency" of an offender (paragraph 71 and the following).

The following can also be noted in favour of the arguments pointed out in the judgment. It arises from § 87^3 of the PC that the application of detention after service of the sentence in regard to a convicted offender basically without a term is not precluded. Therefore, establishment of a convicted offender's criminal tendency may lead to deprivation of his or her liberty for an unspecified term. From this aspect, detention after service of the sentence is one of the most severe sanctions in the Penal Code's system of sanctions. I find that in establishing such an intensive sanction, the legislator shall make sure in accordance with § 23(1) of the Constitution that the bases for the sanction would be specified as unambiguously as possible. Penal law shall not include sanctions with vaguely specified bases for application in case of which it is not possible to understand when and in regard to whom these will be applied. In addition to the abovementioned, the argument that at least considering the means at the disposal of criminal proceedings our ability to predict the offender's future behaviour is very much limited cannot be ignored. I fully share the opinion expressed in literature that even in the case of commission of several criminal offences, it is never possible to say with full certainty, regardless of the insufficient effect of the punishments so far, that a person will commit criminal offences in the future after service of the sentence. Consequently, there is no way to rule out the possibility that the last act so far could have remained the last, for which reason there is always the possibility that the state's severe interference in the form of detention after service of the sentence would no longer have been necessary (W. Frisch. Bases and Fundamental Issues Regarding Post-Sentence Detention. Juridica 2008/8, pp 531–538). If any unfounded deprivation of liberty even once is too much, then unfounded deprivation of liberty for an unspecified term is even more so.

A dissenting opinion of the justices of the Supreme Court Villu Kõve, Peeter Jerofejev and Henn Jõks on the Supreme Court *en banc*judgment in matter no. 3-4-1-16-10

1. We do not concur with the majority of the Supreme Court *en banc* that § 87^2(2) of the PC [Penal Code] is in contradiction with the Constitution on the grounds stated in the judgment and should be declared invalid.

2. § 20(1) of the Constitution guarantees to every person the fundamental right to liberty. The same is provided for in the first sentence of Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF). Personal liberty is a significant value based on both the Constitution and the ECHRFF, and deprivation or restriction thereof may take place only in precisely defined cases for the protection of constitutional values. Upon interpreting the Constitution, the case-law of the European Court of Human Rights (ECHR) regarding detention after service of the sentence cannot be ignored.

3. Pursuant to § 87^2(1) of the PC, detention after service of the sentence is a non-punitive sanction, the main objective of which is prevention of commission of new criminal offences by a person convicted of a criminal offence seriously endangering or damaging another person's physical, mental or sexual inviolability, and in regard to who there is reason to believe that when at large he or she may commit new similar criminal offences. This way detention after service of the sentence has a clear preventive objective, arising from the danger a person is posing, for the protection of other persons.

We concede that neither the Constitution nor the ECHRFF prescribe an *expressis verbis* option to detain persons who have committed severe criminal offences against persons merely on preventive considerations. However, personal liberty is not the only fundamental right and we are of the opinion that in certain cases the right to liberty of a person dangerous to others does not outweigh the fundamental rights of others to life, health, human dignity etc. which shall be guaranteed by the state according to §§ 13 and 14 of the Constitution. By taking necessary and proportionate measures the state shall guarantee that persons potentially dangerous to other members of the society cannot carry into effect the danger they are posing. Consequently, the fundamental rights of persons balance each other. We also note that deprivation of liberty solely for the purpose of preventing the carrying into effect of a risk arising from the danger a person is posing is permitted according to both § 20(2)5) of the Constitution and Article 5(1)e) of the ECHRFF in case of a person suffering from an infectious disease, a person of unsound mind, an alcoholic or a drug addict, and also in case of vagrants according to Article 5(1)e) of the ECHRFF. However, the danger they are posing may be several times smaller than that arising from a person who has repeatedly committed criminal offences against persons.

4. We do not agree with the resolute opinion expressed in the judgment that the Constitution precludes the institute of detention after service of the sentence altogether in Estonia.

It was found in the judgment that § 20(2)1) of the Constitution precludes detention of a person on the basis of danger under a court judgment because it is not sufficiently connected to conviction for commission of a specific criminal offence (see paragraph 84 of the judgment). Although the corresponding provision of the ECHRFF, namely Article 5(1)a), has a little different wording, we feel that it does not have a different meaning compared to the provision of the Constitution. Precisely based on that provision of the ECHRFF the European Court of Human Rights (ECHR) has clearly acknowledged the legitimacy of detention after service of the sentence (see recently unambiguously*Schmitz v Germany*, court judgment of 09.06.2011, request no. 30493/04, and *Mork v Germany*, court judgment of 09.06.2011, requests no. 31047/04 and 43386/08). The Supreme Court *en banc* judgment has not addressed the issue of in what respect the provisions of the Constitution and the ECHRFF differ. In our opinion the Supreme Court *en banc* has only interpreted § 20(2)1) of the Constitution in the light of the applicable penal law and has not intended to explore the nature of detention after service of the sentence and weigh the constitutional values justifying the permissibility thereof.

It is noteworthy that by justifying the inappropriateness of § 20(2)3) of the Constitution as the basis for detention after service of the sentence, the Supreme Court *en banc* has proceeded only from the ECHR's interpretation of Article 5(1)c) of the ECHRFF (see paragraphs 86–89 of the judgment). However, by justifying the inappropriateness of § 20(2)1) of the Constitution as the basis for detention, the Supreme Court *en banc* has said nothing about the case-law of the ECHR regarding the application of Article 5(1)a) of the ECHRFF. Consequently, the case-law of the ECHR regarding the application of the ECHRFF has been used selectively, only in the part which coincides with the opinion of the majority of the Supreme Court *en banc*.

5. We hold that the Supreme Court *en banc* should have considered the opinions of the ECHR on detention after service of the sentence and should have formed its opinion accordingly (on the case-law of the ECHR and application of detention after service of the sentence in other countries see also Sten Lind. Is Post-Sentence Detention Incompatible with the Rule of Law? Juridica 4/2010, pp 296–303). According to the ECHR, decisive is that detention after service of the sentence is decided by the court adjudicating the issue of a person's guilt with the same court judgment and its objectives overlap with the objectives of imprisonment – i.e. to preclude the commission of new violent criminal offences.

Also the judgment of 4 May 2011 of the German Constitutional Court which declared invalid the provisions of the German penal law which were the main basis for the regulatory framework of detention after service of the sentence in Estonia does not deem this institute impermissible. However, in the light of the opinions of the ECHR it has been demanded that as a preventive measure, detention after service of the sentence shall

significantly differ from deprivation of liberty as a punishment, i.e. execution of detention after service of the sentence shall be guaranteed so that only minimum restrictions would be imposed on a person in addition to deprivation of liberty. According to that, persons detained after service of the sentence shall be, among other, separated from those serving imprisonment, quality socialising and therapeutic measures shall be applied in respect of them to guarantee a perspective of liberty, and the duration of the detention shall be verified by the court at least once a year.

6. Although in part VII of the judgment the Supreme Court *en banc* has tried to "soften" the impact of its judgment, it still raises more questions than gives answers.

7. It is unclear what is meant by the phrase "what is stated in this judgment does not affect the application of § 56 of the PC" in paragraph 91 of the judgment.

Pursuant to the first sentence of § 56(1) of the PC, punishment shall be based on the guilt of the person, i.e. at least primarily the imposition of a punishment is based on guilt according to the Penal Code. However, based on the second sentence of § 56(1) of the PC, in imposition of a punishment, a court shall take into consideration, among other, the possibility to influence the offender not to commit offences in the future and the interests of the protection of public order, thus also danger. It has been pointed out in legal literature that in case of commission of an offence, consequences may be applied in respect of a person, in case of which both the guilt of the person and the danger the person is posing are proceeded from, i.e. the possibility that the person will commit similar acts also in the future (see, e.g., prof Jaan Sootak. What Should Be Done When the Harmfulness of a Person Is Greater Than His Guilt? The Experience of Germany As Regards Non-Penalty Sanctions; Juridica 8/2006, pp 519–529). The Constitution does not prescribe what may be considered in imposition of a punishment. If the Supreme Court *en banc* meant that the danger a person is posing can and must be considered already in imposition of a punishment, it should have clearly said so and justified as to in which respect the assessment of the danger a person is posing under § 56(1) of the PC differs from the assessment of the danger under the regulatory framework of detention after service of the sentence.

Such an approach is obviously less favourable to a person than in case of detention after service of the sentence. To consider danger, the sanction rates for specific criminal offences should be increased, aggregation of punishments should be extended or unspecified sanctions should be established. In such a system, the "playground" of the court and the vagueness of a punishment are clearly greater than in application of detention after service of the sentence in cases prescribed by law. Further, such a person would not be treated differently from so-called prisoners sentenced solely based on guilt (i.e. they would be in imprisonment on the same terms) and whether the danger they are posing has ceased to exist would not be checked periodically. In addition, considering danger under § 56 of the PC in imposition of a punishment would actually mean the court's "concealed" right to predict the danger a person is posing and to consider this in imposition of a punishment, i.e. to basically reach the same result in terms of prevention as in the case of detention after service of the sentence declared unconstitutional by the Supreme Court *en banc*. As stated above, consequences to a person, however, are less favourable.

8. The judgment does not answer the question what the state may do within "advancing the existing system of sanctions and other measures" to decrease the danger arising from dangerous criminals with criminal tendencies, also referred to in paragraph 91 of the judgment. The opinion of the Supreme Court *en banc*, stated in paragraph 92 of the judgment, that the safety of the society can be increased effectively enough also by infringing personal liberty less appears to be merely a slogan. The measures indicated in paragraph 93 of the judgment do not guarantee the safety of the society to the same extent as detention after service of the sentence. However, it also raises the question of based on which provision of the Constitution the application of the said measures which also restrict liberty could be acknowledged, i.e. by which provision the Supreme Court *en banc* justifies the application of, among other, § 871 of the PC and other non-punitive sanctions after service of the sentence.

9. It is unclear why the Supreme Court *en banc* analysed at all the constitutionality of detention after service

of the sentence in the light of § 23(1) of the Constitution in terms of compliance with the requirement for specification, if it was found that the entire institute is unconstitutional.

10. We agree that by its intensity, detention after service of the sentence may be viewed as a punishment within the meaning of § 23 of the Constitution which shall be covered also by the guarantees according to that provision. We also agree that the prerequisites for and the consequence of the application of detention after service of the sentence shall be specified sufficiently clearly (see paragraph 66 of the judgment). However, we do not concur that detention after service of the sentence has not been sufficiently specified and is therefore in contradiction with § 23(1) of the Constitution.

The Supreme Court *en banc* has justified its opinion, above all, by saying that the delimitation of the scope of application of the provision by means of a long list of elements of criminal offences and many characteristics restricting the list complicates the establishment of the scope of application (see paragraph 69), that it does not appear from § 87^2(2)1) and 2) of the PC to which convictions and impositions of a punishment these apply (see paragraph 70), and that § 87^2(2) of the PC does not specify criminal tendency nor regulate the establishment thereof sufficiently (see paragraph 75).

11. We find that the vaguenesses referred to in the judgment are not such which would justify the viewpoint that detention after service of the punishment is unconstitutionally unspecified. Although the wording of § 87^2(2) of the PC really is somewhat complex, it is possible to understand for which acts detention after service of the sentence is applicable, and the vagunesses referred to by the Supreme Court *en banc*in understanding the formal prerequisites for detention after service of the sentence can be furnished by case-law. The same applies to the furnishing of the definition "criminal tendency" which can also be done through case-law. Danger is predicted also in imposition of a punishment upon the application of the second sentence of § 56(1) of the PC, and e.g. in case of release on parole under § 76 or 77 of the PC, but also in case of placing a person in a closed institution in civil proceedings.

In our opinion a person can understand and foresee that his or her acts may result in the application of detention after service of the sentence. Considering the limits of concrete norm control, the Supreme Court *en banc* should have assessed § 87^2(2) of the PC in terms of V. Koemets and the acts committed by him. We hold that there is no doubt that the accused at trial would have been able to understand the possibility of application of detention after service of the sentence for his acts indicated in the county court judgment.

12. We do not rule out that § 87^2(2) of the PC could have proven to be in contradiction with the Constitution on other grounds. That, however, would have required verification of the application of the provision in respect of acts committed prior to the entry into force of the provision, and performance of, above all, verification of the proportionality of the provision, assessing, among other, the limited discretion of the court in application of detention after service of the sentence.

13. All in all, we are of the opinion that the Supreme Court *en banc* did not wish to deal with the merits of the institute of detention after service of the sentence and assess its necessity and permissibility in substance, but so-called blocked it unfoundedly with immediate unconstitutionality on the basis of § 20 of the Constitution. The Supreme Court *en banc* basically expressed that since in its opinion the institute is incompatible with the applicable penal law (danger is in the opinion of the Supreme Court *en banc* obviously an issue of imposition of punishment), it simultaneously also means unconstitutionality.
