

**Plenary Session. Judgment 132/2010, of December 2, 2010 (Official Spanish Gazette number 4, of January 5, 2011).**

STC 132/2010

The plenary session of the Constitutional Court, composed of Ms. María Emilia Casas Baamonde, President, Mr. Guillermo Jiménez Sánchez, Mr. Vicente Conde Martín de Hijas, Mr. Javier Delgado Barrio, Ms. Elisa Pérez Vera, Mr. Eugeni Gay Montalvo, Mr. Jorge Rodríguez-Zapata Pérez, Mr. Ramón Rodríguez Arribas, Mr. Pascual Sala Sánchez, Mr. Manuel Aragón Reyes and Mr. Pablo Pérez Tremps,

Magistrates

has passed

**EN NOMBRE DEL REY**

the following

**SENTENCE**

On the question of the unconstitutionality number 4542-2001, presented by the Court of First Instance number 8 of A Coruña, regarding article 763.1, first and second paragraphs, of Law 1/2000, of January 7, of civil procedure, due to the possible infringement of the articles 17.1 and 81.1 of the Constitution. The State Attorney and the State Attorney General have taken part. The reporting judge has been Magistrate Eugeni Gay Montalvo, who expresses the Court's opinion.

**I. FACTUAL BACKGROUND**

1. On August 8, 2001, the written report of the holder of the Magistrate Court of First Instance no . 8 A Coruña was received at the General Registry of the Court, along with the testimony of the non-contentious jurisdiction proceeding number 48-2001-C processed by that judicial body, Resolution of said Court of July 31, 2001 in which it is agreed to refer to this Court the issue of the unconstitutionality regarding article 763.1, first and second paragraphs, of the Law 1/2000, of January 7, of civil procedure, due to its possible infringement of the Constitutional articles 17.1 and 81.1.

2. The question of unconstitutionality arose from the non-contentious jurisdiction proceeding number 48-2001-C followed in the Court of First Instance number 8 of A Coruña regarding the involuntary internment of a legal age person in a psychiatric hospital.

Of the various actions remitted by the judicial body petitioner, it turns out that the main events which give way to the consideration of this question are the following:

a) On June 20, 2001 a citizen appeared before the judicial authority asking for the pertinent authorization for the internment of her uncle, of legal age, in a psychiatric hospital, pleading that he suffered from mental disorders and alcoholism.

b) By order dated June 20, 2001 the Court of First Instance number 8 of A Coruña admitted the appearance in court and initiated the non-contentious jurisdiction proceeding number 48-2001-C, arranging for the following day, 21, the examination of the affected party and the preparation of a forensic report on his state of health and the convenience of agreeing to the targeted internment measure.

c) Having verified the aforementioned examination, the Court, by Order dated June 25, 2001, agreed, in accordance with article 35.2 of the Constitutional Court Organic Law (CCOL), requires the parties and the Public Prosecutor, within ten days and with suspension of the proceeding, to plead what they consider appropriate in relation to the relevance of the constitutional issue raised in connection with article 763.1, first and second paragraphs, of the Law 1/2000, of January 7, of civil procedure, due to the possible infringement of the articles 17.1 and 81.1 of the Constitution.

d) The Public Prosecutor brought an appeal for reversal against the previous writ, pleading that the procedure had not concluded yet, since the hearing of the Public Prosecutor envisaged in article 763.1 of the Law of Civil Procedure (LCP) had been omitted. Said appeal was upheld by the Resolution of July 13, 2001. When the procedure was finally concluded with the previously omitted proceeding being held, the Court newly agreed, by Order dated July 17, 2001, to require the opinion of the concerned parties in accordance to article 35.2 LOTC and in the terms established in the abovementioned order dated the previous June 25.

e) The Public Prosecutor submitted its pleading in written form on July 27, 2001, concluding that consideration of the issue of unconstitutionality was appropriate. In its opinion, and after making sure all necessary procedural circumstances were satisfied for the consideration of the issue, the reasons stated in the STC 129/1999, dated July 1, and in the accompanying dissenting vote were sufficient for considering that the doubt regarding the unconstitutionality of article 763.1, first and second paragraphs, of the Law 1/2000, of January 7, of civil procedure was not groundless, the Public Prosecutor highlighting the admission of the issue brought up at the time by the same Court in relation to article 211, first and second paragraphs, of the Civil Code (C.I. number 4511-1999) whose content is now included in article 763 LCP.

f) No other pleadings were submitted.

g) By Resolution dated July 31, 2001 the Court of First Instance number 8 of A Coruña agreed to consider this issue of unconstitutionality.

3. In the opinion of the judicial body which brings up the issue, the right of personal freedom established in article 17.1 of the Constitution reaches those who are subject to a judicial internment decision referred to in article 763 LCP, as results from the doctrine of this Constitutional Court (SSTC 104/1990 and 129/1999), so such provision, being a rule which establishes one of the cases in which a person may be deprived of liberty, attends to the development of the fundamental right guaranteed by article 17.1 of the Constitution and should, therefore, have the nature of an organic law, as required by article 81.1 of the Constitution and is recognized in the STC 129/1999, dated July 1, on the occasion of an issue

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brought up in relation to the second paragraph of this same article 211 of the Civil Code. However, the provision questioned does not have such nature, which would imply, for the Court, its unconstitutionality and nullity due to infringement of articles 17.1 and 81.1 of the Constitution.

4. By Order dated October 2, 2001 the Third Section agreed to hear this issue of unconstitutionality and refer the proceedings received, as established in article 37.2 of the CCOL, to Congress and the Senate, through their respective Presidents, to the Government, through the Minister of Justice, and likewise to the State Attorney General with the objective that, in the next fifteen days, they could involve themselves in the process and make submissions. It was agreed as well to publish the initiation of the proceedings in the "Official Spanish Gazette". This was verified in number 244, dated October 11, 2001.

5. By letter registered in the Court on October 18, 2001, the President of the Senate communicated to the Court that Parliament, in the meeting of the previous October 16, had agreed to appear in the proceedings and offer its collaboration for the purposes of article 88.1 of the CCOL.

6. The President of Congress, communicated by letter registered on 19 October 2001, that Bureau of the Chamber, at the meeting of the previous day, 17, had agreed that the House of Representatives would not act in the proceedings nor would formulate pleadings, putting at the disposal of the Court the acts of the Chamber that may need, with referral to research and Documentation Directorate of the General Secretariat.

7. The State Attorney, in her legal representation, presented written pleadings on October 23, 2001. The government's legal representative begins by pointing out that the article 763.1, first and second paragraphs, of the Civil Code is challenged by a purely formal reason, without any objection arising from the point of view of its content in relation to the articles 17 and 81 of the Constitution, otherwise endorsed in the SSTC 104/1990 and 129/1999, referred to the article 211 of the Civil Code, repealed by article 763 of the LCP, in whose parliamentary elaboration the doctrine established in said declaration was kept in mind. Next, the State Attorney pleads that this issue of unconstitutionality is similar to the one brought up, with number 4511-1999, by the same judicial organ regarding article 211, first paragraph, of the Civil Code, so the government's representative understands the pleadings formulated in such proceed are applicable to this one.

The State Attorney affirms, firstly, that the demand of judgment relevance requires the exclusion from this process the part of the provision dedicated to minors and emergency internment, due to fact that neither circumstance takes place in the proceeding below. Furthermore, Law 1/2000, of civil procedure, has repealed, among others, the previously challenged provision, substituting its mandate with article 763 LCP. Nevertheless, the new juridical regime would not come into force until January 8, 2001, so the issue would maintain its purpose until said date.

Those clarifications being made, the State Attorney reiterates that the Judicial Decree which raises the issue does not formulate any objection to the allowance of a supposed restriction on personal freedom motivated by the cause of mental disorders which requires the internment of someone which cannot look after himself, subject to receiving court approval, a prior medical report and hearing for the

affected person. This results, on the other hand, from the SSTC 104/1990 and 129/1999. The issue is limited, therefore, to the rank of the standard, the Court understanding, in line with the dissenting Vote of the STC 129/1999, that the internment is a deprivation of liberty which affects that fundamental core of the right recognized in article 17 of the Constitution and that, by the application of article 81.1 of the Constitution that limitation can only be made by organic law.

The State Attorney understands that the deprivation of liberty imposed by article 763 of the LCP, while stressing the right of personal freedom proclaimed in article 17.1 of the Constitution, is sufficiently enabled by an ordinary law, due to the fact that the supposed entitling event does not require the additional guarantee which involves the reserve of the organic law. Attending the literal sense of article 17.1 of the Constitution –the pleading continues with-, "even if the deprivation of liberty is applicable to all the supposed restrictions of freedom, it cannot be denied that it is in a context... referred to the limitations of freedom which are originated from a criminal cause, either because they refer to the investigation and the assurance of responsibility in the case of crimes or criminal sentences which are a consequence of a prior criminal ruling". The jurisprudence cited in the Judicial Decree approach has delivered precisely on such assumptions, substantially different to the one which has motivated this proceeding. Because of this, the government representative affirms that the precedents referred to shall be placed in their "context, which is the protection against arbitrary detentions without judicial control or limits, with punitive purposes", which has frequently resulted in that the Court has linked the mandate of article 17 of the Constitution to the principle of criminal legality of the article 25 of the Constitution, which it has identified, through its relation to article 81.1 of the Constitution, with the exception of the classification of crimes and their penalties in the organic law. So it would result from the doctrine summarized in the STC 17/1987 and from the decision in STC 104/1990 in connection with a supposed case similar to the present.

The State Attorney then considers the differences, which he considers evident, between the restriction of liberty motivated by the investigation of a crime and the internment of someone who suffers from a mental disorder. The former arises from the commission of a crime proven in a proceeding, it has the duration determined by law and its aim is to ensure, either the investigation of a crime or the execution of the imposed sentence, in other words, it responds to reasons of public safety and is imposed in the interest of society as a whole. The latter is established fundamentally for the benefit of the affected person—who cannot take care of himself- and consists of his admission into a center in which he will be treated of his illness. The protection of the right of freedom applies to this case in that both the law and its application must assure the existence of the supposed (the intensity of the illness), the affected must be examined and heard, a medical expert shall intervene and it must be meditated by judicial decision.

One measure of these characteristics – the representative of the government continues- has a much greater relationship to the provisions of article 49 of the Constitution, a provision that would authorize the internment, "operating as the best development and, obviously, the best guarantee of the right of freedom." The article 763 of the LCP would be a realization of the constitutional mandate established in article 49 of the Constitution indicating the treatment, rehabilitation and integration of people with physical, mental or sensory disabilities.

Alternatively, the State Attorney understands that if an organic law enabling the internment were considered essential, it could be argued that in article 763.1 of the CCOL one finds an organic authorization in the article 101 of the Criminal code, being "a solidification, in the civil scope, of the generic authorization contained in the Criminal Code, of which it is a mere development". A thesis that would make sense given the procedural nature of the law of civil procedure which does not contain provisions of a substantial nature. And if, yet, the Constitutional Court considers that the disputed provision should have been passed as an organic law, the State Attorney pleads that the fact that it was passed by "no less than 317 voted out of 319 casted" should be considered relevant, since, even if they were conscious of the procedural specialty provided in article 81.1 of the Constitution, the government representative believes that, "given the specificity of the matter at issued in the provision which concerns us here and, in contrast, the generality and scope of the Law of Civil Procedure in which it is included, it seems that the majority which passed the final draft of the regulation must be considered significant", since what is important is that "the reinforced guarantee is to ensure the requirement of Organic Law has existed in this case".

And if, in spite of everything –the pleading concludes-, the Court were to believe that the issue must be upheld, the State Attorney asks it to consider "the possibility of issuing a ruling which, using formulas such as the one called deferred unconstitutionality' or a similar one, allows the reduction of as much as possible of the undesirable practical consequences that could derive from an unconstitutionality ruling without mitigation, in line with the doctrine established in pronouncements such as those contained in the SSTC 195/1998 and 235/1999.

In light of all the foregoing, the State Attorney wishes that the judgment be rendered declaring that the questioned provisions are in accordance to the Constitution.

8. The written pleading of the State Attorney General was registered on October 29, 2001. After referring to the background of the case, the State Attorney General highlights that the STC 129/1999, dated July 1, dismissed an issue of unconstitutionality which referred to the second paragraph of article 211 of the Civil Code, in which it was clearly stated that the determination of the supposed cases in which there is a prior deprivation of liberty is subject to the organic law, in accordance to Articles 53.1 and 83.1 of the Constitution, since it is unquestionable that such definition constitutes a case of "development" and not a mere "involvement" of a fundamental right.

Accordingly, the State Attorney General believes that "so that article 763.1, first and second paragraphs, of the LCP can be considered, from a formal point of view, compatible with the requirements derived from articles 17.1, 53.1 and 81.1 of the Spanish Constitution for the regulation of the limitations of fundamental rights, it would be necessary that said provisions had an organic law rank, of which, as it has previously been mentioned, they lack, which inevitably leads to it being declared null and void under the provisions of article 39.1 of the Constitutional Court Organic Law and, therefore, to its expulsion from the legal system".

The written pleading then recalls that the doctrine followed by the Constitutional Court (SSTC 112/1988 and 129/1999) follows the one established by the jurisprudence of the European Court of Human Rights

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on the conditions and circumstances in which the deprivation of liberty of the insane person (cases Winterwerp, dated October 24, 1979, and Ashingdane, dated May 8, 1985) may be agreed, and recalls that the purpose of this question is reduced to the formal defect allegedly suffered by the questioned regulation.

Regarding the extent of the unconstitutionality declaration which we are dealing with, the Attorney General pleads that it is necessary to consider if its effects should also reach the regulation of internment of minors regulated in article 763.2 of the LCP, an issue that, in his opinion, should have a negative answer, on the one hand, because article 763.1 of the LCP includes both adults and minors and, on the other, because in article 763.2 CP it does not establish those cases raising deprivation of liberty but the centers where the internment shall take place and some steps of the procedure that must be followed in all cases, issues which do not entail a development of law, but at the most, involvement of the same.

Due to all this, the State Attorney General asks for a sentence that declares article 763.1, first and second paragraphs, of the Law 1/2000, dated January 7, of civil procedure null and void, for being contradictory to articles 17.1, 53.1 and 81.1 of the Constitution.

9. By Order dated June 15, 2009 the Plenary court agreed, in accordance with article 10.1.c) LOTC as amended by the Organic Law 6/2007, of May 24, to defer to the Second Chamber, which in turn becomes seized of this matter.

10. By Order dated June 15, 2009, the Plenary agreed become seized of this issue.

11. By Order dated November 29, 2010 this Sentence was fixed for deliberation and vote on December 2 of the same year.

## II. LEGAL REASONING

1. The present issue of unconstitutionality brought by the Court of First Instance number 8 of A Coruña aims to determine the possible unconstitutionality of article 763.1, first and second paragraphs, of the Law 1/2000, of January 7, of civil procedure (CP), for violation of the Organic Law established in the articles. 17.1 and 81.1 of the Constitution.

Article 763.1 of the LCP regulates both the authorization of the Judge to determine the forced internment measure of those people who suffer from mental disorders and the procedural rules for the formation of the judicial decision to detain.

As it has previously been described, the Court of First Instance number 8 of A Coruña understands, in accordance with the doctrine established in the STC 129/1999, of July 1, that article 763.1, first and second paragraphs, of the Law 1/2000, of January 7, of civil procedure, in is as much as establishes a supposed case in which a person may be deprived of his liberty, should have been passed as an Organic Law, should be considered unconstitutional for infringing articles. 17.1 and 81.1 of the Constitution.

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The State Attorney General shares the view of the judicial organ, in that he defends the constitutionality of article 763.1, first and second paragraphs, of the Law of civil procedure with the argument that the doctrine the Court refers to- and article 17.1 of the Constitution – refers to the supposed cases of deprivation of liberty in the criminal field, so the measure of internment in a mental health facility provisioned in the contemplated precept would be connected to article 49 of the Constitution, whose mandate would include a concrete guarantee of the rights of handicapped people with mental disorders, it could also be considered a realization, in the civil scope, of the generic authorization contained in the Criminal Code for the deprivation of personal liberty, of which it would be a mere development, so the specific coverage of an Organic Law would not be necessary.

2. The constitutional question considered in this proceeding by the Court of First Instance number 8 of A Coruña strictly refers to that the judicial organ understands that the questioned regulation should have been passed as an Organic Law.

Due to all this, prior to any consideration, it is important to recall, in the first place, that article 763 of the LCP was introduced by the Law 1/2000, dated January 7, of civil procedure, drafted, passed and enacted as an ordinary law.

Similarly, it is necessary to recall that the doubt of constitutionality which we must resolve has already been answered in the STC 129/1999, of July 1, which resolves the issue posed by the Court of First Instance and Instruction number 6 of Orihuela (Alicante), in conjunction with article 211, second paragraph, of the Civil Code, as amended by Law 13/1983, dated October 24, reforming the Civil Code in guardianship matters.

On that occasion we pointed out that "the right to personal freedom established by article 17.1 of the Constitution reaches, obviously, those who are the subject of the judicial decision of internment referred to in article 211 of the Civil Code. It is, indeed, doctrine of this Court that in the cases and manner mentioned in article 17.1 " the considerations must include the 'regular detention... of an insane person' to which article 5.1 of the European Convention on Human Rights refers" (STC 104/1990, legal basis 2). While constituting of a deprivation of liberty, it is obvious that the decision to detain can only be determined judicially and, as relevant here, that the provision which made it possible can only be an organic law, since, given its status as one of standard setting where person may be deprived of liberty, it is part of the development of the fundamental right guaranteed in article 17.1 (STC 140/1986)." (FJ 2).

However, this Judgment did not consider necessary the form of Organic Law for the questioned article (article 211, second paragraph, of the Civil Code, as amended by Law 13/1983, dated October 24) because it is related to procedural rules for the formation of the judicial decision to detain. According to this doctrine, the requirement of Organic Law is limited to "the regulation that in our Law allows the internment of people who suffer from mental disorders" (STC 129/1999, FJ 2).

This doctrine has been reiterated in today's Judgment, December 2, 2010, handed down on the issue of unconstitutionality number 4511-1999, brought by the same Court of First Instance number 8 of A Coruña who raised the present issue about the possible violation of articles 17.1 and 81.1 of the

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Constitution by the article 211, first paragraph, of the Civil Code, and, where appropriate, with the final twenty-third provision of the Organic Law 1/1996, dated January 15, on the legal protection of children, which regulated this same measure of forced interment of the people who suffer from mental disorders before the entry into force of the Law 1/2000 of civil procedure.

3. The application of said doctrine to this case leads us to declare the unconstitutionality of those subsections of the first and second paragraphs of articles 763.1 of the Law 1/2000, dated January 7, which make the decision of non-voluntary internment for reasons of mental disorder possible, since this constitutes a deprivation of liberty, this measure can only be regulated by Organic Law.

This is the case of the first subsection of the first paragraph of aforementioned article 763.1 of the LCP, according to which "the internment, for mental disorder reasons, of a person who is not in conditions of deciding it for himself, even if he is subject to parental authority or guardianship, shall require a judicial authorization", and of the first subsection of the second paragraph of the same article with established "the authorization will be previous to said internment, unless reasons of urgency make the adoption of the measure necessary immediately".

Certainly in both cases we face provisions which are included in an ordinary law and have this nature which, nevertheless, regulates a subject that, in accordance with the doctrine established in STC 129/1999, FJ 2, is a subject reserved to organic law (articles 17.1 and 81.1 of the Constitution), so they violate article 81.2 of the Constitution .

To this declaration of unconstitutionality we need not tie into this case a declaration of nullity since it would create an undesirable vacuum in the legal system, especially not having questioned its material content. Furthermore, as we recall in the aforementioned Judgment of today in the issue of unconstitutionality number 4511-1999, (FJ 4), the possibility of not linking unconstitutionality and nullity has been recognized by our jurisprudence.

Consequently, we are before a violation of the Constitution that only the legislator can remedy; for which reason it is obligatory to urge him to shortly proceed to regulate the non voluntary internment for reasons of mental disorder measure by organic law.

4. Similarly, the application of the doctrine established in STC 129/1999, newly reiterated in the Judgment of this same date dictated in the issue of unconstitutionality number 4511-1999, leads us to dismiss the doubt of constitutionality brought up by the Court which promoted this issue in relation to the other subsections of the first and second paragraphs of article 763.1 of the Law 1/2000, which establish the procedural rules for the formation of the judicial decision of internment for reasons mental disorder, so they do not contain a regulation which should be considered included in the scope reserved for organic law.

WE DECIDE

In light of all the foregoing, the Constitutional Court, IN CONNECTION WITH THE AUTHORITY CONFERED BY THE CONSTITUTION OF THE SPANISH NATION,



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Has decided

To partially uphold the present issue of unconstitutionality and, in consequence:

To declare unconstitutional, with the effect established in the legal basis 3 of this Sentence, the subsection "the internment, for psychic disorder reasons, of a person who is not in conditions of deciding it for himself, even if he is subject to parental authority or guardianship, will require a judicial authorization" of article 763.1, first paragraph of the Law 1/2000, of January 7, of Civil Procedure.

To declare equally unconstitutional, with the same effect, the subsection "the authorization will be prior to said internment, unless reasons of urgency make the adoption of the measure necessary immediately" of article 763.1, third paragraph, of the same Law.

To dismiss the remainder of the issue.

Publish this Sentence in the "Official Spanish Gazette".

At Madrid, on December second two-thousand and ten.