



## SUNICOP

### Protection of HR's

What is more important

- regulatory level
- adjudication?

## ANOTHER DIALOGIC INTERACTION

### o after

- **retroactive taxation** in the Constitution (Act XX of 1949); **curtailment** of the competences of the Constitutional Court (2010 autumn)
- **fast constitution-making** process (debate in the Parliament between 14 March-18 April 2011)
- **withdrawal of „legal status of church”** from churches could not meet requirements introduced by the new Act

### o **there is an overruling** of another decision of the Constitutional Court on

- the interpretation of due process, right to lawful judge, impartiality, equality of arms
- right to decision in reasonable time

### o **and a questionable compliance with** the opinion of the Venice Commission

# CONSTITUTIONAL COURT

## Act on Criminal Procedure:

Prerogative of prosecutor to bring a case to other court

??



## ECHR, Constitution, case laws:

right to lawful judge  
impartiality  
equality of arms

### Hussein case

„...**impartiality** for the purposes of Article 6 § 1 must be determined according to a **subjective test**, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an **objective test**, that is, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect...”

„...even **appearances** may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, in the accused.”

### Bulut case

„...under the **principle of equality of arms**, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under **conditions that do not place him at a disadvantage vis-à-vis his opponent** [...]. In this context, **importance is attached to appearances** as well as to the **increased sensitivity to the fair administration of justice**...”

### DMD GROUP case

“the paramount importance of **judicial independence and legal certainty** for the rule of law call for **particular clarity of the rules applied** in any one case and for clear safeguards to ensure objectivity and transparency, and, above all, **to avoid any appearance of arbitrariness in the assignment of particular cases to judges** [...].”

## Decision of the Constitutional Court (20 December 2011) unconstitutionality

- a wide range of discretionary power
- the “lawfulness” of the decision is based on only his declaration
- no clear parameter or control mechanism
- there are no transparent and clear and objective parameters
- assignment of other courts is possible within the judiciary

Case laws

**1**  
**Prerogative of  
prosecutor**

**Constitutional Court  
annulment  
20 December 2011**

**OVERRULING**

**Transitory provisions to  
the Fundamental Law  
23 December 2011**

**2**  
**Assignment of  
other courts by  
the President  
of the NJO**

**Act on  
administration  
of courts**

**Venice  
Commission**

## VENICE COMMISSION – OPINION

- the reasonable time requirement is not absolute (see also case laws)
- the right to a lawful judge for a fair trial ➔ **less intrusive means** (sufficient number of judges and court staff)
- **general criteria** (alphabetical order, a computerised system or other objective criteria such as categories of cases)
- **regulatory level** (law, special regulation, but cannot remain on the level of internal guidelines; the NCJ should have a decisive role)
- **expertise**
- **no discretionary power**  
for the President of the NJO

## REACTION OF THE GOVERNMENT (DRAFT MODIFICATION)

Section 62 (1) is altered as follows:

(1) The President of the NJO may – **taking the principles set by the National Council of Judges into account** – as an exception, appoint a court with the same competence for the assessment of a case instead of the competent court if the case or a specific group of cases received by the court during a given period cannot otherwise be assessed within a reasonable time due to the extraordinary and disproportionate work load of the court and if the appointment does not result in a disproportionate burden for the appointed court.

Section 76 (4) b) is altered as follows:

... the President of the NJO shall [...] b) **by taking the principles set by the National Council of Judges into account** designate another court to proceed instead of the presiding court if so necessitated by the objective of adjudicating cases within a reasonable period of time.

## CONCLUSION IN A WIDER PERSPECTIVE

- New and different kind of
  - constitutional arrangement is built
  - balancing between rights and values is established
- It is a general rule to
  - overrule Constitutional Court decisions
  - disregard opinions
- Lack of understanding of
  - democratic principles
  - values of Europe and the European Union
- Misusing the majority by the political decision maker



# THANK YOU FOR YOUR ATTENTION!