

SUMMARY OF THE JUDICIAL ACTIVITY OF THE CONSTITUTIONAL COURT IN 2021

1. General references; brief comparative overview: the period 2021-2019.

Although fully affected by the state of alert, the year 2021 was one of intense activity for the Constitutional Court.

The restrictive conditions imposed by the COVID-19 pandemic have led to the implementation of specific administrative measures, responding to the need to prevent the infection of the Court's staff, to the deployment of computer software and applications that allow employees to work remotely, where and when possible. At the same time, all the necessary steps were initiated and finalized for the litigants to have access to the electronic case files on the docket of the Constitutional Court, in parallel with maintaining the physical access to the Court's headquarters for the study of the case files.

➤ Thus, *in terms of technological evolution related to the legal-administrative measures*, we note, for 2021, the internal procedures for launching and implementing, starting with 1 September 2021, the computer program for ensuring access to electronic case files, and changing the method of notification of the parties, measures that required the amendment and completion of the Regulation on the organization and functioning of the Constitutional Court by the Decision of the Plenum of the Constitutional Court No. 9 of 23 June 2021, published in the Official Gazette of Romania, Part I, No. 702 of 15 July 2021 .

Although these measures were not an absolute novelty in the general judicial landscape of our country, the Court's website published explanatory notices, as well as instructions for accessing the electronic case files, and the IT and specialized staff of the Court have made and continue to make sustained efforts for providing technical assistance to litigants / parties who encounter difficulties in requesting access to the electronic case files. The increasing use of technological means of communication and access to remote information via the Internet is a reaction of institutional adaptation and response during the pandemic period and is already an "asset" through its many benefits, therefore the effort of adaptation to the new digital age must be combined and made in both directions, not only in order to quickly remove any communication blockages and provide access to the relationship between citizens and public institutions, but also to streamline and accelerate the efficiency of public activity in the service of litigants.

Similarly, for the most efficient use of administrative resources in the process of ensuring free access to constitutional justice, the Court initiated, simultaneously with the access to the electronic case files, *the procedure of notifying the parties and the Public Ministry* on the hearing date established for resolving the objections of unconstitutionality by *posting the hearing lists, by date, on the Court's website*. For the authors of the objections, the classic procedure of summoning was maintained, by civil registered mail, and the restoration of the procedure is operated by telegrams sent to the postal service by e-mail (*e-letter*).

➤ Strictly regarding *the judicial activity of the Court*, the year 2021 stands out with a record number of **cases registered** in the last 3 years (2021-2019) namely **3,964 referrals**, which represents an over 50% increase compared to the number of referrals addressed to the Constitutional Court during the year 2020 (2518) and an almost 15% increase compared to the number of cases registered in 2019 (3462).

The activity of the Court in 2021 also stands out, in relation to the same reference period, in terms of the record number of **solved cases**¹, namely **2,245**, which reflects a significant increase, by over 50% compared to the number of solved cases in 2020 (1473 cases) and by over 25% compared to the number of cases solved in 2019 (1762 files).

Regarding the **number of judicial acts** issued in 2021, it remains within the average levels of the last 3 years, namely: **904 decisions** in 2021, compared to 907 decisions and rulings issued in 2020, and 952 in 2019.

A significant difference registered in 2021 compared to the indicators of 2020 is found in the number of admission decisions, through which the Court found the unconstitutionality of the legal text under analysis. Thus, although the number of judicial acts issued during the last 3 years is comparable, in 2021 only **49** of the 904 decisions pronounced represent **admission decisions**, which represents 5.42% of the total, a decrease from 9.92 % (90 decisions), corresponding to 2020 and 6.93% (67 decisions) corresponding to 2019

With regard to **institutional performance**, it should be noted that, although more than 50% more cases were settled in 2021 than in the previous year, the number of cases still "in queue" pending before the Court did not decrease accordingly, since it depends directly on the number of referrals addressed to the Court². Given that, in connection with this increase in the settlement of cases, the same increase was recorded in 2021 in terms of the

¹ Cases settled in a given year do not necessarily refer exclusively to those registered in the same year, but mainly concern cases registered in previous years.

² In order to provide an order of magnitude, on the Court's docket there are between 70-100 new cases registered / week.

number of referrals, and the number of cases still pending at the report stage before the Court, which includes previous years, remains on average the same or even increases, although there is the constant concern of judges and assistant judges of the Court for an efficient and useful constitutional justice, by shortening the time needed to settle an objection of unconstitutionality registered before the Court, so that the drafting of the report, setting the hearing date and drafting the decisions comply, as much as possible, with reasonable time limits. However, one cannot disregard the high load upon the Court³, the complexity of the cases, as well as the rule of settling the cases in the chronological order of their registration. At the same time, an important cause for the delays is the still insufficient number of assistant judges, which is why in early 2022 the competition procedure for filling in four vacant assistant judge positions was started by the Constitutional Court.

2. The types of referrals registered in 2021

The 3,964 referrals registered in 2021 are classified, according to the criterion of the powers exercised by the Constitutional Court according to Article 146 (a) – (l) of the Constitution, as follows:

- **Article 146 (a) – constitutionality review of laws prior to promulgation - 15 cases⁴**

The referrals were made by the following authors/subjects of law:

- The President of Romania – 3, out of which 2 were admitted;
- The Government – 3, out of which 3 were admitted;
- The High Court of Cassation and Justice - 1, out of which 1 was admitted;
- The Advocate of the People - 2, out of which 2 were admitted;
- deputies and senators (belonging to the parliament groups of PNL, USR, AUR, PSD, minorities) – 6, out of which 4 were admitted.

- **Article 146 (c) - constitutionality of the Parliament's Standing Orders, referral made by a parliament group - 1 case;**

- **Article 146 (d) – objections of unconstitutionality – 3.939 referrals;** of these, 10 were raised directly by the People's Advocate, of which one referral was admitted;

³ At the time of writing this activity report, the Court's docket has, in total, approximately 8000 files in the reporting stage, registered between 2019-2022.

⁴ 8 of the 15 referrals were settled by decisions issued in 2022

- **Article 146 (e) - legal disputes of a constitutional nature between public authorities: 2 cases** (1 referral submitted by the President of the Senate, dismissed, and 1 referral from the Government, admitted);

- **Article 146 (l) - constitutional review of decisions issued by the Senate/Chamber of Deputies/Parliament - 7 cases⁵**; out of these complaints, made by parliament groups of senators and/or deputies, two concerned decisions of the Senate and were dismissed by the Court, and the remaining five referred to decisions of the Parliament, which were found to be unconstitutional.

3. The typology of judicial acts issued in 2021

In 2021, the Constitutional Court issued 904 decisions, 49 of which represented admission solutions (in whole or in part) of the pleas of unconstitutionality, which reflects an admission percentage of 5.42% of the total number of its judicial acts issued during this year. Their distribution according to the powers of the Court is as follows:

| POWERS / object of the constitutionality review | ADMISSIONS | DISMISSALS |
|--|-----------------------|------------------------|
| Law before promulgation [Article 146 (a) of the Constitution] – a total of 19 decisions | 14 (73,68%) | 5 (26,32%) |
| Standing Order of the Parliament – Article 146 (c) – a total of 1 decision | 0 (%) | 1 (100%) |
| Objections of unconstitutionality [Article 146 (d) of the Constitution] – a total of 875 decisions | 29 (3,31 %) | 846 (96,69%) |
| Legal conflict of a constitutional nature | 1 (50,00 %) | |

⁵ 2 of the 7 referrals were settled by decisions issued in 2022

| | | |
|---|---|------------------------|
| between public authorities [Article 146 (e) of the Constitution] – a total of 2 decisions | | 1 (50,00 %) |
| Parliament decision [Article 146 (l) of the Constitution] – a total of 7 decisions for review | 4 (57,14 %) | 3 (42,86%) |
| Total - 904 decisions | 49 (5,42%) see the website www.ccr.ro , Case law – Admission decisions Section | 846 (96,69%) |

4. 2021 versus 2020

The two reference years are characterised by the same conditions specific to the state of emergency (March-April-May 2020) and then to the state of alert imposed by the authorities due to the COVID-19 pandemic.

As concrete results of the current judicial activity of the Constitutional Court, counted in the number of judicial acts handed down, the two years are comparable: 907 decisions and judgments in 2020 and 904 decisions in 2021.

A remarkable difference is recorded in the number of referrals to the Court, where 2020 was exceeded by more than 50 %, but also with regard to their typology, i.e. the distribution according to the powers of the Court established by Article 146 a) to l) of the Constitution.

Thus, the most striking distinction is observed with regard to the referrals concerning the review of constitutionality of laws prior to promulgation: if in 2020 they reached a record number of 105 referrals, only 15 such referrals appear in 2021, symbolising, in this respect, a “return to normality”. However, despite the significantly different number of referrals of this kind, the percentage of admission decisions issued by the Court in the performance of this task remains within comparable limits, i.e. 73.68 % in 2021, compared to 71.42 % in 2020.

The Court's power with regard to the resolution of constitutional legal conflicts between public authorities also shows a major decrease in referrals, i.e. from 6 applications in 2020 to only 2 in 2021. In this situation too, due to the quality of the legal subjects lodging these types of referrals to the Court pursuant to Articles 146 a) and Article 146 e) respectively, a return to standards of normality can be noted, reflecting an active but balanced political scene in the process of appealing to the mechanism for triggering constitutionality review.

5. Activity of the Constitutional Court during the state of alert

In 2021, the activity of the Constitutional Court was carried out in compliance with all legal restrictions imposed by the alert state regime, due to the need to prevent the spread of the SARS-CoV-2 coronavirus.

In applying the legal measures thus ordered, the Constitutional Court has also taken a series of *administrative measures* aimed, in essence, at reducing public access to public hearings, reducing the physical presence of staff at the Court's premises, standardising working hours with the public, using predominantly the technological means of distance communication, while supplementing the specific measures of prevention and sanitary hygiene.

In conjunction with the need to comply with these restrictions, a software has been implemented at the level of the Constitutional Court to ensure that *the parties have access to the electronic file*, so that the procedural rights of individuals in the given context are not affected. At the same time, the parties' physical access to the Court's files was maintained, within the limits of a standardised programme with the public, on the basis of a prior telephone appointment and in compliance with all the requirements in force.

51 public hearings were held during 2021. They continued to take place in a *videoconference system*, with simultaneous physical presence, in the public hearing room of up to 10 persons, including the President of the Court/meeting, the Assistant-Magistrate appointed in the files at the hearing, the representative of the Public Ministry, the parties and/or representatives of the parties (lawyers, legal advisers, etc.), the technical support team. The constitutional judges watched the public hearing in real time, from their offices at the Court's premises, and could ask questions to the parties present through the President.

6. During 2021, the Constitutional Court issued 49 admission decisions. Of these, as in the previous year, those which focused on the issue of legislative measures taken in

the context of the coronavirus pandemic were of particular interest in society. Below I would refer selectively to some of these thematic decisions, as well as to others which also have a particular impact.

a) Decisions of the Constitutional Court of Romania on COVID-19.

1. DECISION No 100 of 17 February 2021 *on the objection of unconstitutionality of the Law approving the Government Emergency Ordinance No 168/2020 supplementing the Government Emergency Ordinance No 70/2020 regulating certain measures, as of 15 May 2020, in the context of the epidemiological situation caused by the spread of the coronavirus SARS -CoV-2, extending certain deadlines, amending and supplementing Law No 227/2015 on the Fiscal Code, the National Education Law No1/2011 and other legislative acts and amending and supplementing the Government Emergency Ordinance No 37/2020 on the granting of facilities for loans granted by credit institutions and non-banking financial institutions to certain categories of debtors (published in the Official Gazette of Romania, Part I, No 280 of 19 March 2021)* - by which the Court found that the law subject to constitutional review was adopted by the Chamber of Deputies in breach of the principle of bicameralism, whereas, on the one hand, it reveals the existence of essential differences in legal content and configuration between the forms adopted by the two Chambers of Parliament and, on the other, departs from the objective pursued by the initiator of the draft law and respected by the first Chamber seised - the Senate, namely the approval of the Government Emergency Ordinance No 168/2020, which led to its unconstitutionality, in its entirety, by reference to the provisions of Articles 61 (2) and Article 75 of the Constitution.

2. Decision No 392 of 8 June 2021 *on the exception of unconstitutionality of the provisions of Article 3 (2), Article 4 (1), second sentence and Article 72 (1) of Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, Article 72 (2) of that law, with reference to Article 42 (3) of the Government Emergency Ordinance No 21/2004 on the National Emergency Management System for Emergency Situations, as well as the provisions of the Government Emergency Ordinance No 192/2020 amending and supplementing Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, and amending Article 7 a) of Law No 81/2018 on the regulation of teleworking activities (published in the Official Gazette of Romania, Part I, No 688 of 12 July 2021)* - by which the Court found that the provisions of Article 72 (2) of Law No 55/2020 were unconstitutional, with reference to Article 42 (3) of the Government Emergency Ordinance No 21/2004, as well as the legislative solution in Article 72 (1) of Law No 55/2020, according to which the provisions of that law are to be supplemented by the

rules of common law applicable to the matter as regards the resolution of actions brought against Government decisions establishing, extending or terminating the state of alert, as well as the orders and instructions establishing the application of measures during the state of alert. The Court pointed out that Article 126 (6) of the Constitution enshrines judicial review of administrative acts of public authorities by means of administrative disputes, and the provisions of Article 72 (2) of Law No 55/2020 expressly exclude the application of Law No 554/2004 on administrative litigation, thus it follows that the provisions of Article 72 (1) of Law No 55/2020 do not meet the requirements of clarity and predictability arising from the constitutional provisions of Article 1 (5) as regards the determination of the judicial procedure applicable to such actions, and that it is not possible to determine from the content of the provision “the rules of common law applicable to the matter”. Moreover, the Court noted that the lack of clarity of the regulation has direct consequences on the exercise of the right of access to justice and of the right enshrined in Article 52 (1) of the Constitution, because the person concerned to lodge an appeal against a Government decision, order or instruction issued under Law No 55/2020 cannot identify the applicable procedural regulations. Therefore, the defect of unconstitutionality circumscribed to the absence of an effective remedy for challenging Government decisions establishing, prolonging or terminating the alert state and subsequent acts was penalised.

3. **DECISION No 672 of 20 October 2021** *on the referral of unconstitutionality of Decision No 5/2020 of the Parliament of Romania approving the state of alert and the measures introduced by the Government Decision No 394/2020 on the declaration of the state of alert and the measures which apply during its duration to prevent and combat the effects of the COVID-19 pandemic (published in the Official Gazette of Romania, Part I, No 1030 of 28 October 2021)* - by which the Court found that the contested Parliament Decision establishes a new form of parliamentary control over Government decisions within the meaning of their consent/rejection/amendment, a form of control which does not appear between the constitutional ranking mechanisms established to regulate the relations between the public authorities within the system of separation and balance of powers, enshrined Article 1 (4) of the Basic Law. As a result, the “approval” or “amendment” by the Parliament of the measures adopted by the Government through a decision is devoid of constitutional basis, distorts the legal regime of Government decisions, as acts implementing the law, enshrined in Article 108 of the Constitution and contravenes Article 61 (1) of the Constitution. At the same time, this hybrid act without any constitutional basis creates an uncertain legal regime from the point of view of the incidence of Article 126 (6) of the

Constitution, with the consequence of violating the provisions of Articles 21 and 52 of the Constitution, which enshrine free access to justice and the right of the person injured by a public authority. In addition, the Parliament's Decision No 5/2020 was adopted on the basis of Article 4 (3) of Law No 55/2020, a legal provision declared unconstitutional by the Constitutional Court's Decision No 457 of 25 June 2020, which means that the subsequent act of the Parliament is also devoid of constitutional foundation and has no legal effect, by virtue of the provisions of Article 147 (1) and (4) of the Constitution. The Court also noted that the unconstitutionality of the Romanian Parliament's Decision No 5/2020 has no consequence on the existence of the Government Decision No 394/2020 on the declaration of the state of alert and the measures applicable during its duration to prevent and combat the effects of the COVID-19 pandemic, a self-standing legislative act adopted in the implementation of the provisions of Article 4 (1) of Law No 55/2020 and which continues to produce legal effects in the form unchanged by the provisions of the Romanian Parliament's Decision No 5/2020.

b) Other relevant decisions:

1. **DECISION No 60 of 26 January 2021** *on the objection of unconstitutionality of the single article of the Law supplementing Law No 72/2016 on the pension system and other social security rights of lawyers concerning the term "before acquiring the status of insured person" (published in Official Gazette of Romania, Part I, No 186 of 24 February 2021)* — by which the Court found that the exclusion from entitlement to the 15-year reduction in the retirement age, under the social insurance scheme of lawyers, of insured persons who acquired a serious disability after insurance uptake in the said scheme constitutes discrimination, prohibited by Article 16 (1) of the Constitution, compared to insured persons with a pre-existing disability at the time of enrolment into the lawyers' insurance scheme.

2. **DECISION No 233 of 7 April 2021** *on the exception of unconstitutionality of the provisions of Articles 400 (1), 405 (2) and (3) and 406 (1) and (2) of the Code of Criminal Procedure (published in the Official Gazette of Romania, Part I, No 508 of 17 May 2021)* — in which the Court found that the provisions of Articles 400 (1), 405 (3) and 406 (1) and (2) of the Code of Criminal Procedure were unconstitutional, as contrary to Articles 1 (3), 21 (1) to (3), 23 (11) and 124 (1) of the Constitution, and Articles 5 (1) and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In essence, the Court held that the drafting of the criminal judgment, delivered at first instance and on appeal, that is to say,

the statement of reasons in fact and in law made after the delivery of the minute (decision) ordered in the case at issue, deprives the convicted person of the safeguards pertaining to the administration of justice, infringes the right of access to a court and the right to a fair trial. The Court also found that the enforcement of a final criminal judgment, prior to the statement of reasons in fact and in law, is contrary to the constitutional and conventional provisions relating to individual freedom and security of the person and to those which enshrine human dignity and justice as the ultimate values of the rule of law. The Court therefore found that it was necessary for the judgment to be drafted, stating the reasons in fact and in law, at the time of delivery.

3. **DECISION No 455 of 29 June 2021** *on the referral of unconstitutionality of Resolution No 36/2021 of the Romanian Parliament for removal of Ms Renate Weber from the office of Advocate of the People (published in the Official Gazette of Romania, Part I, No 666 of 6 July 2021)* — by which the Court found that the act of the Parliament for removal of Ms R.W. from the office of Advocate of the People was unconstitutional and stated that, from the date of publication of the decision in the Official Gazette of Romania, she was to resume her office as Advocate of the People. In essence, the Court noted that the Parliament has the possibility of imposing the legal penalty of removal from office following a finding that there has been an infringement of legal rules, no matter which ones, but it also noted that the current legislative framework on the basis of which such a decision is adopted has a serious substantive deficiency, since it does not regulate separately and exhaustively the situations in which the procedure for removal from office may be triggered. The possibility to remove from office the Advocate of the People “*as a result of the infringement of the Constitution and the laws*” does not comply with the requirements of clarity, foreseeability and reasonableness. Moreover, neither the law nor the parliamentary regulations lay down the procedure under which the decision for removal from office is adopted, merely determining the holder of the proposal for removal from office and the decision-making forum, or guarantees as to the rights of defence of the person removed from office. The decision thus adopted is the result of an arbitrary act lacking constitutional foundation, contrary to the provisions of Article 1 (3) of the Constitution, which enshrine the principle of the rule of law. The term “*improper performance of the duties*” of the Advocate of the People, contained in Article 9 (2) of Law No 35/1997 on the organisation and functioning of the institution of the Advocate of the People, used by the Parliament as the basis for the dismissal of Ms R.W. from the office of Advocate of the People, is not equivalent to “*the infringement of the Constitution and laws*” and, by its maximum general nature, appears in itself to be vitiated by

unconstitutionality. Parliament has given this term an even broader meaning, extending the scope of cases of removal from office beyond the infringement of the law to its misapplication. By taking the decision for removal from office based on an interpretation of the legal provision which goes beyond its content, the Parliament acted in breach of Article 9 (2) of Law No 35/1997 and, consequently, of Article 1 (5) of the Constitution, which enshrines the principle of legality and the supremacy of the Basic Law. The Court held that the Parliament cannot have a discretionary right to impose the penalty of removal from office, since it must comply with legal and constitutional requirements in the exercise of its own powers.

4. **DECISION No 670 of 19 October 2021** *on the exception of unconstitutionality of the expression “upon initial registration for pension” in Article 170 (3) of Law No 263/2010 on the uniform public pension system, referring to old-age pensions established after 1 January 2011 and which were converted from partial early retirement pensions established before that date (published in the Official Gazette of Romania, Part I, No 1157 of 6 December 2021)* — by which the Court found that the method of calculating pensions governed by Law No 263/2010 was less advantageous for pensioners than the method of calculation provided for in Law No 19/2000, in the sense that the expression “*upon initial registration for pension*” in Article 170 (3) of Law No 263/2010 establishes a differential treatment, as only persons who become beneficiaries of old-age pensions after 1 January 2011, whose pension is not converted from partial early retirement pension obtained prior to that date, *benefit from the correction index set forth in Article 170*, and not also persons who become beneficiaries of old-age pensions after 1 January 2011, whose pension is converted from partial early retirement pension obtained prior to that date. In carrying out the proportionality test, the Court found that the difference in treatment does not have an objective and reasonable justification, since it does not maintain a reasonable relationship of proportionality between the means employed and the aim pursued. Since the retirement conditions laid down in Law No 263/2010 are more disadvantageous than those contained in Law No 19/2000, retirement pensions converted from partial early retirement pensions are also affected by those conditions. In view of the rationale for granting the correction index, the pensioners must also benefit from it. The legislator is free to grant or not to grant certain benefits, but in the exercise of its discretion, the State is bound by the requirement to ensure that, once a benefit is regulated, it is granted in a non-discriminatory manner.

5. **DECISION No 708 of 28 October 2021** *on the exception of unconstitutionality of the provisions of Article 136 (2) and of the second sentence of Article*

137 (3), referring to the term “turnover”, of the Criminal Code (published in Official Gazette of Romania, Part I, No 1160 of 7 December 2021) — by which the Court upheld the exception of unconstitutionality of the provisions of the second sentence of Article 137 (3), referring to the term “turnover”, of the Criminal Code. The Court held that the criminal law in force does not define the meaning of the term “turnover” in relation to which the court determines the amount corresponding to a day-fine when determining the fine for a legal person operating for profit. Other legal definitions of that term are to be found in special legislation, namely the legislation in the field of taxation and competition, but may only have limited scope, specialised in those matters, since its transfer into criminal matters in order to determine the amount corresponding to a day-fine in the event of a fine being set for a legal person operating for profit is contrary to the principle of legality. The Court also found that the criminal rule complained of was also incomplete as regards the determination/retention, from a temporal point of view, of the turnover of a legal person operating for profit in respect of which the court determines the amount corresponding to a day-fine. Consequently, given that the criminal fine imposed on legal persons who are criminally liable has the nature of a criminal penalty, being the only main penalty that can be imposed on them, the Court found that the provisions of the second sentence of Article 137 (3) of the Criminal Code, as regards the term “turnover”, do not comply with the constitutional requirements relating to the quality of the law, i.e. do not meet the requirements of clarity, precision and foreseeability, and are contrary to Article 1 (5) of the Constitution.

6. **DECISION No 789 of 23 November 2021** on the exception of unconstitutionality of the phrase “is not under disciplinary investigation” in Article 27⁴⁶ (1) (b) of Law No 360/2002 on the police officer’s status (published in Official Gazette No 59 of 19 January 2022) — in which the Court found that the contested legal provision prevents the police officer, a civil servant with special status, from having access to the competition for a managerial position, which falls within the scope of the service relationship, thereby infringing the combined provisions of Article 16 (3) and Article 41 of the Constitution. In carrying out the proportionality test on the interference found, the Court held that the requirement imposed on a police officer applying for a managerial position, i.e. not to be under disciplinary investigation, does pursue a legitimate aim, and is appropriate, but does not satisfy the necessity requirement, that is to say, the measure must be necessary for the purpose pursued, or the proportionality requirement, that is to say, there must be a fair balance between competing interests, just as it does not comply with the requirement of minimum interference, namely the adoption of legislation which fulfils the objective pursued

with the same effectiveness, without undermining the fundamental rights and freedoms already recognised.