World Conference on Constitutional Justice

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Mr President,

Honourable participants,

Ladies and gentlemen,

First of all, I am extremely honoured to address the distinguished participants in the first World Conference on Constitutional Justice, on behalf of the forty (40) constitutional jurisdictions associated into the Conference of European Constitutional Courts, which I so represent. That is why, with your permission, I would like to begin with a short presentation of our regional group.

As early as 1971, the presidents of constitutional courts from four European countries (Germany, Austria, Italy and the Federal Republic of Yugoslavia) agreed to organize, on an informal basis, a conference of their respective courts, bearing in mind the idea of sharing experience as regards constitutional practice and jurisprudence in a more general, that is, **European context**, with due regard to the principle of **judicial independence**. Consequently, in 1972 they had a first Conference held in Dubrovnik (former Yugoslavia), which was also attended by representatives of the Swiss Federal

Tribunal, the French Constitutional Council and the Romanian Parliament. Since then, meetings within the framework of the so-called Conference of the European Constitutional Courts have taken place on a regular basis, in various locations, although no formal statute or regulations had originally established the principle of a rotating venue.

A first major development occurred in 1978 when the Conference enlarged its membership to include the Swiss Federal Tribunal, followed by the constitutional courts of Spain and Portugal in 1981 and respectively, 1984. Another turning point was marked by the 1981 Lausanne Conference, with observers co-opted from the European Court of Human Rights in Strasbourg and the Court of Justice of the European Communities in Luxembourg. The participation of European bodies was further strengthened once the Venice Commission of the Council of Europe "Democracy through Law" came in (since 1996).

If the enlargement process went on with the French Constitutional Council and the Turkish Constitutional Court (in 1987), it was only in the early '90s that the Conference began to experience an unprecedented growth, by the admission of constitutional courts and similar jurisdictional bodies from Belgium and Poland (1990), Hungary (1992), Croatia, Cyprus, Romania, Slovenia, Andorra (1994), continuing with the Russian Federation (1996), the Czech Republic, Lithuania, Bulgaria, Slovakia, Malta, Liechtenstein (1997), Macedonia (1999), Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Latvia, the Republic of Moldova, Ukraine (2000), Luxembourg (2002), Estonia, Ireland, Norway (2003), Denmark, Montegro, Serbia (2006), and finally, Monaco (2008). Apart from its full-fledged members, the Conference also includes an associate member (Belarus), and a number of observers and guests (from non-European countries, such as Israel, Uzbekistan, Kazakhstan, Mongolia, and others).

For its main part, the Conference of European Constitutional Courts has increased membership over the past eighteen years or so following the radical political and economic changes which had swept away totalitarian rule in countries of the former Eastern block. While embarking on building up a pluralist democracy based on the rule of law, the protection of human rights and a free-market economy, almost all of these countries have set up a constitutional court, which accounts for most of the later admissions into the Conference. That, however, went side-by-side with the interest shown by a number of national courts from "traditional or long-established democracies", so that the Conference seems now to evolve into an almost "pan-European dimension".

Having regard of the many organizational, but also technical questions posed by such stepped-up enlargement, it appeared extremely important to have a formalized framework and statutory rules so that the Conference of European Constitutional Courts may attain its purposes, based on the good practice established so far but also looking into the future. Accordingly, its Statute was adopted on the occasion of the XIth Conference held in Warsaw in 1999, followed by detailed Regulations adopted on the Brussels Conference, in 2002.

In conformity with these instruments, the Conference organs are the "Circle of Presidents", which is the central decision-making body composed of the Presidents of the Courts and the institutions with full member status, and the Congress, which is held once in every three years. Otherwise, the Circle of Presidents decides on the selection of topics for the Congress, while specifying the requirements for the presentation of the national reports and the elaboration of a questionnaire. If needed, the Circle of Presidents may also create committees which elaborate a report regarding specific issues.

Chairmanship is held by the President of the Court which is to host the next Congress and who also presides over the "Circle of Presidents". In 2008, on

the occasion of the XIVth Congress held in Vilnius, the Constitutional Court of Romania was elected to that position which it shall fulfil for a three-year interval.

The fundamental criteria required for full membership are evoked under Article 6 in the Conference Statute: "*European Constitutional Courts and similar European institutions which exercise constitutional jurisdiction, in particular reviewing the conformity of legislation and which conduct their judicial activities in accordance with the principle of judicial independence, being bound by the fundamental principles of democracy and the rule of law and the duty to respect human rights. In this respect the Conference shall follow the practice established in previous conferences and by the Council of Europe*."

In that regard, most of the constitutional courts associated into our Conference share a so-called European model, which is based on Hans Kelsen's idea of a "negative legislator". It emerged as a counterpart to national parliaments whose legislative action needs to be reviewed in terms of its conformity with the Constitution. If the legislator acquires legitimacy as a result of free elections held on a regular basis, then such a specialized, independent body vested with review powers will equally enjoy endorsement once its creation has been approved by a national referendum. Over the past 90 years, this European model has gained preference vis-à-vis judicial review, whether diffuse or concentrated, still carried out by the ordinary courts. Not counting that constitutional courts also exert some other typical functions, in fulfilling their role as guardian of the Constitution.

The aims pursued by the Conference of European Constitutional Courts are explicitly set forth by Article 3 of the Statute, in that "*it shall promote the exchange of information on the working methods and constitutional case-law of member courts together with the exchange of opinions on institutional, structural and operational issues as regards public-law and constitutional jurisdiction. In addition, it shall take steps to enhance the independence of constitutional courts*

as an essential factor in guaranteeing and implementing democracy and the rule of law, in particular with a view to securing protection of human rights. It shall support efforts to maintain regular contacts between the European Constitutional Courts and similar institutions".

Dear participants,

Undoubtedly, the specific aims of the Conference of European Constitutional Courts have now attained a **global** perspective considering that we have come together under the auspices of a first World Conference on Constitutional Justice.

It is therefore my privilege and duty – one of the most rewarding I have ever been entrusted so far – to salute all participants and constitutional jurisdictions throughout the world on behalf of the Constitutional Courts from the "old continent", also extending warmest thanks to the Constitutional Court of South Africa and to the Venice Commission for their excellent idea and also significant efforts deployed in the organization of such reunion.

At the same time, since my country, Romania, belongs to the European democracies having succeeded, after an epoch of authoritarian and totalitarian regimes, to consolidate the rule of law, the separation and balance of powers, human dignity, the citizens' rights and freedoms, justice and political pluralism, all of which are defined under Article 1 of our Basic Law as being supreme constitutional principles and values to be fostered "in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution", I would like to continue my presentation with only a few

considerations on the influence of the Constitutional Court[1] decisions on society – which also takes us to the role of constitutional justice in guaranteeing the supremacy of the Constitution.

[1] **Summary presentation of the Constitutional Court of Romania. Creation, composition and powers**

Romania's Constitution adopted in 1991 has created, under a distinct Title, a Constitutional Court that came to be effectively established in 1992, on the basis of a special organic law. It comprises nine judges, three of which are appointed by the Chamber of Deputies, other three by the Senate, and the remaining three by the President of Romania, for a nine-year term of office. Exceptionally, however, the members of the first Court had been appointed for terms with a differentiated length, that is three, six, and nine years, so as to allow its composition be partially renewed on a regular basis, one third of its members being replaced every three years. The President of the Constitutional Court is elected through secret vote by the constitutional judges from among themselves, for a three-year period.

Subject to the law, the Constitutional Court is the sole authority of constitutional jurisdiction in Romania, independent from any other public authority, and guarantees the supremacy of the Constitution.

The Constitutional Court powers are listed under Article 146 letters A) through K) of the Constitution, as revised in 2003. Essentially, constitutional review is carried out as:

- an abstract (*a priori*) review of laws prior to promulgation, or of international treaties prior to ratification [letter A), first thesis, and letter B)];
- an abstract (*a posteriori)* review of standing orders of Parliament [letter C)];
- or a concrete (*a posteriori)* review of effective laws and Government ordinances, by means of an objection of unconstitutionality which is raised before the ordinary courts [letter D), first thesis], or directly by the People's Advocate (Ombudsman) [letter D), second thesis].

Furthermore, the Court is vested:

- to resolve legal disputes of a constitutional nature between the public authorities [letter E)];
- to see to the observance of Presidential elections' procedure, confirm the voting results and validate the election of the President of Romania [letter F)];
- to ascertain circumstances which justify the interim in exercising the President's office [letter G)] or to issue an advisory opinion on a proposal to suspend the President from office (the impeachment procedure) [letter H)];
- to see to the observance of referendum procedures and confirm poll returns [letter I)];
- to review any initiative for the revision of the Constitution [letter A, final thesis] and also to verify popular legislative initiatives [letter J]; and,

The influence of constitutional justice on society

Competencies and jurisdiction of a constitutional court account for its role as being the guardian of the Constitution, the ultimate resort for neutralizing unconstitutional legislation, action or decision. But more than that, even the process of transformation in emerging democracies has been much indebted to the decisions made by constitutional courts, which had an important impact on society, in general.

In the first place, the Constitutional Court acts as a vehicle for the review of the constitutional nature of laws in a political system ruled by the parliamentary majority: where such control is conducted *a priori*, that is on a preventive basis, at the request of certain constitutional entities, among which a number of MPs (in Romania, that is at least fifty Deputies or at least twenty-five Senators) that has been a consistent and effective means for the protection of parliamentary opposition, which saw its criticism validated by the Court's judgment of unconstitutionality. In Romania, for example, the number of cases where a law or certain provisions thereof have been challenged prior to the law's promulgation by the head of state and subsequently declared unconstitutional is nearly 40%, calculated over no less than 17 years since the Court was created. Indeed, an impressive percentage, also bearing in mind that out of the total number of requests made within the preventive, *a priori* review, those addressed by the parliamentary minority weigh no less that 63%.

- to settle challenges for review of constitutionality of political parties [letter K)].

The Constitutional Court decisions are **generally binding** and take effects only for the future, as of their date of publication in the Official Gazette of Romania (Article 147 of the Constitution).

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Moreover, when carried out *a posteriori*, the constitutional review has ensured the primacy of the rule of law and the protection of fundamental rights and freedoms. In Romania, for instance, although the Constitutional Court cannot be approached directly, by a so-called *action popularis*, it is possible for either party at trial before a court of law or of commercial arbitration, for the public prosecutor – where involved in trial proceedings - or for the court hearing the case to raise an objection of unconstitutionality against an effective law or Government ordinance which is relevant for the adjudication of that specific case. The matter shall be then referred to the Constitutional Court, whose decision is generally binding. Where the law is declared unconstitutional, in part or in whole, such becomes inapplicable, in that it shall cease any legal effects unless duly accorded with the Basic Law within 45 days after the publication of the Constitutional Court decision. For this duration of time, unconstitutional provisions are suspended *de jure*.

The Constitutional Court case-law, by its clarification of the content of human rights and fundamental freedoms for both courts of law, and the individual, has made a significant contribution in establishing a unified judicial practice in the courts of law, and also in guaranteeing free access, as well as the administration of justice in Romania.

Still, the impact of the Court decisions on society should be measured not only in terms of their effects or degree of ***acceptance***, which is widely reflected in the mass media and debates in civil society, but also in regard of the number of cases brought before the constitutional court. To say the least, in Romania we have been witnessing a trebled case-load over the past two or three years, which is a significant indicator for the public recognition of the Constitutional Court authority.

Other instances of maximum resonance in society are related to special prerogatives vested in a constitutional court with regard to the impeachment procedure. Not only in the Republic of Lithuania, but also in Romania, the Constitutional Court was involved in procedures against the incumbent head of state, a fact of unprecedented attention for the general public. Briefly put, in March 2007, the Court was requested to give its advisory opinion on the proposal for suspension from the office of the President of Romania, as part of the impeachment procedure initiated by Parliament concerning allegations of his having committed serious violations of the Constitution.

As is well known, the Romanian case (and solution) has substantially differed from that of the ex-President Paksas. Basically, our Constitutional Court found that the accusations brought against the President of Romania were either unsupported by evidence or that actions imputed actually concerned his **political statements**[2]**,** thus leaving the matter into the hands of Parliament to decide, based on evidence submitted, as to the existence and seriousness of the actions on account of which the suspension from the office of the President of Romania had been proposed. Although the Court gave its negative opinion, Parliament continued impeachment proceedings so that eventually the President was suspended, pending organisation of a national referendum for his removal from office. The referendum held on 19 May 2007 revealed a dramatic vote against the Parliament decision, with some 75% against the President's removal. More than ever before, the Constitutional Court position was regarded and invoked as an endorsement of the people's choice, as that was expressed not only in the

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[2] "The Court holds that opinions, value judgments or assertions made by anyone while in the exercise of office bearing public dignity – such as the President of Romania (…) or the head of a public authority – in respect of other public authorities … remain within boundaries of freedom of expression of political opinions, subject to limitations set under Article 30 paragraphs (6) and (7) din Constitution."

presidential elections, but also in respect of the mandate entrusted to the head of state, calling for a more profound implication on his behalf into the problems posed by the process of transformation in our society[3].

At the same time, the process stimulated an extraordinary focus in society on whether public authorities act in faithful compliance with the constitutional provisions, which should be regarded as a manifestation of a full-fledged democracy in Romania.

The next point I would like to bring to your attention refers to decisions pronounced by a constitutional court while resolving conflicts of competencies between public authorities.

In Romania, the Constitutional Court holds a prerogative "to decide on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers [of Parliament], the Prime Minister, or the President of the Superior Council of Magistracy". We can recognize more or less similar attributes vested in the courts of Albania, Bulgaria, Croatia, Georgia, Germany, Italy, the Republic of Macedonia, Slovakia, Slovenia, Serbia, or the Russian Federation.

Over the past three years, our Court's jurisprudence in this area has mostly dwelt **Error! Hyperlink reference not valid.**on the *"principle of separation and balance of powers - legislative, executive and judicial"*. In consideration of said principle, the Court has elaborated, in exact terms, the institutional relations between public authorities, also stressing on the necessity of their co-operation in respect of their constitutional powers, that being an essential pre-requisite for the

[3] "Constitutional prerogatives, just like democratic legitimacy bestowed upon the President of Romania following his election by the electorate of all the country will call for an active role, as his presence in political life cannot be narrowed down to a merely symbolical exercise of protocol functions."

smooth operation of all public authorities in the realization of the Romanian State’s fundamental objectives.

However, the Constitutional Court decisions bear an impact not just on the public authorities concerned, but also on various social groups and ultimately, on the citizens themselves. That because, on the one hand, they provide the means to surpass any constitutional deadlock in the activity of public authorities, while on the other hand, such activity will be unequivocally directed towards satisfying public needs.

Thank you very much for your attention.