Lecture by the President of the Constitutional Court, Mr. Marian ENACHE, on the occasion of the launch of the project "Constitutional Tradition and Perspectives of Constitutionalism in Romania", dedicated to the 100th anniversary of the adoption of the Romanian Constitution, in March 1923. The event was organised by the Institute of Legal Research of the Romanian Academy on 29 September 2022.

Distinguished Professor Ioan Aurel Pop, President of the Romanian Academy,

Distinguished Professor Mircea Duțu, Director of the Institute of Legal Research of the Romanian Academy,

Esteemed audience,

Please allow me to extend my cordial greeting to the President of the Romanian Academy and to the Director of the Institute of Legal Research of the Romanian Academy.

I would like to sincerely congratulate you on the initiative of launching the project "Constitutional tradition and perspectives of constitutionalism in Romania", dedicated to the centenary anniversary of the Constitution of Greater Romania of 1923.

I highly appreciate this initiative of the Romanian Academy, of the President of the Academy and of Professor Mircea Duțu, aimed at debating, deepening and revealing the essential aspects of our constitutional tradition, as well as the prospects of affirmation of the Romanian constitutionalism in the European Union's common area of justice.

This scientific event, which will unfold as a cycle of monthly conferences, will be attended by reputed specialists in the field, who, I am convinced, will substantially contribute to a deeper and more adequate knowledge of the history and future of Romanian constitutionalism.

My intervention, which will be totally brief and selective, is clearly not intended to be an analysis and an assessment of constitutions and constitutionality in Romania, because such an approach of great complexity involves in itself an extensive and in-depth historical and legal scientific research of the political institutions that have existed in different periods and historical contexts, enshrined in constitutional acts and engulfed in the state of constitutionality of the society.

Constitutions are and remain legal documents with a predominantly political content, considered the foundation of a State and a society, since they concern State organisation, the core of the rule of law, the political regime, the relations between State powers, between these and the citizens, fundamental rights and freedoms, the supreme values of a particular type of State and society, as well as the principles governing the relations of a State with

other States, as a subject of international law. From this perspective, we can thus speak of a component of constitutional identity, as an integral, intrinsic part of the identity of a State, of a political community and of the ethos of a people, whose purpose is to ensure the physiognomy and stability of a nation.

When building any constitutional structure, we operate with two inseparable dimensions: tradition and innovation.

The structure of this relationship is not antithetical, but rather reversible. This type of interrelation between the two terms operates in an evolutionary and correlative logic, the strength of tradition and its observance representing the intangible patrimony of the intellectual creation of a people, i.e., a permanent reference system in the process of constitutional enrichment, refinement, innovation and development, a process determined by the very evolution of historical events of human societies. Thus, we can say that the relations between constitutional traditions and the natural process of constitutional development are complementary and interactive, given that tradition, the perspective of its development and innovation do not exclude each other, but they coexist and influence each other throughout the history of any political community.

In this frame of reference, I would allow myself to make some concrete illustrations of how tradition, the original thinking of a constitutional essence of a people throughout history has intertwined with innovation, by assimilating more performant and modern values, principles and models or by its own creative thinking in the field.

From this perspective, our history, Romanian history, offers us the opportunity to observe this interesting dialectic of evolutionary constitutional modelling against the background of Romanian constitutional traditions, but also of the integration of new constitutional paradigms.

The fall of the totalitarian-communist regime led to the reconstruction of the entire constitutional architecture, which materialized in the adoption, in 1991, of a new Constitution, which took over the Romanian traditions of constitutionality, but also assimilated new, democratic institutions, belonging to the Western-style rule of law and model of political civilization.

In Article 1 of the 1991 Constitution, which enshrines the features of the Romanian State and its supreme values, the framers related the process of assimilation of these new institutions to “the spirit of the democratic traditions of the Romanian people and of the ideals of the Revolution of December 1989”.

The provision in the same Article of the current Constitution, according to which “Romania is a national State”, belongs to the text of the Constitution of 1923. The phrase “national State” was first introduced in the wording of this Constitution, considered one of the most democratic and liberal constitutions of Romania, following a fulminant speech before the Constituent Assembly by our great historian Nicolae Iorga, being traditionally preserved in the texts of the subsequent constitutions, when identifying the features of the Romanian State, just like it was established in the new Constitution of 1991, obviously in a non-ethnocentric interpretative sense.

Another provision of the 1991 Constitution upon which the Constituent Assembly decided by democratic vote is the bicameral organization of the Romanian Parliament, namely the Chamber of Deputies and the Senate.

The debates within the Constituent Assembly focused on two theses: the first thesis, consisting of parliamentary unicameralism as a natural effect of the unitary nature of the Romanian State, a proposal which, actually, I have formulated myself by referencing to a rationalized constitutionalism, and the second thesis, of parliamentary bicameralism, unfit, by definition, of a unitary State, but which ultimately triumphed, being appropriated by the members of the Constituent Assembly as such, a choice motivated by the force of tradition, as it was evoked that Romania has "traditionally" had, during its democratic period, a bicameral parliament, an aspect also mentioned in the case-law of the Constitutional Court of Romania in Decision No 799 of 17 June 2011.

Also, the regulation of the constitutional review by the 1991 Constitution expresses attachment to our constitutional traditions. This form of review was stipulated in Article 103 of the 1923 Constitution, being exercised by the Court of Cassation in its Joint Sections. It is worth mentioning that this 1923 regulation is also the continuation of a previous one, considering that constitutional review was first enshrined through court decision, in 1912, in the famous "tram trial", in which the Ilfov County Court had declared, by Decision No 919 of 2 February 1912, the unconstitutionality of an alleged interpretative law of 18 December 1911, solution confirmed by the Court of Cassation by Decision No 261 of 16 March 1912. Romania, as such, was among the most advanced States to adopt the idea of constitutional review. In the same vein, i.e., of continuity and preservation of institutional traditions, the Court of Auditors and the Legislative Council were re-established, as they had existed in the constitutional tradition of the interwar period and which, by virtue of tradition, were re-established in the 1991 Constitution, being given constitutional status.

This is how the spirit and institutions of the democratic and constitutional traditions of the Romanian people survived not only in the previous successive constitutions of Romania, enjoying continuity, but even in the new Constitution of 1991, revised in 2003.

Next, I will refer to some examples of innovation and "constitutional transplants", as they have been described in the doctrine, with particular reference to the 1991 Constitution.

As we know it all too well, after the fall of the communist regime, a Constituent Assembly was convened through democratic elections in 1990, whose main objective was to adopt a new Constitution, reflecting Romania's option for an authentic democratic regime and the values of the rule of law. Personally, I was part of the Constituent Assembly and of the Committee responsible for drafting this Constitution, which entitles me to make some more consistent considerations about how this Constitution was adopted, about the debates that took place, about the clashing theses and antitheses that reflected tradition and innovation, but that is not the purpose of this meeting.

In this respect, I would like to evoke only a few novelties, innovations, "transplants", if you accept this terminology, introduced in the 1991 Constitution, which have aligned with our constitutional spirit and traditions, developing into a functional constitutional architecture, namely the introduction of the principle of supremacy of international law in the sphere of human rights, of a wider repertoire of citizens' rights and freedoms, the introduction of two new fundamental institutions, i.e., the Constitutional Court and the Advocate of the People, regarded from the very beginning, by the 1991 Constituent Assembly, as two "exotic"

institutions for the legal mentality of the '90s and which, I believe, are still not sufficiently assimilated in the national legal consciousness and Romanian public opinion in terms of their democratic nature, role and functions.

We cannot speak of constitutionalism and constitutionality without the existence of special and specialised institutions to carry out the constitutional review within the limits of the competences established by the Basic Law.

The enshrining of the constitutional review of laws, either in the form of a judicial review or in the form of a review by independent judicial authorities, represented a qualitative leap in strengthening the rule of law, since this type of review protects, more efficiently and more effectively, the supreme principles and values of a democratic society, as a system of reference and legitimation for the entire system governed by the rule of law.

The possibility to review the compliance of laws with the requirements set by the Constitution and to debunk the "sacredness of laws", of "legalism" and of the "absolute sovereignty" of parliaments in the law-making endeavour meant a radical change in the traditionalist conception about the omnipotence of the legislative power, which, in a genuine rule of law, can be limited when it violates both supreme values and principles of society, and human rights.

The freedom that parliaments enjoy in the law-making process is limited, in accordance with the rule of law, by the violation or non-observance, in the process, of these individual values and rights, situations in which the law in question may be declared unconstitutional and, therefore, inapplicable. This is one of the major effects of constitutionalism, in which constitutional justice becomes an indispensable condition of the rule of law, and the purpose of constitutional courts is to form a new constitutional awareness of the balance and proportionality between the authority of State power and respect for the legitimacy of citizens' freedom.

Another novelty, introduced by the 2003 revision of the Constitution, is the priority application of European Union law within the limits of the competences conferred on the European institutions by the Treaty of Accession to the European Union, reflected in Article 148 (2) of the Constitution, according to which *"the provisions of the constituent treaties of the European Union, as well as other binding Community regulations, shall take precedence over contrary provisions of domestic laws, subject to compliance with the provisions of the accession act".*

In the context of applying European Union law, Romanian constitutionalism is today facing an interesting challenge in the relations between European Union law and national constitutional norms, between the principle of priority of EU law and domestic constitutional provisions.

We believe that this issue is currently a topic of great relevance for Romanian constitutionalism, as well as for all European Union States, and requires the promotion of an institutionalized judicial dialogue between national constitutional courts and the European Court of Justice, of European legal cooperation, in the area of European legal pluralism, based on trust, good faith, mutual respect and complementarity between the two legal orders, i.e., European and national one.

Under these conditions of interactive and complementary constitutionalism, a new form of European diplomacy has emerged, alongside governmental diplomacy and parliamentary diplomacy, namely European judicial diplomacy, which aims to promote a new legal synchronism, essential in the common European space.

Referring to the possibility of achieving a European constitutionalism, we can ask ourselves: what kind of constitutionalism should it be?

Undoubtedly, a constitutionalism that unites people, as Jean Monnet said, and shapes a common territory for Europeans, which must be culture, as Paul Valéry said; in our case, the constitutional culture of concepts, paradigms and proceedings, which, through their universalism, play an important role in uniting people rather than in coalescing States.

Regarding the catalogue of fundamental rights and freedoms that form the core of the rule of law, we see the maintenance of traditional rights, but also the addition of new generations of rights and freedoms compatible with the evolution of society and the development of specific guarantees and means for their national and international protection.

We should mention, as "constitutional novelties", the regulation of the limits of the revision of the Constitution, provided for by Article 152 of the Constitution, as well as of the procedure for approving, by popular referendum, the Constitution of 1991 and the law on its revision, which endows our Constitution with a superior legal force to the other categories of legal acts that are part of the pyramid of our legal system.

A constitution, any constitution, is a creation, a human product, and it carries all the virtues, limitations and "weaknesses" of human nature and of the historical period in which it was adopted.

Therefore, regardless of its qualities and usefulness, a constitution should not be considered an immutable work, as it can be subject to revision whenever this is urgent for the smooth running of society.

The passage of time inevitably causes mutations at the level of the entire State system, as processes and structures in society evolve or change, imposing new visions and approaches, in accordance with the ever-changing landscape of the socio-economic and cultural life.

This phenomenon is universal; even the first ever written Constitution, that of the United States of America, although it has only seven Articles, it has been revised by 27 amendments since its enactment in 1787.

Therefore, these fundamental acts of political-legal creation, called constitutions, on which society relies in its development and progress, must be adapted to the requirements of people's real lives and to the requirements of States that representatively and legitimately direct societies.

Rationality requires us to admit that the constitutional systems of States belong to the category of open systems, sensitive to the dynamics of the historical processes and capable of enrichment through new values, principles and institutions that confer, simultaneously, stability and evolution to the entire social system. To this effect, by paraphrasing the Romanian philosopher Constantin Noica, we can say that, metaphorically speaking, any constitution is a closure that opens and it is, it must always be permeable to the evolution of society and history.

But there is also a counterpoint to this: constitutions are usually foundational through their structured, stabilizing nature, through their legal force, which is superordinated to the legal system, through the matters and methods of regulation, as the ultimate expression of the sovereign will of the people. Therefore, their revision must be done with caution and balance and include the necessary useful adjustments, which, however, should not imply the risk of destabilizing the legal system and the constitutional and legal status of citizens in a democratic society.

The need for constitutionalisation, which may arise in the future at society level, is currently determined by the challenges posed by artificial intelligence and environmental protection requirements, which may generate regulatory needs for new fundamental human rights or additional guarantees of these rights in relation to the potential effects of large-scale transformations that may affect citizens' lives and freedoms.

Obviously, all these new concerns have to do with man, seen as a person who, by herself/himself, has absolute value, whose dignity must be preserved and guaranteed as intangible in all its forms of manifestation and in whatever space the human person lives.

If we were to measure, today, the state of constitutionality of the Romanian society, in which the Constitutional Court of Romania plays the role of a barometer, it would be useful to prepare a study in which, by capitalizing on theoretical knowledge in the field of constitutional law, of the history of Romanian political and legal institutions, as well as of the case-law of the Constitutional Court, we should determine and quantify the state of constitutionality of the Romanian society, all the more so as a sufficient number of years have passed since the adoption of the new Constitution of Romania in 1991 and 30 years since the establishment of the Constitutional Court, which is the interpreter and guarantor of the supremacy of the Constitution, in order to be able to offer specialists and the general public a complete scientific study to assess the state of constitutionality of the current Romanian institutions and society.

It is our intention that this project be carried out in collaboration with the Romanian Academy, with the researchers of this institution, together with the specialists of the Constitutional Court, judges and magistrates of this authority that carries out constitutional justice effectively.

To this effect, I had some general discussions with the President of the Academy, with Professor Mircea Dutu, with other specialists and professionals, in order to jointly conduct this study so necessary and expected by the civil society. It will be a study that will involve interdisciplinary, historical, sociological, political and, it goes without saying, legal research.

For my part, as a constitutional judge, regardless of the ratio between traditionalism or innovation in a constitution, I am convinced and I believe that the interpretation and application of any constitution must be based on a civic constitutionalism, equally for all the citizens of a homeland, free citizens, with full rights, and not be based on a formalist, ethnicity-based and populist constitutionalism, degraded forms of constitutional democracy.

In conclusion, I express my confidence that the initiative regarding the scientific research into the tradition and perspective of Romanian constitutionalism, which the President of the Romanian Academy and Professor Mircea Duțu chose to celebrate on the

centenary of the 1923 Constitution, will bring new approaches and contributions from those involved in this necessary historical and legal *restitutio*. I would like to express the same optimistic thoughts regarding the potential research project on assessing the state of constitutionality of the Romanian society, which I propose today to our partners, the Romanian Academy and "Acad. Andrei Rădulescu" Institute of Legal Research.

Congratulating you once again for launching this generous and engaging project,

I would like to thank you for your attention!

President of the Constitutional Court of Romania,
Marian ENACHE