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Key-note Speech
5th Congress of the World Conference on Constitutional Justice
Session E
Stocktaking on the independence of the Member Courts¹

1. A short introduction: the WCCJ and the rule of law

Issues dealt with in this session are of utmost importance for ascertaining the role of constitutional courts in democratic societies. They are also crucial in defining the separation of powers and in establishing a balance among institutions, in order to enhance the independence of constitutional justice. Hence, they are central in current concerns on the rule of law principles, in several parts of the world.

Some caveats must be mentioned, before entering the merits of my speech.

¹ The following questions were included in this part of the questionnaire: 1) Has pressure been exercised on your Court by other state powers during the consideration (examination) of cases? 2) Has excessive pressure been exercised on your Court by the media during the consideration (examination) of cases? 3) Has your Court encountered resistance from other state powers following the adoption of decisions which they disliked? 4) Have the decisions of your Court been duly published? 5) Are the decisions of your Court being executed? Are there special mechanisms for the execution of the decisions of your Court? 6) Are there problems in the execution of specific types of decisions? 7) Have there been attacks on the Court following the adoption of decisions? 8) Have there been any legislative initiatives or actions leading to creating obstacles to the activity of your Court? 9) How did your Court deal with cases of pressure from other state powers, media, etc.? 10) Has your Court received assistance from other bodies at the national or international level? Please specify the provided assistance 11) Does your Court consider that it is prevented by judicial restraint from defending itself in the media or from seeking assistance?

The opinions I express and the interpretation of information provided in national reports are my own. They do not involve any of the courts responding to the questionnaire, neither they refer to the Constitutional Court of Italy, in which I am honoured to serve as a judge. The large amount of information received makes it impossible to mention each single national system. This forces me into inevitable simplifications, which I hope do not imply substantial misunderstandings.

The postponement of the 5th World Congress may have caused discrepancies in updating national reports. However, the information provided is wide-ranging. I am grateful to the Secretariat of WCCJ and to the organizers in Bali for collecting all such materials.

My deepest regret is that I am not present in delivering this speech, due to the unexpected coincidence of an important session of the Court in Rome. I am thankful to the organizers for taking into account this and I thank President Grabenwarter, chair of this session, for accepting to deliver my speech. A long tradition of collaboration between the Italian and the Austrian Courts, accompanied by mutual respect, is further confirmed in this occasion.

The outburst of an armed conflict at the heart of the European continent represents a most dramatic occurrence, which cannot be ignored. The unpredictable coincidence in selecting peace and its constitutional implications as the main theme around which all sessions rotate, is an even stronger challenge for us all and implies careful considerations. Against this background, the discussion on the independence of constitutional courts, in itself a suitable ground for open exchanges of points of view, acquires a wider resonance and implies a shared intent to bring forward ideas and critical evaluations, in order to provide new impulse to the world-wide community of courts we belong to.

At this regard, **I submit that the results of our meetings, in single sessions and in the plenaries, should circulate as widely as possible.** They can become the ground of joint declarations to be delivered to the press and – if so agreed – published in the websites of the WCCJ member courts. **The WCCJ can speak with an independent voice, acting as a democratic association, hence raising awareness, providing objective descriptions and circulating ideas.** The WCCJ should direct messages to member courts and to the states, as an outcome of this conference, in order to consolidate the founding principles of the rule of law. This session is well-timed for

approaching current challenges in many parts of the world and expressing shared views.

With the intent to simplifying the discussion and, at the same time, offering full account of the extensive positions provided by the courts, in reply to the questionnaire, **I attempt to suggest three main threads of reflection**, assembling in such a way the most relevant points which emerged from national contributions, in reply to the questionnaire. It has to be acknowledged that replies are sometimes uneven. This may imply different legal traditions and different approaches to the topics selected. All such differences cannot be fully taken into account in this speech, but they constitute the ground on which to build further research.

2. Constitutional Courts, Parliaments and other State powers: a matter of mutual respect

The first thread I suggest to untangle has to do with the subtle line which divides constitutional adjudication from the legislature. Answers to the questionnaire go into different directions and show the many difficulties courts encounter in drawing such a line. Mutual respect implies that both roles be interpreted following strict and coherent criteria.

First of all, a matter of mutual respect arises whenever a Constitutional Court's decision is not self-executing and needs to be implemented. **Rather than discussing this issue in terms of pressure put on the courts, it may be described as a discontinuity between constitutional adjudication and legislature's initiatives.**

It can imply – as in **Estonia** – a strong disagreement on restrictions of the activities of pharmacies, unreasonably limiting competition according to the Court, and yet, despite its judgment, proposed again by Parliament in subsequent legislation.

It can also happen that a delay in adopting legislation to enforce a Constitutional Court's ruling – as in **Moldova** – forces the Court to return on the same issue, assembling numerous complaints in one ruling.

In **Rumania** decisions holding unconstitutional the law transposing Directive 2006/24/EC on privacy, arguing on excessive limits put on private life, with no guarantees against abuses, were attacked by the national Intelligence Service, thus creating tension with parliamentary prerogatives. The Court's President asked the President of the Republic to intervene – as for art. 80 of the Constitution – enforcing his prerogative to mediate between state powers.

Although in **Lithuania** the general percentage of Court's rulings implemented by Parliament is good enough, there are decisions which have not been implemented for more than 10 years. A 2010 decision concerning the regulation of judges' pensions is still pending, due to lacking legislation in compliance with constitutional provisions on paying such pensions.

In the **Netherlands** the climate case *Urgenda*, decided by the Supreme Court in 2020, opened the floor to fervent discussion on whether the Court had 'taken the seat' of the legislature, imposing a 25% cut in greenhouse gases emissions. Environmental issues are indeed at the cross-road of politics and the protection of fundamental human rights. It is worth noting that this innovative – and yet highly controversial case – was initiated by the foundation *Urgenda*, a civil society organization, which brought a lawsuit against the Dutch state.

In **Switzerland** political discontent caused by Court's judgments gave rise to the launching of referenda (on naturalisation and on self-determination) and even to threats by politicians against judges, implying that they should not to be re-elected.

Contrast with the executive in **Pakistan** substantiated in 2007 in a Court's order to restrain from taking unconstitutional steps contrary to the independence of the judiciary. Yet this order was violated and it took time to re-establish the right institutional balance. In 2009 the judges were restored in their position, following an intense struggle promoted by civil society organizations, human rights activists and lawyers.

For the establishment of mutual respect, it is significant to mention cases in which constitutional courts, ruling on delicate matters which involve highly discretionary choices to be made in parliament, allow time for the relevant legislation to be approved.

This happened in **Italy** on end-of life treatment and on releasing strict presumptions for detainees charged with life imprisonment, in order to allow them to apply for alternative measures.

In both cases parliament did not adopt legislation within the time limit set by the Constitutional Court, thus forcing the Court to adjudicate, following the initial interim order. This technique is new to the Italian constitutional court and consists in noting, but not declaring unconstitutional the provisions under scrutiny. The final decision is referred to a later hearing. This implies that *medio tempore* applications of the challenged provision are not filed with the Court.

End of life measures have not yet been adopted, following the Court's ruling 242/2019. The latter judgment declared art. 580 of the criminal code unconstitutional only with reference to specific cases, namely that the person is kept alive by means of life-sustaining care, is afflicted by an illness provoking intolerable physical or psychological suffering and is nevertheless capable of taking free and informed decisions.

Since the constitutional boundaries set in the ruling are sufficiently clear and well-defined, in a few recent cases persons falling within such limits and wishing to put an end to their lives have been treated in public hospitals. The lack of political consensus to be reached in parliament gave no precise answers to the Constitutional Court's ruling. Delays in Parliament reflected a divided public opinion.

As for the other case mentioned, dealing with alternative measures to life imprisonment, the discussion in Parliament was fairly advanced, but did not meet the deadline set by the Court, which had indicated a precise date for the hearing. The Court decided for another postponement and referred a second call to Parliament, setting an extended deadline (8 November) for yet another hearing. The political crisis occurred in July 2022 makes it problematic to complete parliamentary discussions and enact legislation.

In **Germany**, according to Section 35 *BVerfGG* – which, however, does not contain any specifications for Court's decisions implementation – it is the Court's discretion to order measures to restore compliance with the Constitution. Furthermore, the Court can order that legislation, despite having been held unconstitutional, continues to be in force for a transitional period. This can be tied to a deadline for the legislature, that generally adheres to orders of this kind.

The German 'model' was the one considered by the Italian Constitutional Court, albeit in the absence of a specific legal provision, for delaying decisions in some ethically sensitive matters, waiting for the Parliament to intervene.

In **Thailand** too we encounter situations in which provisional measure may serve the purpose of preventing empty spaces in legislation and potential discontent in the public opinion.

In **Ukraine** the Court refers to have increasingly exercised its right to make recommendations to Parliament, so to establish a delayed term for the Court's decision to enter into force and reduce the impact of legislative gaps, or to reinstate the norms that were consistent with the Constitution of Ukraine, but subsequently

have been changed to unconstitutional ones. Therefore, in 2018 and 2019, the Court postponed the annulment of the norms previously declared unconstitutional, in order to bring them in line with the Constitution. There were cases in which social protection for war veterans and their families had to be restored or the establishment of alternative options for compensation of cancelled benefits had to be granted, in accordance with the provision of funds in the state budget.

In **Russia** a large number of institutions – ranging from the President of the Russian Federation to the Federal Assembly, the Government, the Supreme Court and the General Prosecutor – are called to interact with the Court in order to guarantee enforcement of the Court’s rulings, although it is not specified how each of them intervenes and in which order.

Pressure on the Constitutional Court – it is reported – took place in 1993 during a period of political crisis, when the President of the Russian Federation issued Decree No. 1400 “On the Gradual Constitutional Reform in the Russian Federation”, ordering the Constitutional Court not to hold any sittings before the start of the work of the new two-chamber Parliament (the Federal Assembly). On the same date the Constitutional Court adopted an Opinion No. 3-2 “On conformity with the Constitution of the Russian Federation of the actions and decisions of the President of the Russian Federation B.N.Yeltsin in connection with his Decree No. 1400 and address to citizens of the Russian Federation on 21 September 1993”, whereby it was stated that the Decree should serve as a basis to impeach the President or for other special mechanisms of liability.

It appears that the Court was, under those critical circumstances, at the centre of an institutional dispute. In 1994, the first Federal Constitutional Law was adopted. All judges remained in the composition of the Court. In addition to the 13 judges present, the new Constitution and Federal Constitutional Law expanded the court composition by adding 6 judges and excluded the possibility to consider cases *ex proprio motu* from the powers of the Constitutional Court.

No mention is made of the 2020 constitutional reform and of its impact on the Court.

In **Austria** the Constitutional Court files an application with the Federal President for the enforcement of its own decisions, which is then conducted, under the President’s instructions, by federal or local authorities.

In **Kosovo** the percentage of Court's decisions implemented is very high. However, in case of lacking implementation, the Court notifies the Chief Prosecutor, entitled under the Constitution to take concrete measures, in force of the criminal code.

In **North Macedonia** too non implementation gives rise to criminal sanctions (one to five years imprisonment for the person responsible)

Criminal offences, as well as disciplinary measures against public officials who do not enforce the Court's rulings are also envisaged in **Slovakia**. Furthermore, the Court has the power to award pecuniary remedy to the parties whose rights have been infringed.

From this first overview many options emerge, mainly dealing with implementation of Courts' decisions in a dialectic relationship with legislatures. On the one hand respect for discretionary choices of parliaments is a guiding principle; on the other hand, delays in enforcing courts' rulings can create empty spaces for the guarantee of fundamental rights.

The choice to introduce criminal sanctions – as it has been reported in a few cases – appears at first sight an *extrema ratio*, hard to combine with a transparent balance of powers. However, national choices are hard to be evaluated when detached from an overall consideration of the legal systems under discussion.

It should be considered – and amplified in the discussion – whether punitive sanctions, even criminal ones, comply with rule of law principles. As for delayed follow-ups to courts' rulings, especially when time is allowed for parliaments to intervene, a delicate balance among state powers is at stake. It is controversial whether Constitutional courts which exercise self-restraint in choosing not to act as legislatures, should nevertheless be fully aware of their institutional role and act consequently if they have noticed – and not declared – laws unconstitutional. This point too deserves attention in the discussion.

3. Constitutional Courts and communication: a matter of transparency

Transparency in communication has several implications. Delivering correct and accessible news is a way of making public opinion aware of the role covered by constitutional courts. It also helps clarifying technicalities and possible consequences of courts' decisions especially when, as we discussed earlier, their enforcement is delayed for specific reasons. Independence of courts is guaranteed through openness and accessibility of internal rules of procedure and by elucidating complex issues.

Transparency recurs as an issue in most answers to the questionnaire and is counterbalanced by avoiding initiatives of the press, which may be regarded as too intrusive of secret deliberations, or unduly focussed on individual judges, rather than on collegiality. This can produce mystifications or even give rise to threats.

It is reported that in **Pakistan** the Supreme Court, in a case of irresponsible media coverage of a pending matter, in the *Suo Motu* Case No. 28 of 2018 held that strict guidelines had to be implemented to prevent prejudicial comments, without infringing freedom of the press. The Court issued a writ of *mandamus* to the Pakistan Electronic Media Regulatory Authority, to ensure that parameters laid down in the law and in the code of conduct for journalists were correctly enforced, with a view to avoiding pressure on the Court.

In **Ukraine** it frequently happened that rallies in front of the Court were organized, as a consequence of media calls, throwing light on sensitive cases. This happened during deliberations concerning the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbolics", held constitutional in Decision No. 9-r/2019 of July 16, 2019. Another delicate case is the one involving the constitutionality of the law on lustration for government officials. Hate comments and frequent threats to judges, accusing them to be biased, forced the Court to make a statement on its website in order to stop demonstrations, which put excessive pressure on judges and affected their work negatively.

In **Cyprus** it is reported that in the not too recent case *Constantinides v Vima Ltd* the Supreme Court declared openly that the 'trial by the press' undermines the foundations of the judiciary, whereas judges in their oaths maintained to be independent from media as well as from politics.

In **France** efficiency and rapidity in deciding cases are put forward as virtuous alternatives to bad press. It is also remarkable that in this country members of the *Conseil* have to refrain from expressing opinions on questions decided or likely to be decided. According to art. 7 of the *ordonnance* n. 58/1067 of 1958 – the organic law on the constitutional court – the Council of Ministers issues a decree stating the 'obligation to be discrete'. The latter has not been interpreted as an absolute ban on expressing opinion, but is mentioned among other legal obligations of constitutional judges.

Press releases, published in official websites and often made available in other languages, are a common practice in several countries.

In **Italy** special attention is paid to drafting them in a clear language, simplifying references and offering all details useful for dissemination and better understanding of the Court's rulings. A few years ago, a designated professional position to oversee communications, separate and distinct from the press office, was created. Its work expanded in the publication of a yearly report of the Court's work, with references to most relevant rulings, as well as to other Court's activities, such as conferences and meetings with other courts.

Most relevant cases, which are likely to attract a wider attention in the public opinion, are anticipated by announcements on the website and followed in some cases by a press release, even before the formal filing with the Court's registry. A second, more detailed announcement follows the publication. These new experiments in communication encountered some criticism in the academic community, but are well received by the press, which now covers the Court's work more accurately than before.

In **Spain** similar choices were made. The Constitutional Court Press-Office produces an estimation of 120-140 press-releases per year. Its social-network activity started in 2019; the Court's Twitter account has 23.000 followers and Instagram account 1.800 followers.

In the way of conclusions, it is hard to draw a line between self-restraint, a mode which should always accompany constitutional courts in their work, and a broader attention to communication, which may serve to enhance transparency and bring such institutions closer to citizens.

The balance must be found – and this point emerges in national reports – in avoiding the personalization of decisions. **Rather than putting excessive stress on judges acting as rapporteurs and drafting the rulings, the emphasis should be on collegiality and to ways in which procedural rules guide the courts work, in full compliance with the rule of law.**

Furthermore, reactions to press whenever criticism has been manifest and even harsh, can be counterproductive, if this implies going beyond a correct and transparent explanation of the legal arguments developed in the rulings. Courts cannot be involved in public controversies, neither they can take sides in political discussions.

However, independent and professional journalists and communicators, together with social media experts, can represent the bridge towards the world outside and become part of a coherent institutional mechanism. Transparency is the key word: it brings about respect for the courts and, at the same time, enhances their standing as independent democratic institutions.

It is useful to quote that the **European Commission's 2022 Report on the rule of law mentions among its key points independence of media and of regulatory agencies, in fostering the independence of the judiciary**. This issue is also well developed in the Council of Europe's documentation, merged into the Secretary General's annual reports on the state of democracy and the rule of law.

4. The independence of Constitutional Courts: a matter of trust

This last thread to be untangled intersects with all that has been said before, in discussing the binding nature of Constitutional Courts decisions and looking at the different ways in which implementation of the same is guaranteed. Independence is in fact a multi-faceted notion: it is referred to the Court as an institution and to individual judges.

Courts are guarantors of effective and timely enforcement of rights; hence their rulings must have precise follow-ups. **Trust is the outcome of the overall functioning of the system, which implies accurate remedies and reliance on other state powers**. It also presupposes, as we argued previously, transparency in external communication, to increase the awareness of other institutions and of citizens.

A case reported in **Austria** is paramount, in order to show how the authority of the Court may depend on the public opinion as well as on other state powers. In a dispute on bilingual topographic signs and names in Carinthia, where a Slovenian-speaking minority lives, the Court decided that a 10% of the population suffices to trigger this obligation. The refusal of the Land governor to enforce this decision brought about a long dispute, ending with the approval of a special federal law leading to respect of linguistic minorities.

In **Bosnia Herzegovina** a long dispute on the electoral law, held unconstitutional by the Court, was accompanied by a decision to delay the enforcement, in order to allow time for the legislature to intervene. However, no initiative was taken and an individual application was filed with the ECtHR, on the ground of alleged discrimination, since the right to vote was jeopardized. The ECtHR found that failure

to enforce the Constitutional Court's 2010 ruling on local elections to be held in Mostar violated the rule of law. Elections were eventually held in 2020, after twelve years.

The Constitutional Court of **Lithuania**, in cases regarding sensitive political issues, has attracted the criticism of politicians, who filed a petition with the President of the Republic claiming that the President of the Court was no longer suited for his position and that the Court decision required revision. In the face of such criticism, the Constitutional Court has defended its position through the provisions of the Constitution with the full support of the President of the Republic.

The Constitutional Council of **Cameroon** was involved in a case following the 2003 general elections, which resulted in lacking political majority. The King asked the Constitutional Council for an opinion as to whether he should open the session of the National Assembly, despite the disagreement of two parties, crucial in the composition of a political majority. The Council expressed a positive opinion and was severely attacked by the media and political parties. The Council had to defend its position on a legal ground, making sure not to carry any political connotation.

In **Pakistan** the political temperature was rising in the run-up to the Presidential and General Elections in the last quarter of 2007. On one hand, the ruling coalition was facing the heat of the vigorous campaigning launched by the opposition parties. On the other, relations between the executive and the judiciary were increasingly less positive. An application was filed on 2 November 2007 in the Supreme Court requesting the Court to pass an order restraining the President from taking any unconstitutional or extra-constitutional step. A seven-member bench of the Supreme Court passed an order on 3 November 2007 restraining the executive from taking any action contrary to the independence of the judiciary. Notwithstanding this injunction, Oath of Office (Judges) Order 2007 was promulgated on 3 November 2007. The judges who refused to take fresh oath or were not given oath ceased to hold office. The restraining order passed by the Supreme Court was violated. However, the judges were restored in 2009 following a campaign launched by lawyers, civil society, human rights activists and opposition political parties. The validly reconstituted Supreme Court declared the extra constitutional measures taken by the President in November 2007 illegal and the judges who had disregarded the restraining order dated 3 November 2007 were removed from their offices.

Another case to be mentioned refers to **Spain** and to the events occurred in September 2017, when the authorities of the Autonomous Community of Catalonia declared the intention to organize a referendum on self-determination, based on an alleged "right to decide". The procedure is not *per se* unconstitutional, when pursued with established constitutional means. But no constitutional reform had been approved. Despite all this, the autonomous Parliament of Catalonia passed two laws, both suspended on a precautionary ground by the Constitutional Court. They were, later on, held unconstitutional, in breach of the fundamental right to political participation. Disobedience in Catalonia conducted the Constitutional Court to deduct testimony from people responsible and to involve the public prosecutor's office, so that possible crimes could be evaluated in criminal proceedings.

The independence of the judiciary can also be put at risk because of delays of the President of the Republic's submission of proposals for the appointment of judges, following the end of the mandate of judges in the first decade (1993-2003) of the Court. This is reported in the **Czech Republic** and is connected with political disagreement with the Constitutional Court's rulings and more broadly on the implications of the judiciary being a privileged cast, not responding to people's immediate needs.

Another example of delay in Parliament for the election of constitutional judges occurred in **Slovakia**, where the Court was for a long time prevented from working. The Venice Commission's recommendation to increase parliamentary majority to three fifths, so that the opposition could be included, was not approved as a constitutional amendment.

In 2018, the Constitutional Court of **Albania** did not have the necessary legal quorum to meet in plenary sessions, due to the vetting process (the process of re-evaluation of judges and prosecutors in Albania) and delays occurred in appointing new constitutional judges. The long period of non-functioning of the Constitutional Court of Albania has increased the expectations of the applicants, the public and the media towards the Constitutional Court. The period of resumption of the functioning of the Constitutional Court was therefore accompanied by increased pressure.

Issues mentioned in this section reveal most delicate balances among state powers, which may be the result of political controversies and, precisely because of this, can only be solved with recourse to constitutional adjudication. The latter must restore an equilibrium in the exercise of fundamental rights.

5. Concluding remarks

In introducing my speech, I expressed some caveats related to the difficult task of bringing together information referred to countries with different legal and political backgrounds. I also mentioned that as lawyers and constitutional judges we have an incumbent duty to alert public opinion and spread positive messages.

I suggest that in order to do this we **take into account the prestigious work of the Venice Commission and in particular the most recent Reports by the Secretary general of the Council of Europe on the rule of law and independence of the judiciary**. In the 2021 Report “State of democracy, human rights and the rule of law” all legal and advisory instruments adopted in the Council of Europe are enumerated, including soft law Recommendations of the Committee of Ministers, the Sofia Action Plan that ever since 2016 helps to strengthen judicial independence and impartiality.

The Report highlights, for example, the role of councils of the judiciary, which have been under the scrutiny of both the ECtHR and CJEU. It also focuses on criteria for appointing judges, which should be regulated by law and be based on objective criteria. The security of tenure, with statutory age of retirement is underlined too.

The 2022 Report “Moving forward” is equally rich of recommendations, based on specific findings and shows, among other achievements, the importance of training programs for judges. Some national reports make a reference to the help they have received by the Venice Commission and other international organizations.

However, **the reflection on common standards guaranteeing an independent functioning of the judiciary should be brought more openly to the fore**, it should be analyzed in greater detail and, if necessary, expanded in its scope.

The European Commission too has recently – July 2022 – published a Report on the rule of law and has, for the first time, issued specific recommendations to member States. The European Union is experiencing unprecedented threats to the rule of law and to the independence of the judiciary. An active role is played by the Court of Justice of the EU, which frequently argues in syntony with the ECtHR. ‘Systemic’ crisis is reported in some countries of the EU.

This rich case law and the underlying national situations of potential breaches of the rule of law principles do not emerge from answers to the questionnaire we are discussing in this session. No national report was provided by Poland.

It must also be pointed out that on 28 August 2022 four organizations of European judges – which also include Polish judges’ associations – filed a complaint to the CJEU

(art. 263 TFEU) against the Council's decision to release recovery and resilience funds to Poland. The arguments put forward in the press release are related to the defense of judges' independence throughout the EU. The 'milestones' indicated by the European Council are not considered satisfactory. They refer to: the substitution of the disciplinary chamber with an independent tribunal; an overall reform of the disciplinary system; judges who have been sanctioned by the disciplinary chamber should be heard again by a new independent chamber.

The notion of "institutional accountability", which is pivotal to comparative research, can guide us in summing up the results of this session and in filling possible gaps.

The suggestion I made to untangle three threads of thoughts and reflections is centered on three words: respect, transparency and trust. These are three components of judiciary independence, which must be evaluated and measured against other powers. **A stronger emphasis in the discussion should be put on international organizations and on common standards to be accurately monitored, in a combined effort to strengthen the rule of law throughout the world.**