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## **Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies**

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### **1. Introduction**

Separation of Power is one of the basic structural principles of democratic societies. It was already discussed by ancient philosophers, deep analysis can be found in medieval political and philosophical scientific work, and we base our contemporary discussion on legal theory that has been developed in parallel to the emergence of democratic systems in Northern America and in Europe in the 18<sup>th</sup> Century.

Separation of Powers is not an end in itself, nor is it a simple tool for legal theorists or political scientists. It is a basic principle in every democratic society that serves other purposes such as freedom, legality of state acts – and independence of certain organs which exercise power delegated to them by a specific constitutional rule.

When the organisers of this World Conference combine the concept of the separation of powers with the independence of constitutional courts, they address two different aspects. The first aspect has just been mentioned. The independence of constitutional courts is an objective of the separation of powers, independence is its result. This is the first aspect, and perhaps the aspect which first occurs to most of us.

The second aspect deals with the reverse relationship: independence of constitutional courts as a precondition for the separation of powers. Independence enables constitutional courts to effectively control the respect for the separation of powers.

As a keynote speech is not intended to provide a general report on the results of the national reports, I would like to take this opportunity to discuss certain questions raised in the national reports and to add some thoughts that are not covered by the questionnaire sent out a few months ago, but are still thoughts on the relationship between the constitutional principle and the independence of constitutional judges.

### **2. Two preliminary remarks on the scope of the topic**

Before I begin my analysis, I should make two preliminary remarks which are necessary for a proper discussion of the topic. The first remark deals with the definition of what is a constitutional court. The second remark is directed at the differences in the constitutional system in which a constitutional court develops its case law.

#### *a) Constitutional Courts and equivalent bodies*

The Congress of the World Conference does not only deal with Constitutional Courts, but also with “equivalent bodies”. This wording is clearly aimed against a narrow view on a certain

type of constitutional justice, especially against a restriction to the “European type” of constitutional courts.

When I say “European type”, I am fully aware of the fact that there is no monopoly of any region of the world to a certain solution in construing constitutional justice. However, for the sake of classification, I make reference to the historical roots of constitutional justice in the Europe of the 20<sup>th</sup> Century. After the establishment of a Constitutional Court in Austria, in 1920, which did not exist between 1934 and 1945 and of the Constitutional Court of Czechoslovakia in 1920, which never became effective, European States have established Constitutional Courts in two waves after 1945 and after 1989. These have a number of common features, which distinguish them from other systems, such as the system of the US Supreme Court, which I will call the American type of constitutional justice.

For today’s topic, there are fundamental differences in the functions with a view to the Constitution, which have to be mentioned here in order to get an accurate answer to the question of the separation of powers. The European type constitutional courts are judicial organs that were entrusted with ensuring normative superiority of the constitution over the remainder of the legal order. Fundamental rights form an integral part of the legal body of constitutional law. In many European systems, individuals are entitled to file applications in order to enforce their rights. At the same time, international human rights were made effective. They have been increasingly influencing the domestic practice over the last six decades.

In Kelsenian constitutional thinking, the ordinary (criminal, civil or administrative) judge had no power at all to decide on the conformity of a law with the constitution. The task of defending the integrity of the hierarchy of norms is in the exclusive competence of the constitutional court. This is called the “monopoly to annul laws” (*“Normverwerfungsmonopol”*). On the other hand, constitutional courts are limited to deciding constitutional disputes and constitutional questions in disputes involving various questions.

*b) "Younger" and "older" democracies*

It is common ground among all experts on Constitutional Justice as well as insiders, such as the participants in this Conference, that the social contexts in which a particular constitutional court has been instituted and continues to operate, vary to a large extent.

A rough division into two groups of constitutional courts proposed also in one of the written contributions to this Conference (Harutyunian, CC of Armenia) takes account of this context: Courts in young democracies and courts in democracies with a longer democratic tradition. In this second group, we find a commitment to functional separation of powers, a certain constitutional culture and especially a high convergence of constitutional law and constitutional practice. Questions to both groups may be the same on an abstract level, but they must be put in different ways. The answers must be different anyway.

An overview shows that competences of constitutional courts vary considerably. We still find that a number of courts have a limited scope of jurisdiction. In the long run, a limited scope of the constitutional court will hinder it from becoming an effective guarantor of the supremacy of the constitution. The ex post-control of the conformity of laws with the constitution together with the power to set aside laws found unconstitutional may be seen as the “Archimedean point” for effective constitutional justice.

A second point is decisive: the access of the individual to the constitutional court. This right has proven to be the most important ingredient for successful constitutional justice; examples of young democracies show this, as do established democracies such as Germany, which have demonstrated it in the second half of the 20<sup>th</sup> Century.

### 3. Separation of Powers – a valid concept in today’s constitutional theory

You probably do not expect me to give a lecture on the separation of powers at the beginning of a conference with a limited time budget and in front of an audience that is most acquainted with the separation of powers be it in theory or in practice.

Modern legal theory takes due account of what *John Locke* has formulated in Book II of “Two treatises on Government” and Montesquieu has established in “De l’Esprit des Lois” (“The Spirit of Laws”). However, the ideal of checks and balances and of three equivalent powers had to be adjusted in view of the developments that occurred during the 20<sup>th</sup> Century. Separation has always been more than drawing borders, it was the distribution of powers and it was the intertwining or joining of powers.

When we talk about the separation of powers, it is also clear that it comprises functional, institutional and personal separation. The degree and the quality of separation of powers in a particular constitutional system can only be measured if one assesses the extent to which functional separation corresponds to institutional separation, i.e. whether different functions are fulfilled by different institutions and persons that are not directly dependent on organs of other institutions.

In modern constitutionalism, there is a tendency to consider the complexity of inter-organ-relations within one state power. This tendency takes due account of the contribution of the distribution of competences (powers) within a certain state power to the overall quality of the separation of powers. Such a contribution exists for instance if, in a system of a two chamber parliament, both chambers have the right to elect a certain number of constitutional judges.

Above all, it was the judicial power that has given rise to much discussion within the separation of powers doctrine. It was held, by Montesquieu and others, that the judiciary had no limiting function *vis-à-vis* the legislator. This is true, as far as the ordinary judge is concerned, who is strictly bound by law and who is not empowered to decide on the constitutionality of laws. However, this is not true for the American type supreme courts and for the constitutional courts to the extent that they can effectively limit the power of legislation to the boundaries of the constitution.

The separation of powers does not, however, create the independence of courts in general and of the constitutional court in particular. The material requirement of independence is not replaced by an abstract principle. Its function is limited to assisting the material guarantee of independence. We can see this relationship more clearly, if we imagine the following: if there were mixed powers of legislation and executive and both were under the effective control of an independent constitutional court, we would find the power of government limited, although there was no classical separation of powers in the triadic sense of Montesquieu.

### 4. Independence of Constitutional Courts and the Legislature

As constitutional courts are empowered to set aside laws and statutes, legal theory describes them as “negative legislators”. Legal theory has done so since the early 20<sup>th</sup> Century. However, this is only one aspect of the influence of constitutional courts on the legislative power:

the constitutional judge is inevitably and on a permanent basis close to the powers of the legislator in a “positive” sense as well. Let me enumerate three features of a possible positive interference of constitutional courts with the legislative power.

a) **“Interpretation in conformity with the constitution”**: in many systems, constitutional courts have a certain discretion when they make a decision during norm control proceedings concerning the constitutionality of a legal rule on whether to annul the law or to interpret it in a way that makes it conform to the constitution. While at first sight they preserve the integrity of the law, it is not always an act of judicial self-restraint. Especially in cases where the legislature has obviously intended a solution which the constitutional court found unconstitutional, the court substitutes the original meaning with a new one, it is materially “amending” the law. In cases where the legislator could have chosen another solution that was also in line with the constitution and taking into account the fact that the majority in parliament would have opted for a different solution, the approach may limit the legislature *de facto* in its range of action.

\$\$\$b) **Guidelines for new legislation**: Sometimes constitutional courts do not restrict themselves to just saying what is absolutely necessary in giving the grounds for the annulment of a law. In fact, they go on in their reasoning and present to the parties of the proceedings and above all to the legislature, guidelines for future legislation. In systems, where the constitutional court is commonly accepted by all political parties and has gained high authority, such guidelines may have a considerable impact on the legislative process following the annulment of a legal rule.

c) **Constitutional courts supplementing Parliament**: there may be situations where legislation was necessary according to the constitution or simply for practical reasons, but there was no consensus in Parliament for a solution. Under such circumstances, it is possible for one of the conflicting parties to submit a more or less political question to the constitutional court, which is often willing to decide that question by means of constitutional law.

In a discussion among judges, it will not be wrongly understood when I call for awareness of the fact that constitutional courts regularly come close to the boundary between judicial power and legislative power – which is neither a straight nor a clear one. And there may be situations in a constitutional system where a constitutional court steps over this line without being accused of abusing its power.

If we are aware of that matter, we are also conscious of the legislature’s political discretion; it enjoys a “margin of appreciation” especially in complex situations involving technical questions of any kind where the *ex ante* view of the legislature is necessarily different from the *ex post* view of the constitutional judge. Constitutional courts will also take into account the strong material democratic legitimacy of a decision of a parliament, which the court will not replace with its own assessment in situations of political discretion.

The extent of the judicial self-restraint will vary from country to country and from one field of legislation to another. Nevertheless, there are common lines in a comparative perspective, common lines that are drawn by international courts, especially regional courts such as the European Court of Human Rights or the Interamerican Court of Human Rights. These courts have set standards in the past with respect to many human rights guarantees and they have defined areas where the member states enjoy a larger margin of appreciation and situations where there must be a stricter control by the international judge. It may well be held that this theory of “margin of appreciation” has some impact also on the separation of powers in the internal constitutional system.

It is not a coincidence that the question of margin of appreciation – and with that a special feature of the separation of power – has appeared in the field of human rights. Decisions on human rights’ questions often entail defining public and private interests, balancing these interests and making a choice of preference for one or the other. In a number of cases, human

rights decisions reflect a social change, answers given by the legislature and ultimately by the constitutional court reviewing the legislation are in a certain sense “political answers”.

Another phenomenon highlights the political role of the constitutional court *vis-à-vis* the legislature. In a number of constitutions, we find special contents that may be called “supra-constitutional” contents of constitutional law. This part of constitutional law cannot be altered by Parliament, not even by the majority (usually a two-thirds majority) and the proceedings for “ordinary” amendments of the constitution. If the constitutional court is competent to define the content of “supranational” law and its limits, it decides directly on the field of action of the *pouvoir constitué*, that means (i.e.) not only the “ordinary” legislator, but also the legislator competent to amend the constitution.

The famous word “Constitution is what the constitutional/Supreme court says it is” seems to describe the reality in some of the countries where the constitutional courts enjoy a strong position. From a theoretical separation of powers’ perspective, however, this is not a fully adequate description of the separation of powers: Parliament remains in charge with the exception of “supra-constitutional law” it can change the constitution when it is of the opinion that the constitutional court has interpreted the constitution in a way that was not intended. In other words: with respect to constitutional law, it is not the constitutional court but Parliament that has the “last word”, although the requirement of a two-thirds majority will usually – if the Government does not have such a majority in Parliament – not lead to a reaction by the legislature.

The more powerful reaction to the case-law of a court may be exercised by nominating judges that are closer to politics. The effect and the possibilities in this respect depend largely on the national rules on nominating judges. The reports to the conference show a wide range of requirements, procedures and other criteria, and one of the working groups will deal with this question in detail. From a general perspective, professional requirements, long terms of office and a fixed age-limit, the division of rights to present candidates among various state organs and qualified majorities in election proceedings will reduce the possibilities of influencing the composition of a constitutional court as a reaction to certain case law. A developed constitutional culture will provide additional safeguards against any discretionary reaction by Government or Parliament.

This leads me to my final point in this part of my speech. The constitutional judge who respects the separation of powers between legislation and the judicial control of legislation will take due account of the margin of appreciation, of political questions and of the democratic legitimacy of decisions of Parliament. In turn, it may expect the unlimited respect of parliament for its own decisions, which aim to enforce the supremacy of the constitution over legislation and the executive.

## **5. Independence and Separation of Powers - General conditions of an effective constitutional control in transitional systems**

The situation is of course different in transitional societies, where this respect must sometimes still be attained. Here, we need conditions that cannot be created by the constitutional courts; they can only contribute to a step-by-step development of the legal system and the societal environment. They have to be a role model for other constitutional organs in using the legal method when interpreting the constitution, strict obedience of rules of conduct, take account of international standards and thereby give support to the individuals when they are seeking the protection of their fundamental rights. A number of constitutions of transitional systems might still need some clarification in defining the powers of the state and their relationship to each other. Above all, discrepancies between the texts of the constitutions and constitutional

reality must be reduced, and constitutional culture must break ground in all spheres of exercising state powers. Having said this, I would like to emphasise that I am not trying to give advice to judges who know their difficult situation better than anyone else. I am just saying, in my own words, what I have read in the reports and what I have read between the lines.

Today, constitutions and constitutional courts in transitional systems have much less time to develop and reach certain standards in comparison to the time institutions had in the 19<sup>th</sup> and 20<sup>th</sup> Centuries. However, from an international and a comparative perspective, today we find a rich experience of how to implement constitutional judicial review in situations of transition. Let me take up a few observations of possibilities and risks constitutional courts face in transitional systems:

\* First, if we look at older systems, we can see that the current standard was not reached in an instance. A number of steps needed to be taken, sometimes in difficult situations. The step-by-step-approach has proven to be the best way to improve judicial standards.

\* A second point is the role of human rights today, both on an international and on a national level. We find a body of case law of regional human rights courts, practice of UN institutions and case law of national constitutional courts that is exchanged between the courts on a bilateral and on a multilateral basis. Learning from the experience of others and learning from each other's contributions to the quality of constitutional justice all over the world and in many fields of constitutional law, above all in the field of human rights, has become a decisive factor of success.

\* Third, it seems that constitutional courts have to gain faith, trust and self-confidence over a certain period of time. Trust by society and legal experts is gained by a predictable practice, case law with a clear methodological basis, where former decisions are quoted to show a consistent "line".

\* It is one of the most important tasks of constitutional courts to develop values behind the provisions of the constitution. In doing so, the constitutional court also has the possibility of establishing the consensus in a young democracy, which might not have existed when the State was founded.

\* It seems that the range of competencies must not be too small for a while and it must not be too large at the very beginning.

\* Judicial courts that have a procedural law where the court was a neutral arbitrator between parties have proven to be successful. For this reason, adversarial proceedings tend to strengthen independence. In such a system, the constitutional judge is not a public prosecutor in charge of defending the constitution, he or she should be the neutral guardian. Against this background, the competence to institute proceedings *ex officio* has to be seen with scepticism.

\* A court that is not in the position to work efficiently will not be an effective guardian of the supremacy of the constitution. It is therefore a danger when a constitutional court is confronted with an enormous workload from the very beginning, producing a backlog of cases that increases from year to year.

\* In traditional systems, the role of international courts cannot be estimated high enough. International and regional courts strengthen internal independence, especially in systems of transition. Where there is still a lack of internal consensus, the authority of a long existing international institution accepted by the large majority of states concerned will help to stabilise the system in general and the constitutional court in particular.

## **6. Five factors determining/supporting independence of constitutional courts**

Let me return to the general perspective and include the topic of our conference in the following question: what factors may – if they work or are used in a positive manner – strengthen independence of constitutional courts in modern democratic societies governed by the rule of law or in conditions of societal transformation?

Five factors seem to be of particular importance: ethical standards for and of constitutional judges, a constitutional culture of respect for co-justice, a well-balanced role of the use of mass media, the protection of individual rights and international co-operation between constitutional courts.

*a) Ethical standards of judges*

In countries where the constitutional court is an effective organ, it follows from the competencies of the court that it deals with questions of a “political” nature. Human rights, disputes on competencies of the highest organs under a constitution, the annulment of a government decision or the annulment / setting aside of a law very often entail “political” questions. It is therefore not excluded that the single judge or the court as a whole comes under political pressure in certain circumstances. Sometimes the legislative rules on the court reflect this danger and they address this danger with specific and concrete safeguards. Sometimes they do not. It would not be appropriate to draw conclusions from the extent of legal regulation about the quality of independence of constitutional courts for the following reasons.

The extent to which independence of constitutional courts is respected by Government and Parliament highly depends on the political and constitutional culture of a given state. Very detailed regulations may not be worth much where there are subtle mechanisms of influencing judges or where pressure is actually exercised on them. Rather vague rules may be sufficient where the court and its judges are respected as ultimate guarantors of the constitutions.

*b) Constitutional Culture*

Having said this, I must add that constitutional culture is not a thing which exists without an alternative and which cannot be influenced. Admittedly, the starting point for one constitutional court may be more difficult than that of another, taking into account the history of a state and the history of its constitution. However, in every situation it is in the hands of Government, civil society including above all the media and not forgetting the judges themselves, to enhance the respect for the constitutional court and thereby also its independence. On the other hand, even under “mature” democracies, where the constitutional court has reached a strong position, confidence and independence may be in danger and may be hampered by Government, the media or the judges themselves.

Let me identify two factors of culture I chose out of many others.

*Election process:* the reports by all delegations to the World Conference show that most constitutions have more or less similar criteria for the election of constitutional judges, a working group will produce a report showing common grounds as well as differences. One feature shared by quite a number of constitutions are clear criteria for the qualifications and rules that anticipate that a single political party may not decide on the composition of the courts. This procedure produces plurality in the court, and plurality is an important factor, if not a legal precondition for the independence of constitutional courts. On this basis, transparency in electing constitutional judges and choosing women and men that have gained respect in their former professional life, irrespective of their political beliefs, enhances the independence of courts. Self-restraint of the political class in electing new judges that have spent most of their former professional life in politics is also important.

*A proper balance between confidentiality and transparency:* confidentiality of court deliberations is common practice all over the world – also with respect to constitutional justice. The extent to which the public is informed about what is going on in the courtroom differs from country to country. Systems with individual reasoning provided by each judge or in mitigated versions with the possibility of concurring and dissenting opinions make it possible for the general public or legal experts to discern “groups of judges”, tendencies, sociological analysis etc. At the other end we find systems – most of them in Europe – where even the number of votes supporting a judgment is not published. The quite obvious result of that are the numerous books on the functioning of the US Supreme Court whereas especially American legal publicists quite often deplore the lack of publicity in Europe in this respect, which makes it impossible to do research in a certain direction.

In continental Europe, however, there is a certain transfer of knowledge from inside the constitutional court at least to the legal experts. This transfer takes place in at least two ways. First, the judges themselves sometimes have the tendency to explain their decisions when they are invited to scientific conferences, and it happens regularly that they do not simply tell what can be read in the judgment.

A second means of transfer exists in countries where assistants to constitutional judges, who are highly qualified, leave the court after a few years in order to continue a legal career in a public authority, as a judge, as a private lawyer or as an academic. In their daily work or even in scientific publications, they will of course never tell the public details of discussions. Nevertheless, they work on legal cases that may ultimately come before the court with the understanding and the background of a former “insider”; quite often they stay in contact with their former colleagues, in some cases this forum is “semi-institutionalised”; this “how the court works”- knowledge used outside the constitutional court reduces, to some extent, the confidentiality in a strict sense; in the end it helps the constitutional court to be an organ of effective control.

Beyond this point, however, good reasons call for a stricter view on confidentiality. There are, of course, various reasons for confidentiality of court deliberations. For today’s topic of independence, it is the aspect of independence of the single judge and the court as a whole that may be in conflict with the disclosure of the personal opinion and voting behaviour of a particular judge. Let us think of fictitious examples of a government or powerful groups in civil society putting pressure on certain judges for a certain opinion held in court deliberations or mass media disclosing internal proceedings of deliberations. Most constitutions provide for a certain number of judges that sit in the plenary or a chamber when they decide important cases. In general, this number is not below 7 or 8 and sometimes reaches the number of 14 or 15 judges. A certain size of a court reduces the risks of pressure exercised on individual judges. The personal opinion then disappears behind the decision of the court.

### *c) The Role of the media*

The media have a role that should not be underestimated. In modern society, the publication of decisions in official collections of judgments or in law journals is still important; but it is not decisive for the overall perception of the performance of a court. Long before these publications appear, there is a public debate in the media on the content of decisions, its reasoning and its consequences. In this situation, the media bear responsibility for the proper perception of court decisions, and it is a common feature in democratic societies that the media strengthen and support the independence of constitutional courts by giving them a voice in the public debate.

Having said this, I turn to the dangers of the relationship between the courts and the media and to the duties of the constitutional court. The courts must be aware that their decisions may

be perceived differently in a general political debate than in the circles of specialised (constitutional) lawyers. That means that a judge drafting a decision must bear in mind that it will be read by non-lawyers while keeping the standards of legal reasoning. Sometimes, a “translation” of a judgment for the public may be required – for instance by means of press releases. The European Court of Human Rights gives us an example of good practice in informing the European public and the public of the Member State concerned. Beyond this task of “translation”, the Court and its judges should refrain from “interpreting” the judgments. In any event, it shows that there is a fine line between informing and translating a judgment, on the one hand and interpreting or even commenting it, on the other hand.

#### *d) Judicial Protection of individual rights*

The independence of constitutional courts is supported if the court has a larger scale of competences. One crucial competence is the control of conformity of all state acts, especially those of the legislature, with fundamental rights of individuals. To be effective, the access to the court must be wide enough. In a comparative perspective, constitutional courts that have become strong and independent institutions in their countries have the competence to set aside or leave unapplied, official acts (judgments by ordinary courts, administrative decisions or laws) conflicting with the requirements of human rights, be it directly on individual application or following the referral by a court.

The reasons for this are both legal and factual: the legal reason is that only individual applicants put the constitutional court in a position to review constitutionality on a larger scale. Reduction to abstract norm control proceedings makes the constitutional court dependent on political opportunity, on whether an opposition group or a government decides to appeal to the constitutional court. If constitutional review is open to individuals, there is a certain guarantee that every conflict with the constitution will come before the constitutional court. Citizens who are aware of their constitutional rights became "quasi-organs" in service of the constitution.

The factual reason is a consequence of the legal one. A court that decides on conflicts between individuals and the state will, to a certain extent, decide in favour of the applicant. Even if the percentage of successful applications is low, the public perception will be that the constitutional court is an effective instrument for protecting fundamental rights. This is favoured by the reality of the modern media society: one spectacular case won by the applicant may be in the headlines of the press and the electronic media for weeks, whereas no one takes notice of the thousands of rejected applications. For this reason, the constitutional court very often has the public opinion on its side. The role of the media is also decisive in this respect.

#### *e) International Co-operation of Courts*

The final aspect concerns the international dimension. Independence of constitutional courts may be assisted by international co-operation. In my view, there are three important ways of co-operating:

- co-operation between constitutional courts and international courts;
- bilateral co-operation between constitutional courts;
- multilateral co-operation between constitutional courts.

aa) *Co-operation between constitutional courts and international courts*: in the modern world, the national level takes account of the international developments in various aspects. This is also true for constitutional justice. Constitutional judges are increasingly faced with situations involving questions of international law. In such cases, they will search for solutions found by international organs and, above all, international courts and take account of

their decisions even in cases where the state is not legally bound by a treaty. The most significant example is, again, the protection of human rights. In cases where international organs of the UN charged with the protection of human rights and regional courts dealing with human rights have developed a practice or a certain case law, a constitutional judge is likely to take it into account when interpreting a constitutional fundamental right that corresponds to the international right.

Sometimes, the relationship is even more complex: a regional human rights court may quote UN practice and the national judge may include the reasoning of the regional court in his or her judgment. Things are even more complex in Europe, with the European Court of Justice in Luxemburg, and its EU Fundamental Rights Charter, the Strasbourg ECtHR with the EU as a future Member and the national constitutional courts obliged to take into account both legal dimensions. As we are in a World Conference, we will not discuss our European problems; mentioning it as a particular network of co-operation therefore should be sufficient.

However, this form of co-operation is not a one way relationship. Co-operation means that international courts need the national constitutional courts at least in a twofold manner: first, the case law of the national courts gives the international case law a firmer basis for its own judgments. If a number of national courts have developed similar solutions, this may serve as an argument supporting the solution reached by the international court. This is also not only a factual relationship, depending on the respective treaty, there may also be a legal obligation to take into account the internal practice of courts.

Secondly, the authority of the international courts and of their case law depends on the "translation work" of the constitutional courts. Again "translation" has two dimensions, first a "literal" one, i.e. to bring legal arguments in the language(s) of a state, because most of the individuals and also many lawyers will not understand the language of the international court; and second a translation into the legal world of the constitutional system of a country. This task becomes more and more important with the increase of international court decisions. The dramatic increase of numbers of judgments of the European Court of Human Rights may serve as a good example.

The decisive point for our topic is: in systems that are open to international law, and I assume that all democratic systems are, reference to international court decisions will enhance or at least confirm the authority of a judgment of the constitutional court. In this sense, the international courts are able to strengthen the authority and thereby the internal independence of the constitutional court.

However, there is a "but": this effect is jeopardized when the solutions reached on an international level cannot be understood on the national level. Interpreting human rights means dealing with very broad concepts referring to values and calling for balancing interests. It has been accepted for years that international human rights instruments have, to some extent, been the *avant garde* in the protection of human rights. In recent years, however, we are facing a development that is dangerous. The *avant garde* aspect has become stronger in some parts of the world, and the constitutional courts are less willing to follow the interpretation of the international court. This situation calls for a very careful examination on both sides. We must not squander a common good of high quality protection of human rights by doing too much of seemingly good things.

*bb) Bilateral co-operation between constitutional courts:* bilateral co-operation is often underestimated, because it is only partly visible to the public. It is visible as far as constitutional courts refer to similar decisions of foreign constitutional courts, usually to decisions of courts of neighbouring countries or important constitutional courts in a region, such as the German Federal Constitutional Court or the US Supreme Court. The invisible part is informal co-operation between courts, which takes place by way of mutual visits, with talks

and common seminars on recent problems in the jurisprudence of two constitutional courts. Quite often new solutions are developed in such talks or solutions of one court are presented to the other, which might adopt the approach in its own case law.

*cc) Multilateral co-operation has been developed on different levels:* this form of co-operation takes place on three levels: first, we find co-operation on an informal basis by opening bilateral meetings to (often neighbouring) states. Quite often, the common language leads to a circle of courts meeting regularly.

The next step are then regional organisations comprising a certain number of constitutional courts defined by geographical criteria or again by the common language. Regular conferences and meetings on certain topics enable the constitutional courts to have an exchange of answers to questions relating to common problems. An elaborate system of regional co-operation can be found within the Council of Europe and its satellites. The Venice Commission offers an effective system of exchange of views in case of a particular problem in a certain case within the Venice Forum. Moreover, the Venice Commission has a sub-commission on Constitutional Justice. Its members are also members of the Joint Council on Constitutional Justice, which is constituted by the Venice Commission and the constitutional courts and equivalent bodies in its member and observer states. The Venice Commission also supports the Conference of European Constitutional Courts, which is however organised by the courts themselves. The other regional organisations, such as the ACCPUF or the Ibero-American Association of have the same significance and function at this level.

And thirdly, on a worldwide basis, we have the World Conference on Constitutional Justice that organises a world conference every three years, again with the support of the Venice Commission.

These forums have a twofold significance: first, they support the exchange of views on common problems of constitutional justice. Apart from this transfer, these initiatives assist the constitutional court to hold an independent position in the internal separation of powers.

## **7. Conclusion**

Ladies and Gentlemen, let me conclude with a short final remark. The rich experience that is reflected by the national reports is not adequately dealt with if one reduces them to the pure legal perspective. For this reason, I had to depart from the legal perspective and leave it sometimes behind me in order to complete the picture - which is a picture of comparative public law - of a crucial institution in democratic legal systems governed by the rule of law.

I am fully aware of the fact that not all of you will agree with me on every point, in other words: that you might want to draw a different picture on various aspects. My hope, however, is that we can agree on the basic colours and the main motive of the picture.