PRINCIPLE OF THE SEPARATION OF POWERS AND THE CONSTITUTIONAL JUSTICE SYSTEM

Mr Chairman, Ladies and Gentlemen, Dear Colleagues,

First, I would like to thank the hosts for the kind invitation to participate in this important international conference. It is an honour to be among such notable justices from Central Asia here in Strasbourg.

Somehow, I rejoice in the knowledge that we have all simultaneously, in different parts of the world, prepared for this trip, in order to meet here in the heart of the Council of Europe and the European Union. This important conference provides us with the opportunity to open mutual judicial dialogue between the countries of the Central Asian region and, at the same time, between them and Europe's representatives, especially the Venice Commission.

Since we are talking about the constitutional justice system, our talks cannot be restricted only to the traditional principle of the separation of powers. Our examination must go beyond this: to an examination of the role, place and meaning of the constitutional justice system in the light of this principle. This is not an easy issue to discuss.

Why not?

Simply because it goes to the very essence of the structure of our states. It raises questions concerning the manner in which our states are governed. Therefore, issues related to the separation of powers and constitutional justice are not only of a legal nature, but they are also political issues par excellence. Indeed, as Mollers pointed out, "Introducing the idea of separation of powers into these debates could serve as a transmission belt for the conversation between constitutional law and political theory and bring the two disciplines closer together – considering that the concept dates back to a time when law and political theory were not wholly distinct from each other. ... This means that a purely political concept of constitutionalism is as deficient as a purely legal one. An important means of connecting legal and political constitutionalism ... is a model of separated powers that acknowledges the
significance of both elements and identifies their proper place in a legitimate government structure. This is exactly what the epigraph by John Rawls refers to: purely legal and purely political constitutionalism both miss the very point of a constitution – to mutually reinforce the legal and the political systems and to protect their differences. Therefore, separation of powers should not be understood as a pure instrument of restraining political power. It is also an instrument that constitutes this power. There is no legitimate structure of separated powers without a political lawmaker, but the idea of a 'political lawmaker' is in itself not a purely political one.”¹

As Mollers mentioned in the above quotation, the concept of separation of powers dates back "to a time when law and political theory were not wholly distinct from each other". So, let us remember, with deep respect, an 18th century French social and political philosopher Charles-Louis de Secondat, baron de La Brède et de Montesquieu, and his work, *The Spirit of Laws* (1748),² which is considered one of the greatest works in the history of political theory and jurisprudence.³ In very simple terms, under Montesquieu's model, the government is divided into legislative, executive and judicial powers. In the Book XI "Of the Laws which establish political liberty, with regard to the Constitution", in Chapter IV entitled "Of the Constitution of England", Montesquieu stated:

"In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may

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³ However, "Montesquieu did not invent the doctrine of the separation of powers, and that much of what he had to say in Book XI, Chapter 6 of the *De l’Esprit des Lois* was taken over from contemporary English writers, and from John Locke. Montesquieu, it is true, contributed new ideas to the doctrine; he emphasized certain elements in it that had not previously received such attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than did most previous writers. However, the influence of Montesquieu cannot be ascribed to his originality in this respect, but rather to the manner and timing of the doctrine's development in his hands." Cf. Vile, M. J. C. (1998) Constitutionalism and the Separation of Powers, 2nd ed., Indianapolis: Liberty Fund, p. 83.
arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

The separation of powers, therefore, refers to the division of government responsibilities into distinct branches. Montesquieu asserted that these three branches of powers must be divided in person and in function and they must act independently, limiting any one branch from exercising the core functions of another. It is a way to most effectively safeguard liberties and guard against tyranny.

As Vila said, Montesquieu "paved the way for the doctrine of the separation of powers to emerge again as an autonomous theory of government. This theory was to develop in very different ways in Britain, in America, and on the continent of Europe, but from this time on, the doctrine of the separation of powers was no longer an English theory; it had become a universal criterion of a constitutional government.”

Let us recall the USA and France to show that the doctrine of the separation of powers has different meaning in different countries.

With regard to the American system of the separation of powers, one of the central personalities is certainly the fourth President of the United States, the co-author of the Federalist Papers, the Father of the US Constitution and the writer of the American Bill of Rights, James Madison. He retorted that a "pure", technical separation of three powers was neither what Montesquieu intended, nor was it practical. "[Montesquieu] did not mean that these [branches] ought to have no partial agency in, or no control over, the acts of each other. His meaning ... can amount to no more than this, that where the whole power of one [branch] is exercised by the hands that hold the whole power of another, the fundamental principles of a free constitution are subverted. [T]here is not a single instance in which the several [branches] of power have been kept absolutely separate and distinct.”


6 Vile, Constitutionalism and the Separation of Powers, supra note 3, p. 105.

Implicit in Madison’s argument was an interesting challenge to the very doctrine of the separation of powers: what will prevent the accumulation of power in the absence of pure separation? The answer was to be found in a unique feature of the Constitution: the pairing of separated powers with a system of checks and balances. For Madison, organization of powers answered the great challenge of framing a limited government of separated powers: "first enabl[ing] the government to control the governed ... and in the next place, obling[ing] it to control itself." This system is designed to give each branch fortifications against encroachments by the others. Combining the normative idea of liberty with the institutional preconditions of liberty, the "Madisonian Model" gave genuine and practical life to the vision of Montesquieu. "Despite disagreement as to how well it has worked, one characteristic of the checks and balances system cannot be denied: it encourages constant tension and conflict between the branches. Such conflict, however, the American Constitution smiles upon it".

What does Madison’s theory look like in practice? In short, the legislative branch makes law and the president may check Congress by vetoing bills Congress has passed, preventing them from being enacted. In turn, Congress may enact a law over the president’s objection by overriding his veto with a vote of two-thirds of both the House and Senate. The Supreme Court can then check both branches by declaring a law unconstitutional (known as judicial review), but the Supreme Court itself is checked by virtue of the fact the president and Senate appoint and approve, respectively, members of the Court. Furthermore, both the president and federal judges are subject to impeachment by Congress for 'treason, bribery, or other high crimes and misdemeanors' (United States Constitution: Article II, Section 4).

However, governmental powers and responsibilities are too complex and interrelated to be neatly compartmentalized. They intentionally overlap. As a result, "there is an inherent measure of competition and conflict among the branches of government. Throughout American history, there also has been an ebb and flow of preeminence among the governmental branches. Such experiences suggest that where power resides is part of an evolutionary process."

On the other hand, in the same year when the American Constitution came into effect, France adopted the famous Declaration of the Rights of Man and of the Citizen – *La Déclaration des Droits de l'Homme et du Citoyen* (1789). It is difficult to exaggerate Rousseau's importance in determining the particular form that the separation of powers took in France. Article 16 of

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10 Separation of Powers with Checks and Balances, *supra* note 9.


the Declaration proscribes, "Any society in which rights are not guaranteed, nor the separation of powers determined, has no Constitution." However, as Joseph Dainow pointed out, "[e]ver since the Revolution, it has been a primary objective of the French people, in reaction to previous political organization, to prevent and counteract any possibility of tyranny and arbitrariness. The separation of powers – executive, legislative and judicial – provided the broad formula, but primarily only as a distribution of functions; there are no checks and balances similar to the American system. Under the Fourth Republic of 1946, supremacy was vested in the National Assembly as the legislative power. The executive power administered the government but did so as subordinate to the legislative power. For the judiciary, the separation of powers meant the independence of the courts and the judges. The Fifth Republic of 1958 made important changes in the distribution of authority between the executive and the legislative powers, giving much more authority to the President and making the executive the most important power. The position of the judicial power was not greatly altered in this broad framework."

However, the 1958 French Constitution was fundamentally changed on 23 July 2008 by the constitutional revision bill of modernization of the institutions of the Fifth Republic in order to rebalance the relationship between the Parliament and the Government, in favour of the former. All branches of Government are affected by this reform. First, the exercise of the executive power is modified. The revision puts an end to the ambiguous diarchy between the President of the Republic and the Prime Minister. Indeed, it recognises the supremacy of the President of the Republic while it limits his prerogatives. Secondly, a set of measures is devoted to the legislative power with the goal to restore to favour the role of Parliament by eliminating some of the harsher instruments of rationalized parliamentarianism introduced in 1958. Thirdly, the constitutional revision deals with judicial power and citizens' rights. The most noteworthy provision here is the introduction of a new form of a posteriori constitutional review of legislation by the Constitutional Council.

Today, France as a republican unitary State and a parliamentary democracy, often qualified as semi-presidential, is characterised by a flexible separation of powers, i.e. the Government is politically responsible before the Parliament and can, in turn, dissolve the National Assembly.

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13 "Toute société dans laquelle la garantie des droits n’est pas assurée ni la séparation des pouvoirs déterminée, n’a point de Constitution." (Art. 16), La Déclaration des Droits de l'Homme et du Citoyen, France 1789.
15 The French legal system, Ministry of Justice, Secrétariat général, Service des affaires européennes et internationales (SAEI) and Département de l’information et de la communication (DICOM), November 2012, p. 3.
After this short and very simplified overview of the development of the doctrine of separation of powers in the USA and France, let us now turn to the five countries of the post-Soviet Central Asian states: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. I would like to remind you that the Tajik President, His Excellency Emomali Rahmon, pointed out in September 2015 that "the principle of separation of powers was alien in the history of the governance of the Tajik people in terms of state management". He stated:

"Our Constitution pays a special attention to arranging and establishing the government based on its division into legislator, executive and judicial branches, and the procedure of establishment and operation of the supreme authorities is regulated according to the principle of check and balance between them.

The theory of division of governance, which was known still at the Ancient Rome Empire, and later was applied as the main governance principles in the constitution of the majority of democratic states, was alien in the history of governance of Tajik people in terms of state management even in the soviet legal system."  

I think that this statement can also apply to the other four counties of Central Asia, as well as to my own country, Croatia.

Let us look first at the Central Asian countries, which took different paths in establishing new states after the collapse of the Soviet Union. However, they all guaranteed the principle of the separation of powers in their new constitutions.

Article 3, para 4 of the Constitution of the Republic of Kazakhstan prescribes, "The state power in the Republic of Kazakhstan is unified and executed on the basis of the Constitution and laws in accordance with the principle of its division into the legislative, executive and judicial branches and a system of checks and balances that governs their interaction."  

Article 3, point 2 of the Constitution of the Kyrgyz Republic prescribes, "The state power in the Kyrgyz Republic shall be based on the following principles: ... 2) Separation of state power; ...

Article 9 of the Constitution (Basic Law) of the Republic of Tajikistan prescribes, "State power shall be exercised on the basis of the separation of the legislative, executive, and judiciary branches."

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19 Unofficial translation from Russian of the Constitution of the Kyrgyz Republic (Kyrgyzstan), adopted by national referendum 27 June 2010, was done by the EU-UNDP Project on Support to the Constitutional and Parliamentary Reforms and OSCE/ODIHR, at <www.lawline.org/documents/id/5045> (Last accessed: 6 October 2015).
Article 4 of the Constitution of the Republic of Turkmenistan prescribes, "State power is based on the principle of separation of powers between the legislative, executive and judicial branches, which operate independently, balancing each other."\(^{21}\)

Article 11 of the Constitution of the Republic of Uzbekistan prescribes, "The principle of separation of powers into the legislative, executive and judicial shall underlie the system of state authority of the Republic of Uzbekistan."\(^{22}\)

We cannot but observe that the Constitution of Kazakhstan explicitly refers to the system of checks and balances, while the Constitution of Turkmenistan refers to the achievement of a balance among all branches of power.

At the same time, the bodies of constitutional control in Central Asia represent the whole variety of constitutional justice systems. Turkmenistan does not have a Constitutional Court at all. On the other hand, there are traditional constitutional courts in Tajikistan and Uzbekistan. Kazakhstan has a Constitutional Council and the Kyrgyz Republic has a special Constitutional Chamber of the Supreme Court.

The Constitution of the Republic of Tajikistan created a legal basis for formation and development of a number of new state and political institutions, including the Constitutional Court of the Republic of Tajikistan, as a specialized body of the constitutional control.\(^{23}\) In Tajikistan, the Constitutional Court is as an independent judicial authority responsible for constitutional review. It is established for the purpose of defending the Constitution, ensuring the primacy and direct effect of the provisions thereof and protecting human and civil rights and freedoms.\(^{24}\) The acts of the Constitutional Court are final.

In Uzbekistan, the Constitutional Court is the organ of judicial authority to hear the cases on the constitutionality of acts of the legislative and executive authorities. It determines the compliance of the laws and resolutions of the chambers of the Oliy Majlis, decrees of the President of the Republic, resolutions of the government and the local organs of state authority, interstate treaty and other obligations of the Republic with the Constitution.\(^{25}\) The


\(^{25}\) The Uzbekistan's Court also gives the opinion on the compliance of the Constitution of the Republic of Karakalpakstan with the Constitution of the Republic of Uzbekistan, and of the laws of the Republic of Karakalpakstan with the laws of the Republic of Uzbekistan.
Court interprets the norms of the Constitution and the laws of the Republic of Uzbekistan, hears other cases referred to its competence by the Constitution and the laws of the Republic of Uzbekistan. It adjudicates the cases and gives the opinions based solely on the Constitution of the Republic of Uzbekistan. The decisions of the Constitutional Court are final and not subject to appeal.\textsuperscript{26}

In Kazakhstan, the Constitutional Council is a state body which provides for the supremacy of the Constitution in the entire territory of the Republic. Laws and international treaties recognized by the Council not to be in compliance with the Constitution may not be signed or, accordingly, ratified and brought into effect. Laws and other normative legal acts, recognized as unconstitutional because they infringe the rights and freedoms of an individual and citizen secured by the Constitution, the Council is authorised to cancel. The decisions of the Constitutional Council are binding on the entire territory of the Republic, final and not subject to appeal.\textsuperscript{27}

Finally, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic is the highest judicial authority which independently performs the constitutional oversight by way of constitutional legal proceedings. In the event that laws as well as other normative and legal acts contradict the Constitution, the Constitutional Chamber is authorised to declare them unconstitutional. The Chamber provides its opinion on the constitutionality of international agreements which have not yet entered in force for the Kyrgyz Republic. It also provides its opinion on draft laws envisaging the changes in the Constitution. The decisions of the Constitutional Chamber are based on the Constitution and represent the legal position of judges which is free from whatsoever biases.\textsuperscript{28}

Zhurakulov pointed out that the countries of Central Asia rely today on foreign experience and standards to promote state-building at home. They are fully aware that it is necessary to improve "the tripartite system" through studying and applying the experience accumulated by the democratic countries and the most developed states.\textsuperscript{29}

It seems that the European Union (EU) has recognised their need. Under the auspices of the EU’s Rule of Law Initiative for Central Asia, the Rule of Law Platform project acts as a coordination mechanism to facilitate policy dialogue and promote the measures needed to encourage and support legal and governance reforms in each of the Central Asian countries. The project supports the Central Asian partners with core legal and judicial reforms. In this way it contributes towards the development of a stable and democratic political framework,

\textsuperscript{26} About the Court, Constitutional Court of the Republic of Uzbekistan, at http://www.ksu.uz/en/page/index/id/5 (Last accessed: 6 October 2015).
\textsuperscript{27} Constitution of the Republic of Kazakhstan, supra note 18.
\textsuperscript{28} The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, at <http://constpalata.kg/en/> (Last accessed: 7 October 2015).
functioning economic structures and the promotion and respect of human rights, as called for by the EU strategy for Central Asia.  

In this light, let us now turn to my country, Croatia. Since I am addressing notable justices from the countries of Central Asia for the first time, except those from Kazakhstan, I would like to begin this part of my presentation by saying a few words about my own country – Croatia.

The Republic of Croatia arose from Tito's communist Yugoslavia, within which Croatia was one of six federal units. Tito's Yugoslavia was governed by the principle of unity of powers. The dissolution of the former Yugoslavia began in 1990 and it lasted for many years. It was followed by an extremely unscrupulous and cruel war, unparalleled in Europe after the Second World War. Croatia fought heavily for its independence and gained it in 1991. Today, it is a full member of the Council of Europe and the European Union. Croatia is defined as a unitary and indivisible democratic and social state. Until 2000, there was a semi-presidential system of government in Croatia. Today, Croatia has the main features of a parliamentary democracy. The Croatian Parliament (Sabor) has been unicameral since the 2001 amendments which abolished the former Chamber of Counties.

Constitutional judiciary was introduced in 1964. From 1991, it has been organized on the lines of what is known as the Hans Kelsen model, which is also called the European-Continental Model of Constitutional Review. Accordingly, the Court may repeal laws enacted by the Croatian parliament, as well as regulations passed by the executive branch of power and by public administration if it finds them unconstitutional. In addition, Croatia has recognized the constitutional complaint. The Constitutional Court may quash judgments of the courts or other individual acts of any state and public body (including those of local and regional self-government) if it finds that constitutional rights and freedoms have been violated by them.

The principle of separation of powers was introduced in Croatia in 1990 by the new Croatian Constitution. Article 4 of the Croatian Constitution prescribes, "In the Republic of Croatia government shall be organized on the principle of separation of powers into the legislative, executive and judicial branches, but also limited by the constitutionally-guaranteed right to local and regional self-government. The principle of separation of powers encompasses forms of mutual cooperation and reciprocal checks and balances as stipulated by the Constitution and law." As you can see, the constitutional concept of separation of powers in Croatia expresses the basic idea of the "Madisonian Model" of checks and balances.

The Croatian Constitutional Court has until now always emphasized the instrumental character of the separation of powers and its non-independent value, with the imperative requirement not to interpret it mechanically. Let us see how this principle works in Croatia.

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There are four organs of government, in which the principle of separation of powers is implemented: the Croatian Parliament is a representative body of the people and is vested with legislative power; the Government and the President of the Republic are two pillars of the executive power: the Government exercises executive power and the President represents and acts on behalf of the Republic at home and abroad; the Supreme Court is the highest court in Croatia and together with lower courts form the judicial power. However, Croatia has five constitutional organs. The fifth one is the Constitutional Court, which is not part of the "classical" triad of government powers, but rather a special constitutional body outside that system.

The President and the Parliament are elected directly by the people. Judges are elected by a special, independent body, the State Judicial Council. Its members are elected from judges, by the judges themselves. Only the President of the Supreme Court is elected by Parliament. Parliament also elects the Government and all the judges of the Constitutional Court.

The President of the Constitutional Court exercises preliminary control of the elections of the President of the Republic, for the President swears a solemn oath before the President of the Constitutional Court, declaring loyalty to the Constitution. The President entrusts the mandate to form the Government to a person who enjoys the confidence of the majority of all Members of Parliament.

As for control, the Parliament controls the Government. As for the President of the Republic, the Parliament may institute proceedings for the impeachment of the President by a two-thirds majority vote of all deputies, but the Constitutional Court shall decide on the impeachment by a two-third majority vote of all of its judges. The President of the Supreme Court delivers an annual report before Parliament on the state of the judiciary. On the other hand, the Constitutional Court controls all the branches of power, and is vested with very strong authorities. All in all, it is a dense network of mutual relations, where it is clear that there is not a single connection between executive powers (the President of the State and the Croatian Government) and the judicial system, and only a slender connection between Parliament and the judicial system (through the President of the Supreme Court). On the other hand, the controlling authorities of the Constitutional Court over all the branches of the government are strongly defined. There is no power exercising control over the Constitutional Court.

What I ultimately want to emphasize is that the Constitutional Court in Croatia is not part of the judiciary. The constitutional judiciary forms what is known as the "fourth branch of power" and it reviews all the other three branches of power – namely, legislative, executive and judicial power – in constitutional matters.

However, in some other European countries, constitutional courts are part of the judiciary as the third branch of power. Of course, this does not stop them from being completely independent of all other branches of power, and from being wholly separate from the judicial system.
Let us look at Germany. The division of powers is one of the principles of Germany’s democracy and is anchored in the Basic Law (Grundgesetz). The powers of the state are divided between several branches, the legislative, the executive and the judiciary, which are supposed to monitor one another and limit the power of the state. In line with the principle of the separation of powers, the Bundestag is the highest organ of the legislative in Germany. Alongside it stand the Federal Government, representing the executive, and the federal and Land courts, representing the judiciary. So, Germany also has five constitutional organs. However, the Federal Constitutional Court is considered as part of the judiciary. Thus, only this court, not the German Federal Supreme Court, is considered to be a constitutional body, or a body making up the constitutional identity of the modern German state.

When we look at the very complex mutual relations between the constitutional organs in countries that are mentioned above, what does all this show? My answer to this question would be as follows: It clearly shows that there is variety of modern constitutionalism based on the very same idea of the separation of powers, which is normatively as well as factually open to different institutional solutions. Therefore, it is difficult to define a common ground in the confusing variety of western constitutional traditions and their diverse use of the notion of separated powers. For the purposes of this paper, this is simply not possible.  

It is sufficient here to ask ourselves how the idea of separated powers has been put into effect in countries with different traditions (such as countries of Central Asia, on one hand, and Croatia, on the other) and if the fundamental goal of this doctrine has been realised in these countries. This is the way to show its normative and descriptive value for contemporary legal orders we are talking about today. Let us recall, "[t]he separation of powers, combined with judicial protection of individual rights, forms the ‘matrix of constitutionalism’ (the term borrowed from Richard Bellamy – op. J. O.). Both of them are inseparable and indispensable for the functioning of a constitutional system that meets the standards of contemporary international law. A system based on the separation of powers that lacks effective mechanisms for the protection of individual rights or a judiciary that is not independent from the other branches of government would ultimately not serve the rule of law."  

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31 This does not mean that the search for this common ground is not necessary. Just the opposite. Thus, for example, in his book "The Three Branches: A Comparative Model of Separation of Powers" (see supra note 1) Mollers has inquired how the decision-making responsibilities of courts, administrations, and parliaments should relate to one another in order to plausibly claim legitimacy. The author tried to reconstruct the traditional notion of the separation of powers as a theory of legitimate decision-making and applied that theory comparatively to different national, European, and international legal issues. In other words, the author tried to develop a systematic link between a model of normative political theory and the organization of public action, based on the idea of separated powers, exploring the idea that constitutional orders acknowledge the contradictory claims of individual and democratic collective autonomy, and that a specific correlation between the three branches of government serves to express, mediate, and mitigate those claims.

So, the question is: whether - in the light of specific features of a particular State - the principle of the separation of powers has been effectively implemented in that state?

In my opinion, from the practical view of constitutional judge, the answer mostly depends on four elements.

Firstly, it depends on the manner in which authorities are distributed between the executive and the legislative powers, as well as on the degree of independence of the courts and judges, especially from executive power.

Secondly, the effectiveness of the implementation of the principle of the separation of powers in a particular State also depends to a large extent on the manner in which this principle are interpreted and applied in everyday practice by those who are vested with executive, legislative or judicial authorities. I will give you an example to illustrate this.

The dream of all Croatians throughout the communist period was to build roads to connect the continental part of Croatia with its Mediterranean part. We fulfilled this dream many years later, but at the cost of incurring huge debts. Today Croatia has the most beautiful motorways in Europe, but too many debts and too many expenses. Our marvellous motorways are just not cost effective, except during the summer months. In such a situation, the Government made a unilateral decision to put all the Croatian motorways under concession in order to reduce the public debt. Accordingly, the Government launched an international tender. Croatians rose to protest immediately. Within 15 days, over half a million valid signatures were collected from voters who requested the holding of a popular referendum with a view to stopping Croatian motorways from being put under concession. Under this enormous pressure, the Government backed down and annulled the tender, but the Constitutional Court, on this occasion, rendered a decision warning the Government that even in an area dealing with economic issues, there are cases when the preliminary decision must be left to Parliament for only the Parliament can provide the entire economic undertaking with the undisputable democratic legitimacy.33

I have chosen this particular example because it casts the light on the third important element which defines the effectiveness of the principle of the separation of powers in a country. It is certain that Croatians would never have risen to such a protest and that the Constitutional Court would never have rendered such a decision had not the problem been linked to the specific Croatian circumstances and our "collective mentality".

So, the third element speaks about us, our roots, traditions and view-of-life. In 1944, Judge Learned Hand pointed out that "Liberty lies in the hearts of men and women". He observed, "when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it." So, building faith in the idea of the separation of powers, as an instrument for gaining liberty, requires a similar transformation in mentality as much as it does in the formal laws that govern political relations. Since we all lived in communist

societies based on the unity of power, any effort to generate a rigid template for developing the system based on the separation of powers is therefore likely to fail. The major transformation required is in the minds of the people who administer our countries, as well as in the minds of general population; we must therefore be sensitive to the particularities of these facts both at the level of form and of substance.

Indeed, it seems that this is one of the most important prerequisites for accepting the doctrine of the separation of powers in Central Asia region. Zhurakulov stated, "... in the near future the Central Asian ... countries should move away from arithmetic to algebra; to be implemented the separation of powers principle demands that political-legal issues of a higher order should be successfully resolved. It is highly important to avoid the extremes that can be described as 'divided power', which leads to an open confrontation among the branches of power, conflicts among the people in power, and mounting opposition between the people and the government. Even the most detailed models of the tripartite system will never work in a society that has not yet completely accepted democratic values, that is, remains at a fairly low level of legal awareness. This makes democratic changes absolutely indispensable, and, as we see it, they should occur first and foremost in public conscience."34

Fourthly, and finally, I am convinced that – in countries that have a constitutional judiciary – in order to effectively meet the principle of the separation of powers, the following question is extremely important: how the Constitutional Court itself understands and approaches this principle and how prepared it is to defend it. I will give you just one example from the case-law of the Croatian Constitutional Court.

When a heated campaign was carried out in Croatia in 2013 concerning a popular constitutional referendum on whether marriage should be defined in the Constitution itself (as a living union between a woman and a man), the Constitutional Court clearly pointed out that the referendum question on the definition of marriage in terms of its content is in fact a positive legal provision contained in the Family Act. Article 5 of that Act reads: "Marriage is a legally governed life union between a woman and a man." Accordingly, putting this very same provision in the Constitution means reducing or completely removing the competence of the Constitutional Court to control ordinary legislation. In other words, "constitutionalisation" of primarily legislative matters can result in an infringement of democratic checks and balances and the separation of powers. The Court stated:

"9.1. The Constitutional Court could not accept as a rule the new aspect that in a citizens' constitutional referendum already existing legislation would be transformed into constitutional law, whereby a provision, which belongs to the corpus of legislation, is introduced into the Constitution.

The Constitutional Court recalls the standpoint of the Venice Commission, the advisory body of the Council of Europe for constitutional matters, of the unacceptable systematic 'constitutionalisation' of legislation in a democratic society, in view of the fact that this undermines the democratic principle of 'checks and balances' and the

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34 Zhurakulov, Separation of Powers in the States of Central Asia and the Caucasus, supra note 29, pp. 56-57.
principle of separation of powers. For example, on the occasion of the amendments to the Hungarian Fundamental Law of March 2013, whereby some legislation was 'constitutionalised', the Venice Commission in its Opinion of the Fourth Amendment to the Fundamental Law of Hungary of 17 June 2013 (Opinion of the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), Opinion 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013), pointed out:

76. ... even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy.

86. According to European standards, in particular the Statute of the Council of Europe, Hungary is obliged to uphold democracy, the protection of human rights and the rule of law. The sovereignty of the Hungarian Parliament is therefore limited in international law.

87. The Venice Commission is concerned that the approach of shielding ordinary law from constitutional review is a systematic one. This results in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution. This is a problem both from the point of view of the rule of law, but even more so from the point of view of the principle of democracy. Checks and balances are an essential part of any democracy. The reduction (...) and, in some cases, complete removal ('constitutionalised' matters) of the competence of the Constitutional Court to control ordinary legislation according to the standards of the Fundamental Law results in an infringement of democratic checks and balances and the separation of powers.

(…)

137. ... Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the 'political game', but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought.'

These standpoints are general in nature and relate to all amendments to the constitution, regardless of whether they are undertaken by parliament or by a citizens' constitutional referendum.

The Constitutional Court in this sense points out that the incorporation of legislative matters into the Constitution must not become a systematic occurrence, and exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society, as the ECtHR stated for the institution of marriage in § 62 of the judgment in Schalk and Kopf v. Austria (2010).”\(^\text{35}\)

In sum, in this decision the Croatian Constitutional Court has clearly demonstrated that it is prepared to effectively defend the democratic principles of the separation of powers and 'checks and balances'.

Esteemed colleagues, constitutional courts must not engage in political regulation but in legal discernment using legal methods. Constitutional courts must always base their findings exclusively on valid constitutional law, and not on what might be politically, socially or economically appropriate. However, regarding important constitutional issues such as the principle of the separation of powers, which have a prominent political dimension and which cause turbulence, I consider that the Constitutional Court must not keep quiet. Even in the face of strong criticism, and huge negative reactions, and sometimes under unbearable pressure, it must stand firm, defend and shape fundamental constitutional principles of its country, always bearing in mind that the legal system is a living organism which breathes and grows and adjusts to serve the needs of society.

I hope that the points I have just stressed could be interesting for our discussion here.