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Constitutional Courts' Activism and the Relation Between Law and Politics: A Legal Theoretical Contribution

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Abstract

If one looks at the Constitutional Courts and their place in the architectural landscape of a constitution in a Western or Western-like democracy, they appear to lean into politics through their activism in the political game. This leaning appears to go against the (at least theoretical) nature of a court, which has the task of settling legal cases, not dealing with political decisions. In particular, many Constitutional Courts in the Western or Western-like democracies have grown more distant from the legal arena (as the ultimate authority on what constitutes valid law) and closer to the political one (by limiting and expanding the operating space of the political actors and their legislative tools). The basic thesis of this article is that, from a descriptive point of view, Constitutional Courts, though playing a bridging role between the political and legal worlds, are – from an institutional and functional perspective – primarily legal actors. Without a doubt, these Courts play a role in the political game; however, their position as institutional actors should be based upon the direct effects of their decisions ('outputs') in the legal arena, rather than on the indirect consequences ('outcomes') in the political arena. As a consequence, the article comes to the conclusion that the Constitutional Courts'

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primary responsibility ought to be towards the legal community and the paradigms governing its discourse.

Keywords: constitutional courts, politics, judicial activism, functions, institutional position

I. Introduction

If one looks at the Constitutional Courts and their place in the architectural landscape of a constitution in a Western or Western-like democracy, they appear just like the Leaning Tower of Pisa: they are essential in giving the landscape a certain character, they are beautiful to behold, but they also instill a certain discomfort. Just as the Tower of Pisa has an obvious feature that is quite unnatural for a tower, that is, deviating from the 'natural' position of standing straight in relation to the ground, so the Constitutional Courts, when observed in their constitutional landscapes, can immediately be seen to lean into politics through their activism in the political game. This leaning appears to go against the (at least theoretical) nature of a court, which has the task of settling legal cases, not dealing with political decisions.

Such leaning towards the political game on the part of the judges (in particular at the highest levels) is not a novelty of our times, going back at least to the late 18th century (as seen in the role of judges in the French Revolutionary state) or the early 19th century (as seen in the role of the Supreme Court in the institutional building of the United States).[1] However, the role that the judicial bodies play in the political arena has become one of hottest topics of debate in the legal world in the last decades, often under the label of "judicial activism" or "judicialisation of politics".[2] As regards what are usually the highest of the judicial bodies, namely the Constitutional Courts (or under any other court operating as a guardian of the respect for the constitutional documents on the part of the other

[1] E.g., the French Loi des 16-24 août 1790 sur l'organisation judiciaire, Title II *Article* 12 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000704777> *accessed 14 March 2021*; or the famous *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

[2] Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011) 253. E.g., Anke Eilers, 'The Binding Effect of Federal Constitutional Court Decisions upon Political Institutions' (European Commission for Democracy Through Law (Venice Commission, 22 May 2003) <www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf> accessed 14 March 2021; or Sandra Day O'Connor, 'On the Importance of Having A Fair and Independent Judiciary' (2006) 38 Third Branch 9, 10 ("Directing anger toward judges has had a long tradition in our nation … While scorn for some judges is not altogether new, I do think that the breadth of the unhappiness being currently expressed, not only by public officials but in public opinion polls in the nation, shows that there is a level of unhappiness today that perhaps is greater than in the past and is certainly cause for great concern.").

legal actors and the law-makers), one can easily see a trend in the recent decades. For reasons which will not be explored in this article, many Constitutional Courts in the Western or Western-like democracies have become increasingly 'active' by furthering their activities in a law-making direction and offering authoritative interpretations of the valid law, different from that of other actors at the top of the constitutional structure which are institutionally devoted to law-making (e.g., the national assemblies or the executive branch).[3] In other words, many Constitutional Courts have shifted their 'recognised' role of being the authoritative interpreter of the law, in light of the constitutional documents, towards the middle of the institutional map of a democracy based on the rule of law. Thus, they have grown more distant from the legal arena (as the ultimate authority on what constitutes valid law) and closer to the political one (by limiting and expanding the operating space of the political actors and their legislative tools).[4]

As can be understood from this concise introduction, judicial activism (in particular on the part of the highest courts) focuses primarily on the relations between law and politics. Therefore, the main purpose of this article is to evaluate whether Constitutional Courts should be considered, according to legal theoretical criteria, to be legal actors simply enforcing what is written by political actors in statutes and constitutions, or institutional actors with a predominantly political nature, determining what the law should say. To achieve this, the investigation will not only focus on the function that Constitutional Courts play, between law and politics, but also on their institutional positioning itself.

When reading the legal literature on Constitutional Courts and politics, it is evident that important concepts are applied inconsistently and imprecisely. The result is a befuddlement among scholars whereby, in certain instances, the same concept can have several different interpretations. An example of the terminological inexactitude used in the discourse concerns the word 'political'. When some academics refer to 'political' in the Constitutional Courts, they refer to the fact that these judicial bodies perform the work of politicians. Yet, other scholars use the word to identify the fact that Constitutional Courts are themselves

[3] E.g., Richard A Posner, 'The Supreme Court 2004 Term–Foreword: A Political Court' (2005) 119 Harvard Law Review 32, 35–39; Michael Hein, 'The Least Dangerous Branch? Constitutional Review of Constitutional Amendments in Europe' in Martin Belov (ed), *Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary* (Routledge 2020) 187–206.

[4] Joseph Raz, 'On the Nature of Law' in Joseph Raz, *Between Authority and Interpretation:* On the Theory of Law and Practical Reason (OUP 2009) 99–100. E.g., Julien Mouchette, 'The French Constitutional Council as a Law-Maker: From Dialogue with the Legislator to the Rewriting of the Law' in Monika Florczak-Wątor (ed), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 9–27; Harvie J Wilkinson, 'Of Guns, Abortions, and the Unraveling Rule of Law' (2009) 95 Virginia Law Review 253, 275–288.

political actors, just like any other political party, with their own political agenda. In particular, this article aims to better understand the role of the politics in the work of the Constitutional Courts. It suggests that legal practitioners and scholars must reflect upon and more clearly define, with the help of political and social-science scholarship, where the institutional positioning of these Courts are in the legal architecture of a Western or Western-like democracy and the functions such judicial bodies should play in the political arena.

The basic thesis is that, from a descriptive point of view, Constitutional Courts, though playing a bridging role between the political and legal worlds, are – from an institutional and functional perspective – primarily legal actors. Without a doubt, these Courts play a role in the political game; however, their position as institutional actors should be based upon the direct effects of their decisions ('outputs') on the legal arena, rather than on the indirect consequences ('outcomes') on the political arena. As a consequence, and moving from these descriptive findings into the realm of normative judgements, the article comes to the conclusion that the Constitutional Courts' primary responsibility ought to be towards the legal community and the paradigms governing its discourse.

This article makes no pretensions on providing any final words either in the discussion on judicial activism or as regards the relations between the legal and political worlds in general. First, the focus here is solely on Western (or Western-like) legal systems; second, this work has a more limited objective of contributing to clarifying the terms of the discussion, in particular by finding a solid basis (at least from a legal perspective) upon which to begin the discussion on whether judicial activism is good or bad. In other words, this investigation primarily has a *legal theoretical* task: To clarify what is meant when the legal discussion deals with the 'political' in the work of Constitutional Courts.[5] In particular, the legal theoretical approach is considered an appropriate lens because, if used in HLA Hart's terms, it enables one to consider how the concept 'political' is conceived and employed inside the legal order by legal actors when talking about the Constitutional Courts. This approach also allows one to clarify the specific meaning of the idea of politics in the Constitutional Courts within a legal context, distinguishing it then from the use it can have in ordinary everyday or political language. By offering such "elucidation of the use of words in characteristic legal contexts", the legal theoretical approach can then provide some normative criteria to the legal actors on how to evaluate the work done by such high courts when the Constitutional Courts come in contact with the political arena or, in general, with highly political

[5] HLA Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105 University of Pennsylvania Law Review 953, 961–962. See also HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37, 60.

issues during their work.[6] In other words, the legal theoretical approach, by making descriptively clear in what sense 'politics' enters into the work of the Constitutional Courts, helps also to set the stage for a more normative enterprise aimed at indicating to legal actors what ought to be considered (and not) when evaluating the 'political' work done by Constitutional Courts.

In Part I, certain key concepts used in this article are defined. The focus in Part II is on the importance of judicial activism when dealing with Constitutional Courts. Part III moves the attention to a feature of Constitutional Courts in well-established Western democracies, namely their positioning between the legal and political arenas and how this hybrid nature may be a theoretical problem. The final Parts IV and V then identify why the characterisation of Constitutional Courts, as either legal or political actors, is relevant from a legal perspective, both in descriptive and normative terms. These parts also explore how it is possible, at least from a legal theoretical perspective, to resolve the dilemma of 'legal vs. political actors' by defining Constitutional Courts as legal actors performing a political function.

II. A Definitional Framework

Before we delve into the topic at hand, some key concepts used in this text must be clarified. First, *judicial activism*, sometimes referred to by other words (e.g., 'constitutional politics', 'government of judges', or 'judicialisation of politics'), identifies the general phenomenon – typical of (but not limited to) well-established Western democracies – when "courts impose a judicial solution over an issue erstwhile subject to political resolution" by intervening against and striking down a part of properly enacted legislation, or by "legislating" in an area in the absence of legislation.[7] Judicial activism thus identifies a judicial activity directed at stretching the formal structures and the letter of the law to fill gaps (or what are perceived as gaps) left by politicians. The judges take a more 'active' stance towards law-making (in particular in its legislative form) to implement values that the political

[6] Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (n *5*). See also HL*A* Hart, *The Concept of Law* (3rd edn, OUP 2012) Chapters II and IV; and Hart, 'Definition and Theory in Jurisprudence' (n 5) 38.

[7] David L Anderson, 'When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante' (1990) 42 Stanford Law Review 1549, 1570. See also Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 California Law Review 1441, 1463–1476; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) 61–66; Charles S Lopeman, *The Activist Advocate: Policy Making in State Supreme Courts* (Preager 1999) 3. *cf* Frank H Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 University of Colorado Law Review 1403, 1403; William P Marshall, 'Conservatives and the Seven Sins of Judicial Activism' (2002) 73 University of Colorado Law Review 1217, 1220–*122*1 (pointing out to the difficulties of identifying a single meaning of "judicial activism").

actors are unable to sense in the community or are unable to transform into legislative measures, or that are part of the political baggage of certain judges.[8] Usually, the courts find support for their new course in the foundational structures of the legal system, for example, the constitution or international treaties. In other words, judicial activism refers to the complex of judicial activities through which the judges consciously and explicitly take upon themselves a power that has traditionally been left to other institutional actors, for example, the political actors sitting in the national assemblies or (to a lesser extent) the public administration. In doing so, the courts are guided by the idea that their primary role is neither to find the true intention of the legislative bodies nor to review the work done by the public agencies. Instead, they intend to act as guardians of the legal system as a whole, by positioning themselves as a third party and solving disputes in the light of fundamental legal principles which have not been contemplated by the legislative bodies and which have been neglected in administrative practice.

Second, when referring to Constitutional Courts, this includes all the highest courts that – under varying names (e.g., High Council or Supreme Court) – have among their primary legal duties the jurisdiction to evaluate the constitutionality of the law, for example, the consistency or conflict of legally relevant documents produced within a certain legal system in relation to the basic legal documents of that community. Such courts are also characterised, at least with respect to conducting constitutional reviews, by being positioned outside the ordinary court system, in a sense, and by their work being completely independent (at least in its modality) from the other branches of the state.[9] It is worth noting that several types of Constitutional Courts can find a place under this definitional umbrella. In particular, this definition allows scrutiny both of Constitutional Courts that have an abstract review competence (e.g., when a Constitutional Court is asked to determine the compatibility of statutory law with the Constitution at the request of non-judicial public bodies, e.g., a law-drafting committee of the national assembly or a regional government), and those that have a more concrete review power

[8] E.g., Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 8–10. See also Niels Petersen, *Proportionality and Judicial Activism:* Fundamental Rights Adjudication in Canada, Germany and South Africa (CUP 2017) 18–33 (pointing out judicial activism as aimed to correct the failures of the political market).

[9] Ralf Rogowski and Thomas Gawron, 'Constitutional Litigation as Dispute Processing' in Ralf Rogowski and Thomas Gawron (eds), *Constitutional Courts in Comparison:* The US Supreme Court and the German Federal Constitutional Court (2nd edn, Berghahn 2016) 1. Due to this very "external" position in relation to the ordinary judiciary, Western legal systems usually assign to Constitutional Courts other fundamental "above the parties" types of jurisdiction. Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 6.

(e.g., when a Constitutional Court's review jurisdiction is activated by a party to litigation, or by a lower judge, stating that a law violates the constitutional texts).[10]

Third, the definition of 'political actors' adopted here is fairly different from that used by the other discipline that also investigates the role of Constitutional Courts in relation to the political system, namely political science. While for the latter, political actors are more or less identified as all institutional actors that 'make the law', the term in this article is intended from a more legal perspective and refers to a narrower range of institutional entities whose primary goal is to see their values implemented into a community by making use of the legal apparatus and system, for example, political parties or interest groups. Political actors can (and usually do) have a primary goal of a non-legal nature (e.g., an economic or social nature) and therefore, in their operations, mainly take into consideration the environments surrounding the legal arena, for example, the political or socio-economic ones. Moreover, their primary intention is to influence people into adopting a certain model of behavior by convincing the addressees of the "inner goodness"[11] of their model.

Lastly, particularly in Western legal systems, *legal actors* can be defined as institutional actors primarily aiming at influencing the legal system, and therefore mainly focusing on the latter's logical structure. Like for political actors, the main goal of legal actors is to exercise power, that is, to force people to do things that they otherwise are not willing to do. As pointed out by Hans Kelsen, both law and politics try to make people do something, the law being "a social order, that is to say an order regulating the mutual behavior of human beings".[12] However, legal actors, when dealing with a statute or legal precedent, consider these normative documents as exercising their (binding) power on the addressees only as (and as long as they are) part of a larger hierarchical system of norms with a similar (legal)

[10] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 823; and Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 65–74. See also Albert H Y Chen and Miguel Poiares Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2015) 97–98 (as to the distinction between an American "decentralised" model and a continental European one of a more "centralised" character).

[11] Raz (n 4) 101; Niklas Luhmann, *Law as a Social System* (OUP 1994) 370; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law and Society Review 239, 259. See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1998) 266. *cf* Frederick W Frey, 'The Problem of Actor Designation in Political Analysis' (1985) 17 Comparative Politics 127, 127–*12*9.

[12] Hans Kelsen, 'Law, State, and Justice in the Pure Theory of Law' in Hans Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science* (University of California Press 1957) 289. See also Max Weber, *The Theory of Social and Economic Organization* (Free Press 1964) 152.

nature, and with specific (legal) rules to be used for interpretation, application, and creation (legal reasoning).[13]

III. The Relevance of Judicial Activism in Constitutional Courts Compared to Other Courts

The 'creative' interpretation of legal texts, or judicial activism, is a phenomenon generally characterizing all courts in a legal system, from the lowest county court to the highest court. However, judicial activism becomes a 'more evident' issue when addressed by Constitutional Courts (and the highest courts in general, e.g., the French Court of Cassation). First, the judicial activism performed by Constitutional Courts tends to become more visible as it often deals with fundamental questions relevant to all the other spheres of a society, that is, questions that by their nature can affect not only the legal or political arenas, but every arena and every person within a national community. Decision-making on the part of Constitutional Courts focuses on the fundamental laws of a community, and one of the features of a well-established democracy is the (actual or potential) intrusion of the law in all aspects of community life.[14] Moreover, the typically high degree of social legitimacy that Constitutional Courts are given by all actors within a certain community, contributes to rendering every decision taken by these courts more than simply a question of law and politics, but rather a question concerning the fundamental legal and political shape of that community.

When judicial activism takes place at the constitutional level, its consequences can reach the community at large, or at least – using Luhmann's terminology – it creates "noises" that can "disturb" the internal work (*autopoiesis*) of all the other subsystems.[15] This observation is valid for both Constitutional Courts with a jurisdiction of abstract review and those with a more concrete review jurisdiction. For example, in a specific euthanasia case submitted to its attention by a lower judge, a Constitutional Court's decision can face issues relevant for cultural or religious subsystems, namely the general question of how far the State can interfere with individual rights, or whether the 'right to live' encompasses also

[13] Habermas (n 11) 233–234; Kaarlo Tuori, *Critical Legal Positivism* (Ashgate Publishing 2002) 36–39; Luhmann (n 11) 188 (and his idea of "juridical rationality"). See also Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 657.

[14] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) vii; Marc Galanter, 'Law Abounding: Legalisation Around the North Atlantic' (1992) 55 Modern Law Review 1, 13–14. See also Lawrence M Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harvard University Press 1998) 15.

[15] Luhmann (n 11) 80–84; Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 64–99. See also Matthew E K Hall, *The Nature of Supreme Court Power* (CUP 2010) 156–165.

the necessity for the public authorities to protect this right against the will of the 'owner' of such right.

The second factor underlying the general importance of judicial activism on the part of the Constitutional Courts relates to their being the highest judicial body of a legal system. It is true that judicial activism is important throughout all the levels of the judicial system. However, in the majority of cases, it is questionable whether lower level judicial law-making, though directly important for the community, can actually influence the higher levels.[16] For instance, a county court's law-making interpretation of a specific county council directive on shop licenses to allow for a certain kind of business in town tends to have an impact confined to the local implementing administrative offices, due to its limited jurisdiction. On the other hand, even such a simple issue can in the exceptional case have reverberations throughout the entire judicial system, for example, when it is a question of a pornography shop and freedom of speech.

When it comes to Constitutional Courts, their influence often transcends all the lower and intermediate levels, affecting the entirety of the legal structure, that is, including the lower structure, and a large part of the political world. This influence, and the resulting relevance of constitutional judicial activism over everything that is legal and political, is due to both the structure of the constitutional system itself (e.g, its being hierarchical) and the typically high degree of legal legitimacy that these types of courts have gained historically among the actors within the legal arena.[17] The centrality of the law-making of the Constitutional Courts is also recognizable in the fact that, when discussing judicial activism, most critical voices – whether in academia, politics, or the judiciary – end up having these Courts (not the lower ones) as their main targets.

IV. Converting the Hybrid Nature of Constitutional Courts Into a Theoretical Problem

When dealing with the issue of Constitutional Courts in relation to politics, the first question is where these institutional actors should be positioned on an imaginary map of two ideal-typical continents, namely the legal world and the

[16] Stone Sweet (n 7) 21–22. *cf* Lynn Mather, 'Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation' (1998) 23 Law & Social Inquiry 897; Jennifer Bowie and Elisha Carol Savchak, 'Understanding the Determinants of Opinion Language Borrowing in State Courts in the United States' in Susan M Sterett and Lee Demetrius Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar Publishing 2019) 277.

[17] Habermas (n 11) 238–286; Marc Bühlmann and Ruth Kunz, 'Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems' (2011) 34 West European Politics 317, 332. See also Chen and Maduro (n 10) 100–101.

political world. This question is legitimate, since it is easy to see the importance of the role played by the courts in general and the Constitutional Courts in particular within both the legal and political systems.

As far as the legal system is concerned, Constitutional Courts are ranked at the top, being the supreme and ultimate interpreters of the constitution and consequently of the constitutionality of different law-making measures, in particular (but not exclusively) statutes. In other words, constitutional review is the legal competence allowing such courts to enjoy an exclusive decision-making power and a legal superiority in relation to the other branches of power, to an extent which is often unknown to most of the other judicial bodies within a national community. In addition to this lofty position within the legal structure, Constitutional Courts also tend to occupy a dominant place in the political building characterizing a democratic form of state. Constitutional Courts are entrusted by the political system (and, through it, by the community as such) to act as the ultimate guardians of the basic values that inspired the founding fathers and mothers when writing the fundamental documents (or in establishing the fundamental customs) underpinning and regulating the life of the political community.[18]

However, if the Constitutional Courts are seen from the perspective of the relations of law and politics, one can assert that they actually occupy a third position, at a much deeper level, functioning as a sort of transfer point between the legal and political worlds. If one considers the primary position occupied by Constitutional Courts (which is often implicit in the building of a modern democracy), this location can be identified as a bridge between values produced in the political world and in legal thinking. As stated by a political scientist,

> "[*c*]*onstitutional courts act systematically both in the legal and the political systems*. Almost every judgment has some consequences on the legal system (e.g., the abrogation of an unconstitutional law) and the political system (e.g., the retroactive defeat of the parliamentary majority that enacted this law)".[19]

As previously seen, the primary function of a Constitutional Court is constitutional review, that is, to continuously monitor the compatibility of

[18] Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2015) 73–82. See also Cass R Sunstein, *Legal Reasoning and Political Conflict* (OUP 1998) 82–83; Robert Alexy, 'The Dual Nature of Law' (2010) 23 Ratio Juris 167 (as to this dualistic position of the legal discourse in general).

[19] Michael Hein, 'Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach' (2011) 3 Studies of Transition States and Societies 3, 17 *(emphasis in original)*. E.g., Martin Shapiro and Alex Sweet Stone, *On Law, Politics, and Judicialization* (OUP 2002) 81; Ralf Michaels, 'American Law (United States)' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 75–76; or Nevil Johnson, 'The Interdependence of Law and Politics: Judges and the Constitution in Western Germany' (1982) 5 West European Politics 236, 239–244.

legislation and other normative measures with the basic values as announced in the constitution or other fundamental laws. While this role assigned to the Courts is quite undisputed, it carries an underlying problem of conflicting logic. At one end, the legal message of the Constitution, namely the models of behaviors prescribed, is heavily affected by the fact that constitutions are not only written by political actors (as are most legal measures), but are also often the product of extremely complex political compromises or very general political statements. Their being a political product, the constitution or fundamental law tends to be written less in legal terms, that is, as (at least in their intention) 'if x then y' or 'either/or' statements, and more as political messages, specifically in terms that resemble political propaganda, where the fundamental goals are models of behavior that the political actors want to be 'realised' in the community itself.[20] At the other end, constitutional documents are for historical reasons regarded as the highest sources of law in Western legal systems or, in other words – at least from a legal perspective – the constitution is legal in nature, that is, it is binding towards the addressees. As constitutions are designed as legal documents, they are treated as legal sources, having the strongest binding force on all the national law-making and law-applying agencies and on the community as well.[21] In other words, constitutions or fundamental laws in general have contents that tend to be dominated by the logics of the political discourse, but that are inserted into shells which have the form of laws and legal logics and shaping – somehow setting the agenda (at least as a direct effect) for the entire legal arena of a certain community.[22] As recently stated by a legal scholar,

> "[c]onstitutions structure the relationship of law and politics. They politicise the production of law, by connecting the legal system to a political process, and they legalize this political process through its obligation to superior legal rules".[23]

Since the primary goal of a Constitutional Court is to 'protect' such documents, it is easy to understand how this institutional actor tends to end up being a legal player, but inclined towards the political world. Three different

[20] E.g., Rudolf Streinz, 'The Role of the German Federal Constitutional Court: Law and Politics' (2014) 31 Ritsumeikan Law Review 95, 103–*104*; Jeremy Waldron, *Law and Disagreement* (OUP 2001) 220–222.

[21] E.g., András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 23–25; John O McGinnis and Michael B Rappaport, *Originalism and the Good Constitution* (Harvard University Press 2013) 130–*132*.

[22] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 349–*351*; and Martin Loughlin, 'Fundamental Law' in Miguel Nogueira de Brito and Luis Pedro Pereira Coutinho (eds), *The Political Dimension of Constitutional Law* (Springer 2020) 8–19.

[23] Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' in Matthias Jestaedt *and others* (eds), *The German Federal Constitutional Court: The Court Without Limits* (OUP 2020) 143.

features affect Constitutional Courts, making them actors that, though having their feet in the legal world, tend to lean heavily towards the political arena. First, from a legal theoretical perspective, Constitutional Courts are legal actors leaning into politics from an *institutional perspective*, that is, from the perspective of where these courts are positioned among the different organisations in a certain community which has as its primary goal governing the behavior of individuals, and are characterised as being permanent as well as making and enforcing rules governing human behavior. A Constitutional Court maintains its role as a legal institution, that is, an organisation constructed to safeguard certain important legal issues from a legal perspective, not the political opportunities that statutes create.[24]

At the same time, a Constitutional Court indirectly places the activities and operations of political actors, such as national or local assemblies, under scrutiny. It is true that its evaluation is directly legal in nature, but it is also true that the law is the main voice of political actors – at least in a democratic form of a state that has adopted the rule of law. Each time Constitutional Courts modify, approve, or even remain silent as to that which political actors have expressed through the law, the courts operate in the political institutional arena, particularly by allowing or disallowing certain political actors to produce statements that are directly relevant to and binding for the entire community from which such actors have (directly or indirectly) been chosen.[25] In other words, Constitutional Courts are legal institutional actors because of their being a court, but, at the same time, they are gatekeepers in relation to the political world, allowing the actors in the latter to be heard (or not) in the legal world.

Alongside this institutional factor, concerning the location of Constitutional Courts among the different actors, a second factor operates from a *structural perspective* in such a way as to render Constitutional Courts as legal actors heavily leaning into the political arenas. It has been mentioned how Constitutional Courts reside outside of the ordinary court system and are independent from other branches of the public authorities. However, Constitutional Courts always tend to present a certain 'structural cohesion' with the actors belonging to the political arena. This means that almost all Western legal systems have foreseen that political

[24] Dieter Grimm, 'What Exactly Is Political about Constitutional Adjudication?' in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (CUP 2019) 310–311. *cf* Robert A Dahl, 'Decision Making in Democracy: The Supreme Court as National Policy-Maker?' (1957) 6 Journal of Public Law 279, 279; Kevin T McGuire, 'The Institutionalization of the U.S. Supreme Court' (2004) 12 Political Analysis 128, 129–135 (as to the traditional political science perspective on the issue).

[25] Grimm (n 24) 308–309; Nuno Garoupa and Tom Ginsburg, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences' (2011) 28 Arizona Journal of International & Comparative Law 539, 541.

actors, either as legislators or within the executive branch, can have partial (as in Italy) or total (as in the US) control as far as concerns the individuals who are to sit as justices in the Constitutional Courts. As a consequence, the political arena and the ideologies prevailing within it affect and to a certain extent overlap with the structure of the courts and their fundamental components, by means of the legal power to decide who will be justices.[26]

Despite this important political influence in deciding the structure of Constitutional Courts, these courts cannot be considered as having a purely and exclusively 'political structure'. Though the justices sitting in such courts can (and often are) politicised individuals, they nevertheless come from the legal world, that is, the predominant feature of individuals sitting in Constitutional Courts is normally that they are chosen among lawyers or individuals with formal education in law. In other words, even when all justices are chosen based on political considerations and personal political ideologies and affiliations, the selection process is limited (either by law or by constitutional customs) to individuals trained at least formally in the art of law, for example, holding a law degree. Moreover, most (but not all) of the time, the recruitment procedures require that the candidates have some experience from the judiciary branch at a high level.[27]

Lastly, Constitutional Courts can be seen as legal actors inclined towards the political world from a *functional perspective*, that is, by observing the function these courts have in the relations between lawyers and politicians.[28] Viewed from this functional perspective, one can note how Constitutional Courts perform an intermediary function between these two arenas. As briefly sketched above, one of the major contributions of a Constitutional Court to its community is mediating between the highly political statements present in the constitution. The articles of a constitution tend to be dominated, from a legal perspective, by the rationality of

[26] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP 2003) 138–141; Walter F Murphy and Charles Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process* (4th edn, Random House 1986) 139; Nicola Ch Corkin, *Europeanization of Judicial Review* (Routledge 2014) 115–116. E.g., Donald P Kommers, 'American Courts and Democracy: A Comparative Perspective' in Kermit L Hall and Kevit T McGuire (eds), *Institutions of American Democracy: The Judicial Branch* (OUP 2006) 207.

[27] Stone Sweet (n 7) 45–49; Klaus Stüwe, 'The U.S. Supreme Court and the German Federal Constitutional Court: Selection, Nomination, and Election of Justices' in Rogowski and Gawron (n *9*) 242–244. cf Peter H Russell, 'Conclusion: Judicial Independence in Comparative Perspective' in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001) 303–304.

[28] In this article, "function" refers to the "function as effects" (as different from "function as purpose") of a certain institution on a certain environment, or, as in this case, the concrete outcomes that the work of Constitutional Courts have on both legal and political structures. Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (CUP 2006) 245–249.

the political discourse; at the same time, they are 'legally relevant' concepts and categories, that is, concepts binding public officials and the community in general through their observance of the parameters of the rationality required by a legal system.[29]

This mediating role played by Constitutional Courts is not only directed at the legal world, where the Courts define for its actors in legal terms what the general statements of goals in the constitutional documents or practices mean, for example, by guiding a justice in the interpretation of constitutionally questionable statutes. The mediating function is also aimed at the political arena, as the decisions of Constitutional Courts set the legal frameworks that the political actors ought to respect in their law-making.[30]

Since a constitution is the product of the will of a community (through their political representatives), at least in theory, a Constitutional Court in a democratic state has the function of mediating to the community and, in particular, to its political representatives, the value message that this same community and its political actors originally adopted, but now in terms of a legal message, that is, a message primarily directed at the actors given the duty of implementing the legal rules as interpreted (or accepted) by the Constitutional Court. As in particular the American legal realists and Alf Ross have pointed out, judges in general play a decisive role as the point of passage where the "law-in-books" becomes the "law-in-action," that is, the normative apparatus of rules felt as binding by the population or by the public officers.[31]

In this case, Constitutional Courts have the primary function of translating into binding norms for the political actors and the community, the law-in-books that the political actors have enacted. Constitutions tend to become documents where the political origins of the law, a typical feature of contemporary law, surface more clearly than in other legal documents (e.g., a statute regulating taxation law). Constitutions are often used not only as a legal document grounding a new legal

[29] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Raz (n 4) 369–370; and Jiří Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Routledge 2007) 21. E.g., Dworkin (n 14) 370–371.

[30] Torbjörn Vallinder, 'When the Courts Go Marching In' in C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) 13–24. E.g., Ulrich K Preuß, 'Die Wahl der Mitglieder des BVerfG als verfassungsrechtliches und -politisches Problem' (1988) 19 Zeitschrift für Parlamentsfragen 389, 389–91; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 7–9.

[31] Karl N Llewellyn, *Bramble Bush: On Our Law and Its Study* (Oceana Publications 1951) 150; Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12, 35–36; Alf Ross, *On Law and Justice* (University of California Press 1959) 75–77. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 7–15; and Waldron (n 20) 262.

system, but also as a primary form of "political symbol", that is, a message to the community from the political actors as to which fundamental values the state/community is based upon.[32] Moreover, and as a consequence of this partially political nature, legal language in the Constitution tends to be interspersed with political language.[33] A classic example of this is the article of the Italian constitution stating that property ownership is guaranteed by the law as long as it fulfills its social function.[34]

This being the situation, where judges are the intermediaries between the "paper law" and "real law," with the "paper law" being the Constitution – a mixture of political statements and legal concepts – it is not surprising that Constitutional Courts, more than other branches of the judiciary, become the law-making actors by being the interpreters of the law. As already pointed out by many legal scholars, the interpretation of the law that is typical for a court in general can become a law-making power.[35] In the case of the Constitutional Courts, this phenomenon is more evident, because the legal text against which the interpretation of the statutes has to take place (namely the constitutional document) is so vague that the clarification of its content and of its borders becomes law-making (at least if seen from a legal perspective) directly applicable in concrete cases (as regards the concrete constitutional review) or in general (as regards the abstract constitutional review).[36] In summary, Constitutional Courts, for all the reasons mentioned above, are a special type of institutional actors which, though positioning themselves among the legal actors, that is the actors aiming at interpreting and applying the law, tend to lean heavily into the political world of law-making, given that

[32] Raz (n 29) 343–344.

[33] ibid 365–366; Habermas (n 11) 388–389. See also Mark Tushnet, 'Abolishing Judicial Review' (2011) 27 Constitutional Commentary 581, 585–586.

[34] Constitution of the Italian Republic, Article 42: "Private property is recognised and guaranteed by the law, which prescribes … its limitations so as to ensure its social function and make it accessible to all". See also Giuseppe Portonera, 'The Problem of Squatting in Italy: A New Approach by the Courts' (International Index of Property Rights, 2019) 4–5 <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3472293_code3097842.pdf?abstractid=3472293&mirid=1> accessed 14 March 2021.

[35] E.g., Frederick Schauer, 'Opinions as Rules' (1986) 53 University of Chicago Law Review 682, 684; Hart, *The Concept of Law* (n 6) 132–136; Neil MacCormick, *H.L.A.* Hart (2nd edn, Stanford University Press 2008) 157–159. See also Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 Harvard Law Review 19, 62; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (CUP 1980) 1–9.

[36] Gunther Teubner, 'And God Laughed ... Indeterminacy, Self-Reference and Paradox in Law' in Jean Pierre Dupuy and Gunther Teubner (eds), *Paradoxes of Self-Reference in the Humanities, Law and the Social Science* (Anma Libri 1991) 31. See also Stone Sweet (n 10) 827–828; Anna Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4 Cambridge Journal of International and Comparative Law 423, 424–434.

Constitutional Courts through interpretation shape the legal panorama regulating a certain community.[37]

V. Relevance of The 'Political vs Legal Nature' Discussion as to the Constitutional Courts

Shifting attention to the topic central to this work, namely whether Constitutional Courts should be defined as primarily legal or political actors, a first reaction could be to question the importance of this issue. It appears to be a purely terminological matter, as the competence and jurisdiction accorded to Constitutional Courts, at least in well-established Western democracies, tend to be the same from a legal perspective, regardless of whether they are considered more political or more legal actors operating inside a certain system of powers. Whether they are seen primarily as legal or political actors, justices sitting on the highest benches will always be in charge of determining the constitutionality of statutes and, by doing this, will always be influenced by the political environment and prevailing political ideologies.[38]

However, the question presented here is not simply a definitional or academic problem. As often happens in legal matters, defining something or someone means attributing it with certain legal areas of competence and jurisdiction and, at the same time, limiting its capacity to operate in other legal areas. In other words, when it comes to legal issues, the classification of either a problem or a subject-matter means shaping it and, at the same time, restricting it.[39]

If one considers in particular Constitutional Courts and the definition of their nature as actors working in a certain environment, it has previously been seen that among their central tasks is 'checking' that the transformations of ideologies or values into law are done in accordance with (or at least not in gross contradiction of) the basic and often politically formulated principles enumerated in the constitution or fundamental laws of a certain community. The characterisation of Constitutional Courts as being either legal or political actors brings with it the identification of fundamental criteria, or in Max Weber's terminology, 'rationalities', that ought to govern this control over the constitutionality of the law-making that takes

[37] Luhmann (n 11) 235.

[38] Hans Kelsen, *The Pure Theory of Law* (University of California Press 1970) 3–5; Waldron (n 20) 144. E.g., Alexy (n 22) 366; Lawrence Baum, *American Courts: Process and Policy* (7th edn, Wadsworth 2013) 270–272.

[39] Timothy A O Endicott, 'Law and Language' in Jules L Coleman and Scott Shapiro (eds), *Handbook of Jurisprudence and Legal Philosophy* (OUP 2002) 935–968. See also Waldron (n 20) 229; Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (Palgrave Macmillan 1988) 2–3. E.g., Linda L Berger, 'Applying the New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context' (1999) 49 Journal of Legal Education 155, 155.

place in a certain legal system.[40] By normatively defining the nature and function of Constitutional Courts (e.g., what they 'ought' to be and to do), it becomes possible to answer the following normative question that is fundamental for every democratic legal system: What are the fundamental criteria that ought to guide a Constitutional Court when performing its task of constitutional review?

Considering that Constitutional Courts operate between the legal and political worlds, it is possible to identify two fundamental criteria, or rationalities, which could shape Constitutional Courts in their work. First, at least when seen from a legal perspective, Constitutional Courts have the option to primarily embrace a Weberian substantive rationality to resolve issues of constitutionality.[41] This choice would mean that, to reach the 'best' solution, justices would regard the legal system as primarily instrumental to the fulfillment of certain goals external to the system itself. In other words, Constitutional Courts ought to be ready to 'sacrifice' the internal rationality and rules traditionally superseding Western legal systems and reasoning, if and as long as this capitulation is directly functional to achieving the political, social, and economic values the courts intend, on various grounds, to insert into a certain community.

However, there is another possible ideal-type rationality or criterion that may guide Constitutional Courts in their work. As pointed out by Weber, in modern capitalist societies, the fundamental criterion inspiring the work of legal actors is formal rationality: they reach a decision or a legal solution based on the logical criteria internal to the legal system and with the purpose of maintaining its consistency, regardless of the actual effects in the surrounding environments.[42] This respect for formal rationality (or 'legality') exists and ought to exist, because, as Weber stated, it is directly functional and fundamental for legal actors (and judges in particular) to gain and maintain their legitimacy, that is, a high degree of probability that their decisions will be observed by the majority of addressees because they are considered 'correct' and, therefore, binding.[43]

The characterisation of a certain actor as legal or political is then always fundamental, at least from a legal perspective, to attach to a certain actor

[40] Weber (n 13) 650–658; Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein tr, Simon & Schuster 1954) 63–64.

[41] Weber (n 13) 656–658. See also Reza Banakar, *Normativity in Legal Sociology:* Methodological Reflections on Law and Regulation in Late Modernity (Springer 2015) 219.

[42] Weber (n 13) 655. See also David M Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) 3 Wisconsin Law Review 720, 733; Anthony T Kronman, *Max Weber* (Stanford University Press 1983) 90.

[43] Weber (n 13) 654–658. See also Sally Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law' (1987) 21 Law & Society Review 487, 497–502. cf Arthur L Stinchcombe, 'Reason and Rationality' (1986) 4 Sociological Theory 151 (as to the substantive rationality being a *conditio sine qua non* for every formal rationality).

a certain criterion (or type of rationality, as in this article) that should guide it in its operations. This definition, however, is even more important in the case of Constitutional Courts, due to the position such courts occupy in modern democratic forms of political organisation. Constitutional Courts are certainly not the only actors whose nature can be and is widely disputed. For example, the legal nature of in-house attorneys is often heavily questioned; they are sometimes treated as simply facilitating a legal cover-up of economic and political programs.[44] However, the theoretical issue of normatively defining Constitutional Courts is fundamental: the decisions of these courts (and consequently the criteria inspiring them) are those that can shape the fundamental legal, but also political and social, features of an entire community, sometimes even more than the decisions made in the democratically elected assembly. For example, in deciding *Brown v. Board of Education* (1954), the Supreme Court of the United States shaped (at least as much as Congress did ten years later with the 1964 Civil Rights Act) the future of an entire national community as far as concerned unlawful structural discrimination based on ethnicity.[45]

It is also true – using Ronald Dworkin's famous metaphor – that Constitutional Courts write just one chapter in the chain novel that constitutes the valid law because after their decisions, their words will be interpreted by all the other actors, for example, legal scholars, lower judges, and law-makers.[46] However, even if the subsequent actors write a 'different' continuation of the novel, it is the Constitutional Courts that have the privilege of setting the agenda for future discussion.[47] For example, with *Brown v. Board of Education,* the US Supreme Court definitively opened the door to de-segregation, that is, it gave a strong push to put

[44] E.g., Robert L Nelson and Laura Beth Nielsen, 'Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations' (200) 34 Law & Society Review 457, 464–468; Prashant Dubey and Eva Kripalani, *The Generalist Counsel: How Leading General Counsel are Shaping Tomorrow's Companies* (OUP 2013) 66–67.

[45] *Brown v Board of Education of Topeka* 347 US 483 (1954); Michael J Klarman, *Brown v.* Board of Education and the Civil Rights Movement: The Supreme Court and the Struggle for Racial Equality (OUP 2007) 302–338. As to a more European context, see also Guarnieri and Pederzoli (n 26) 1–4; Stone Sweet (n 7) 66–70.

[46] Dworkin (n 14) 228–238. See also Mark J Richards and Herbert M Kritzer, 'Jurisprudential Regimes in Supreme Court Decision Making' (2002) 96 The American Political Science Review 305, 306 ("[L]aw at the Supreme Court level is to be found in the structures the justices create to guide future decision making: their own, that of lower courts, and that of non-judicial political actors"); Martin Shapiro, *The Supreme Court and Administrative Agencies* (Free Press 1968) 39.

[47] Luhmann (n 11) 406 (indicating how the main feature of modern constitutions is their "openness to the future"). See also Raz (n 29) 338–343.

into the trash can all the attempts to retain in American society the racist principle 'separate but equal'.

Many other aspects, of both political and legal character, underscore the necessity of coming forward with a clear definition of what kind of actors Constitutional Courts should be. From a political perspective, the definition of a Constitutional Court is important as it clarifies, and therefore, partially prevents, possible points of collision between the highest powers in a community. Pointing out the basic features and criteria that should inspire the work taking place in the courts allows for a better and more precise control of the activity of the courts by political authorities, for example, in the form of offering a clear matrix to parliamentary committees or investigators against which to evaluate certain constitutional judicial decisions. In other words, this legal theoretical definition more clearly pinpoints a fundamental actor on the political map, either as primarily promoting certain ideologies that vary over time (if defined as a political actor) or as primarily attempting to maintain one single and established legal ideology, namely the rule of law (if defined as a legal actor).

Characterizing the nature of Constitutional Courts is also important from a legal perspective, as this allows normative fixing of what type of rationality Constitutional Courts ought to apply in their work. At one end, justices sitting on the highest benches may be defined primarily as legal actors. Accordingly, from a legal perspective, the legality of their decisions in "hard cases" can and should be questioned, even by lower courts, when their legal reasoning is mainly grounded on the goal of implementing values they consider as immanent in a community, although such values do not explicitly appear in the constitutional documents or fundamental laws. This critique of the legality of their decisions can and ought to be performed, in particular when the realisation of values is done at the expense of the traditional criteria superseding the legal reasoning (for example, consistency or respect for previous decisions on similar matters), that is, the only type of reasoning on which legal actors in modern democracy have a legitimate domain. For example, if a court decides within a quite narrow timeframe in diametrically opposite directions in similar cases or issues, it can be directly criticised from a legal perspective for violating a fundamental principle of Western legal systems, namely equal treatment of individuals under identical circumstances.

At the other end, in the event that Constitutional Courts are defined primarily as political actors, the possibility of holding them responsible from a legal perspective for doing something 'illegal' is more restricted. If they are considered political actors, it is not possible to 'force' the courts to decide in accordance, or at least in consistency, with previous decisions, although it is always possible to legally criticize Constitutional Courts for violating certain basic rights guaranteed

in the constitution. One privilege accorded to political actors in general is that they can change their value system without being held responsible (at least legally) for this. If a political party or national assembly decides to pursue values other than those previously planned, it cannot be criticised or held responsible from a legal perspective.[48]

Lastly, another element highlights the importance of normatively setting the nature of Constitutional Courts in Western legal systems. These courts symbolize (and stretch to the limits) an underlying feature typical of most legal actors operating in contemporary Western legal systems: their position in between the political world, where values (or models of society) are created, and the legal world, through which those values have to pass in order to be implemented into a community.

Each of the individuals forming the skeletal structure of the legal actors is educated in the law and such an education is almost always a formal requirement to becoming a part of that group of actors. The individuals composing the legal actors are, in other words, all educated in the idea that law, although highly politicised, has certain features that distinguish it from purely political statements.[49] For justices working in Constitutional Courts, it is the same as for most legal actors: they operate within the legal system, but with the knowledge that law is instrumental to introduce into a community models of behaviors or values embraced by their political source (e.g., legal experts working in political parties) or their economic source (e.g., in-house attorneys for large corporations). This feature of the law in the Western legal systems, that is, it always being functional to something else, then forces legal actors in general to always take into consideration the value systems (and the underpinning ways of reasoning) affecting the origins, development, and environment in which the making or application of the law is taking place.[50]

In short, the importance of defining Constitutional Courts as either legal or political actors lies also in the fact that such institutional actors represent,

[48] Stone Sweet (n 7) 62. See also John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002) 23.

[49] Tuori (n 13) 161; Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995) 108–110. See also Teubner (n 15) 33; Andrew D Abbot, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 52–57; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 188.

[50] Cotterrell (n 49) 281–284; Richard Posner, 'The Decline of Law as an Autonomous Discipline: 1962–1987' (1987) 100 Harvard Law Review 761, 773–774; Francis J Mootz III, '"Die Sache": The Foundationless Ground of Legal Meaning' in Jan M Broekman and Francis J Mootz III (eds), *The Semiotics of Law in Legal Education* (Springer 2011) 48–49. See also Raz (n 4) 99–100; Jeremy Waldron, 'Legislation, Authority, and Voting' (1996) 84 Georgetown Law Journal 2185, 2198.

better than many others, the difficult situation in which lawyers in general operate nowadays. While they are educated in the law and employed to build, interpret, and apply the law, legal actors operate under a constant and extreme pressure that pushes them towards a disregard for what are considered the characterizing elements of a Western or Western-like legal system (predictability, certainty, rule of law, and so on), in order to instead fulfill political (or other non-legal) goals.[51]

VI. A Possible Legal Theoretical Solution

Part III ('Converting the Hybrid Nature of Constitutional Courts into a Theoretical Problem') showed how Constitutional Courts can be considered as actually belonging to the legal world, but strongly leaning towards the political arena. Part IV ('Relevance of the 'Political vs. Legal Nature' Discussion as to the Constitutional Courts') pointed out that it is important, for several reasons, to normatively 'insert' the Constitutional Courts into either of these two ideal-typical boxes, that is, to establish which of the two natures (political vs. legal) should dominate their work and should be used as a starting point for investigating and (if warranted) criticising their decision-making.

A possible perspective from whence to begin the journey to answer this fundamental question is legal theory. Due to the central position and function that Constitutional Courts play in contemporary legal systems, legal theory has devoted many and important writings to this topic: most contemporary legal theories have discussed the issue of what Constitutional Courts are, somehow being forced to tackle this question due to the impact of these courts' decisions on the law and society at large.[52]

Though the journey will continue along legal theoretical paths, it is helpful here to take a slight detour to a sociological distinction between the *institutional* (or *organisational*) *position* (or *status*) of a certain actor (or agent) and the *function-effects* of

[51] Gunther Teubner, 'The Transformation of Law in the Welfare State' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1986) 6–7; Lawrence Friedman, 'Introduction' (2003) 4 Theoretical Inquiries in Law 437, 446; Kaarlo Tuori, 'Legislation between Politics and Law' in Luc J Wintgens (ed), *Legisprudence: a New Theoretical Approach to Legislation* (Hart Publishing 2002) 100–101.

[52] E.g., the debate between Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Clarendon Press 1992) 5–7, and John Finnis, 'Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's "Ideal Dimension"' (2014) 59 The American Journal of Jurisprudence 85, 105–106 (as to the decision by the German Federal Constitutional Court on citizenship *BVerfGE 23 – Ausbürgerung I* [1968], 98, 98–113); or Dworkin (n 14) 387–392 and Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press 1998) 127–128 (as to the US Supreme Court's ruling in *Brown v Board of Education*).

that actor's work.[53] The institutional position of a certain actor intends to signify the position occupied by a certain actor operating inside a larger environment (or organisational structure).[54] This positioning, as far as concerns judicial bodies, is mainly a combination of the operation of two (often overlapping) factors: the degree of legitimacy that judicial bodies enjoy, indicating where along the spectrum of power judges are inserted (vertical positioning), and the distribution of power as sanctioned in the law, which indicates where, at the stage assigned by the legitimacy, the judicial body is located (horizontal positioning). The function-effects of an actor's work simply refers to the impact that the work of the actor has on the environment.[55] These effects can be of different ideal-typical natures. They can be *intended*, where they correspond to the original goal that the actor had in mind when starting the work, or *unintended*, where they do not (fully or partially) correspond to the original motive of the action.[56] Effects can also be in the form of either *outputs* or *outcomes*.[57] Outputs are the impacts (intended or unintended) a certain action has inside the ideal-typical arena in which the action has taken place (e.g., the effect of a court decision on the legal right of the convicted party to appeal). Outcomes, by contrast, mark the effects (intended or unintended) such

[53] Talcott Parsons, *The Social System* (Free Press 1951) 25. As to an application of this distinction within the legal discourse (specifically to the judiciary), see also Robert F Williams, 'In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result' (1984) 35 South Carolina Law Review 353, 397–402.

[54] Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (University of California Press 1957) 17–22. *cf* Ota Weinberger, *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Springer 1991) 18–24; Neil MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 Law and Philosophy 301, 324–331 (where "institutions" within a traditional legal context instead refers to the regulatory tools, e.g., contract or ownership).

[55] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Butterworths 1992) 72–73.

[56] Robert K Merton, 'The Unanticipated Consequences of Purposive Social Action' (1936) 1 American Sociological Review 894.

[57] This separation of outputs from outcomes is an adaptation of the results reached by a long series of studies developed in political science. David Easton, *A Systems Analysis of Political Life* (Wiley 1965) 351–352; Gabriel Abraham Almond, G Bingham Powell, and Robert J Mundt, *Comparative Politics: A Theoretical Framework* (Harper Collins 1993) 20; Jan-Erik Lane and Svante T Ersson, *The New Institutional Politics: Outcomes and Consequences* (Routledge 2000) 60–62. E.g., Selden Biggs and Lelia B Helms, *The Practice of American Public Policymaking* (Routledge 2015) 370–371.

impacts have on the surrounding environment (e.g., the effect of a court decision on the economic situation of the convicted party's family).[58]

If one considers Constitutional Courts in light of these distinctions between institutional positions and function-effects (and the different types of effects), one can see that the dominant features of the courts are of a legal nature. Starting from the *institutional position*, Constitutional Courts are, first and foremost, 'courts'. This label means that their rulings are considered binding by the vast majority of the addressees, not because of the content of the decisions, that is, the models of behaviors they aim to impose on a community, but because they are legal normative decisions. This means that they are rulings that ought to be obeyed because they are produced by a legally formed body, which is entrusted, in the forms prescribed by the law, with the legal power to produce such binding decisions. In contrast to political actors, such as political parties or lobby groups, the consideration and respect for the work of Constitutional Courts is not mainly based on the intrinsic values promoted by its decisions, such as the 'popularity' of a certain political program. The respect, or legitimacy, is given to the decisions due to the legal form such rulings take, and the forms that have been observed while producing the decisions and choosing the individuals (e.g., judges) in charge of making such decisions. In other words, Constitutional Courts keep their position and 'job' in the community as the highest dispute-resolving actor as long as they are able to

[58] As to the distinction between "consequences" and "juridical consequences", Neil MacCormick, 'On Legal Decisions and Their Consequences: From Dewey to Dworkin' (1983) 58 New York University Law Review 239, 247–251. E.g., Tomas M Koontz and Craig W Thomas, 'Measuring the Performance of Public-Private Partnerships: A Systematic Method for Distinguishing Outputs from Outcomes' (2012) 35 Public Performance & Management Review 769, 772 (Figure 1). In reality, these different ideal-types (intended outputs, unintended outputs, intended outcomes, unintended outcomes) almost always tend to be mixed with each other, e.g., in the form of court decisions that have intended and unintended outputs and outcomes simultaneously. Despite this overlapping in the real world, such ideal-types can be useful analytical tools in order to reveal specific tendencies of an actor to operate in one environment instead of another in order to gain certain effects, and then normatively choosing the type of rationality more suitable for that purpose, e.g., indicating the line that the actors, as belonging to a certain arena, ought to pursue.

maintain their legal legitimacy, that is, a legitimacy gained in Western legal systems mostly by observing the paradigms of formal legal rationality (or 'legality').[59]

Naturally, this pushing of the Constitutional Courts into the 'legal box' cannot ignore the fact that justices have political sympathies. However, even when justices are strongly politicised, they still ought to operate with an eye to (and being forced to comply with the barriers of and limits as set by) the legal system. In other words, despite being connected to the political world, the judges sitting in the Constitutional Courts ought to observe the principles or paradigms established by the dominant legal culture (e.g., rule of law, bill of rights, separation of powers, due process and so on) in order not to lose their legitimacy among the addressees (and the community at large).[60]

As to their *function*, if one starts by considering the *intended* and *unintended outputs* of a certain decision by a Constitutional Court, the primary arena of operation of Constitutional Courts is the legal one. A Constitutional Court, by definition, evaluates legal issues, in particular the potential unconstitutionality of statutes or acts from law-making agencies. The outputs of the courts' deliberation are to decide whether certain legal rules of a lower dignity can still be considered as 'binding and therefore existing' legal rules. In particular, Constitutional Courts 'prove' the existence of these rules by evaluating whether they are compatible with the fundamental rules and principles enumerated in (or somehow derived from) constitutions and fundamental laws. This test, as pointed out before, is a typically legal problem since it can operate if, and only as far as, one axiomatically accepts the existence of an ascending structure of rules, where the lower rules, in order to

[59] Ely (n 35) ch 4; Habermas (n 11) 278–279. See also Hein (n 19) 17 ("Constitutional courts, *per se*, have some leeway for making decisions based on political criteria. However, if this margin is too wide, and if the court is dependent on the political interests of other state powers, constitutional conflicts will be provoked"); and Hans Kelsen, *General Theory of Law and State* (Routledge 2005) 117. cf Sadurski (n 10) 53–61 (pointing out, in order to be transformed into legitimacy, the necessity of formal rationality, or "legality" in his words, to be finalised to the realisation of certain values external to the legal discourse, e.g., substantive rationality).

[60] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo Law Review 1419, 1435. E.g., Alexy (n 22) 367. See also Ferreres Comella (n 9) 19 ("We cannot automatically claim that if a given institution strikes down statutes, it is really a 'legislative' body, whereas if it merely sets them aside for purposes of resolving disputes, it acts as a real 'court.' What matters is the sort of grounds -political or legal- on which the institution rests its decisions").

exist as legal (and therefore binding) rules, cannot be in conflict with the higher ones.[61]

As pointed out by Kelsen and other legal scholars, this presupposition is typical of the legal arena.[62] By contrast, the hierarchical structure in the political arena, though present (e.g., basic values vs. tactical choices), is not fundamental to give 'validity' to the lower types of decision. Tactical decisions taken by a congressional party are still considered 'valid' for the political line of a certain party (e.g., because such tactical decisions can strengthen the party's positions in an upcoming election), even if they are contrary to the fundamental values contained in the party program.

In contrast to political actors, Constitutional Courts are not totally free from what can be defined as the external borders of legal reasoning. 'External borders' are identified in particular as the no-cross limits of the legal culture of a certain community, limits which have to exist in order for the legal system as such to survive.[63] In a democratic free-market regime, for example, these no-cross borders can be defined as the fundamental legal principles (e.g., protection of private property) expressing the bedrock of political, cultural, and economic forces upon which the regime itself is created and to which it is functional.[64]

Political actors do not necessarily have to respect such external borders of legal reasoning. Actually, for many political parties, the primary and fully politically legitimised goal for their existence is to change or shift such external borders, for example, by eliminating the legal protection accorded to private property. The situation changes if one moves the focus to the *outcomes* of the decisions taken by Constitutional Courts, that is, the effects (intended or unintended) that their decisions have on the (non-legal) environments surrounding the (legal) one in which the courts operate. It is easy to see how the legal feature characterizing the function played by the Constitutional Courts here tends to disappear. Decisions

[61] Hart, *The Concept of Law* (n 6) 100–110; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 1997) 11 ("To comprehend something legally can only be to comprehend it as law"). See also Luhmann (n 11) 406–407.

[62] Kelsen (n 59) 110–113. See also Kelsen (n 38) 3–4 and 19; Robert S Summers, *Form and Function in a Legal System: A General Study* (CUP 2006) 313; and Neil MacCormick, 'Natural Law Reconsidered' (1981) 1 O*xford Journal of Legal Studies* 99, 108.

[63] Hart, *The Concept of Law* (n 6) 193–200; HLA Hart, 'Problems of the Philosophy of Law' in HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 112 (as to his idea of "minimum content of natural law"). See also Tuori (n 13) 177–183 (as to his idea of the "general legal principles" of the legal culture).

[64] E.g., Jeremy Waldron, *The Rule of Law and the Measure of Property* (CUP 2012) 103; Neil MacCormick, 'MacCormick on MacCormick' in Augustín José Menéndez and John Erik Fossum (eds), *Law and Democracy in Neil MacCormick's Legal and Political Theory:* The Post-Sovereign Constellation (Springer 2011) 23.

by Constitutional Courts almost always have effects outside the legal world, for example, in the cultural, economic, or political spheres.[65] In other words, as far as concerns the outcomes of their decisions, Constitutional Courts have certain similarities with political actors such as the government or national assemblies. What is more, Constitutional Courts ultimately attempt with their decisions (consciously or unconsciously) to impose certain models of behaviors or values upon a community.

Despite this leaning into the political arena, Constitutional Courts should be considered to have a legal nature, that is, as legal actors (and act as though they are). First, the grouping of an actor under a certain terminological roof has to be done primarily based on its *institutional location* and the function-effects of its work, in particular the *intended outputs* that its actions produce.[66] If one were to look at the outcomes, the analytical possibility of grouping actors in ideal-typical arenas, and the resulting possibility of identifying some normative criteria upon which to evaluate and criticize their work, would disappear. Outcomes of decisions almost always tend to spread in different directions and, especially for unintended outcomes, it is often not possible to determine in which area a certain action has had its major impact, particularly after a long period of time. For example, a decision made by a large corporation can have relevant outcomes in the religious or cultural fields, but it would be quite strange to define such corporations as primarily religious or cultural actors, and consequently impose upon the CEO or the board of directors religious or cultural criteria according to which to evaluate their work.

It goes without saying that the positioning of Constitutional Courts among legal actors (and the subsequent imposition of legal criteria to evaluate their work) does not rule out the possibility that they can (and often do) play a political function. As already stated, all legal decisions have certain outcomes, but Constitutional Courts, due to the task assigned to them in the constitutional architecture, make their decisions by looking to the legal outputs, namely the constitutionality or not

[65] From a legal theoretical perspective, this different kind of effect (output as legal and outcome as non-legal) can be considered a consequence of the more general distinction between the normative and social functions of the law. Joseph Raz, 'On the Functions of Law' in AWB Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon Press 1973) 280.

[66] E.g., Lopeman (n 7) 3–5 (as to the idea that judicial activism is primarily "intentional activism"). cf Christopher H Schroeder, 'Causes of the Recent Turn in Constitutional Interpretation' (2001) 51 Duke Law Journal 307, 352–353 (as to the difficulty to disconnect the legal reasoning leading to the legal outputs from the desired non-legal outcomes when it comes to constitutional interpretation).

of certain provisions. As stated by a legal scholar, "[c]ourts legislate, but that does not make them legislatures".[67]

Justices sitting on the highest benches certainly can (and often do) have a political agenda, but they are still forced to confront it with the legal system and its dominating principles. An inverted example can be seen among the members of parliament. They are unquestionably political actors with a clear political agenda, but they still sometimes play a very relevant legal function, and this is done in accordance with a specific legal agenda, that is, in accordance with legal criteria as to how the legal system or part of it should look. For example, this functional leaning into the legal world may happen when members of parliament in a special committee evaluate the legal limits of criminal liability attached to the highest position of the state, such as the President of the Republic or the Prime Minister.

Moreover, and connected to the latter, the legal features of Constitutional Courts are traceable to the fundamental ideology shaping their work. Justices working in Constitutional Courts operate in an environment which, though with many political passersby, has a primary legal task: to be the guardian ensuring that the law-making taking place in a certain state is done (or that a conflict among the highest public authorities is settled) in accordance with the highest rules fixed in the constitutional documents or fundamental laws. This task of Constitutional Courts is legal, in the sense that it consists of dealing with legal rules. When justices sit on the bench, they are assigned the primary task of checking the 'constitutionality' of certain legal rules: they ought to evaluate whether, from a legal discourse perspective (e.g., with the traditional rules regulating the legal reasoning), such legal rules can fit (or not) into the legal system as designed in the constitutional documents or fundamental laws. Obviously, justices are often well aware of the indirect political effects of their decisions (outcomes), an awareness that sometimes affects their settling on a certain solution instead of another. Regardless of any hidden agenda behind a certain decision, however, justices are always forced to "squeeze" their politically motivated decisions into boxes of legal justification, to

[67] Herbert M Kritzer, 'Martin Shapiro: Anticipating the New Institutionalism' in Nancy Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003) 409. See also Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 11–15 (as to the fundamental ontological difference between the legal and political discourses); Luhmann (n 11) 162–165. cf Stone Sweet (n 7) 61; Jerold Waltman, *Principled Judicial Restraint: A Case against Activism* (Palgrave Pivot 2015) 58–61 (with a critical perspective as to the negative effects of introducing the legal paradigms employed by the judiciary into the political discourse).

whose fundamental principles and ways of reasoning the justices ought then to sacrifice (in case of conflicts) their political programs.[68]

In other words, to keep their legitimacy in the community, Constitutional Courts are always forced to speak the language of the law, not the one of politics, even in the cases when they aim to send political messages. As pointed out by Michel Foucault, language in modern society is power, and this feature persists even in the most "politicised" legal terminology: simply by classifying a political problem and a political solution into legal language, the justices are (consciously or unconsciously) choosing to impose on the issue the domain and limits set by the legal discourse.[69] Therefore, the work of the Constitutional Courts should be evaluated accordingly, that is, by using legal criteria and, at the same time, by excluding from the evaluation process all features and limits set by other types of discourses – and, among them, the political one.

VII. Conclusion

In light of the debate on judicial activism at the constitutional level, that is, the involvement of Constitutional Courts in political law-making, this article has investigated from a legal theoretical perspective the issue of whether such courts should be considered primarily legal or political actors. While Part II underlined the importance of Constitutional Courts' 'activism' inside the general issue of judicial activism, Part III pointed out the reasons why Constitutional Courts in established Western democracies, despite their hybrid nature, can be seen as being legal actors, but with strong ties to the political arena. The final Parts IV and V then offered some legal theoretical considerations on why one should normatively impose upon these courts the label of 'legal actors', though they play a political function.

Going back the initial metaphor, we can see that the Leaning Tower of Pisa has stood the test of time and, despite leaning precariously towards the ground, it is still considered (and functions as) a 'tower'. As is done for this tower, one ought

[68] Gonçalo de Almeida Ribeiro, 'Judicial Activism and Fidelity to Law' in Luis Pedro Pereira Coutinho, Massimo La Torre and Steven D Smith (eds), *Judicial Activism:* An Interdisciplinary Approach to the American and European Experiences (Springer 2015) 36–40; Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 208. *cf* Alec Stone Sweet, 'The Politics of Constitutional Review in France and Europe' (2007) 5 International Journal of Constitutional Law 69, 72. E.g., Lawrence B Solum, 'The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights' (2006) 9 University of Pennsylvania Journal of Constitutional Law 155, 160–176; Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 147–150.

[69] Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (Pantheon books 1972), ch 2. See also Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1994) 7–12 and 41–43.

constantly to monitor the stance of the Constitutional Courts in relation to the political terrain: their (natural) activism ought always to be under the scrutiny of exclusively legal criteria (and not, for instance, of political opportunity) and the entrance of the political world into the Constitutional Courts should always be limited to their function and not their structure (e.g., by further politicising the selection process of the justices). Otherwise, by leaning too much towards the political ground, Constitutional Courts, like the Tower of Pisa, run the risk of losing their structural integrity and, becoming simply rocks scattered across the political field, which would fundamentally modify the institutional landscape of a democracy.