I – Independence and the Rule of Law

Effective Protection of the Independence of the Judiciary in France

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1. Introduction

1 – The issue of the independence of the judiciary is raised from time to time in France. Whether it be alleged government interference in the hearing and judgement of cases involving political figures, the procedure for appointing and transferring judges and prosecutors or more generally government influence on the operation of justice, the media reports on suspected interference periodically, giving the public a biased and distorted view of the requirement of good legal governance. The result is a great disparity between the principle of judicial independence as proclaimed by the Constitution and reality as perceived by public opinion.

2 – The principle of judicial independence is nonetheless inherent in any democracy. It appears in all charters of rights and freedoms in one form or another and is reproduced in all international, regional and, of special interest to us, European human rights conventions. It is a central aspect of the right to a fair trial stemming from Article 6 of the European Convention on Human Rights reiterated in Article 47 of the Charter of Fundamental Rights of the European Union under the guarantees of the proper administration of justice. The words are very familiar: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

3 – Deeply rooted in the various legal traditions, judicial independence is nonetheless diversely regulated by member States. As a result, it is a recurring theme in comparative judicial law and the subject of many international meetings of judges. In both the civil law and common law traditions, although the ideological, political and institutional foundations of judicial independence may vary, it is nonetheless an essential component of the Rule of Law. From this comparative perspective, it can be shown that, although the organisation of the French legal system is unique, it comprises the international doctrine of the protection of the independence of the judiciary.

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4 – This will be the focus of the following brief review which will endeavour to show how, in the specific historical and cultural context of France's legal structure, which was not conducive to the development of a strict and absolute conception of judicial independence, substantial guarantees giving effective protection have nonetheless been set up. This analysis will show that there is a specifically French conception of the principle which is the subject of this international symposium, which I would like to thank the organizers for having invited me to attend.

2. The French Context of Judicial Independence

5 – French law has traditionally been subject to two types of constraints — those relating to the specificities of our legal structure and those relating to the place of judges in the national institutional environment.[1]

A. Judicial Independence and the Specificities of the French Legal Structure

6 – The two essential characteristics of the French legal structure are the separation of powers and the place of the public prosecutor in courts of law.

1. The Separation of Powers

7 – Prevalent throughout the complex legal structure of the Former Regime, the separation of powers was systematized by the Revolution.[2] As a reaction against the resistance of high-level bodies (the Parliaments) to orders from the royal authority, the 1791 Constitution considerably curtailed judges' authority and prohibited them from interfering in affairs of the State. This political principle at first reduced contentious dealings between citizens and the State to a recourse to hierarchical authority. However, over two centuries it has allowed the progressive building of an administrative justice protective of public freedoms which has resulted in the setting up of a complete set of courts totally separate from the judicial branch that is made up of administrative courts, administrative courts of appeal and the *Conseil d'État* (Council of State). This pyramidal structure was completed with the overhaul of administrative justice in 1987.[3]

8 – Constitutional justice came about much later. For a long time, the dogma of the Rule of Law, the expression of the general will, which also stems from the political principles of 1789, prevented a constitutional review of the law from being set up. It was finally introduced half-heartedly during the 1958 constitutional reform which instituted the review of a statute's constitutional compliance before its enactment. After a long maturation, the 2008 constitutional reform completed

1 Serge Guinchard *et al.*, *Institutions juridictionnelles* (10th Ed.), Dalloz, Paris, 2009.

2 Jean-Pierre Royer, Jean-Paul Jean & Bernard Durand, *Histoire de la justice en France*, PUF, Paris, 2009.

3 Act No. 87-1127 of 31 December 1987 governing reform of administrative litigation (1).

this process by setting up a true forum for challenging the constitutionality of statutes promulgated by referral from the judicial or administrative branches. Constitutional justice was henceforth entrenched.[4]

9 – For these historical reasons, in each of these branches, the protection of the independence of judges is treated differently, which prevents a clear, unambiguous and unconditional view of a notion which is nonetheless the existential guarantee of justice.

2. The Place of the Government in the Judicial Branch

10 – The combining of judges and prosecutors into a single body should be added to this separation of the judicial branch.[5] The existence of an attorney representing the executive branch before the courts is a French tradition that dates back to feudal times,[6] but it was the Napoleonic reforms that turned it into a means of the government controlling the courts. This control was carried out in three ways.

11 – First, a public prosecutor was set up for each court of law:[7] a prosecutor of the Republic for the lower level courts [and] a Chief Public Prosecutor for each second-level court and the appeal courts. These prosecutors and their substitutes are organized hierarchically and are subject to the central authority of the executive branch — the Minister of Justice. The *Cour de Cassation* [Supreme Court] also has a public prosecutor, assisted by advocates general, so there is a public prosecutor for each court who is based within the court. Public prosecutors are specific to courts of law, as they are not found in either the administrative courts or the Constitutional Council.

12 – Like judges, prosecutors are members of the judiciary. The Constitutional Council has entrenched this principle of unity within a single body while noting that judges and prosecutors perform different roles:[8] the first are responsible for prosecuting offenders while the second judge them. With only a few exceptions, notably that of the guaranteed irremovability of judges, they have the same status. They are hired and trained the same way, they follow the same career path, and they can shift back and forth from being a judge to being a prosecutor without restriction. The result of this interchangeability is a unique *esprit de corps* among members of the judiciary who are sometimes subject to the authority of the executive branch and sometimes not. The statutory lack of differentiation applied to different functions, which is harmful to the professionalization of both these legal

4 Pierre Pactet & Ferdinand Mélin-Soucramanien, *Droit Constitutionnel*, Sirey, Paris, 2012.
5 Roger Perrot, *Institutions judiciaires* (13e ed.), Montchrestien, Paris, 2008.
6 Jean-Marie Carbasse, *Histoire du parquet*, PUF, Paris, 2000.
7 Guinchard *et al.* (2009) *supra* footnote 1.
8 Constitutional Council, Decision No. 92-395 DC of 21 February 1992; Decision No. 93-926 DC of 11 August 1993.

vocations, hinders the building of a culture of independence of judges that is as solidly established as in common law.

13 – Lastly, the intervention of these prosecutors is indispensable in all penal matters. They refer matters before the courts, even when public action is initiated by the victims. This is one of the essential features of an inquisitional system. In certain civil matters, such as those involving civil status, they also act as parties. They also intervene as joined parties in certain matters of public order, such as corporate bankruptcy, and they submit conclusions in all matters where they deem it necessary. They have a right of appeal, the right to have the legitimacy of *Cour de Cassation* judgements reviewed and the right to submit the constitutionality of a statute to the Constitutional Council.

14 – In trials, especially in penal matters, prosecutors have special prerogatives. In penal investigations, they can have people suspected of breaching a penal statute arrested and held in police custody. It is therefore not surprising that their position in the courts and the powers they are given in terms of infringing on fundamental freedoms raise certain problems in terms of the fair trial standards stemming from the jurisprudence of the Constitutional Council or imposed by that of the European Court of Human Rights, based on Article 6 of the European Convention on Human Rights. With respect to Article 5 of the Convention, there is also the question of the prosecutor's ability to deprive a person suspected of committing a crime of his freedom. Several decisions of the national constitutional court have corrected certain aspects of the system but recent cases rendered by the European Court of Human Rights[9] require the French legislature to choose between a body of public prosecutor judges with independent status that likens them to a judicial authority, which public prosecutors would like to have, or a body of prosecutors subject to the instructions of the executive branch, separate from the courts and without the power to order suspected offenders to be detained. Most legal systems around the world have opted for this latter solution. In most systems which have a public prosecutor, he does not have judicial authority.

15 – Although the issue of the public prosecutor's status is the subject of debate in France today,[10] even if the law ends up choosing to give prosecutors independent status[11] there will still be confusion in the French system between two very different aspects of independence — on the one hand the statutory independence of judges with special terms for those who are also public prosecutors, and on the other hand the independence of the courts in rendering judgements, which is very different.

16 – The issue of the public prosecutor does not arise for the other levels of courts. There is no prosecutor for the administrative courts or the Constitutional Council.

9 CEDH, *Moulin v. France*, 23 November 2010.
10 Guinchard *et al.* (2009) *supra* footnote 1.
11 Le Monde, Jean-Claude Bécane, 9 December 2011.

From this perspective, the judicial order is treated differently, which is also the case for the place of judicial judges in institutions.

B. The Place of Judges in the Institutional Environment

17 – With respect to the independence of the judiciary, the place of the judge in his institutional environment raises two series of questions — career management for judges and the separation between the judicial branch and the other two branches.

1. The Existence of a Judicial Civil Service[12]

18 – In France, two-thirds of judges are hired through competitions open to law graduates as soon as they complete their studies and the other third are confirmed lawyers with a few years of practice. Both judges and prosecutors are appointed by decree signed by the President of the Republic and their transfer, change of duties and promotion in the three levels of courts follow the same rule. Throughout their career, such judges are evaluated by the Chief President of the court and, based on their evaluation, they may be promoted to the next court level. A judge's career progresses from the first-level courts to higher courts through successive decisions of the administrative authority, which raises the question of the influence of the executive branch in managing a judge's career and the other political or union influences that come to bear on it.

a. The Influence of the Executive Branch

19 – The influence of the executive branch on judges' careers is measured by the government's impact on their training, the management of their careers and their discipline.

Judges' training[13]

20 – The training of judges is entrusted to a school, the *Ecole nationale de la magistrature*, which has the status of a public establishment with relative administrative and management autonomy. Its board is chaired by the Chief President of the *Cour de Cassation* but the other members are designated by the Minister of Justice. The school is also under the tutorship of this member of the government who chooses its director and appoints the instructors. Lastly, the school's budgetary autonomy is relative — the budget is drawn up and submitted to Parliament by the Minister of Justice.

Career management[14]

21 – The power of the executive branch in managing judges' careers is broadly tempered by the intervention of the constitutional body guaranteeing their independence, the High Council of the Judiciary. For basic positions, appointments

12 Perrot (2008) *supra* footnote 5.
13 Id.
14 Id.

are proposed by the Minister of Justice but they must be confirmed by the High Council of the Judiciary. For the positions of President of the court and appointments to the higher court, i.e. the *Cour de Cassation*, the High Council of the Judiciary appoints the judges directly.

Disciplining judges[15]

22 – The High Council of the Judiciary is also the body responsible for disciplining judges. When a judge breaches the duties of his office, the Minister of Justice has a disciplinary investigation conducted by an inspection service, the 'judicial services inspectorate', which answers directly to the Minister. The same minister then refers the matter to the High Council of the Judiciary. Proceedings can also be taken by the Presidents of the appeal courts on which the judge sits. Disciplinary sanctions for judges are decided by the High Council of the Judiciary. For prosecutors, the High Council only issues an opinion, although it is generally followed by the Minister. These sanctions can include removal from office.

23 – Two issues in particular have arisen regarding disciplinary matters. The first was the possibility of an administrative authority, the Ombudsman, in charge of defending the rights of citizens regarding the various government departments, intervening in the taking of disciplinary action against judges. The Constitutional Council[16] has held the provisions of a 2007 statute which provided for such an intervention contrary to the principle of independence of the judiciary and the separation of powers. The second issue involves the possibility of holding a judge liable for a fault in rendering a judgement where he commits a serious and intentional breach of a rule of procedure. On this point, the Constitutional Council has held[17] that in this case the judge could only be prosecuted if the breach was confirmed in a final judgement, which means that the judge's fault must be established by court judgement, not by the disciplinary body.

24 – Treating this second issue differently, a 2010 statute[18] gave every person the possibility of referring a disciplinary complaint against a member of the judiciary to the High Council of the Judiciary through the petitions committee. The Constitutional Council did not consider this provision unconstitutional but it held that when a complaint relates to a matter which is still before the judge, a procedure must be provided for which respects the impartiality and independence of the judge in question vis-à-vis the parties.

15 Guinchard *et al.* (2009) *supra* footnote 1.

16 Constitutional Council, Decision No. 2007-551-DC of 1 March 2007.

17 Constitutional Council, Decision No. 2011-611-DC of 19 July 2010.

18 Institutional Act No. 2010-830 of 22 July 2010 respecting the implementation of Article 65 of the Constitution.

The composition of the High Council of the Judiciary[19]

25 – The career and discipline of judges are broadly subject to the guarantee of the High Council of the Judiciary, which raises the issue of the composition of this body and in particular its freedom from political influence. In this regard, the series of statutes which have defined the status of members of the Council of the Judiciary contain specific provisions protecting their independence. The jurisprudence of the Constitutional Council pays particular attention to the effectiveness of this guarantee.

26 – From this point of view, it has been difficult to find a balance in the composition of the High Council of the Judiciary between the influence of political institutions and that of the representation of judges. This body was created by the 1946 Constitution. It was completely transformed by the 1958 Constitution and since then its composition, power and rules of procedure have been changed three times. The latest constitutional reform was that of July 21, 2008, implemented by an institutional act of July 22, 2010. The most notable change was that the President of the Republic, who was its President, and the Minister of Justice, who was its Vice-President, no longer sit on it. The President of the High Council of the Judiciary is henceforth the Chief President of the *Cour de Cassation*, which without question increases the independence of the High Council of the Judiciary and indirectly that of the judges.

27 – By symmetry, there is a section of the High Council of the Judiciary for public prosecutors. However, it only issues opinions about appointments proposed by the Minister of Justice. The two sections may also meet in a plenary session at the request of the President of the Republic or the Minister of Justice to examine certain general questions common to the two categories of judges.

b. The influence of unions[20]

28 – In 2010, during the latest reform, one of the most debated issues was that of the proportion of judges on the High Council of the Judiciary. As recommended by various international reference texts, and in particular those of the Council of Europe, the judges wanted to be in the majority. The opposite solution prevailed for appointment decisions: the council has eight outside members designated by the government and the *Conseil d'État* and seven judges at various levels. However, in disciplinary matters, the judges are in the majority. The issue is that of the power of judges' unions over the mechanisms for controlling judges' careers. They had greater influence before the 2008 constitutional reform, leading certain commentators on the workings of the legal system to criticize the 'corporatist' management of the judiciary.

29 – Paradoxically, the issue of maintaining independence in the management of judges' careers comes up less at the administrative court level. Institutions created

19 Guinchard *et al.* (2009) *supra* footnote 1.

20 Guinchard *et al.* (2009) *supra* footnote 1; Institut Montaigne, *Pour la justice*, 2004.

within the *Conseil d'État*, the highest level of this type of court, suggest appointments and promotions to the Executive, which generally ratifies them.[21]

30 – These issues come up even less frequently for the Constitutional Council, where members are in office for a nine-year, non-renewable term. Appointments are divided into three and made by the President of the Republic and the Presidents of each house of Parliament, the National Assembly and the Senate, and are subject to confirmation by the Houses themselves. During their term of office, members of the Constitutional Council cannot be removed unless they breach the incompatibility rules as determined by the majority.

31 – Finally, for each category of judge there are incompatibility rules designed to prevent conflicts of interest and guarantee their freedom from any outside influence, and in particular from the parties. All judges are also subject to an obligation of discretion in various forms which prohibits them from any perceived political affiliation or position-taking.

2. The Interference of Public Authorities in the Operation of the Legal System

32 – Public authorities intervene in the operation of the legal system in two different ways that affect the independence of the judiciary — interference by the legislative branch in judgements and the influence of the executive branch in managing courts' budgets.

a. Interference of the legislative branch in judgements

33 – The interference of the legislative branch in judgements arises in civil matters when a statute becomes applicable to ongoing trials[22] (such a possibility is excluded in penal matters unless the new law is less stringent). The legislature thereby changes the course of a civil proceeding by amending the law the judge must apply, generally to avoid the effect of unwanted jurisprudence. This is clearly a breach of the principle of the separation of powers and the independence of the judiciary. On this issue, the jurisprudence of the Constitutional Council[23] contradicts the position of the European Court of Human Rights.[24] It generally allowed the application of new law in pending civil matters whereas the European Court imposed more stringent conditions: to be retroactive, the statute had to be justified by compelling reasons of public order. After a resounding condemnation of France for such practices, which are contrary to Article 6 of the Convention, the Constitutional Council brought its jurisprudence into line by setting very strict conditions of compliance of so-called 'validation' statutes with the Constitution.[25]

21 Guinchard *et al.* (2009) *supra* footnote 1.
22 Jean-François Renucci, *Traité de droit européen des droits de l'homme*, LGDJ, Paris, 2007, p. 398.
23 Constitutional Council Decisions No. 96-375 DC of 9 April 1996, No. 97-393 DC of 18 December 1997, No. 98-404 DC of 18 December 1998; No. 99-425 DC of 29 December 1999.
24 ECHR 28 October 1999, *Zielinski et al. v. France*, Reports 1999-VII, 95 .
25 Constitutional Council, Decision No. 2001-458 DC of 7 February 2002.

b. The influence of the executive branch on court administration and management[26]

34 – I will conclude this first section with the highly debated issue of the budgetary autonomy of the courts. On this point, the solutions adopted by the various States are quite different. Some States confer great management autonomy on the courts, considering it an inherent part of their independence, while other States deny judges any power in this regard, entrusting these duties to administrators answering directly to the government. In France, the situation is somewhere between the two. The courts have funds which they administer themselves but their budget is proposed and discussed in Parliament by the Minister of Justice, who allocates the funds among the courts. Also, expenditures are ordered within the courts jointly by the Presidents and the prosecutors according to a co-management principle, another indication of the government's control over the courts.[27]

35 – The adoption in 2001 of a new system for voting on and implementing the government's budget[28] would have been an ideal opportunity to rectify this situation. However, the issue of the budgetary management of courts in terms of judicial independence was not taken into account and the situation therefore remained unchanged. In a period of budgetary restrictions, the issue of funding for the courts, which is constantly being debated in France, is a pressing one. The least we can say is that, according to the French conception, the independence of the judiciary does not extend to budgetary autonomy. However, the issue is more satisfactory for administrative courts and even more so for the Constitutional Council which, to various degrees, enjoy greater autonomy in establishing and implementing their budget.

36 – Each of these political, administrative and budgetary characteristics which stand in the way of a natural and unambiguous conception of the independence of the judiciary come into conflict with the constitutional guarantees designed to ensure effective protection of the required standard of independence in a democratic society.

3. The effectiveness of the principle of independence in the French legal model

37 – Like most States, the provisions protecting the independence of the judiciary in France are constitutional. In this way, the Constitution itself bears the mark of a specifically French political concept of justice which is rooted in history. The essential aspect of this identity is that since the Former Regime, the judiciary in France has not been considered an autonomous branch equal to the executive and legislative branches. Emanating from royal authority, it was placed under the control and protection of the sovereign, which would be a source of ongoing

26 Institut Montaigne, *Pour la justice*, 2004.

27 Id.

28 Institutional Act No. 2001-692 of 1 August 2001 governing public finance.

conflict among the courts of the Former Regime and the King and, in response, would lead to the weakening of the courts in revolutionary law.[29] As a result, in the institutions of the Fifth Republic, the law was not on an equal footing with the Executive and Parliament; it was an 'authority' and the independence of this 'legal authority' was guaranteed by the President of the Republic.[30]

38 – With this political background in mind, the Constitution contains constitutional standards which guarantee the independence of the judicial authority. Through its decisions since 1958 and especially beginning in the 1980s, the Constitutional Council has given them content which ensures their effectiveness.

A. Constitutional Provisions Relating to the Independence of the Judiciary

39 – The constitutional provisions relating to the independence of the judiciary are taken from both the Declaration of 1789 of the Rights of Man and of Citizens, to which the preamble of the 1958 Constitution refers, and the provisions of its Title VIII. The independence of the Constitutional Council is guaranteed by the provisions of Title VII which are specific to it and the independence of the administrative courts stems from a fundamental principle recognized by the law of the Republic, entrenched by the preamble of the 1946 Constitution, which is also included in the constitutional corpus.

40 – Article 16 of the Declaration of 1789 reads as follows: "Any society in which the guarantee of the rights is not secured, or the separation of powers is not determined, has no constitution at all". This is the founding principle of the separation of powers on which the independence of anybody vested with the power to judge is based, regardless its nature, and which prevents the legislature or the government from censoring court decisions, subjecting them to injunctions or substituting their own decisions in the judging of disputes falling under their authority.[31] The independence of the judiciary takes on a new dimension with the affirmation of the former principle according to which no person can be reassigned against his will to a court other than that designated by law.[32] As a result, the law cannot create a special court to decide on a specific trial and no citizen may choose a different court unless it is in the public interest. Conversely, no court may be suppressed without guarantees for both the persons subject to trial and the members of such courts.

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29 Royer, Jean & Durand (2009) *supra* footnote 2.

30 Th. S. Renoux, Le président de la République, garant de l'indépendance de l'autorité judiciaire?, *Revue Justices*, 1996, no. 3. This conception was expressed in very clear terms by the President of the Republic in a press conference held on January 31, 1964: "In France there is no authority, whether civil, military or judicial, which does not derive its legitimacy from the Head of State ..." (translation by author).

31 Constitutional Council, Decision No. 80-119 DC of 22 July 1980; Decision No. 87-228-DC of 26 June 1987.

32 Article 17 of the Law of August 16-24, 1790; Th. S. Renoux, Le droit au juge naturel, droit fondamental, *RTDciv.* 1993, no 1, p. 33.

41 – Article 64,[33] which deals with the judicial authority, contains substantial provisions involving the principle of independence in the French tradition. Other than pointing out that the President of the Republic is its guarantor, it states that in exercising this part of his power, the President of the Republic is assisted by the High Council of the Judiciary. It indicates here again that the status of members of the judiciary is determined by a category of special laws, institutional acts, voted on according to a strengthened procedure designed to increase the statutory guarantees granted to members of the judiciary[34] and lastly that members of the judiciary, i.e. judges, cannot be removed from office so they cannot be reassigned without their consent, even for a promotion.

42 – Article 65[35] sets out the composition and mission of the High Council of the Judiciary, presided over since 2010 by the Chief President of the *Cour de Cassation*

33 Article 64: The President of the Republic shall be the guarantor of the independence of the Judicial Authority. He shall be assisted by the 'High Council of the Judiciary'. An Institutional Act shall determine the status of members of the Judiciary. Judges shall be irremovable from office.

34 Constitutional Council, Decision No. 2001-445-DC of 19 June 2001.

35 Article 65: The High Council of the Judiciary shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors.
The section with jurisdiction over judges shall be presided over by the Chief President of the *Cour de Cassation*. It shall comprise, in addition, five judges and one public prosecutor, one *Conseiller d'État* appointed by the *Conseil d'État* and one barrister, as well as six qualified, prominent citizens who are not members of Parliament, of the Judiciary or of administration. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens. The procedure provided for in the last paragraph of article 13 shall be applied to the appointments of the qualified, prominent citizens. The appointments made by the President of each House of Parliament shall be submitted for consultation only to the relevant standing committee in that House.
The section with jurisdiction over public prosecutors shall be presided over by the Chief Public Prosecutor at the *Cour de Cassation*. It shall comprise, in addition, five public prosecutors and one judge, as well as the *Conseiller d'État* and the barrister, together with the six qualified, prominent citizens referred to in the second paragraph.
The section of the High Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the *Cour de Cassation*, the Chief Presidents of Courts of Appeal and the Presidents of the *Tribunaux de grande instance*. Other judges shall be appointed after consultation with this section.
The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors.
The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such capacity, it shall comprise, in addition to the members mentioned in paragraph three, the public prosecutor belonging to the section with jurisdiction over judges.
The High Council of the Judiciary shall meet in plenary section to reply to the requests for opinions made by the President of the Republic in application of article 64. It shall also express its opinion in plenary section, on questions concerning the deontology of judges or on any question concerning the operation of justice which is referred to it by the Minister of Justice. The plenary section comprises three of the five judges mentioned in the second paragraph, three of the five prosecutors mentioned in the third paragraph as well as the *Conseiller d'État*, the barrister and the six qualified, prominent citizens referred to in the second paragraph. It is presided over by the Chief President of the *Cour de Cassation* who may be substituted by the Chief Public Prosecutor of this court.

for the section with jurisdiction over judges and by the Chief Public Prosecutor at the *Cour de Cassation* for the section with jurisdiction over public prosecutors. At the request of the President of the Republic or the Minister of Justice, it meets in plenary session to express its opinion on any question concerning the operation of justice, including those affecting its independence.

43 – The independence of the Constitutional Council is guaranteed by Article 56 of the Constitution,[36] which determines the number of members and the procedure for appointing them.[37] It has nine members who hold office for a non-renewable term of nine years. Three of its members are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. These appointments are subject to the approval of the relevant standing committees of each House, which may oppose them with a majority of at least 3/5 of the votes cast. In addition to these nine members, former Presidents of the Republic are ex officio life members of the Constitutional Council. The President of the Constitutional Council is appointed by the President of the Republic.

44 – Lastly, the independence of administrative courts, which are likened to *Cours des comptes* [courts of auditors], is guaranteed by a fundamental principle recognized by the laws of the Republic.[38] For members of these courts, the rules governing their independence are not found in legislation on the judiciary but in specific rules applicable to them within general civil service regulations.[39]

The Minister of Justice may participate in all the sittings of the sections of the High Council of the Judiciary except those concerning disciplinary matters.
According to the conditions determined by an Institutional Act, a referral may be made to the High Council of the Judiciary by a person subject to trial.
The Institutional Act shall determine the manner in which this article is to be implemented.

36 Article 56: The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The procedure provided for in the last paragraph of article 13 shall be applied to these appointments. The appointments made by the President of each House shall be submitted for consultation only to the relevant standing committee in that House.
In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

37 Constitutional Council, Decision No. 566-DC of 9 July 2008: "It is implicit from all the provisions of the Constitution that the legislator intended to guarantee the independence of the Constitutional Council" (transation by author).

38 Constitutional Council, Decision No. 80-119-DC of 22 July 1980.

39 Constitutional Council, Decision No. 91-L of 12 March 1991.

B. Jurisprudence of the Constitutional Council Regarding the Independence of the Judiciary

45 – Through a series of decisions, the Constitutional Council, which is responsible for deciding whether laws comply with the Constitution,[40] has progressively given effect to each of the constitutional standards we have just mentioned. For courts and the Constitutional Council, the implementation of these texts must be referred to institutional acts[41] which are systematically submitted to it before being enacted. It has therefore been able to systematically oversee the constitutionality of these specific statutes. The organisation and status of other courts are determined by ordinary statute which may be referred to it by political authorities and groups of parliamentarians before being enacted. In addition, since the institution of a constitutionality provision[42] which, during a trial, allows a party to submit the constitutionality of the statute applicable to the dispute to the Constitutional Council upon referral by the judge of first instance and after screening by the *Conseil d'État* or the *Cour de Cassation*, it may be asked to rule on any legislative provision which impairs the independence of the judiciary. This has led to a significant jurisprudential corpus defining the scope and content of the independence of the judiciary, which we will briefly discuss below.

46 – The Constitutional Council thus ensures that the legislature complies with the guarantee of independence, both with respect to its statutory aspect, i.e. the independence of judges, and its institutional aspect, applied to the courts. It exercises this oversight both internally in terms of the operation of justice by ensuring that in rendering judgement, the judge does not receive any instructions from his own superiors,[43] and externally, in terms of the executive and legislative branches, by ensuring that the public authority does not interfere with either judges' freedom to render decisions or the authority of their decisions. This guarantee of independence must also shelter the judge from political and administrative pressure as well as pressure from the parties or private influences. It protects all judges, regardless the court to which they belong, whether they are professional judges or part-time judges hired on an as-needed basis.[44]

47 – The Constitutional Council also ensures that the guarantee of independence applies to all facets of a judge's career, from his appointment,[45] assignment,[46]

40 Article 61 of the Constitution.

41 This requirement stems from Article 64 of the Constitution. Constitutional Council, Decision No. 2002-445-DC of 19 June 2001; Decision No. 2003-446-DC of 20 February 2003.

42 Article 61-1 of the Constitution.

43 Constitutional Council, Decision No. 70-40 DC of 9 July 1970; Decision No. 80-127-DC of 20 January1981; No. 2003-466-DC of 20 February 2003.

44 Regarding *juges de proximité* (local magistrates): Constitutional Council, Decision No. 94-355 of 10 January 1995.

45 Constitutional Council, Decision No. 93-336-DC of 27 January 1994.

46 Constitutional Council, Decision No. 93-336 of 27 January 1994.

the evaluation of his professional skills, remuneration, transfer, promotion[47] and extension[48] to the cessation of his duties.

48 – The Constitutional Council pays particular attention to ensuring that the law efficiently complies with the irremovability of judges and it denounces any proceeding which would move a judge without his prior consent, even in the case of a promotion,[49] or assign him to other duties. It thus carefully examines the status of judges vested with temporary or part-time functions, or rules limiting the time given to exercise certain functions.[50] It gives general scope to the irremovability rule by applying it to both higher court judges and members of administrative courts.[51]

49 – With respect to the requirement of independence, its control extends to legislative provisions relating to the status of members, the rules of procedure of the High Council of the Judiciary, guarantor of the independence of judges, with respect to opinions and decisions regarding appointments, as well as the rules involving disciplinary proceedings and in particular the terms according to which referrals may be made to it by persons subject to trial.[52] The body guaranteeing independence must clearly be sheltered from any influence itself.

50 – Since the judges are elected, like members of labour courts[53] and commercial court judges, the Constitutional Council bases the guarantee of independence, which is an integral part of the exercise of judicial duties, on Article 16 of the Declaration of 1789 rather than on status as member of the judiciary, which does not apply to them. It is important in all cases that those involved be subject to the rights and obligations applicable to all members of the judiciary which give access to court functions, and thus to the same guarantees of independence, subject only to the specific provisions imposed by the part-time or temporary exercise of their duties.[54]

51 – For all categories of judges, the independence guarantee includes verification of their ability to render justice. The law which determines their status must therefore indicate the level of knowledge or legal experience they must have.[55]

47 Constitutional Council, Decision No. 2001-445-DC of 19 June 2001.
48 Constitutional Council, Decision No. 86-220-DC of 22 December 1986.
49 Constitutional Council, Decision No. 67-33-DC of 12 July 1967; Decision No. 80-123-DC of 24 October 1980.
50 Constitutional Council, Decision No. 94-355-DC of 10 January 1995; Decision No. 2001-445-DC of 19 June 2001; Decision No. 2003-466-DC of 20 February 2003.
51 Constitutional Council, Decision No. 80-119-DC of 22 July1980.
52 Constitutional Council, Decision No. 2010- 611-DC of 19 July 2010.
53 Constitutional Council, Decision No. 45-DC of 28 December 2006.
54 Constitutional Council, Decision No. 2003-466 DC of 20 February 2003.
55 Constitutional Council, Decision No. 2003-466 DC of 20 February 2003.

This capacity requirement is based on Article 6 of the Declaration of 1789,[56] from which the principle of equal access to public office is inferred and which, in this case, completes the constitutional sources cited above. The capacities, virtues and talents taken into account must also relate to the functions of a judge and are designed to guarantee equality before the law, a principle which also stems from Article 6 of the Declaration of 1789.[57]

52 – Lastly, the legal requirement of setting up independence guarantees for all judges is controlled both positively, through the censure of legal provisions which breach it, and negatively, where the law fails to provide such guarantees.[58]

4. Conclusion

53 – This brief review shows that the Constitutional Council has built an efficient apparatus for protecting the independence of the judiciary by reconciling the special treatment of the power to judge in our political tradition and the unique context of French legal institutions with the fundamental guarantees set forth in the preamble and body of the Constitution in order to place requirement of judicial independence at the level of international standards. This wish to adhere to universal principles of good legal governance can be seen in particular from the convergence of the decisions of the French constitutional judge with, on the one hand, those of the European Court of Human Rights based on Article 6 of the European Convention on Human Rights and, on the other hand, those of the Court of Justice of the European Union based on fundamental principles of European law.[59] Such a convergence is indispensable in the framework of an European space which requires that justice be rendered in all European Union member States according to identical standards of quality in order to be mutually recognized and executed throughout the European territory.

56 Article 6 Declaration of the Rights of Man and Citizens: "(...) All citizens, being equal in its [the law's] eyes, are equally eligible to all public dignities, places and employments, according to their capacities, and without other distinction than that of their virtues and talents".

57 Constitutional Council, Decision No. 98-336 of 19 February1998.

58 Constitutional Council, Decision No. 2010-10 QPC of 2 July 2010.

59 Renucci (2007) *supra* footnote 22, p. 402.

The Coming of Age of Review of Administrative Action in the Netherlands: A Battle of Effectiveness and the Rule of Law

*Willem Konijnenbelt**

1. Effectiveness and the Rule of Law

Effectiveness, in the context of our subject, essentially means effective review of and protection against administrative action: a procedure that brings the claimant, if he wins his case, the remedy he was seeking. *Rule of Law* essentially means, in this context, a procedure of review that ensures verification of the legality of the administrative action by a court addressing the criteria of Article 6 of the European Convention on Human Rights: in cases where civil rights and obligations are concerned or where a criminal charge is involved – both as understood by the case law of the Strasbourg Court – a review ensured by a court that fulfils the criteria of the Convention with regards to its nature and procedure. One of the essential characteristics required by the Convention is *independence* of the reviewing court. And the implication that the court cannot take the place of the administration.

The question that forms the background issue of the whole article is then: How to reconcile the requirement of effective review of administrative action and the requirement of review by an independent court? The twain, are they compatible or will they never meet?

2. Until the Middle of the XIXth Century

Under the Republic of the United Provinces (1579-1795), all cases against the administration could be brought before the ordinary law courts of the provinces. Following the end of the French period – with its dogmatic separation of judicial and executive powers – in 1814, the newly founded Kingdom of the Netherlands initially retained the ancient system of full competence of the judiciary *vis-à-vis* the administration. The then king, William I (our only autocratic monarch), disapproved of the system and in 1822 the French conflict system was reintroduced. Thus, in civil procedures against a public body before a judicial court, the provincial governor could raise a conflict of competence, as a result of which the court would cease to be competent in the case and the dispute would be decided by the King (who would seek the advice of his Council of State). From 1830 onwards – when

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the royal authority had been seriously weakened by his stubborn and authoritarian way of handling the revolt of the Belgian provinces – raising conflicts fell into disuse; in 1844 the *conflict* system was formally abolished.[1]

3. The Rise of Administrative Review

Still, by then one had become accustomed to having, in several cases, a possibility of *administrative* review instead of one form or another of *judicial* review. The reviewing authority would then be an administrative organ: the municipal council (for decisions by the municipal executive or the mayor); the provincial executive (for decisions by municipal or water board bodies); or the Crown (either directly, for decisions made by ministers or by decentralised bodies, or, indirectly, in cases where an appeal could be brought against reviewing decisions by the provincial executive). Whether an administrative appeal would be possible against a certain kind of administrative decision, whether the decision given in review would be subject to appeal to the Crown and to whom such an appeal would be available, all depended on separate provisions in the statute law: in Acts of Parliament, in government regulations; or in provincial, municipal or water board byelaws. Initially, there were no general rules of procedure or generally accepted principles of due process.

The ordinary courts remained competent for "all disputes about property or rights deriving from it, about claims or civil rights", according to a provision of the 1815 Constitution.

From the mid-1840s onwards, the Provincial States of several provinces would vote byelaws providing rules of procedure, such as the obligation to hear both sides. The Provinces Act of 1850 made such rules compulsory. It was not until 1861 that the Council of State Act would give rules of procedure for the proceedings in applications for administrative review by the Crown: all parties concerned would be heard by the Contentious Section of the Council of State, which would formulate a decision in the form of a draft Royal Decree. Should a minister hesitate to follow the opinion of the Section, he had to demand that the section reconsider its draft. The minister could persist in deciding contrary to the draft only if he found the minister of justice willing to countersign the Royal Decree ('contrary decision'). In practice, contrary decisions were extremely rare: they appear in just 1% or 2% of cases.

The case law of the provincial executives and especially the Crown have both made a fundamental contribution to the development of Dutch administrative law by elaborating – long before the courts and the French *Conseil d'État* – the concept of unwritten general principles of law with which administrative decisions must

1 R. Kranenburg, De bescherming tegen onrechtmatig bestuur, *in* C.W. van der Pot *et al.* (eds.), *Nederlandsch Bestuursrecht*, Alphen aan den Rijn, 1932, p. 255.

comply, such as equality, legal certainty and the protection of legitimate expectations, proportionality, prohibition of *détournement de pouvoir* (use of a power in pursuit of wrong ends) and of arbitrariness.

Since the written law would never give specific reasons for granting a review, it was self-evident that these reasons could be both of a legal and of a policy nature. This being the case, and the reviewing authority being an administrative authority itself, if the review were to come down to the annulment of the decision challenged and therefore a requirement that a new decision be made, the reviewing authority would simply replace the annulled decision with its own decision. Hence, this system offered very effective remedies[2] but the rule of law requirement of review by independent courts was not met.

4. End of the 19th Century: Judicial Review, the Exception

By the end of the century, during the eighties, there was much debate – influenced by developments in Germany and France – about the desirability of creating a system of independent administrative courts. Some supported the idea of transforming the Contentious Section of the Council of State into an independent administrative court. The constitutional reform of 1887 made this possible. The French example was not entirely unrelated to this idea. Others were in favour of creating specialised administrative courts; a third suggestion was to add chambers for judicial review of administrative action to the ordinary courts of justice. In the end, no decision could be reached.

From the nineties onwards, some specialised administrative courts were created (*e.g.* taxes, social security, civil service). In many cases, a statute, or a byelaw issued by a decentralised body, would make some kind of administrative review of individual administrative decisions possible, mostly a review by the provincial executive or by the Crown. In other cases, one would have to try and seek access to the ordinary courts with a claim that an administrative decision was 'illegal' and had therefore harmed the claimant. Over the course of the 20th century, the courts would come to accept more and more grounds for the illegality of an administrative decision: not just conflict with written 'private' law but also with public law and with unwritten principles of law, including the principle of due care.

In financial disputes (*e.g.* tax law, social security), the specialised administrative courts would replace an administrative decision, annulled on grounds of illegality, with their own decision. In other kinds of judicial review of an administrative decision, a judgment that found the decision being challenged illegal would be content with annulling the decision, leaving it to the administration to make a new decision. The 'discretionary power' of the administration ought to be respected, both for constitutional reasons (in many cases statute law gives discretionary power to

2 Kranenburg (1932) *supra* footnote 1.

the administration and to the administration only; only administrative authorities can exercise such powers under parliamentary or comparable responsibility) and on practical grounds (in many cases, the courts lack the skills and the tools for making the right decisions). In administrative review, however, the reviewing body would always, as we have seen, able to make the decision itself if need be.[3]

At this stage, review by the specialised administrative courts met the requirements of both effectiveness and review by an independent court. But in many cases the only judicial review available was a tort action before the ordinary courts. This was an independent judge, but effectiveness was assured only insofar as a claimant could be given adequate financial compensation; a 'better' administrative decision was something the judge could not provide though. In the many cases where only administrative review was possible, the effectiveness of the review was assured but the rule of law requirement of review by an independent judge was not met at all; in this respect, the situation showed no improvement.

5. After the Second World War – 1976: 'Arob', Decline of Administrative Review

After the Second World War, new attempts were made to set up a system of review for individual administrative decisions. In 1976 – after a series of intermediate stages – this resulted in the *Wet Arob* (Act on judicial review of individual administrative decisions). The Act upheld the existing possibilities for judicial or administrative review of individual decisions but it created a new independent court for claims with the intention of the annulment of an individual administrative decision for 'illegality', i.e. being (a) contrary to a written provision of law; (b) contrary to the prohibition on the unlawful use of power (*détournement de pouvoir*); (c) contrary to the prohibition of arbitrariness, and (d) contrary to any other general principle of administrative law. This new court was the Administrative Justice Section of the Council of State. In most cases, an objection procedure, based on the principle of fair hearing before the authority that had made the challenged decision, was compulsory.

The new Section, often referred to as the '*Arob* judge', played an important role in the further development of the procedural general principles of administrative law, thus completing the work of the Crown, the pre-existing administrative courts and the ordinary judiciary. The '*Arob* judge' would, in cases where the challenged decision was annulled, mostly content himself with annulling the decision and leaving it to the administration to decide on the consequences of the annulment; only in cases where it was clear that the reason for annulment, had no, or only partial, bearing on the substance of the annulled decision, could it decide that the legal consequences of the annulled decision were upheld entirely or in part.

3 Kranenburg (1932) *supra* footnote 1.

From 1976, the possibility of administrative review of individual decisions was gradually removed from many pre-existing statutes (though not from all). As a result, '*Arob* review' gradually became the standard method of reviewing individual decisions. But three specialised administrative jurisdictions continued to function, each in its own province: tax courts (as part of the common judiciary); a court for social security and civil service disputes and a court for matters to do with economic legislation.[4]

All in all, ever more individual administrative decisions have become potentially subject to review by an administrative court. Where access to the *Arob* judge was made available, the *Arob* judge replaced the ordinary courts; this has not changed the quality of the system in terms of rule of law: one independent judge has given way to another. In terms of effectiveness the change implied some improvement. On the other hand, where the *Arob* judge had replaced administrative review by the Crown, rule of law had won to the detriment of effectiveness; a shift in the balance.

6. Fall of Administrative Review by the Crown

In 1985, the *Benthem* ruling of the European Court of Human Rights in Strasbourg confirmed the opinion of those who had argued that the Dutch administrative review system did not fulfil the requirements of Article 6 of the European Convention on Human Rights, namely that a claimant whose civil rights or obligations are at stake or has a criminal charge against him, is entitled to a fair and public hearing by an independent and impartial tribunal. When the Crown is the final competent reviewing body, there is no independent tribunal to hear the case. In view of that, the competence of the Crown to hear claims against individual administrative decisions was soon abolished; provisionally, the Contentious Section of the Council of State – the same Section that used to hear the cases and that would draw up the draft Royal Decrees that were meant to decide the cases – was declared competent to decide these cases. It could annul a decision on the same grounds, as could its 'sister' the Administrative Justice Section, in *Arob* cases. (In practice, several Councillors of State would be members of both Sections.) A more permanent solution would be introduced a few years later.[5] – A further gain for rule of law, but at the expense of effectiveness in the eyes of the claimants.

7. 1994: The General Administrative Law Act

The second half of the Eighties and the beginning of the Nineties brought a sort of repetition of the debate of one hundred years earlier about review of administrative

4 H.D. van Wijk/W. Konijnenbelt & R.M. van Male, *Hoofdstukken van bestuursrecht*, The Hague 2002, p. 502.

5 Id., p. 503.

action, the only real difference being that an important role for administrative review was no longer an option. Again, three principal models were discussed: (a) the integration of administrative justice into the ordinary judiciary, with the *Hoge Raad* ('High Council') on top as a mere court of cassation; (b) some administrative courts as courts of appeal and, again, the *Hoge Raad* as a common court of cassation for the whole of the judiciary and (c) the retention of the existing system with some adaptations.

Without great enthusiasm on anyone`s part, the third option prevailed. The specialised administrative courts for social security affairs, civil service disputes (and disputes on scholarships) and for economic law disputes were upheld, the tax law chambers remained part of the ordinary judiciary, and the two judicial sections of the Council of State merged into one Section for Administrative Justice. As a rule, a claimant cannot be heard by an administrative court if he has not followed the objection procedure before the authority responsible for the decision which he is challenging. The law concerning the proceedings before the three 'autonomous' administrative jurisdictions was unified; in 2005, these rules of procedure came to apply in tax disputes too.[6]

Recently, the debate has begun anew. The Government seems to be in favour of leaving the system more or less as it is, with improvements where necessary. I should add that there is a constant stream of minor or major legislative improvements, arrangements for a better lay-out of the system and – as we shall see next – improving its effectiveness.

Unfortunately, I must also add some recent setbacks: for not always very convincing reasons, some procedures – especially in the field of construction and road building – have been shortened (the final decision of the court ought now to be reached within six months), resulting, of course, in delays in other matters treated by those same courts; and there is a bill pending before parliament raising the costs of the procedures drastically. There was a chance, however, that the senate would refuse to pass the bill. In the beginning of the year 2013 the new government withdrew the bill; this danger is now over.

8. Effectiveness and the Rule of Law *Revisited*

The tradition of administrative review by the Crown was one of a *substantive scrutiny* of decisions: although questions of procedural law were not completely neglected, the main focus of the reviewing procedure was *what would be the right decision*. If it was thought that the decision challenged was right in the end, the grounds put forward by the claimant would fail; possible faults of a formal nature,

6 H.D. van Wijk/W. Konijnenbelt & R.M. van Male, *Hoofdstukken van bestuursrecht*, Amsterdam 2011, p. 516; R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, Deventer 2010, p. 1096, 1128.

such as lack of research or failure to hear interested parties, non-convincing motivation etc., would be 'repaired' in the course of the proceedings before the Crown. If it were thought that the decision ought to have been read differently, the decision challenged could be annulled as a whole or in part and the outcome of the proceeding would be the right decision – 'right' meaning both legally correct and appropriate for its purpose. The Crown being itself an administrative organ, it was considered that it had every authority to impose the decision it thought right. The one flaw of the procedure, however, was that the legal scrutiny was carried out not by an independent court but, in the end, by the administration, regardless of the important role of the (independent and impartial) Contentious Section of the Council of State: its role was important, decisive even – but the role was, in law, just an advisory one. Hence, there was non-compliance with Article 6 of the ECHR.

The tradition of the '*Arob* judge', the Administrative Justice Section of the Council of State, was more or less the opposite of the Crown's. The question here was not 'what is or would should have been the right decision?' but 'are the legal complaints of the claimant well-founded or not?'. Very often, if no serious fault of a substantive legal nature could be found, it would appear that the administration had committed one or two formal mistakes and for that reason alone the Section would annul the decision, unless it was sufficiently clear that the mistake had had no effect on the substance of the decision. All in all, it was relatively easy for a claimant to succeed. But very often the victory thus won appeared to be Pyrrhic: the administration, having 'repaired' the reasons for the annulment, could make a new decision, the substance – if not the wording – of which could be an exact replication of the annulled earlier decision. A better founded decision this time, true, but all in all mainly a loss of time.

Under the General Administrative Law Act, 1994, the attitude of the administrative courts has gradually changed. Right from the start the Act, in Article 8:72, stipulated that if an administrative court found a reason to annul the decision challenged, it could, *inter alia*, 'instruct the administration to make a new decision [...] with due observance of its ruling, or it can determine that its ruling will replace the annulled decision or the annulled part of it'. At first, this provision was interpreted rather narrowly: a court was allowed to use its replacement power only if there could be no doubt that only one legally correct decision was conceivable. Gradually, the courts became more lenient. In 2008 they adopted the policy that a court, having annulled an administrative decision and finding that a new decision will have to be made, will make the new decision itself unless there are sound reasons to leave it to the administration. During the hearing, the court may ask the opinion of the parties concerned about possible positive outcomes of the proceeding. There are many possible reasons for leaving the making of a new decision to the administration. For example, the annulled decision was the refusal to grant a written permit, even if it is clear that the permit must be granted now, it may be impossible for the court to establish the conditions attached to the permit. Or the reasons for refusing the permit were insufficient but under the relevant statute

law there may be other serious reasons for a refusal and further exploration is needed before a new decision can be reached. In such a case the court will, nowadays, very often set a term for the new decision, possibly with a penalty payment if the administration does not reach its new decision within a given time-limit.

As of 2013, the GALA provides a special procedure where the court may instruct the administration to try and repair the legal defects discovered so far (and maybe, to find a solution that is more favourable to the claimant), so that the court will be able to take the new decision into account before giving its final judgement.[7]

All in all, nowadays the courts will do their utmost to make sure that the procedure will give every indication possible about the consequences of an annulment. From January 1st of 2013 on, Article 8:41a of the General Administrative Law Act obliges the administrative courts even explicitly to strive after final settlement of the disputes they handle.[8]

All this may be so, but it still cannot avoid the fact that judicial review is, and always will be, 'inferior' to administrative review in one respect: a court of law cannot scrutinise the non-legal, policy aspects of administrative decisions (apart from more or less obvious 'misfits', decisions that are manifestly unreasonable from a policy viewpoint – which, fortunately, occur very rarely).

Here a new approach to the objection proceedings, which are compulsory in nearly all cases before the case can be brought before an administrative court, may help. The aim of objection proceedings is that the deciding authority should reconsider its own decision after a fair hearing of all the interested parties. Under the *Wet Arob* of 1976, the Act which made the procedure compulsory, and in view of the more or less formalistic character of the *'Arob* judge's' approach to such matters, a tradition has developed of using the objection procedure as a sort of pre-trial, neglecting, to a large extent, the non-legal aspects of the affair, even when in reality those were predominant for the objector. The committees which, very often, carry out the hearings for the administration and give their opinion on the outcome they think appropriate, have developed a tendency to 'play the little judge'.

For some years now, a campaign initiated by the Ministry of the Interior has tried to convince the various administrative authorities and their advisory committees to adopt a different attitude in the objectives proceedings and to try to find a solution for the complaints of the objectors, paying less attention (but still enough, if a solution cannot be found) to the legal aspects of the affair. This campaign,

7 B.J. Schueler, J. K. Drewes *et al.*, *Definitieve geschilbeslechting door de rechter*, The Hague 2007; J.E.M. Polak, Effectieve geschillenbeslechting: bestuurlijke lus en andere instrumenten, *Nederlands Tijdschrift voor Bestuursrecht* 2011, 2.

8 *Cf.* footnote 6.

welcomed by most, is beginning to bear its first fruit.[9] But much must still be done in this respect; an attitude that is widely spread and has taken root over some decades cannot be completely altered in such a short time.

The new, more 'positive', attitude of the courts, resulting in fewer fruitless annulments and in far more 'leading' rulings, seems solid enough by now; it is strongly advocated by all administrative appeal courts and there is little opposition. Previously, the courts had already made sure that their rulings were delivered promptly, the proceedings before a tribunal of first instance or before an administrative court of appeal seldom take more than one year. In most cases they take six to ten months, and in urgent cases there is a very effective system of preliminary provisions ('*référé administratif*') available.

If we do succeed in transforming the nature of the objection proceedings into a problem-solving affair instead of 'playing the little judge', the result will be an intelligent combination of 'administrative' and independent judicial review that is both effective and in accordance with the rule of law. So there is hope for the future – but there is still much work to be done!

9 Alex Brenninkmeijer & Bert Marseille, Meer succes met de informele aanpak van bezwaarschriften, *Nederlands Juristenblad* 2011, 1596.

The Function of Judicial Independence in Modern Legal Systems: Preserving the Boundaries of Law

*Martine Valois**

1. Introduction

Since the end of the last century, the general understanding of the separation of powers has changed drastically, especially with respect to the status and function of the judiciary. In 1985, the Supreme Court of Canada had summarised the role of the three branches in the following way:

> ...the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[1]

Under that conception, each power had a very narrow and definite role. Among the three branches of government, the legislature was paramount since only that branch had democratic legitimacy. As to the judiciary, its role was limited to the interpretation of statutes according to legislative intent. The situation is very different today. The Supreme Court of Canada teaches us that the constitutional principle of the separation of powers protects the exclusivity of certain functions performed by each of the three powers, in particular those carried out by the courts, and that a law may 'unconstitutionally interfere with courts' adjudicative role'.[2]

These transformation of the function of courts brought with it a general questioning of the role of judges in the production of norms. Paradoxically, the mounting power of judges poses a challenge for judicial independence – the judges' freedom to make decisions based on law without any form of pressure or influence – also had adverse consequences for judicial independence. This is because the increased mobilisation of the judiciary to decide social or moral issues has led to an increase in the criticism addressed to judges and the decisions they render. The rise of criticism towards the judiciary have paved the way to a diminution in the protection afforded to judges.

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1 *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

2 *B.C. v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 474, para. 54.

My intention in this paper is to explore these issues using the theoretical framework of Niklas Luhmann systems theory.[3] With the unique perspective of systems theory, issues related to the role of the judiciary in modern legal systems and the concept of judicial independence are given a new significance. Indeed, one may ask if there is yet more worth discussing about judicial independence and the rule of law in legal theory, now that it is universally agreed that the rule of law cannot be guaranteed without judicial independence. On the other hand, the fact that there are still serious threats to the rule of law and judicial independence, even in legal systems where both principles are constitutionally guaranteed, raises the question of the conditions required for judicial independence to be fully implemented.

In this text, I propose a new understanding of the way judicial independence works to guarantee the rule of law. Using the conceptual tools elaborated by Nicklas Luhmann, I will demonstrate that the principle of judicial independence is closely linked to law's independence, that is, the autonomy of the legal system. As an autopoietic system, law observes, reproduces, and conserves itself. Its autonomy is maintained by the self-reflexivity of the system's operations. This autonomy preserves the integrity of the law's key function in differentiated societies – the stabilisation of individual and collective normative expectations over time.[4] The independence of law from political pressure and other irritants can only be guaranteed if this autonomy is preserved. By enforcing the principle of judicial independence, the judiciary participates in the organisational closure of the legal system.[5] This closure is preserved by the boundaries of law, which keep communications from other social systems, particularly the political system, outside the legal system. This is so because these communications are not relevant to the operation of the legal system.[6]

In this text, I will first show the conceptual underpinnings of systems theory and how it can be used to elucidate the legal system's functioning. In the second part of the essay, I concentrate on the role of the courts in modern legal systems. In the last part, I explain how judicial independence contributes to law's organisational closure as one of the essential condition of the maintenance of the rule of law.

3 Niklas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004.

4 Id., chapter 3.

5 Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics*, LexisNexis, Markham, Ontario, 2013.

6 Id., p. 102-103: "It [the legal system] does not pursue imperialist interests to attract as much communication as possible and to retain it in the system. It is not an attracting system. It only predicates: *if* law is to be used, that is, if there is a question of law as to law and injustice, it can be used only *in the terms set by the legal system*. Exactly in this sense the legal system is an operatively closed and structurally determined system."

2. Systems Theory Applied to Law

Before we enter into the fundamentals of systems theory, it must be pointed out that this theory does not pretend to depict the reality 'out there', that is, the reality which can be seen by the normal observer. Systems theory operates in the same way as Weber's ideal types;[7] it is a scientific method which serves to make sense of the contingent and complex reality of social facts. Systems theory places the observer in a second-order observation position.[8] The first observer is only capable of observing the object because its look remains fixed on the object.[9] Systems theory concerns what can be inferred using the observation of the first observer and his observation activity. From the second-order position, the observer can observe how others observe and make distinctions.[10] Furthermore, systems theory makes use of very abstract conceptual tools that are unique to that sociological theory, such as self-referential and autopoietic systems, binary codes, conditional programmes and structural couplings. We shall define those notions as we go on.

Social systems are not made of rules or institutions, or of social interactions between actors, but of communications. These communications convey a meaning that is relevant to the function of the system. Systems theory is thus concerned with societal communications 'that accept or reject statements, interpretations, decisions, theories, policies and so on'.[11] The function of every system is to organise societal communications in a way that all communications may be treated by the relevant system. Systems theory does not assess the performance of a system within society; it only depicts how social systems treat communications that are relevant to their function. In the legal system, the relevant communications are the ones relating to the distinction between what is legal and what is not. To illustrate the nature of legal communications, the authors Michael King and Chris Thornhill give the following examples:

> Law extends to all those communications that are understood as directly relating to the issue of legality or illegality. It extends, for example, to car-drivers arguing about which of them made the error of judgment which resulted in an accident, a customer insisting on his or her rights as a consumer that a shop reimburses him or her for faulty goods, a man refusing to pay maintenance for a child on the basis that the father could have been someone else. In all three examples what is invoked is law rather than some other system of communication.[12]

7 Max Weber, *Rudolf Stammler et le matérialisme historique*, Presses de l'Université Laval, Ste-Foy, Québec, 2001, p. 129.
8 Luhmann 2004 *supra* footnote 3, p. 94. Richard Nobles & David Schiff, *Observing Law through Systems Theory*, Hart, Oxford, 2013.
9 Micheal King & Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law*, Hart, Oxford, 2006, p. 18.
10 Id., p. 19.
11 Id., p. 26.
12 Id., p. 36.

It is not because an event can be treated under law that it necessarily falls under the scope of the legal system. It is the legal meaning conveyed through the communications about these events that is relevant to the operations of the legal system. Legal communications are those that serve its societal function, that is, the stabilisation of normative and collective expectations over time.[13] In modern legal systems, law is made of legally regulated decisions. Modern law is thus positive, in the sense that it can be modified by another legally regulated decision, be it a judicial decision or a legislative decision. Only positive law is sufficiently flexible and alterable to respond to the individual and collective normative expectations of differentiated societies.

Social systems are said to be self-referential or autopoietic systems because they use their own reference for the production and reproduction of operations. Hence, a communication is a legal communication if it is treated as such by the legal system. The unity of the system resides in this self-reference since both lawful and unlawful communications are part of the legal system. The self-referential mode of reproduction of law also means that the law does not have to conform to any external authority in order to be considered as valid law by the system. The distinction of system/environment, which is at the heart of the systems theory, entails that the system's operations are closed to the environment of the system. Closure of the system does not amount to isolation;[14] the interaction of the system with the environment exists through structural couplings.

As far as the legal system is concerned, closure of the system means that the system will only use legal standards as programmes for conditional decisions. These decisions are the operations that assign the value legal or illegal. What cannot be treated under the binary code legal/illegal does not belong to the legal system, but to its environment.[15] In other words, the legal system is *normatively closed* but *cognitively opened*. We say that it is normatively closed because only legal communications may be treated internally by the system's operations. It is the system's closure that prevents expectations born out of other social systems from making their way into the legal system.

Every social system operates with a different binary code and structure of programme. The binary code of law is the legal/illegal distinction. This code applies not only to events occurring outside the legal system but also to legal decisions, since the legal system is a self-referential system. The binary code of law excludes the application of a third value, like, for instance, the moral or social acceptability of a court's ruling. The application of a third value would place a risk to the closure

13 Luhmann 2004 *supra* footnote 3, p. 148: "Concretely, law deals with the function of the stabilization of normative expectations by regulating how they are generalized in relation to their temporal, factual, and social dimensions. Law makes it possible to know which expectations will meet with social approval and which not." [footnote omitted].

14 Luhmann 2004 *supra* footnote 3, p. 80.

15 Id., p. 94.

of the legal system. This process is called 'dedifferentiation' by Luhmann. The dedifferentiation of the legal system means that legal norms are supplemented by other considerations irrelevant to the code and programming of the legal system. King and Thorhnhill define dedifferentiation in the following way:

> Where law's institutions (courts, tribunals, statutory drafting, prosecution services), for example, put into effect the policies of the government without giving due consideration to their legal applicability, overtly base their decisions upon the supposed reliability of witnesses who have wealthy connections, delegate responsibility for deciding cases to panels of scientific experts, actively seek to promote people's well-being or protect them from harm or leave matters to be decided by God's will, the legal system will have become dedifferentiated.[16]

Two components of modern law serve to maintain the differentiation of the legal system: a conditional programmes structure of law and organisational closure based on one binary code made up of only two values, legality and illegality. The separation of substantive and procedural law[17] is one of the evolutionary steps in the developments of positive law, which has permitted the introduction of a structure of conditional programmes into law (of the type 'if, then'). The conditional programmes form the architecture of modern legal systems and guarantee the existence of a differentiated legal system. The conditional programmes of law bind judges in their task of making decisions, while limiting their responsibility regarding the consequences of those decisions in the social system. The conditional programmes of law also participate in the stabilisation of law by preventing a change of legal norms even when they fail to respond to their anticipated benefits.[18]

Even when the legal system has achieved the stage of an independent normative order, it is still under the constant threat of dedifferentiation. Differentiated legal systems are constantly subjected to pressure asking for material expectations to be integrated in the normative order. This is so because social systems located in the legal system's environment continuously produce communications that irritate the legal system. The different social systems may not communicate with each other but can 'irritate' one another through their respective environments, which contain every other communication of society. These communications are forcing their way into the legal system to modify the conditional programmes of laws.

Every social system is cognitively open to its environment through the structural couplings it has with other systems. The cognitive openness of systems allows

16 King & Thornhill 2006 *supra* footnote 9, p. 41.

17 Niklas Luhmann, *La légitimation par la procédure*, Presses de l'Université Laval, Québec, 2001, p. 63. The differentiated legal system separates on the one side 'the supply sector of premises to legal decisions', characterized primarily by legislation, and on the other, the source of 'factual premises for decision' situated in the jurisdiction. In this way, the institutions that determine the facts (and therefore truth) and those that establish the law are distinct and socially separated; they are only confronted at the time of the judiciary proceedings.

18 King & Thornhill 2006 *supra* footnote 9, p. 16.

them to learn about expectations coming from other social systems. Structural couplings will occur when the operations of one system trigger a response from another system.[19] In such a case, an event will provoke a response in each system of communication, although it will not be interpreted in the same way because of the difference in coding and programming. Because the system's closure is a semantic closure, communications will not have the same meaning in every system. Legislation is an example of structural coupling between the legal and the political systems.[20] Legislation is communication relevant to both systems but it is not treated in the same way by each of them. While the political system may have a specific policy objective when proposing the adoption of legislation, once this policy is translated into a legal norm, it is treated differently in the legal system where only conditional programmes and a single binary code are allowed.

3. The Courts in Differentiated Societies

Now that we have gone through the essentials of systems theory epistemology, it is time to address the focal point of this paper, that is, whether Niklas Luhmann's systems theory provides a better understanding of how judicial independence can be protected in modern legal systems.

Like many sociologists before him, Luhmann studied the changes in societal evolution over time. He made the postulate of a transformation of the social structure in three successive phases: segmentation, stratification and functional differentiation. For Luhmann, the structure of law followed the transformation of the social organisation and has gone through the same phases of structural changes. Thus, the law has evolved from a state of segmentation where the social structure was essentially based on parental and tribal relationships, to a state of stratification, where law and the exercise of power were ranked according to social prestige, wealth or domination by a superior class over others, to the last stage of differentiation where the social organisation is neither horizontal nor vertical, but functional.

The functional differentiation of law can only be achieved when the production of legal rules are separated from systems of legitimation. The American sociologist Talcott Parsons placed the functional differentiation of law among the few evolutionary universals of societies. For him, the development of an independent normative order is one of the hallmarks of modernity.[21] He defined the independent legal order as follows:

> A general legal system is an integrated system of universalistic norms, applicable to the society as a whole rather than to a few functional or segmental sectors, highly

19 Luhmann 2004 *supra* footnote 3, p. 42-43.
20 King & Thornhill 2006 *supra* footnote 9, p. 44.
21 Talcott Parsons, Evolutionary Universals in Society, *American Sociological Review* 1964, 3, p. 353.

> generalized in terms of principles and standards, and relatively independent of both the religious agencies that legitimize the normative order of the society and vested interest groups in the operative sector, particularly in government.[22]

For Parsons, the establishment of the organisational independence of the judiciary was the crucial symbolic development which accompanied the institutionalisation of an independent normative order. In a universalistic system of rules, symbolised by positive law, the validity of legal norms is not made contingent upon its identification to religious or moral norms. Positive law is a distinctive system of law where the formalisation of procedural rules is independent of substantive legal rules. In democratic societies, the definition of substantive legal rules is the main responsibility of elected legislators, while the judiciary is entrusted with the task of applying substantive legal rules while following a well-defined set of procedural rules.

But in modern legal systems, the legislator often fails to respond to individual and collective normative expectations while the judiciary is pressured into deciding the legality of normative expectations that have been rejected by the legislative system. Normative expectations rejected by the legislative system are trying to make their way into the legal system. Unlike the legislative system, the judicial system does not control the type of cases that are brought before it. Furthermore, because of the prohibition of the denial of justice, the courts are forced to decide the legality of these expectations even in the absence of applicable norms for the solution of the legal dispute. As a result, the distinction between substantive and procedural law, which lies at the very foundation of positive law, becomes blurred by this new role of the courts that formulate the legal norms they have to apply.[23]

In *Law as a Social System*, Luhmann argued that because of the prohibition of the denial of justice, courts are placed in an exceptional position in the centre of the legal system.[24] The prohibition of the denial of justice is present in the French,

22 Id., p. 351.

23 *British Columbia v. Imperial Tobacco Canada Ltd.* supra (footnote 2), para. 51: "The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions – i.e., the common law – in order to bring the legal rules those decisions embody into step with a changing society": *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666.

24 Luhmann 2004 *supra* footnote 3, p. 275.

German and the Swiss civil codes,[25] as well as in the Quebec *Interpretation* Act.[26] Under this principle, judges cannot refuse to decide because of a lack of applicable norms or rules. The courts of autopoietic systems of law are internally different in the legal system. They operate in the centre of the legal system, while other structures (parliaments, lawyers, clients) are placed in the periphery of the system.[27] In this position of relative isolation, the courts regulate the operations of the legal system. These operations are restricted to the code and programmes of law. As we have seen earlier, the application of a third value is excluded. The court's duty is to apply only one or the other side of the binary code, depending on what the conditional programmes of law provide in relation to the specific fact-pattern it has to decide.

In that sense, we can say, as the Supreme Court of Canada in the *Mackin case* did regarding the relationship between courts and others, that the differentiation of courts in the legal system operates an 'intellectual separation'[28] between the norms and the irritants which are trying to make their way into judicial decision making. This separation is even more necessary in democratic societies where the political system controls the legislature and judicial intervention is increasingly sought to force a change in the law.

4. Judicial Independence *versus* Judicial Responsibility

The problem of judicial independence in complex societies lies in the constant requests made to the courts for a change to the law through judicial interpretation. These demands have put a considerable burden on the judiciary. Judges are now faced with the difficult task of deciding conflicts of values and solve problems that should have been dealt with by other social systems. It is not difficult to imagine how the pressure to decide cases even in the absence of applicable legal

25 In article 4 of the French Civil Code, it is stated that the judge cannot refuse to decide (translation) under the pretext of silence, obscurity or insufficiency of the law ("Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice."). Furthermore, in article 5, it is expressly stated that the judge cannot act as legislator to overcome the insufficiencies of the law (Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises). There is thus a double interdiction placed on the judge, one being to refuse to decide in the absence of law and the other to make general rules.

26 *Interpretation Act*, RSQ, c. I-16: 41.2. A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.

27 Nobles & Schiff 2013 *supra* footnote 8, p. 31.

28 *Mackin v. New Brunswick (Minister of Finance); Rice* c. *New Brunswick*, [2002] 1 S.C.R. 405, para. 37: "The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent *status* of judges and the courts, serve to institutionalize this separation." (emphasis added).

norms may have on the impartiality and independence of the judiciary. One of the consequences that this combination of the prohibition of the denial of justice and the increase mobilisation of the judiciary to solve political or social conflicts has on judicial independence, is that judges are asked to take into account the effects of their decision in the social system. The tendency to make the justice system and judges 'responsible' or 'accountable' for the consequences of legal decisions threatens the autonomy of the legal system, because it introduces a criterion of social relevancy into decision making.[29] Law is constructed on a conditional programmes structure of the type, if – then[30] which prevents "any future facts, not accounted for at the time of the decision, from being relevant to a decision concerning legal or illegal".[31]

Judicial independence relies on the differentiation of a legal system working in a conditional programmes structure, as opposed to a purpose-specific programmes structure, which is oriented towards the achievement of predetermined outcomes, either political, economic or other. Under such a conditional programmes structure, judges are not requested to consider the objectives pursued by the normative system, nor are they required to verify whether the decisions will achieve the intended results. Furthermore, the legally imposed condition that decisions be made by an independent and impartial judge presupposes that it will be taken by a judge who is free of his other social relationships, whether parental, political, financial, or even moral or religious etc. Since the decision must be based solely on the law and the facts that are presented before the judge, he or she cannot be criticised on the basis of considerations that have not been taken into account in the process leading to the decision. By justifying his decision solely on the basis of written rules and recognised precedents, the judge frees himself from the undesired consequences of his decisions in the social system. Furthermore, by preventing situations where a judge has prejudged of the outcome of the application of the (legal/illegal) binary code in a decision, the principle of impartiality preserves uncertainty as to the outcome of litigation. The guarantee that judges will decide solely on the law and the facts proven before them ensures an almost complete neutralisation of the possible influence of their other social roles.

Judicial independence is both the condition and the consequence of the internal differentiation of courts in the legal system. Courts have to be insulated from the irritations of the environment of the legal system. It is in the centre of the legal system where judges are best protected from the pressures coming from the political system. Judicial independence is also a consequence of this central position where judges who benefit from the essential elements of judicial independence (security of tenure, financial security and administrative independence) can be shielded from criticism regarding the adverse effects of their decisions in the

29 Valois 2013 *supra* footnote 5.
30 Luhmann 2004 *supra* footnote 3, p. 197.
31 Id., p. 198.

social system.[32] Accountability must be reserved for government officials whose decisions are oriented towards goal-attainment objectives and who are elected on the basis that they will implement specific programmes.

Judicial independence also participates in the differentiation of the legal system and the political system. In the 1997 *Provincial Judge Reference*, the Supreme Court of Canada held that the three components of security of tenure, financial security and administrative independence derive from the "constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized".[33] In systems theory, this constitutional requirement is only another way of saying that the legal system is functionally differentiated from the political system and that communications about the legal principle of judicial independence are relevant to the legal system, not the political system. Thus, when courts claim that they guarantee the rule of law, they contribute to the preservation of the differentiation of law. Only an independent judicial system can safeguard the rule of law, because the legislature is too close to the political system, and contract is bound by to the instrumental considerations of the parties interested in the law. As 'central guardians of the rule of law',[34] courts are essential to the maintenance of an independent normative order. Who but the judges can delimit the boundaries between the legal and the political systems? In a recent Supreme Court of Canada's decision concerning the constitutionality of supervised drug injection sites, Chief Justice McLachlin reminded the federal government that once translated into law, governmental policy choices are no longer relevant to the political system and must be treated as communications belonging to the legal system.[35] The Court also pointed out to the government that moral considerations were irrelevant to the issue of the constitutionality of legislation.[36]

32 Id., p. 202: "The more a decision is supported by such purpose-specific reasons, the higher the probability that it is wrong; for the future remains unknown – even to judges. Purpose-specific reasons expose judges to empirical criticism, which leaves only the authority of office and the necessity of decision-making to render judicial decisions valid."

33 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R., para. 131.

34 *Ell v. Alberta*, [2003] 1 S.C.R. 857, para. 31.

35 *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, para 105: "The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*".

36 Id., para. 102: "The second strand of Canada's choice argument is a moral argument that those who commit crimes should be made to suffer the consequences. On this point it suffices to say that whether a law limits a Charter right is simply a matter of the purpose and effect of the law that is challenged, not whether the law is right or wrong. The morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right."

5. Conclusion

In Weber's sociology of law, the empirical validity is the meaning ascribed to a legal rule by the actors or, in other words, the shared understanding of its validity and enforceability.[37] The sociological validity of a rule can only be determined empirically; precedents or legal rules of interpretation are of no help in that determination, although they might be of great assistance in assessing the juridical validity. To be really effective, the constitutionally guaranteed principle of judicial independence depends on the existence of sociological conditions that serve as empirical foundations to its legal validity. As we have tried to demonstrate, these sociological requisites are the preservation of the conditional programmes of law and the limitation of the judges' responsibility for the consequences of their decisions in the social system. It is under these sociological conditions that the legal principle of judicial independence can acquire its empirical validity in the legal system.

At the level of the legal system, the principle of judicial independence preserves the uncertainty as to the outcome of litigation and contributes to limit the responsibility of judges for the consequences of their decisions in the social system. Judicial independence participates in the autonomy of the judicial system, and in the autonomy of law as a universal, general, and conditional normative order. The keystone to a strong principle of judicial independence is the independence of law from other systems of legitimation such as politics, religion and the market, and a tradition of respect for the judicial role in the legal system. That tradition of respect is one of the most important element in the evaluation of the empirical validity of the principle of judicial independence. As we have seen, in the British legal tradition and in Canada, the lack of a norm of judicial independence in a written constitution was not a bar to the recognition of a strong principle of judicial independence mostly based on tradition.[38]

The determination of the scope of the protection provided by judicial independence is the key to preserving the internal boundaries of the legal system, which keeps courts at a distance from the law's other sub-systems. The norm of judicial independence effects the separation that must exist between the law and the extraneous influences that seek to introduce themselves into judicial decision-making.[39] As guardians of the rule of law, judges are the keepers of this separation between the law and the irritants of the legal system's environment.[40] The autonomy of law depends on this capacity of the judiciary to maintain that buffer zone between

37 Weber 2001 *supra* footnote 7, p. 130.

38 *Valente v. The Queen*, [1985] 2 S.C.R. 673, para. 34: "Lord Sankey, L.C., said in Parliament: The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be."

39 *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, *supra*, footnote 28, para. 35.

40 Valois 2013 *supra* footnote 5.

law and politics.[41] The Supreme Court of Canada's decision in the *Insite* case is a remarkable example of how judges can stand up to the politicians. Unfortunately, even in democratic countries, judges do not always dare to do it.[42]

In the *Provincial Judges Reference,* the Supreme Court of Canada established a strong precedent for the protection of judicial independence and the autonomy of law. Despite the harsh criticism directed towards the Court in the aftermath of the decision, the scope given to the principle of judicial independence by the Court was praised for in other jurisdictions.[43] The fear of a 'government of judges' should never make one forget that only courts can enforce the legal limits which check political authority and prevent the abuse of power.

41 Amnon Reichman, Judicial Non-dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the *Provincial Judges Reference* – The Israeli Perspective, *in* Adam Dodek & Lorne Sossin (eds.), *Judicial Independence in Context*, Irwin Law, Toronto, 2010

42 In Israel, the Supreme Court upheld the legal validity of a coalition agreement between the Labor Party and Shas which instituted a committee composed of five lawyers and a retired judge whose task was to review judicial decision of the Israeli Supreme Court and determine if it kept in line with the status quo in matters of religion: HCJ 5364/94 *Velner v. Chairman of the Labor Party*, IsrSC 49(1) 758 (1994) referred to in Reichman (2010) *supra* footnote 41, p. 441.

43 Id.

'Markers' vs. 'Makers': Are Constitutional Courts Legal or Political Actors?

*Mauro Zamboni**

1. Introduction

In the opening speech for a theme conference a couple of years ago on judicial activism at Georgetown University, retired Justice Sandra Day O'Connor stated:

> 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.[1]

This statement by a former Justice of the US Supreme Court reveals an evident and somehow disturbing aspect characterizing the role of the judiciary not only in the US, but in almost all well-established Western democracies: judicial activism, and in general the role judges play in the political game, one of hottest topics of debate inside the legal world.[2] As Justice O'Connor's words show, this discussion not only affects the intricate relations judicial power has with its surrounding environments, but also the (Hartian) normative perspective as to the issue, i.e. the self-vision judges (and the legal world) have of themselves and their role in this network of relations.[3]

Since judicial activism primarily focuses on the point of the relations between law and politics, the main purpose of this article is to evaluate whether Constitutional Courts should be considered as simply 'markers' of the constitution, i.e. legal actors simply enforcing that written by political actors in statutes and constitutions, or as 'makers' of the constitution, i.e. institutional actors with a predominant nature

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1 *See* Sandra Day O'Connor, *Importance of an Independent Judiciary* (Conference on the State of the Judiciary), available at <www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=178>.

2 *See*, *e.g.*, European Commission for Democracy Through Law (Venice Commission), The Binding Effect of Federal Constitutional Court Decisions upon Political Institutions (available at <www.venice.coe.int/docs/2003/CDL-JU(2003)018-e.pdf>).

3 *See* H.L.A. Hart, *The Concept of Law* (2nd Ed.), Clarendon Press, Oxford, 1994, p. 239. *See also* H.L.A. Hart, Problems of the Philosophy of Law, *in* H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford, 1983, p. 103-105.

of being political in determining what the law should say. This investigation considers in particular not only the function Constitutional Courts play as a bridge between law and politics, but also the very positioning of this bridge. These results are of particular importance in determining what the existence of this point of passage between law and politics implies, on one hand, whether these courts are a necessary requirement for the concept of democracy and, on the other, whether primarily 'political' criteria that need to be fulfilled, particularly the requirement of being 'democratic,' are applicable to such courts.

The basic thesis of this work is that Constitutional Courts, though playing a bridging role between the political and legal worlds, from an institutional and functional perspective are still primarily legal actors. These Courts play without doubt a role in the political game; however their location as an institutional actor should be based on the direct effects of their decisions ('outputs') within the legal arena rather than on their indirect consequences ('outcomes') in the political arena. Thus the primary responsibility of Constitutional Courts is towards the legal community and the paradigms governing its discourse. By underscoring the legal nature and function of these courts, it is also possible to offer some criteria for moulding the ideal-typical structure of a Constitutional Court, namely a court that in its formation and working is truly independent from both the political and socio-economic arenas. In order to preserve in particular the legal nature of the Courts towards the political and social actors, this work suggests a shift of focus in the reforms from substantive decisions to more 'democratic' procedures in Constitutional Courts.

This article certainly makes no pretense of providing any final words either in the discussion on judicial activism or as to the relations between the legal and political worlds in general, whatever the 'solution'.[4] The focus here is also solely on Western legal systems. This work has the more limited objective of contributing to clarifying the terms of the discussion, in particular by finding a solid base (at least from a legal perspective) from which to begin the discussion on whether judicial activism is good or bad. In other words, this investigation has primarily a *legal theoretical* task, at least in a loose Hartian meaning of the words: To clarify that meant when the legal discussion deals with the 'political' in the work of Constitutional Courts.

After defining certain key-concepts used in this article, the focus in Part II is on the importance of judicial activism when dealing in particular with Constitutional Courts. Part III views the typical features of Constitutional Courts in well-established Western democracies, i.e. their 'in-the-middle' position between the legal and political arenas. The central Parts IV and V then identify why the characterization of Constitutional Courts, as either legal or political actors, is so 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

4 *See* Jeremy Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 2001, p. 231.

resolve the dilemma of 'legal vs. political actors' by defining Constitutional Courts as legal actors performing a political function.

Based on this legal theoretical characterization, the final Parts VI and VII sketch certain of the consequences as far as concerns the relevance of questioning an 'activist' Constitutional Courts in relation to the idea of democracy. In particular, Part VII examines the necessity of shifting the focus of attention, when dissecting the necessity of Constitutional Courts more in-line with the ideal of democracy, from a substantive perspective to more procedural standpoints.

2. Some Definitions

Before starting, definitions must be clarified with respect to some of the concepts used throughout the text. First, *judicial activism*, though sometimes also referred to under different guises (*e.g.* 'constitutional politics,' 'government of judges' or 'judicialization of politics'), identifies in general the phenomenon, typical (but not only) of well-established Western democracies, when 'courts impose a judicial solution over an issue erstwhile subject to political resolution' by intervening and striking down a part of properly enacted legislation, or by 'legislating' in an area in the absence of legislation.[5] Judicial activism then identifies a judicial activity directed at stretching the formal structures and letter of the law (in particular at the constitutional level) in order to fill gaps left by politicians. This is done by judges in order to implement those values the political actors are unable to sense in the community, or are unable to transform into legislative measures, or simply those that are part of the political baggage of certain judges.

Second, when referring to *Constitutional Courts*, included here are all the highest courts that although under different names (*e.g.* High Council or Supreme Court), have among their legal duties the jurisdiction to evaluate the constitutionality, i.e. the consistency or conflict of legally relevant documents produced in a certain legal system in reference to the basic legal documents of a community. Such courts are also characterized, at least with respect to conducting constitutional reviews, for being positioned somehow outside the ordinary court system and for their work being completely independent (at least in their working modalities) of the other branches of public authority. For this reason, the other fundamental function of Constitutional Courts is often to eventually resolve conflicts between these different branches, in particular in terms of that defined as legally competence according to the constitutional document or fundamental law.

5 David L. Anderson, When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante, *Stanford Law Review*, Vol. 42, No. 6, 1990, p. 1570. *See also* Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, Touchstone, New York, 1991 and, for a more articulated definition of the term 'activism', Mark V. Tushnet, Tushnet: Comment on Cox, *Maryland Law Review* 1987, p. 147-153 and Greg Jones, Proper Judicial Activism, *Regent University Law Review*, Vol. 14, 2002, No. 1, p. 142-145.

It is worth noting that under this definitional umbrella, several types of Constitutional Courts can find a place. In particular, this definition allows placing under scrutiny both Constitutional Courts that have an abstract review competence (i.e. when a Constitutional Court is asked to decide 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 who have a more concrete review power (i.e. when a Constitutional Court's review jurisdiction is activated by a party to litigation pleading that a law violates the constitutional texts).

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 and towards the political system, political science. While for the latter political actors are more or less identified with all the institutional actors that 'make the law,' by political actors in this article, at least from a legal perspective, is intended 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, *e.g.* political parties or interests-groups. Political actors can (and usually do) have a primary goal of a non-legal nature (*e.g.* economic nature) and therefore mainly take into consideration the surrounding political environment. Moreover, their primary intent is to influence people into adopting a certain model of behavior by means of convincing the addressees of the 'inner goodness' of their model.[6]

Finally, particularly in Western legal systems, legal actors can be defined as those institutional actors primarily aiming at affecting the legal system, and therefore, mainly focusing on the latter's logical structure.[7] Similarly to political actors, the main goal for legal actors is to exercise power, i.e. the concrete capacity of forcing people to do things that they otherwise are not willing to do.[8] 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.'[9] However, that important for a legal actor dealing with a statute or legal precedent is these exist and exercise their (binding) power on the addressees only as part of a larger hierarchical system of norms with a similar (legal) nature,

6 *See* Gunther Teubner, Substantive and Reflexive Elements in Modern Law, *Law and Society Review*, Vol. 17, 1983, No. 2, p. 259.

7 *See* Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (G. Roth & C. Wittich eds.), University of California Press, Berkeley, 1978, p. 657. *See also* Kaarlo Tuori, *Critical Legal Positivism*, Ashgate Publishing, Aldershot, 2002, p. 36-39.

8 *See* Max Weber, *The Theory of Social and Economic Organization* (T. Parsons ed.), Free Press, Glencoe, Illinois, 1964, p. 152.

9 *See* Hans Kelsen, Law, State, and Justice in the Pure Theory of Law, *in* H. Kelsen, *What is justice? Justice, Law and Politics in the Mirror of Science*, University of California Press, Berkeley, 1957, p. 289.

and according to specific (legal) rules to be used for interpretation, application and creation (legal reasoning).[10]

3. The Importance of Judicial Activism by Constitutional Courts

The 'creative' interpretation, or judicial activism, of legal texts is a phenomenon generally characterizing all courts in a legal system, from the lowest county court to the highest court. However, despite that asserted in general by some socio-legal scholars, judicial activism somehow becomes a 'more evident' issue when addressed by and to Constitutional Courts (and all the highest courts in general, *e.g.* the French Court of Cassation).

Using Niklas Luhmann's distinction between the social system and other sub-systems internal to it, it is first possible to see that the judicial activism taking place by Constitutional Courts tends to become more visible because it normally deals with fundamental questions relevant to all the other sub-systems, i.e. questions that by their nature can affect not only the legal or political arenas, but every arena and every person of a national community. Decision-making by Constitutional Courts has as its object the fundamental laws of a community, and one of the features of well-established democracy is the (actual or potential) intrusion of the law in all the aspects of community life.[11] Moreover, the typically high degree of social legitimacy Constitutional Courts possess, i.e. among all actors of a certain community, contributes to rendering every decision taken by these courts more than simply a question of law and politics.

When judicial activism takes place at the constitutional level, as a consequence it potentially reaches out to the social community at large, or at least, using Luhmann's terminology, it creates 'noises' that can somehow 'disturb' the internal work (*autopoiesis*) of all the other subsystems.[12] This is valid both for Constitutional Courts with a jurisdiction of abstract review and also for those with a more concrete review jurisdiction. For example, in a specific euthanasia case, 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' includes also the necessity for the

10 *See* Hans Kelsen, *The Pure Theory of Law*, University of California Press, Berkeley, 1970, p. 3-4, 193. *See also* Hans Kelsen, *Introduction to the Problems of Legal Theory*, Clarendon Press, Oxford, 1996 [1934], p. 11: "To comprehend something legally can only be to comprehend it as law."

11 *See* Marc Galanter, Law Abounding: Legalisation Around the North Atlantic, *Modern Law Review*, Vol. 55, 1992, No. 1, p. 13-14. *See also* Lawrence M. Friedman, Total Justice, Russell Sage Foundation, New York , 1985, p. 147-152; Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture*, Harvard University Press, Cambridge, Massachusetts, 1998, p. 15; Niklas Luhmann, *Law as a Social System*, Oxford University Press, Oxford, 2004, p. 273; and Antonie A.G. Peters, Law as Critical Discussion, *in* G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, Walter de Gruyter, Berlin, 1988, p. 252-254.

12 *See* Gunther Teubner, *Law as an autopoietic system*, Blackwell, Oxford, 1993, chapter 5.

public authorities to implement this right against the consensus of the 'owner' of such right.

The second factor underlying the importance of judicial activism by Constitutional Courts has to do to their being the highest judicial body of a legal system. From a more specific legal sub-system perspective, 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 in an indirect way influence the higher level. 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, for natural reasons derived by its limited jurisdiction, to have an impact confined to the local implementing administrative offices. On the other hand, even such a simple issue in the exceptional case can occasionally 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 as a rule transcends all lower and intermediate levels, affecting the entirety of the legal structure, i.e. including the lower structure, and a large part of the political world. This influence, and consequently relevance of constitutional judicial activism over all that is legal and political, is both due to the very structure of the legal system (i.e. its being hierarchical) and for the typically high degree of legal legitimacy these types of courts have gained historically from the actors belonging to the legal arena. 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 in with these Courts as main targets (and not the lower courts).

4. 'Makers' vs. 'Markers': Constitutional Courts as 'in-the-middle' Actors

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 on which there are two ideal-typical continents, namely the legal world and the political world. The role played by the courts in general and the Constitutional Courts in particular is extremely important in every legal system, in both the legal and political systems.[13]

As far as concerns the legal system, 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

13 *See*, *e.g.*, *generally* Bruce Ackerman (ed.), *Bush v. Gore. The Question of Legitimacy*, Yale University Press, New Haven, 2002, where a decision of the Supreme Court is analyzed by looking at its effects both in the legal as well as in the political worlds.

exclusively) statutes. Constitutional review is the legal competence allowing the courts to enjoy an exclusive decision-making power and a legal superiority in relation to the other branches of power.[14]

In addition to this central 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) 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.

If seen from the perspective of the relations of law and politics, however, one can assert that Constitutional Courts 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 (though often implicit in the building of a modern democracy) position occupied by Constitutional Courts, this can be identified as a bridge between values produced in the political world and legal thinking.[15] Due to their 'in-the-middle' position, and their consequent relevance both for the political and the legal worlds, it is not then surprising that Constitutional Courts have been the favorite target of investigations by the discipline primarily concerned with the political world and its surroundings, namely political science.

As previously seen, the primary function of a Constitutional Court is constitutional review, i.e. to continuously monitor the compatibility of legislation and other normative measures with the basic values as announced in the constitution or fundamental law. The basic problem, at least from a legal perspective, is that the constitution is legal in nature, i.e. it is binding towards the addressees. Its message, however, 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 that they also often are 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, i.e. in terms of (at least in the intention) 'if-x-then-y' or 'either-or' statements, and more in terms of political messages, i.e. in terms that resemble the political propaganda, where the fundamental goals to be achieved in the community are designed in terms of models of behavior the political actors want to be 'realized' in the community itself.[16]

14 *See*, *e.g.*, the landmark decision by US Supreme Court in *Marbury v. Madison*, 5 US (1 Cranch) 177 (1803).

15 *See*, *e.g.*, the debate on the French Constitutional Council as reported by Martin Shapiro & Alex Sweet Stone, *On Law, Politics, and Judicialization*, Oxford University Press, Oxford, 2002, p. 81.

16 "One lesson of American constitutional experience is that words of each provision in the Bill of Rights tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question.", *see* Waldron 2001 *supra*, p. 220.

On the other end, constitutional documents are regarded for historical reasons as the highest sources of law in Western legal systems. This means that they are treated as legal documents, having the strongest binding force on all the national law-making and law-applying agencies and the community as well. In other words, constitutions or fundamental laws in general have a content that tends to be dominated by the logics of the political discourse, but is inserted into a shell which has the form of a law, shaping and somehow determining the agenda for the entire legal arena of a certain community.[17]

Since the primary goal of a Constitutional Court is somehow to 'guard' such documents, how this institutional actor tends to end up being a sort of 'in-the-middle' actor is easily understood. Three different features affect Constitutional Courts, rendering it an actor that though they have their feet in the legal world, they tend to lean heavily towards the political arena.

First, Constitutional Courts are an 'in-the-middle' actor from an *institutional perspective*, i.e. from the perspective of where these courts are positioned among the different organizations in a certain community having the primary goal of governing the behavior of individuals, characterized for being permanent as well as making and enforcing rules governing human behavior. Constitutional Courts are in the middle in the sense that their institutional position as an intermediary link between the political actors, is represented in particular by the various assemblies with law-making powers, and the legal actors, mostly in the forms of judges and all the legal apparatus, having as a primary duty the implementation of the product of the political law-making.

A Constitutional Court has the position of being a legal institution, i.e. an organization constructed for taking care of certain important legal issues from a legal perspective, namely the constitutional review of statutes and other legal documents, and not, for example, the political opportunity of statutes. 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 main voice political actors have, at least in a democratic form of a state that has adopted rule of law, is the 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 and binding for the entire community from which such actors have been (directly or indirectly) chosen. In other words, Constitutional Courts are 'in-the-middle' institutional actors because they are gate-keepers, allowing the actors operating in the political world to be heard (or not) in the legal world.

17 *See* Waldron 2001 *supra*, p. 221-222, calling for not formalizing rights into a fixed constitutional document due to their very political nature (and therefore adaptable to the wishes of the representative institutions).

At the side of this institutional factor, i.e. concerning the very 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 'in-the-middle' actors between the political and legal arenas; this factor has to do with the element characterizing the configuration of these highest courts as different from that of other types of courts.

It has previously 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. By this is meant that almost all Western legal systems have foreseen that political 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, by means of the legal power to decide who will be justices, affect and somehow overlap the very structure of the courts and their fundamental components.

Despite this important political influence in deciding the structure of Constitutional Courts, these courts cannot be considered as having a pure and exclusive 'political structure'. This type of structure, when it occurs at least in Western legal systems, is of an exceptional nature, such as for revolutionary courts (*e.g.* during the French revolution) or for 'people courts' in totalitarian states (e.g. in Germany during the last years of World War II). On the contrary, though they can (and often are) politicized individuals. The predominant feature of individuals sitting on Constitutional Courts normally is that they are always chosen from among lawyers or individuals with formal education in law.

In other words, even when all justices are chosen based on political considerations, and according to their personal political ideologies and affiliation, the selection process is limited (either by law or by constitutional customs) to individuals trained at least formally in the art of law, *e.g.* holding a law degree. Moreover, most (but not all) of the time the recruitment procedures require that the candidates have spent some years working in the judiciary branch at a high level.

Finally, Constitutional Courts can be defined as being 'in-the-middle' actors between the political and legal arenas from a *functional perspective*, i.e. by observing the function these courts play in the relations between lawyers and politicians. In this work, function refers to the function-as-effects of a certain institution on a certain environment, in this case, the concrete outcomes that the work of Constitutional Courts have on structures in both the legal and political worlds.

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 Constitutional Courts to the community

is mediating between the highly political statements present in the constitution, i.e. statements dominated, from a legal perspective, by the substantive rationality of the political discourse, and the 'legally relevant' concepts and categories, i.e. concepts binding public officials and the community in general due to their observance of the parameters of formal rationality required by a certain community from a legal system.

This mediating role played by Constitutional Courts is not only in the direction towards the legal world in defining for its actors in legal terms what the general statements of goals enunciated in the constitutional documents or practices mean, for example, by guiding a justice in the interpretation of constitutionally questionable statutes or parts thereof. The mediating role is also played in the direction towards the political arena as the decisions of Constitutional Courts set the legal frameworks that the political actors in their law-making ought to respect, for example by extensively discussing the right of 'due process' with regards to a new administrative procedural statute.

This mediating role has not only a horizontal dimension, i.e. among different arenas in the same system, but also a vertical one. In particular, it is worth briefly noting how Constitutional Courts play a decisive role in mediating the values produced at international or supranational levels into the national legal arena. A classic example is the US Supreme Court's decision in *Lawrence vs. Texas*, or several of the decisions taken by different European national courts in order to further implement the values of the EU fundamental charters.[18]

Since a constitution is the product of the will of a community (through their political representatives), at least in theory, Constitutional Courts in a democratic state play the function of mediating to the community and, in particular, to its political representatives, the value-message that this very community and its political actors originally adopted, but now in terms of a legal message, i.e. a message also and primarily directed to the actors endorsed with the duty of implementing the legal rules as 'interpreted' (or accepted) by the Constitutional Court. As the American legal realists and Alf Ross pointed out, judges in general play a decisive role as the point of passage where the 'law-in-books' becomes 'law-in-action,' i.e. the normative apparatus of rules felt as binding by the population or by the officers.[19]

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 very latter have enacted. Constitutions tend to be documents where the political

18 *See*, the US Supreme Court decision in striking down the sodomy law in Texas with *Lawrence v. Texas*, 539 US 558 (2003). In particular, Justice Anthony Kennedy, citing a European Court of Human Rights' case (*Dudgeon v. United Kingdom*, 1981, signs an opening of the 'parochial character' of some parts of the American legal system, in particular at the State level, to the political globalizing political values, *e.g.* equality regardless of sexual orientation).

19 *See* Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*,: Harvard University Press, Cambridge, Massachusetts, 1996, p. 7-15; and Waldron 2001 *supra*, p. 262.

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 system, but also as a primary form of a 'political symbol', i.e. as a message to the community by the political actors as to which fundamental values the state/community is based. Moreover, and as a consequence of this partial political nature, legal language in the Constitution tends to be interspersed with the political language. A classic example in this sense is the article of the Italian constitution stating that property ownership is guaranteed by the law as long as it fulfills its social function.[20]

This being the situation, where judges by their nature are the intermediaries between the 'paper-law' and 'real-law,' and the 'paper-law' being the Constitution, a mixture of political statements and legal concepts, it is then not surprising that more than in the other branches of the judiciary, Constitutional Courts become the 'makers' by being the 'markers.' As already pointed out by many legal theoretical approaches focusing on the legal discourse, regardless of whether their competence is of concrete or abstract constitutional review, the adjudication power that is typical for every court, therefore even for the Constitutional Courts, tends to become a law-making power. The very text to 'mark' is so vague that the 'marking' of its content and of its border becomes a 'making' (at least if seen from a legal perspective) of the law directly applicable in concrete cases (as for the concrete constitutional review) or in general (as for the abstract constitutional review).[21]

In summary, Constitutional Courts, for all the reasons mentioned above, are a special type of institutional actor that positions themselves among the 'markers' of the law, i.e. they are mostly actors aiming at interpreting and applying the law, but at the same time largely overlap with the 'makers' zone, i.e. through interpretation Constitutional Courts shape the very law.[22] This being the situation, the question naturally arises as to whether and why it really is necessary, from a legal perspective, to insert Constitutional Courts into a box with either 'legal actors' or 'political actors' labels.

5. Why Is A Definition, either Legal or Political, So Important For Constitutional Courts?

Shifting attention to the central question of this work, namely whether Constitutional Courts should be defined as either primarily legal or political actors, a

20 Italian Constitution, Art. 42: "Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its *social function* and make it accessible to all" (emphasis added).

21 *See* Gunther Teubner, And God Laughed... Indeterminacy, Self- Reference and Paradox in Law, *in* J.-P. Dupuy & G. Teubner (eds.), *Paradoxes of Self-Reference in the Humanities, Law and the Social Science*, Anma Libri, Stanford, 1991, p. 31.

22 *See* Luhmann 2004 *supra*, p. 235.

first reaction can be to question the importance of this very issue. It appears to be a purely terminological question as the competence and jurisdiction accorded to Constitutional Courts tend, at least in well-established Western democracies, 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. Regardless of whether they are considered primarily as legal or political actors, justices sitting in the highest benches will always be in charge of deciding the constitutionality of statutes and, by doing this, will always be influenced by the political environment and their political ideologies.

However, this is not simply a definitional or academic problem.[23] As often happens for 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.[24] 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, reducing it.[25]

If one considers in particular Constitutional Courts and the definition of their nature as actors working in a certain environment, it has been previously seen that among their central tasks is 'controlling' that the transformations of ideologies or values into law are done according (or at least not grossly contrary) to the basic and often politically formulated principles enumerated in the constitution or fundamental law of a certain community.

The characterization of Constitutional Courts as either being 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 of the constitutionality of the law-making taking place in a certain legal system.[26] By defining the nature and function of Constitutional Courts, it then is possible to answer the following normative question that is fundamental for every democratic legal system: What is the fundamental criterion that ought to guide a Constitutional Court when performing its task of constitutional review?

Considering the fact that Constitutional Courts operate as 'in-the-middle' actors between the legal and political worlds, it is possible to identify two fundamental criterion, or rationalities, inspiring Constitutional Courts in their work. First, at

23 *See* Waldron 2001 *supra*, 229.

24 *See* Timothy Andrew Orville Endicott, Law and Language, *in* J. L. Coleman & S. Shapiro (eds.), *Handbook of Jurisprudence and Legal Philosophy*, Oxford University Press, Oxford, 2002, p. 935-968.

25 *See*, *e.g.*, Linda L. Berger, Applying the New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, *Journal of Legal Education*, Vol. 49, 1999, No. 2, p. 155. *See also* Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis*, Palgrave Macmillan, London, 1988, p. 2-3. *See*, *e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, Massachusetts, 1986, p. 50-51.

26 *See* Weber 1978 *supra*, p. 650-658.

least when seen from a legal perspective, Constitutional Courts have the option to primarily embrace a substantial rationality in order to resolve issues of constitutionality. In order to reach the 'best' solution, justices then 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 reaching 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 ought to 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, i.e. they reach a decision or a legal solution according to the criteria of internal logical criteria and for the maintenance of the consistency of the legal system, regardless of the actual effects in the surrounding environments. This respect for formal rationality (or 'legality') is and ought to be, as Weber continues, because it is directly functional and fundamental for legal actors (and judges in particular) in order to gain and maintain 'legitimacy,' i.e. a high degree of probability that their decisions will be concretely followed by the majority of addressees because they are considered 'correct' and therefore binding.[27]

The characterization of a certain actor as legal or political then is always fundamental, at least from a legal perspective, in order to attach to a certain actor a certain criterion (or type of rationality, as in this work) that should guide it in its operations. This definition, however, is even more important in the case of Constitutional Courts due to the position these types of courts occupy in modern democratic forms of political organization.

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 treated as facilitating simply a legal cover-up of purely economic and political programs; the same can be said of general practitioners or law professors.[28] However, the theoretical issue of defining Constitutional Courts is fundamental because, among both legal and political actors of a modern democracy, 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 taken 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 the Congress did ten years later with the 1964 Civil Rights Act) the future of an

27 *See* Weber 1978 *supra*, p. 654-658.

28 *See*, *e.g.*, Neil MacCormick, *H.L.A. Hart*, Stanford University Press, Stanford, 1981, p. 126.

entire national community as far as concerned unlawful structural discrimination based on ethnicity.[29]

It is also true, by using Dworkin's famous metaphor, that Constitutional Courts write just one chapter in the chain novel that constitutes the valid law, since, after their decisions, their words will then be interpreted by all the other actors, *e.g.* legal scholars, lower judges and law-makers.[30] 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. Using the previous example, with *Brown v. Board of Education* the US Supreme Court definitely opened the door to de-segregation, i.e. it gave a heavy push to put into the trash can all the attempts to retain in American society the racist principle 'separate-but-equal.'

Many other aspects, both political and legal, underscore the necessity of coming forward with a clear definition of which kind of actors Constitutional Courts are. 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. By pointing out the basic features and criteria that should inspire the work taking place in the courts, this clarification allows for a better and more precise control of the activity of the courts by political authorities, *e.g.* 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 locates a fundamental actor on the political map, either as primarily promoting certain and different in-time ideologies (if defined as a political actor) or primarily as attempting to maintain one single and established legal ideology, namely the rule of law (if defined as a legal actor).

The necessity of characterizing the nature of Constitutional Courts is also important from a legal perspective as this maneuver allows us to normatively fix what type of rationality Constitutional Courts ought to follow in their work. Justices sitting on the highest bench can be defined primarily as legal actors. As a consequence 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 they do not explicitly appear in the constitutional document or fundamental law.

This critique of the legality of their decisions can and ought to be done in particular when the realization of values is done at the expense of the traditional criteria superseding the legal reasoning (*e.g.* consistency or respect for previous decisions on similar matters), i.e. the only type of reasoning on which legal actors

29 *See Brown v. Board of Education*, 347 U.S. 495 (1954).

30 *See* Ronald Dworkin, *Law's Empire*, Belknap Press, Cambridge, Massachusetts, 1986, p. 228-238.

in modern democracy have a legitimate domain. For example, if a court decides in diametrical directions in similar cases or issues, it can be directly criticized from a legal perspective for violating a fundamental principle of Western legal systems as such, namely treating individuals equally under the same circumstances.

On the other end, in the event 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, while it is always possible to legally criticized Constitutional Courts for violating certain basic rights guaranteed in the constitution through a certain decision, it is not possible to 'force' the courts to decide in accordance, or at least consequent, with previous decisions. One privilege accorded to political actors in general is the fact that they can indeed 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 originally planned, it cannot be criticized or held responsible from a legal perspective for such.

Finally, another element stresses the importance of questioning the nature of Constitutional Courts in Western legal systems. Constitutional Courts somehow symbolize and stretch to the limits an underlying feature typical of most legal actors operating in contemporary Western legal systems: their 'middle' position 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 one of the concrete individuals forming the skeletal structure of the legal actors is formally educated in the law and such an education is almost always a formal requirement to becoming a part of this group of actors. The individuals composing the legal actors, in other words, are all educated in the idea that law, although highly politicized, keeps certain features that distinguish it from pure political propaganda.[31]

On the other end, for justices working in Constitutional Courts, most legal actors operate within the legal system but with a face also turned to the outside world, to the world where non-legal (in the sense of value-oriented) ways of reasoning dominate. They work within the legal system, but they do this with the knowledge that law is instrumental in order to introduce into a community models of behaviors or values embraced by their political reference (*e.g.* for legal experts working in political parties) or by economic reference (*e.g.* in-house attorneys for large corporations).

This characteristic feature of the law and legal system in the Western legal system, i.e. their always being functional to something else, then forces legal actors in

31 *See*, *e.g.*, Karl N. Llewellyn, On Reading and Using the Newer Jurisprudence, *Columbia Law Review*, Vol. 40, 1940, No. 4, p. 589 and Alf Ross, *Towards a realistic jurisprudence: a criticism of the dualism in law*, E. Munksgaard, Copenhagen, 1946, p. 72. *See also* Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978, p. 188.

general to always take into consideration the ideologies, or value systems, affecting the origins, development and final environment in which the law-making or law-applying is taking place. In short, the importance of defining Constitutional Courts as either legal or political actors lies in the fact that such institutional actors represent better than others the difficult situation in which lawyers operate nowadays: educated in law and employed in order to build, interpret and apply the law, but under an extreme non-legal pressure that wants them to disregard that considered the characterizing elements for a legal system (predictability, certainty, rule of law and so on) in order to instead fulfill political goals.

6. A Possible Legal Theoretical Solution

Part III (*'Makers' vs. 'Markers:' Constitutional Courts as 'In-the-middle' Actors*) showed how Constitutional Courts can be considered as actually positioning 'in-the-middle', between the legal and political worlds. Part IV (*Why Is the Definition 'Either-Legal-Or-Political' So Important For Constitutional Courts?*) pointed out that for several reasons, it is important to somehow 'insert' the Constitutional Courts into either one of these two ideal typical boxes, i.e. to establish which of the two natures (political *vs.* legal) dominates Constitutional Courts and should be used as basic point for investigating and (if warranted) criticizing their decision-making.

A possible perspective from whence to begin the journey to answer this fundamental question is certainly legal theory. Due to the central position and function Constitutional Courts play in contemporary legal systems, legal theory has devoted many and important writings on this topic. From the modern natural law theories to legal positivism, from critical legal thinking to legal-sociological approaches, most contemporary legal theories have tackled the issue of what Constitutional Courts are, somehow being forced to take issue with this question due to the impact of these courts decisions on the law and society at large.[32]

Though along legal theoretical paths, it is helpful here to start, however, by resorting to a sociological distinction made between the institutional position of a certain actor and the function-effects of that actor's work. By the first is intended the position given to a certain actor operating inside a larger environment. This positioning, as far as concerns judicial bodies, is mainly a combination of the operating of two (often overlapping) factors: the degree of legitimacy that judicial bodies enjoy, indicating where in 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).

32 *See, e.g.*, the decision of the US Supreme Court in *Brown v. Board of Education*, 347 U.S. 495 (1954) or by the German Federal Constitutional Court in *Wünsche Handelsgesellschaft* (BvR 2, 197/83; 1987 3 CMLR 225), (1986) (Solange II).

When speaking of function-effects of an actor's work, this simply refers to the impacts that the work of the actor has on the environment. These effects can be of different ideal-typical natures. They can be *intended*, where they correspond to the original goal the actor had in mind when starting the work, or *unintended*, where they do not (totally or partially) correspond to the original motive of the action. Effects can also be in the form of either *outputs* or *outcomes*.[33] 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.* effect of a decision of a court on the legal right of the condemned to appeal). Outcomes, in contrast, mark the effects (intended or unintended) such impacts have on the surrounding environment (*e.g.* the effect of a court decision on the economic situation of the condemned's family).

In reality, these different ideal-types almost always tend to be mixed with each other, *e.g.* in the form of court decisions that have intended and unintended effects or outputs and outcomes simultaneously. Despite this, such ideal-types can be useful analytical tools in order to reveal specific tendencies in an actor as to operating in one environment instead of another in order to gain certain effects, and then choosing the type of rationality more suitable for that purpose.

If one considers Constitutional Courts in light of these distinctions, between institutional position and function-effects (and among the different types of effects), one can see how the dominant features of the courts are of a legal nature. Starting from the institutional position, Constitutional Courts first of all are 'courts.' This means that their decisions are what they are, namely considered binding by the vast majority of the addressees, and not because of the content of the decisions, i.e. the models of behaviors they aim to impose on a community. They are considered binding because they are legal normative decisions, that is decisions that ought to be obeyed because they are produced by a legally formed body, entrusted with the legal power to produce such type of binding decisions. In other words, the major institutional position of the Constitutional Courts, i.e. their being a 'dispute-resolving' actor, is given to them by the legal legitimacy such courts enjoy in the modern form of a democratic state.

In contrast to political actors such as political parties or lobby groups, the consideration and respect for the work of Constitutional Courts is not so much based on the intrinsic values promoted by the very decisions, for example, such as the 'popularity' of a certain political program. The respect, or legitimacy, is given to the decisions by the legal form they take, and by the forms that have been observed while producing the decisions and choosing the individuals (i.e. judges) in charge of taking such decisions. In other words, Constitutional Courts keep their position

33 This separation of outputs from outcomes is actually an adaptation of the results reached by a long series of studies developed in political science. *See*, *e.g.*, Joel A. Thompson, Outputs and Outcomes of State Workmen's Compensation Laws, *Journal of Politics*, Vol. 43, 1981, No. 4, p. 1132; or Francis G. Castles, *Comparative Public Policy. Patterns of Post-war Transformation*, Edward Elgar, Northampton, Massachusetts, 1998, p. 248-292.

and 'job' in the community as the highest dispute-resolving actor as long as they are able to maintain their legal legitimacy, i.e., legitimacy gained in Western legal systems mostly by observing the paradigms of formal legal rationality.

Naturally, this does not mean that Constitutional Courts lack political sympathies. However, even when justices are strongly politicized, they still have to operate taking a look at and being forced into the barriers and limits as set by the legal system or, if in more modern terms, by the principles or paradigms established by the dominating legal culture (*e.g.* rule of law, bill of rights, separation of powers, due process and so on) in order to not lose their legitimacy among the addressees.

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 here is the legal one. A Constitutional Court, per definition, evaluates legal issues, in particular the possible unconstitutionality of a statute or acts of 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, as pointed out before, is a typical legal problem since it is created exclusively by axiomatically accepting the legal principles presupposing an ascending structure of rules, where the lower rules, in order to exist as legal (and therefore to be binding) rules, cannot be in conflict with the higher.

As pointed out by Hans Kelsen, and also by other legal scholars (even natural law theoreticians), this idea is typical of the legal arena.[34] In contrast, the hierarchical structure in the political arena, though present (*e.g.* basic values vs. tactical choices), is not fundamental in order 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, even if contrary to the fundamental values contained in the party program and even if such tactical decisions can perhaps 'shape' the support the party's leader enjoy in the same party.

In contrast to political actors, Constitutional Courts are not totally freed in their reasoning from what can be defined as the 'external' borders of legal reasoning. By 'external borders', or 'minimum content of natural law' in Hart's terminology, are identified in particular the no-cross limits of the legal culture of a certain community, limits which have to exist in order for the legal system to exist as such.[35] In a democratic free-market regime, for example, these no-cross borders can be

34 *See*, *e.g.*, Hans Kelsen 1970 *supra*, p. 3-4, 19. *See also* Neil MacCormick, Natural Law Reconsidered, *Oxford Journal of Legal Studies*, Vol. 1, 1981, No. 1, p. 108.

35 *See* H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961, p. 189-195. *See also* Hart 1983 *supra*, p. 112.

defined as the fundamental legal principles (*e.g.* protection of freedom of expression and private property) expressing the substratum of political, cultural, and economic forces by which the system itself is created and to which it is functional.

Political actors do not necessarily have to respect such external borders of the legal reasoning. Actually, for many political parties, the primary and fully politically legitimized goal of their existence is to change or shift such external borders, for example by heavily restricting freedom of expression or by eliminating legal protection accorded to private property.

The situation changes if one moves the focus to the *outcomes* of the decisions taken by Constitutional Courts, i.e. the effects (intended or unintended) that their decisions have on the (non-legal) environments surrounding the one in which the courts operate (the legal one). It is easy to note here how the legal feature characterizing the function played by the Constitutional Courts tends to disappear. Decisions by Constitutional Courts almost always have effects outside the legal world or, using Luhmann's terminology, in the other sub-systems composing a society: in the cultural, economic, and political life of a community. In other words, it goes without saying that as far as concerns the outcomes of their decisions, Constitutional Courts present certain similarities with political actors such as, for example, the government or national assemblies. As for the latter, Constitutional Courts with their decisions also attempt in the end (consciously or unconsciously) to impose certain models of behaviors or values upon a community.

Despite this sliding into the political arena, Constitutional Courts should be considered as having primarily a legal nature, i.e. primarily being a legal actor. First, the grouping of an actor under a certain terminological roof has to be done primarily according to both its institutional location and the function-effects of its work, in particular the intended outputs its actions produce. If one should look at the outcomes, the very analytical possibility of grouping actors in ideal-typical arenas, and the consequent possibility to identify some normative criteria according to which 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 even 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 taken by large corporations can have relevant outcomes in the religious or cultural fields, but it would be quite strange to define such corporations (and consequently evaluate their work) as primarily religious or cultural actors.

The fact that Constitutional Courts are legal actors does not rule out the possibility that they still can (and often do) play a political function. As said, all legal decisions have certain outcomes, but generally, Constitutional Courts make their decisions by looking (or at least by reasoning according) to the legal outputs, namely the constitutionality or not of certain provisions. Justices sitting on the highest bench certainly can (and often do) have a political agenda, but they are still forced to confront it with the legal system and the principles dominating within it. A reversed

example can be found in individuals sitting in the Parliament. They are without doubt political actors with a clear political agenda, but they still sometimes play a very relevant legal function, and this is done according to a specific legal agenda, i.e. according to certain model of how the legal system or part of it should look. This is the case, for example, 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 feature attached to Constitutional Courts is traceable to the fundamental ideology shaping their work. Justices working in Constitutional Courts live in an environment which, though with many political passersby, has a primary legal task: to be the guardian insuring that the law-making taking place in a certain state is done, or conflict among the highest public authorities is decided, according to the highest rules fixed in the constitutional documents or fundamental law.

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 primarily work with checking the 'constitutionality' of certain legal rules, i.e. with the possibility that, from a legal discourse perspective (i.e. with the traditional rules regulating the legal reasoning), such legal rules can fit 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 very reaching a certain solution instead of another. However, regardless of any hidden agenda behind a certain decision, justices are always forced to somehow 'squeeze' their politically-motivated decisions into boxes of legal justification.[36]

In the end, Constitutional Courts must always speak the language of the law, not the one of politics, even if they want to send political messages. As pointed out by Michel Foucault, among others, language in modern society is power, and by classifying a political problem and a political solution according to legal terminology, the choice of language immediately imposes on the issue the domain and limits set by the legal discourse and, at the same time, tends to exclude all features and limits set by the other types of discourses, among them the political one.[37]

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36 For instance, the doctrine of stare decisis is primarily a legal doctrine, though it certainly presents both political roots and political effects on the political world. *See, e.g.* Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, *University of Pennsylvania Journal of Constitutional Law*, Vol. 9, 2006, p. 160-176; and Ronald Dworkin, *Justice in Robes*, Belknap Press, Cambridge, Massachusetts, 2006, p. 147-50.

37 *See* Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, Pantheon books, (New York, 1972, chapter 2. *See also* Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, Pluto Press, Chicago, 1994, p. 7-12, 41-43; and Anne Barron, Foucault and Law, *in* J. Penner *et al.* (eds.), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, Butterworths, London, 2002, p. 955-997.

Now that the fundamental nature of Constitutional Courts, at least from a legal theoretical perspective, has been established, it is now time to move back to the original issue, namely the law-making activity by Constitutional Courts and in particular, the possibility of evaluating it according to a political criterion such as its (present or absent) 'democratic' character.

7. Constitutional Courts as Legal Actors and The Idea of Democracy

One of the major criticisms against judicial activism is that it allows non-elected legal actors (highest courts) to substitute themselves for duly elected political actors (legislatives) and, therewith, destabilizing the very idea of democracy. In general, most legal theories describing or prescribing what democracy is, or better, the fundamental elements for having a democratic form of state are, have problems with 'fitting in' the position and function played by Constitutional Courts in their theoretical portrait of a democratic law-making.

With all the specifications taken, one of the basic elements for a democracy, at least when dealing with law-making, is that the ultimate agency empowered to enact laws (or to somehow 'sanction' the legitimacy of certain normative statements as legally binding) resides in the political actors. This is because only the latter are the elected (and therefore legitimate) representatives of the ultimate actor from which all power in a democracy emanates, namely the people.

This being the case, it is quite consistent that it is difficult for most democracy theoreticians (both inside legal and political scholarships) to somehow insert in their idea of how a law-making works in a democratic country the fact that some older men and women, not chosen or directly sanctioned by popular vote, have the power to stop a statute or a decision taken by the legally highest representative of the people, either the Congress or President of a nation. While (more or less) shared solutions have been reached as to similar limits imposed on the law-making and political actors by the legal concept of human rights (mostly by incorporating the latter into the very idea of democracy), it is still very difficult for most democracy theories to somehow accept the fact that a non-elected actor actually has an institutional position higher than the representatives of the people, a position that allow justices to always have the final word in legal matters. Even where Constitutional Courts are not especially 'active', they still retain a law-making power of striking down new pieces of legislation enacted by the political representative of a certain community.

The definition of Constitutional Courts as legal actors then reveals a central question once considered from the perspective of the democratic form of state. One fundamental feature of democracy shared by the majority of contemporary legal theories is that the political powers of the state organization are chosen (directly or indirectly) by the community. Moreover, there ought always to be a possibility for the representatives of the people to somehow control and decide the course of

action of all the other non-political actors belonging to the state apparatus. In addition to all accepted specifications (*e.g.* Robert Dahl's theory of economic democracy), the adopting by a modern state of democracy ideology still takes with it the axiom of the prevalence of the political discourse and its main actors above all the other discourses, either religious, cultural, or legal.[38]

In contrast to the current political discourse, which in order to exist as such needs a legitimacy built on the acceptance (even by the most extreme ideologies) of the concept of 'support' (explicit or implicit) by the majority of people, legal discourse is by nature undemocratic. This feature is given to the legal discourse in particular by its very way of working its primary source, the law, the latter being based on the 'authority' of certain decisions taken by certain unelected persons, regardless of whether they are supported by the majority of people.

If one defines Constitutional Courts as legal actors, the question that can be raised then is the following: As Constitutional Courts are not democratically elected by the majority of a certain community, is it undemocratic that they retain the highest legal power among the public authorities, a power allowing them to virtually stop every legal measure taken by political actors who are representative of the people? Isn't the fact, that through Constitutional Courts, the 'undemocratic' legal discourse prevails over the 'democratic' political discourse, against the very concept of democracy?

These are significant issues and it certainly is not feasible to answer them by the end of this short essay, as this would probably take more than a few pages. However, based on the results reached by the analysis developed above, it is perhaps possible to at least identify the correct perspective from which to start answering whether Constitutional Courts fit without major problems in an ideal democratic form of state.

When talking about democracy, one refers to a form of primarily political organization, namely a form to organize the 'striving for a share of power or for influence on the distribution of power.'[39] The idea of democracy is either a picture mirroring the reality (for the descriptive theories) or a painting of how the reality should be (for the normative theories) and it zooms directly on the organization, structuring and sharing of political power. In other words, the characterization of a democratic

38 *See* Adam Smith, *Lectures on Jurisprudence* (R.L. Meek, D.D. Raphael & P.G. Stein (eds.)), Oxford University Press, Oxford, 1978 (1762-1763), p. 200. *But see* Hart 1961 *supra*, p. 72-74; *cf.* Wolfgang Friedmann, *Law in a Changing Society* (2nd Ed.), Stevens & Sons, London, 1972, p. 505-506. Another explanation can be traced back to Machiavelli's idea as to the modern state in general (and not necessarily in a democratic shape), where one can observe the growth and dominance of political reasons and categories over almost all other kinds of discourses. *See*, *e.g.* George H. Sabine, *A History of Political Theory* (3rd Ed.), Holt Rinehart & Winston, New York, 1964, p. 344-347.

39 Max Weber, The Profession and Vocation of Politics, *in* P. Lassman & R. Speirs (eds.), *Max Weber: Political Writings*, Cambridge University Press, Cambridge, 1994, p. 311.

form of state is ascribed to it primarily by the specific way the power is distributed in a certain community. Of course, this structuring and sharing of political power is usually done by means of using certain legal instruments and legal institutions (such as an elected legislative assembly).

However, while the presence of certain forms of political organization is fundamental for defining a certain state as democratic (*e.g.* the presence of competing political ideologies represented in the political discourse), the presence or absence of the usual legal instruments normally attached to a democratic form of state can be not essential. Using a previous example, while it is certain that a democracy has to protect human rights, it is still highly controversial which human rights are to be protected (*e.g.* the right to private property), their extent (*e.g.* right to life) and whether the public authorities should act 'actively' for their implementation (*e.g.* right to work).[40]

Similarly, different political communities in the Western hemisphere in particular, share a common denomination of democracy, but this does not necessarily imply the presence of the same legal institutions with the same legal powers, and in particular of a Constitutional Court with the jurisdiction of constitutional review. A typical example can be found in a parallel observation of the United States and Sweden. Both these systems are considered as a political form of democracy. However, as far as concerns the organization of their legal systems, fundamental differences are detectable, in particular as to the presence of a highest court with jurisdiction in constitutionality matters.

The United States has a highest court with the specific power to check the constitutionality of statutes and when necessary, the legal possibility to directly strike them down. Sweden (as most of the other Nordic countries) has a high organ, composed of well-experienced judges, with the jurisdiction to perform a constitutional review prior to the passage of legislation, the Council on Legislation. However, this body cannot be considered a Constitutional Court, since its decisions are not legally binding to the addressees (namely the Parliament and the Government in this case); it is more a constitutional council, working as legal advisor for the political actors but unable to stop them, even in cases of gross violations of fundamental laws. It is true that courts, either general or administrative, have the power to strike down acts of the Swedish Parliament as unconstitutional, but this power is strictly limited only to the case in question, and only if the error is 'manifest' (in Swedish, *uppenbarhetsrekvisitet*). This power has only been used in a handful of cases in recent decades. Moreover, this power has been granted comparatively recently in comparison to that of the United States Supreme Court (thirty years

40 *See* Waldron 2001 *supra*, p. 224-225 as to the very complexity of the legal concept of 'rights' already in its philosophical underpinning.

compared to the almost two hundred since *Marbury v. Madison*), and certainly long after Sweden was considered a well-established democratic form of State.[41]

Moreover, if one looks at the procedures used in selecting justices, extremely different processes exist, different in particular as far as concerns the role political actors and political culture play. Existing procedures are stretched across a broad spectrum. At one extreme is the US Supreme Court, where justices are directly nominated by the President (a political actor) with the approval of the Congress (another political actor) after hearings in which the candidate's position on various (and often very hot) political issues are 'tested.' Somewhere in the middle is the Italian procedure of choosing constitutional judges (and to some extent also France's), where political actors and their 'political scrutiny' play a relevant role (by electing one-third of the judges). The legal world and its dominating culture also matter, one-third of the judges elected being among the most qualified judges, appointed directly by the Supreme Organ of the Judicial Body, the highest internal instance of the judicial body. Sweden can be positioned at the other extreme end of the spectrum, where, though political 'affiliation' plays a certain role (due in particular to the fact that the appointment of the justices is entirely by political actors), the criteria and reasons of choosing one justice over another are based mainly on evaluative criteria 'internal' to the judicial body. The criteria used in this Scandinavian country are almost of a purely 'judicial bureaucratic' nature and do not consider the 'link' between the political value of the justice and the political representatives of the community.

As the procedures for choosing justices are so different among well-established political democratic regimes, as is also the role political culture plays in them, the simple conclusion can be drawn that a necessary *sine qua non* relation between the selection of the justices and the participation of the representatives of the people in the process does not exist; or, to put it in another way, a democratic political system does not necessarily require a direct link between political actors and the justices sitting in Constitutional Courts in order to guarantee the 'democratic' representation of the latter.

Another element considered essential to Western democratic regimes from which Constitutional Courts depart is the position of political rights (*e.g.* the right to vote) as essential for a constitution and the work of Constitutional Courts in protecting them.[42] If, as for the previous example, one considers the US Supreme Court and the Swedish Supreme Court as two different ideal-typical Constitutional Courts, one can notice a deep divergence of positions on this issue. First, the consideration and progressive 'refinement' of political rights enumerated in the Constitution has occupied quite a bit of space of the US Supreme Court's work, being followed

41 *See* Instrument of Government (in Swedish, *Regeringsformen*) (Ch. 11, § 14, 1974). *Compare* to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

42 *See* Martin Shapiro, Judicial Review in Developed Democracies, *Democratization*, Vol. 10, 2003, No. 4, p. 11-13.

in this (but only to a certain extent) by several European Constitutional Courts, such as the German Federal Constitutional Court or the Italian Constitutional Court. In the Swedish form of democracy, the primary role of the Supreme Court (and the constitutional texts) has been, at least until recently, mostly concentrated on distributing and delimiting political power among the various institutional actors. Until very recently, the protection and interpretation of most basic political rights have been left instead to extra-parliamentary agreements among the actors of the political, legal and social arenas; when addressed by statute, political rights tend to fall under the domain of administrative law and administrative courts more than that of constitutional law. Similar to Sweden, the French Constitutional Council has only from the early 1970's taken a strong stand in positioning basic political rights in the central part of the constitutional map.[43] In both cases, however, Sweden and France have been considered democracies long before the constitutional recognition of political rights took place.

Finally, from a legal perspective, one aspect that the different Western Constitutional Courts at least have in common, as pointed out in Part II (*Some Definitions*) is that all Constitutional Courts are courts with the specific legal competence to check the constitutionality of statutes or acts. This being the case, when one starts evaluating the actual use or implementation of such legal power, a broad range of positions can be detected, however, going from the frequent striking down of the constitutionality of the work of the political actors (as in the US or many of European countries) to the almost constant 'constitutional-guarantee' stamp for every word produced in the political world (as in Sweden or, until the early 70's, in France).

Naturally, one can maintain the idea that Constitutional Courts in Sweden (or in France) do not go against the law-making by political actors because the latter were more 'cultivated into legal matters' and 'obedient' to the law than in other Western countries. However, a more realistic assessment, at least from a legal perspective, is that in the Swedish (and to some extent French) form of democracy, the control of constitutionality by a specific court does not belong to the legal underpinning necessarily required by a Western democratic political regime, legal underpinnings to which, for instance, one can ascribe legal rules safe-guarding freedom of expression, freedom of association or private property.

This brief comparative analysis shows one important fact: Constitutional Courts in the well-established democracies can, in relation to the political world, present fundamental differences as to their legal jurisdiction, as to the procedures for their formation (and the role political actors play in it), as to the areas of focus of most of their work, and even as to the 'actualization' of their judicial review jurisdiction. As the issue of whether both the United States and Sweden are fully considered and legitimized as Western democratic forms of state is not debated, the conclu-

43 *See* Constitutional Council of France (in French, *Conseil Constitutionnel*), Décision n° 71-44 DC of 16 July 1971.

sion then must be drawn that the presence or absence of a Constitutional Court, with binding decision-making power as to constitutional review, cannot be considered a *conditio sine qua non* for a democracy. As recently pointed out in an article by Lee Epstein *et al.*, Constitutional Courts can play a decisive role in 'reinforcing' already democratic political regimes, but not in 'establishing' them.[44] In other words, having a Constitutional Court is helpful but is not a fundamental requirement for a community in order to be considered as living in a democracy.[45]

A fundamental bias can then be detected in the accusation against a certain legal system or legal culture in general for being undemocratic because there is space for judicial activism that a legal actor, as a Constitutional Court, can control, limit and somehow modify the decisions taken by a democratically elected political power. This charge presupposes that the concept of democracy necessarily incorporates Constitutional Courts, an incorporation that the empirical observation of the realities of the legal systems in the Western world does not support.

At the same time, this accusation of operating as political actors paradoxically starts with the implicit presupposition that Constitutional Courts should be political. It begins with the premise of attaching to Constitutional Courts the wrong kind of legitimacy, namely legitimacy based on the idea that, as for the political actors, it is given by the content of their decision ('the decision is against the majority's will, therefore it shakes the legitimacy of the court'). However, Constitutional Courts are primarily legal actors and, as pointed out by Weber at least for Western legal systems, the fundamental criterion according to which their legitimacy is acquired and maintained is not by following the substantive rationality, but the formal one.[46] This means that the formal legitimacy of Constitutional Courts is not based on how 'democratic' their message is, but on the observance of the pre-established rules regarding how the decision should be taken, according to which procedures and by whom ('the decision is done following the proper forms, therefore it reinforces the legitimacy of the court').

In the end, criticism against the judicial activism of Constitutional Courts is shown to be a paradox, or better yet, confusion as to which kind of legitimacy is and should be attached to these courts. Critics attack court activism for destabiliz-

44 *See* Lee Epstein, Jack Knight & Olga Shvetsova, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, *Law & Society Review*, Vol. 45, 2001, No. 1, p. 138-148.

45 *See* Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution*, Cambridge University Press, Cambridge, 2002, chapter 6, as an example of possible coexistence of a dictatorial political regime and a functioning Constitutional Court.

46 *See* Weber 1978 *supra*, p. 37 ("Today the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner"). *See also* Gianfranco Poggi, *The Development of Modern State. A Sociological Introduction*, Stanford University Press, Stanford, 1989, p. 132; Immanuel Kant, Die Metaphysik der Sitten, *in* I. Kant, *Immanuel Kants Werke Band VII 25-26*, (B. Kellermann ed.), Bruno Cassirer, Berlin, 1916 (1797), p. 122 and Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, Harper and Row, New York, 1978, p. 51-52.

ing democracy due to the political content of their decisions, and in the long run, for endangering one of the central axioms of democracy, namely a system of courts legitimized as purely law-applying actors. However, this criticism of being 'political' presupposes that the work of courts and their decisions ought to be evaluated (and legitimized) from the same perspective as for other political actors' decisions, namely from the presence (or not) of a content which is supported (directly or indirectly) by the majority of the people.

Once the constitutional document has been written and its legitimacy as such accepted and, in particular, the premise that an independent Constitutional Court should exist with the primary legal task of controlling that the law is done and applied according to the constitution is accepted by the political actors, it would be against the very idea of certainty of the fundamental law to ask Constitutional Courts to play according to a different criterion, namely the political evaluation of the democratic level of certain decision instead of their legality.

8. Towards A More 'Democratic' Model of Constitutional Court

It is necessary to point out one thing before concluding this article. The point of this article is not to totally 'disconnect' Constitutional Courts from the ideal of democracy. The basic point instead has simply been to stress that Constitutional Courts are not necessarily present in every Western democratic political system or, in other words, the institution of Constitutional Courts does not belong to the legal substratum typical for every democratic regime. However, as pointed out above by Epstein *et al.*, Constitutional Courts can (and usually do) help a community reinforce the democratic form of organization: democracies can exist without Constitutional Courts, although it can be seen to be better if democracies are assisted by Constitutional Courts.[47]

In other words, the point made here is that the debate on judicial review, in particular at the constitutional level, does not have to end by claiming that courts (and their judicial review) and democracy do not belong together. On the contrary, based on the consideration of the legal nature of Constitutional Courts and the primary political nature of the concept of democracy, the aim is to re-set the terms of the debate of 'democracy' and 'judicial review,' at least from a legal theoretical perspective.[48]

47 *See* Lee Epstein, Jack Knight & Olga Shvetsova 2001 *supra*, p. 155-156.

48 *See*, *e.g.* Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, *Law and Philosophy*, Vol. 9, 2004, No. 4, p. 353-354; Gunther Teubner, Substantive and Reflexive Elements in Modern Law, *Law and Society Review*, Vol. 17, 1983, No. 2, p. 254; and Andrew Halpin, The Theoretical Controversy Concerning Judicial Review, *Modern Law Review, Vol. 64,* 2001, No. 3, p. 500. *But see* Waldron 2001 *supra*, p. 283.

Most of the debate as to constitutional judicial review starts from the request to the courts to be a more 'integral part' of the democratic form of state, the position then being different as to what is expected by 'democratic' courts (*e.g.* strict obedience to the legal rules laid down by the representatives of the people vs. 'activism' in searching of the 'true meaning' behind the legal text). However, as seen up to now, by defining Constitutional Courts as essentially legal actors, there is a need to shift the perspective from which the evaluation (and eventually criticism) of the work of the Constitutional Courts originates, at least in the legal debate: from the political standpoint (*e.g.* majority's support to a certain decision) to the legal standpoint (*e.g.* respect to the traditional rules dominating the legal reasoning).[49]

Specifically, since Constitutional Courts are not part of the conceptual hard-core of 'democracy', but usually play a relevant function in the establishment of democracy, the re-setting of the debate on constitutional judicial review and democracy should then not be in the direction of absorbing one element (Constitutional Courts) into the other (democracy), but instead in proposing an 'ideal' of Constitutional Courts more aligned or compatible with the elements characterizing a democratic form of state.

As an example of this search for compatibility between Constitutional Courts and ideals of democracy, one can begin with the definition of democracy developed, among others, by Jürgen Habermas: Democracy is that form of state striving for the participation of all the community (or specific part of it) to the formation of the decisions which have effects on the community (or on the specific part of it).[50] If one starts from this definition of democracy, then changes to the Constitutional Courts in order to make them more 'compatible' to a democratic system should be in the direction of their procedural aspects, and less on the material content of their decisions, i.e. in the direction of making the addressees of the decisions more participatory in decision-making processes.

The first step to be taken is certainly one of adopting a process of selection of the candidate justices similar to the one used for the US Supreme Court. In particular, the 'hearings' procedure in front of the national Assemblies would allow not only a more specific control of the judges by the representatives of the people. More importantly in the modern information society, public hearings also allow the

49 As typical representative of the political standpoint from which to investigate the idea of democracy in relation to the role of Constitutional Courts, *see* Waldron 2001 *supra*, p. 283.

50 *See* Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1998, p. 134, according to whom the democratic discourse is the one allowing the citizens "to test whether a contested norm can or could obtain to acquiescence of all those who might be affected". *See also* Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, Oklahoma, 1991, p. 8-9. *But see* the substantive idea of democracy as expressed by Dworkin 1996 *supra*, p. 17, for whom the most fundamental aim of genuine democracy is not to pass laws in accordance with certain procedural requirements, but to treat "all members of the community, as individuals, with equal concern and respect".

community (in particular through the mass media) to have a larger set of information as to the people occupying such an important position as a justice. Unlike that which happens now in most European Constitutional Courts, in this way the community will have access to greater information and, hopefully, a clearer idea of 'who represents what' or of the specific political culture each justice carries.

This solution, of course, does not prevent justices from playing a less 'political' function, a function that as seen above is somehow connected with the 'in-the-middle' position of Constitutional Courts. However, public hearings give the addressees, or their representatives, a better way of participating in fundamental decisions affecting them, certainly better than the 'behind-closed-doors' procedures vastly used in Europe and at the European Union level.

A general preference for the typology of concrete instead of abstract review is a further procedural element adapting the Constitutional Courts better to the ideal of democracy. The concrete review typology, by allowing the parties of a case to raise a possible question of constitutionality, implements a relative 'socialization' of the constitutional review. By this expression is meant that, though in relative terms due to the filtering presence of the court invested by the case, concrete constitutional review gives the possibility for a wider spectrum of actors in a certain national community to stimulate the control and the respect of the constitution.

Instead of leaving the entire commencement procedures in the hands of public authorities (as for the abstract review typology), concrete review better fits in the idea of democracy by transferring the starting mechanisms to the hands of those who are the direct addressees of a certain provision thought to be unconstitutional. This transfer to the social arena provided by the concrete review typology is furthermore strengthened if it is paralleled by the extension of the number of institutional actors that can access and promote the judicial constitutional review. In particular, Constitutional Courts are more aligned with the ideal of democracy if the procedures governing their work allow 'groups of interests' relevant for the case (*e.g.* NGOs in human rights issues) to participate and help private parties in cases in front of the Constitutional Courts. Moreover, this 'democratization' of the constitutional review procedures can be strengthened by parallel reforms of procedural law allowing these groups of interests to participate in various trials where the issue of constitutionality can be then raised.

Another aspect to consider is introducing the mechanism of dissenting opinions. In this way, the various positions of justices, somehow mirroring the complexity of the issue among the community, can be represented entirely behind the legal reasoning leading to a certain decision. Introducing the mechanism of dissenting opinions also allows the legal discourse to get closer to those discourses in the other sub-systems. In controversial questions (*e.g.* euthanasia), in particular, the legal discourse, which tends to operate in a binary way ('either-or'), will be structurally more in touch with the other kind of discourses (*e.g.* cultural discourses), which can present a range of possible intermediate solutions. Moreover, as shown

for example by US constitutional law history, the dissenting opinion of today can become the majority opinion for tomorrow or, in other words, it can lead the path for future decision-making and law-making developments.

A final suggestion in the direction of making the work of Constitutional Courts more in-line with the ideal of democracy here assumed, should be in the direction of opening to the public (and to the media in particular) the very proceedings of discussion of constitutional review. This, for instance, can be done by modeling the phase of debate as more similar to a 'normal' trial than as to the usual 'behind closed doors' decision-making process, the latter being closer to the political parties or group interests' way of taking fundamental decision (i.e. political actors).

In summary, pointing out the 'undemocratic' nature of decisions taken by justices is a never-ending debate, and probably, a question without a concrete solution, as justices are legal actors who will, and should, always play a political function. Instead, by focusing on the procedural aspects surrounding the work of Constitutional Courts, the above-mentioned suggestions open the courts to the scrutiny of and availability to larger segments of the community, and in the end, render the entire system of constitutional judicial review closer to the ideal of participative democracy.[51]

9. Conclusion

In the light of the debate as to judicial activism, in particular at the constitutional level, this work has investigated the issue of whether Constitutional Courts should be considered primarily legal or political actors and whether they really should be targeted for the political accusation of being 'undemocratic.' After having stressed in Part II the importance of Constitutional Court 'activism' inside the general issue of judicial activism, Part III pointed out the reasons why Constitutional Courts in established Western democracies can be seen as occupying an 'in-the-middle' position between the legal arena and the political arena. The central Parts IV and V then stressed the importance of the reasons why Constitutional Courts can be defined, from a legal theoretical perspective, as legal actors, though playing a political function. Part VI sketched certain of the consequences of this 'legal' characterization of Constitutional Courts, in particular as far as concerns the wrongfulness of absorbing judicial activism at the constitutional level (and the work of Constitutional Courts in general) in the general discussion about democracy. Finally, Part VII presented some possible examples of making the work of Constitutional Courts more 'compatible' with the Habermas ideal of democratic form of political organization, in particular focusing on the need of shifting from a 'democratic' Constitutional Court decisions to a 'democratic' Constitutional Courts procedures.

51 *See* Waldron 2001 *supra*, p. 276: "[P]rocedural rules... make participation possible, by setting out a matrix of interaction in which particular contributions can take their place and 'register'."

In conclusion, criticizing Constitutional Courts for not fulfilling the democracy criterion is like criticizing a soccer referee for not being democratic because he or she does not follow the teams' beliefs on controversial decisions during a match. As for political parties, the teams' belief can eventually become a criterion in choosing a certain referee (as for justices in the United States), or in adopting certain types of basic rules at the beginning of the tournament or in the deciding of playing a certain tournament or even in later changing the rules of the game. However, once the teams have decided to be in the tournament and to play by the fundamental rules, while playing the match the teams' belief systems cannot and ought not to be used in evaluating how the referee should apply the fundamental rules of the game: a soccer referee can be criticized for having applied the wrong rule or of having misjudged the situation to which the rule was applied, but not for being 'undemocratic.'[52]

As for soccer, one of the essential elements for having a real, functioning, and fair to everybody democracy perhaps is having 'undemocratic' chosen referees for the match, who apply during it rules felt as 'undemocratic' both by one team's players and fans.

52 *See* Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy*, University of Chicago Press, Chicago, 1995, p. 163-164, as to the different types of constitutive rules and regulative rules. *But see* Waldron 2001 *supra*, p. 277.