CHAPTER ONE

The Rise of Constitutional Courts

A SUCCESSFUL STORY

Let's go back to 1920. It is very unlikely that the framers of the constitutions of the new republics of Czechoslovakia and Austria imagined that the institution they had just created (a constitutional court) would be so popular nowadays. Before the Second World War, only Lichtenstein (in 1921) and Spain (in 1931) had decided to establish such a court. The other countries in Europe remained impervious to the invention.[1]

During that period, a particularly powerful voice, that of Hans Kelsen, could be heard in support of the new system. This important legal philosopher (who lived from 1881 to 1973) was very influential in the construction of the Austrian Constitutional Court—where he served as a judge from 1921 to 1930. Of course, Kelsen did not invent the constitutional court out of nothing; others had come up with similar ideas before, and some institutions served as precedents.[2] But there is no doubt that he deserves enormous credit for its introduction and for its theoretical defense. He wrote extensively in favor of subjecting legislation to some type of judicial review and in favor of the centralized model, in particular, as opposed to the American alternative.[3] It is very useful to examine Kelsen's ideas in order to understand the intellectual sources of the European model—which is often called "Kelsenian."

After the Second World War, things started to change in a dramatic

way. Italy (in 1947), Germany (in 1949), and France (in 1958) enacted new constitutions whose protection against ordinary legislation was entrusted to a constitutional tribunal. After their transitions to democracy, Portugal (in 1982) and Spain (in 1978) introduced such a court in their new constitutions too.[4] Belgium and Luxemburg joined the club as well (in 1980 and 1996, respectively). And after the fall of communism, almost all Central and Eastern European countries followed suit.[5]

In particular, eighteen out of the twenty-seven states that currently belong to the European Union—Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain—have created constitutional courts, a figure that shows the extent to which there is a strong preference for such institutions in the region. Only three countries within the European Union have adopted a system of judicial review similar to that of the United States: Sweden, Finland, and Denmark. In practice, though, courts in these Nordic countries very rarely find a statute unconstitutional.[6]

Of the six remaining countries within the European Union, four—Ireland,[7] Greece,[8] Cyprus,[9] and Estonia[10]—have adopted systems that are difficult to classify because they combine features of the American and the European models in different ways. The other two countries, the Netherlands and the United Kingdom, are exceptional in that they have no system of constitutional review of legislation. The Constitution of the Kingdom of the Netherlands explicitly prohibits judges from setting aside legislation on constitutional grounds.[11] Judges lack that capacity in the United Kingdom as well. The Human Rights Act 1998, which came into force in October 2000, has empowered certain U.K. superior courts to declare that a given statute is incompatible with any of the human rights that are enumerated in the act. (The act incorporates the European Convention on Human Rights into the domestic legal system.) Such a judicial declaration, however, does not mean that the statute is invalidated or set aside. Courts must still enforce it. The effect of a declaration of incompatibility is mainly political: the British parliament is expected to modify a law that a court has found to violate a human right, but it may elect not to do so. Parliament is still sovereign.[12]

The centralized model, which is clearly dominant within the European Union, has also had some influence in other regions. In Latin America, for example, some countries have gradually departed from the American model that was originally established in the nineteenth century and have moved toward a mixed system that includes some components of the centralized model.[13] The system is mixed in that all courts are usually empowered to exercise constitutional review in the course of ordinary adjudication, but in addition, legislation can be formally invalidated by a specific body. For these purposes, some countries (Peru, Guatemala, Chile, Ecuador, Bolivia, Colombia) have introduced constitutional courts, whereas others (Costa Rica, El Salvador, Honduras, Nicaragua, Paraguay, Venezuela) have created a special constitutional chamber within the existing supreme court. We also find constitutional courts in other parts of the world (in South Korea, Indonesia, Thailand, South Africa, Egypt, and Turkey, for example).

Actually, there are so many nations that have established constitutional tribunals that a wide variety of types has emerged. We need to transcend the particular traits of the different national systems, however, in order to understand the deep principles and tendencies of the centralized model. For these purposes, my discussion is anchored by a group of eight countries of Western Europe (Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal, and Spain), though I sometimes offer information about other nations, especially those of Central and Eastern Europe.[14]

THE BASIC FEATURES OF THE EUROPEAN MODEL

Before we embark upon a discussion about the rationale of the European model, we need to identify its main characteristics. We must briefly consider three questions: (1) Over what matters does the constitutional court have jurisdiction? (2) Who is authorized to ask the court to review the constitutionality of a statute? (3) What are the effects of the court's decisions? The answers to these questions will give us the technical infrastructure we need for the topics discussed throughout the remainder of the book.

Functions of the Constitutional Court

As already explained, what defines the European model is the existence of a special institution—the constitutional court—in charge of assessing the constitutionality of legislation. This institution is granted a monopoly in this field: no other court—not even the supreme court—is entitled to disregard a parliamentary statute on its own authority. In many countries,

ordinary judges, as we will see shortly, are allowed to stay the proceedings of a given case in order to make an application to the constitutional court for the annulment of a statute that they think is inconsistent with the constitution. They are not authorized, however, to disregard the statutory provision themselves.[14]

Two qualifications about the constitutional court's monopoly should be mentioned, however. First, in some countries, ordinary judges may set aside a legislative provision that was enacted *before* the constitution entered into force. In those countries, therefore, it is only post-constitution legislation that falls under the exclusive control of the constitutional court.[15] Second, in Portugal, a constitutional tribunal has been created, but ordinary judges are also empowered to exercise legislative review.[17] It must be noted, however, that the tribunal must intervene whenever a lower court has ruled that a law is unconstitutional. (The public prosecutors' office has the duty to lodge an appeal in such a case.) This means that, in practice, the system is relatively centralized; only the constitutional tribunal has the final authority to set aside a statute in a particular lawsuit.[18]

Now, constitutional courts differ as to the relative prominence of legislative review within their portfolio of responsibilities. Constitutional courts are sometimes given jurisdiction to supervise the regularity of elections and referenda, for example, or to verify the legality of political parties or to enforce the criminal law against high governmental authorities or to protect fundamental rights against administrative and judicial decisions. Most of these tasks are still "constitutional" in that they require the interpretation and enforcement of constitutional provisions, but others are not: they merely involve ordinary law. We can say that a constitutional court is not "pure" when, apart from reviewing legislation, it has some other functions. The more important those other functions are, the larger the workload they generate, and the closer they are conceptually to the enforcement of ordinary law, the less pure the constitutional court is.

We can thus locate constitutional courts along a spectrum of purity. At one extreme, we find absolutely pure constitutional courts, whose only job is to review legislation for its constitutionality (Belgium and Luxembourg).[19] In the middle, we find courts that perform some additional tasks, although their main activity is still legislative review (France, Italy, and Portugal).[20] At the other end of the spectrum, courts have jurisdiction over so many different matters that it would be wrong to say that, in terms

of everyday practice, their most important function is to determine the constitutionality of legislation (Germany, Austria, and Spain).[21]

Access to the Court

Let us now turn to the issue of standing. Various procedures have been established in different European countries to submit claims to the constitutional court that a particular statute is unconstitutional. One type of procedure is initiated through *constitutional challenges*, which are usually brought by public institutions, such as the executive, the ombudsman, the general prosecutor, the parliament, or a qualified minority of the parliament. In some countries, private individuals are also allowed to bring such challenges. Through this type of procedure, legislative provisions are attacked directly and in the abstract—the procedure is not tied to any specific controversy. Normally, the challenge must be filed after the statute has been promulgated. In some jurisdictions, however, preventive (a priori) review is permitted: statutes can be attacked before they are promulgated.[22]

A second way to get to the court is through so-called *constitutional questions* which are initiated in the course of ordinary adjudication. When regular judges handling specific disputes believe that the applicable statute is unconstitutional, or have doubts about its validity, they stay the proceedings and certify the issue to the constitutional court.[23] The latter will simply declare whether the statute is valid. It is then for the ordinary judges who raised the question to decide the specific controversies in light of the answer provided by the constitutional court.[24]

In some countries (Spain, Germany, and Austria), there is a third way to invoke the jurisdiction of the constitutional court. Individuals can file a *constitutional complaint* alleging that one of their fundamental rights has been violated by public authorities.[25] In most cases in which the complaint is justified, the breach of the fundamental right stems from an incorrect interpretation or application of the relevant statute or body of law. But sometimes it is the statute itself that is at fault. In such instances, the constitutional court will review the statute and determine its validity.

A fourth type of procedure exists in Portugal. As already explained, the Portuguese system is exceptional in that regular courts are permitted to disregard legislation they find unconstitutional. Their rulings can then be appealed to the Constitutional Court by the parties to the case (or by

the public prosecutor). The Constitutional Court's jurisdiction is limited, however: it can decide only whether the lower court got it right when it disregarded, or upheld, the pertinent piece of legislation.

So there are variations within the European model. Obviously, a constitutional tribunal is more or less detached from the ordinary judiciary, depending on the type of procedures that can be used to attack a statute. In the context of abstract challenges, the tribunal is not linked to the regular courts. In contrast, there is such a link when ordinary judges raise constitutional questions. The link is even stronger when the constitutional tribunal has jurisdiction to review decisions rendered by ordinary judges, as in the complaints procedure or in the appeals procedure of Portugal. The dualist structure that characterizes the European model can thus be more or less rigid.

This, of course, has implications for how "abstract" or how "concrete" the system of legislative review is. The general tendency in Western Europe is for constitutional courts to scrutinize the laws in the context of specific cases—through constitutional questions, individual complaints, or appeals of the Portuguese sort. Abstract review initiated by means of constitutional challenges is less frequent in practice.[26] Until very recently, France represented the most prominent exception to this general pattern, for abstract review brought by public institutions was the only kind of review that the French Constitutional Council could engage in. An important constitutional amendment of July 23, 2008, however, has deeply transformed the French system. Ordinary judges are now empowered to certify questions to the Constitutional Council, if the applicable law is attacked on the grounds that it violates one of the constitutionally guaranteed rights or liberties.[27] (Such questions, however, must be filtered by the Court of Cassation, the highest court of ordinary jurisdiction, or the Council of State, the highest administrative court.) Abstract review is thus combined with concrete review. It is likely that in the near future, a great number of statutes will be tested by the French Constitutional Council in the context of questions raised by ordinary judges, as has happened in other European countries. The general practice in Central and Eastern Europe, in contrast, seems to more strongly center around abstract review. According to Wojciech Sadurski, abstract review, which has been established in all the countries in that region, is widely used, whereas concrete review initiated by regular courts is rarely practiced.[28]

Effects of the Court's Decisions

Finally, what about the effects of the decisions handed down by the constitutional court? In general, when the court declares that a statute is unconstitutional, its decision is binding on everyone. It produces "*erga omnes* effects," as the expression goes. The statute is effectively repealed, and no court or governmental organ is allowed to apply it.[29] Kelsen used to say that the constitutional court acts as a "negative legislature" when it strikes down a law, for it does something similar to what the parliament does when it repeals a law.[30]

When the court upholds a statute, in contrast, one may still challenge that statute in the future by bringing new objections in subsequent proceedings.[31] Of course, if the court reviews the statute not only in light of the specific grounds that the challengers have adduced in their briefs but also in light of additional reasons that the court articulates *sua sponte*, its conclusion that the statute is constitutional is harder to revisit in the future.[32] Still, there is always some room for further judicial examination, whereas if the statute is invalidated, that's the end of the story. (A new statute with the same provisions would have to be passed by the legislature in order for the constitutional court to have the opportunity to take a second look at the underlying issue.)[33]

It is important to note, however, that constitutional courts quite often hand down "intermediate" decisions that identify the constitutional defects of a given statute but do not immediately invalidate it. Courts, for example, sometimes suspend the effects of their decisions declaring a law unconstitutional in order to give the parliament enough time to repair the defects. In other cases, they issue a "reconstructive" decision that directly amends the defective statute to make it comport with the constitution. These and other techniques have been crafted to satisfy practical needs. Experience has shown that the dichotomy between striking down statutes, on the one hand, and fully upholding their constitutionality, on the other, is unacceptably rigid.[34]

With this preliminary characterization of the European model, we have the technical background we need for the discussion in the next chapters. So let us now proceed to the question concerning the rationale of the model. Why should a country establish a special tribunal to assess the constitutionality of legislation instead of entrusting this function to ordinary courts, as is the case in the American system?

CHAPTER TWO

Historical Background

THE PRINCIPLE OF SEPARATION OF POWERS

IN ORDER TO EXPLAIN, at least in part, the European inclination toward constitutional courts, scholars often note that a specific conception of the principle of separation of powers emerged in continental Europe as a result of the French Revolution of 1789. Under this conception, which was very influential in many countries, judges were to have a restricted role. Determining the validity of legislation was not a power to be allocated to them. To guarantee the supremacy of the constitution over ordinary law, alternative institutions had to be conceived. Constitutional courts finally emerged as the appropriate bodies for the task.

As I will argue, this historical narrative is fine, but if we want to construct a modern justification of the European preference for constitutional tribunals, we should forget about the principle of separation of powers as traditionally understood. We should instead assess the potential advantages and disadvantages of such tribunals in a more straightforward and pragmatic way, without being constrained at the normative level by the historical accidents that led to a particular understanding of separation of powers. History is important in explaining the birth of institutions, but we should transcend it when we try to find good reasons to maintain or reform the institutions we have.

THE FRENCH REVOLUTION AND THE PRINCIPLE OF SEPARATION OF POWERS

The historical narrative is as follows: Both the American and the French revolutionaries at the end of the eighteenth century explicitly invoked the principle of separation of powers. The constitutions that were adopted on both sides of the Atlantic were supposed to respect that principle. The specific content that was ascribed to the idea of separation of powers, however, was remarkably different, especially when it came to the role of the judiciary vis-à-vis popularly elected assemblies.

Americans tended to trust judges as guardians of individual liberties and were prepared to grant them the power to check legislation under the U.S. Constitution, although the precise scope and the limits of that power were controversial. The problem of parliamentary tyranny was high on the constitutional agenda. Americans, after all, had rebelled against the British parliament, and the framers of the U.S. Constitution reacted, at least in part, against the legislative excesses that they found in the states after Independence. It is against this background that we must read Chief Justice John Marshall's famous holding in *Marbury v. Madison* that courts in the United States have the power of constitutional review. The whole political system was built on the idea of checks and balances, which is a particular rendering of the more abstract principle of separation of powers. As M. J. C. Vile explains, "The separation of powers, in itself, is not a sufficient basis for the establishment of a doctrine of judicial review." Something more is needed: the acceptance of the idea of *checks and balances* as essential barriers to the improper exercise of power. One branch can then interfere with the functions of another to the extent of invalidating its acts.[1]

The French revolutionaries, in contrast, relied on the legislature and the executive as the main engines of social transformation to liberate the people from feudal privileges. New codes would be enacted to protect individual rights and the principle of equality before the law. Thanks to codification, moreover, the law could be reduced to a precise, coherent, and complete body of written legislation so that the task of judges would be rather mechanical.[2] A modernized and meritocratic administration, in its turn, would be in charge of bringing society closer to the revolutionary ideals.[3]

To a considerable extent, this restrictive conception of the role of

judges was a reaction against the abuses perpetrated during the ancien régime by the higher courts—the parlements—that had been set up in various French cities. Those courts had suspended the enforcement of royal decrees, whose aim was to modernize the law against old feudal privileges. The courts had done so in the name of traditional higher law (the so-called fundamental laws of the kingdom). As Mauro Cappelletti explains, judges were "almost always among the bitterest enemies of even the slightest liberal reform. They were the fiercest opponents of the Revolution, whose guillotine was soon to reap a rich harvest of their most honorable heads."[6]

In this historical context, then, separation of powers was understood differently than it was in the United States. Under the new scheme in France, judges would have a rather modest part to play. Judges were required to "address themselves to the legislative body" whenever they thought it "necessary to interpret a statute or to make a new one."[7] Through this mechanism—which was called *référé législatif*—the parliament would clarify the meaning of the applicable statute. It would provide judges with the "authentic interpretation" of the legislative text. In this regard, the French revolutionaries followed Montesquieu's idea that judges were to be "only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."[8]

Actually, the French revolutionaries suspected that judges might be tempted to decide cases against the clear meaning of the law. Accordingly, they created the Court of Cassation.[9] This institution, which would quash judicial decisions that deviated from the law, was originally conceived as an appendix of parliament that would protect its laws against judicial erosion. Thus, the 1791 constitution provided that each year, a commission of eight members of the court would be sent to the legislative assembly to report the judgments made.[10]

Given the distrust with which the revolutionaries viewed the judiciary, it is not surprising that the latter was denied any power to check the actions of the executive and legislative branches. "Judicial functions," the law provided, "are distinct and will always remain separate from administrative functions." Therefore, "it shall be a criminal offence for judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions."[11]

As a result, different institutions, separate from courts, had to emerge to make it possible for the legal validity of administrative acts to be checked. This task was gradually assumed by the Council of State, which was established by Napoleon in 1799, and by lower administrative tribunals that were created later.[12] These bodies were separate from the judicial branch. A division of labor between the ordinary judiciary and the "administrative tribunals" was thus introduced as a result of the restrictive conception of the role of the judiciary in a system of separation of powers.[13]

Similarly, judges were forbidden to assess the validity of statutes. The law provided that courts could not "interfere with the exercise of legislative powers or suspend the application of the laws."[14] This principle was soon understood to mean that judges could not set aside legislation on constitutional grounds.

It is important to emphasize that the French revolutionaries did not deny that the constitution is the supreme law of the land. The preamble to the 1789 Declaration of the Rights of Man and of the Citizen stated that rights were declared so that the acts of the legislature and of the executive could be compared with the goal of all political institutions—namely, the protection of rights. The declaration (which was later attached to the constitution of 1791) established direct limits on the legislature: article 5, for example, provided that the law could punish only those actions that were harmful to society, and article 8 prohibited penalties that were not strictly and evidently necessary. There is no doubt that the French revolutionaries wanted legislation to respect these constitutional principles. After all, they made the constitution more difficult to amend than ordinary legislation because they took it for granted that the constitution was supreme.[15] Their restrictive understanding of the role of judges, however, precluded judicial review of legislation. They relied on other types of constraints on the legislature, such as the executive veto. They had great confidence, moreover, in the watchful eyes of the citizenry as a guarantee that the constitution would be observed. To this effect, the 1791 constitution appealed to the general loyalty of public institutions, the vigilance of parents, the affection of young citizens, and the courage of the French people in general.[16]

When it was gradually felt that, quite apart from these general political checks on the legislature, some specific system of constitutional review was needed, ordinary courts were not relied upon. Other bodies

were instead conceived. Thus, the French revolutionary Emmanuel-Joseph Sieyès soon proposed the creation of a "constitutional jury" (*jurie constitutionnaire*), a body of 108 members to be recruited from among political representatives. His proposal was rejected, however.[15] Later, in 1799 and in 1852, the Conservative Senate was established as a guardian of the constitution. This solution was not successful, though, for the Conservative Senate was under the complete political dependence of the emperor and therefore lacked the necessary institutional distance to evaluate the laws.[16]

In the twentieth century, the constitution of 1946 created yet another nonjudicial body, the Constitutional Committee, which was granted the authority to determine whether a law was contrary to the organic (that is, structural) part of the constitution and thus required a previous constitutional amendment in order for it to be validly enacted.[17] The present arrangement in France is part of this tradition. The 1958 constitution assigns the task of determining the validity of legislation to a special body, the Constitutional Council. Because this institution is not part of the judiciary, it is possible to maintain that the traditional principle of the Revolution is still honored: there is no *judicial* review of laws in France, since the institution responsible for review is emphatically not part of the judiciary.

This interpretation of the principle of separation of powers, under which it is not for ordinary judges to assess the constitutionality of statutes, has been adopted in a more extreme form in France than in other European countries. But it has nevertheless played a role historically in many of them, in one form or another. The wave of codification that swept Europe during the nineteenth century brought with it the assumption that the judiciary was to play a modest part in the governmental scheme. As Allan-Randolph Brewer-Carías puts it, "The traditions of parliamentary supremacy, on the one hand, and of separation of powers on the other, have been so powerful in Europe that they have prevented ordinary judicial bodies from any possibility of judging the constitutionality of legislation." The constitutional court, in contrast, is created at a later stage, as a fourth branch of government that is separate from the judiciary and whose specific task is to scrutinize parliamentary enactments. It is erected on a different institutional level, "above the traditional horizontal separation of powers—equally above the legislature, the executive and

the courts—to ensure the supremacy of the Constitution with respect to them all."[18]

The establishment of a constitutional court, in short, seems to be the natural option in those countries that want to protect the constitution against the legislature but have traditionally entertained a relatively narrow conception of the role of (ordinary) judges under a system of separation of powers.

Now, if we move beyond this historical explanation and try to assess and justify the European model of constitutional review from a normative perspective, is there much we can get from the principle of separation of powers? In what follows, I argue that the answer is no.

THE LIMITED NORMATIVE RELEVANCE OF THE PRINCIPLE OF SEPARATION OF POWERS

Whether it was a good idea for European countries to create special constitutional courts to review the validity of laws is a question to be decided in a pragmatic spirit. The principle of separation of powers, as traditionally understood in Europe, should not distract us from a direct assessment of the advantages and disadvantages of these special institutions. That the French revolutionaries distrusted ordinary judges at the end of the eighteenth century is a historical fact that has great explanatory force in accounting for later events. But it is irrelevant when it comes to constructing a modern justification for the set of institutions that Europeans inherited from those revolutionaries.

Despite their important differences in several respects, ordinary courts and special constitutional tribunals are both courts: they are relatively independent from the political branches; they normally render their decisions in the context of procedures initiated by others; and they justify those decisions by reference to a set of legal norms that they are in charge of interpreting and enforcing. If a special tribunal is instrumentally better than the ordinary judiciary for checking the validity of legislative provisions, we have a good reason to set it up. But the principle of separation of powers does not by itself dictate that this is the right choice. Why should such a principle proscribe legislative review by ordinary courts but license (or even require) legislative review by special constitutional tribunals?[19]

It is interesting to note, by the way, that some of the special bodies

that were created as a result of the French revolutionary distrust of ordinary courts have undergone a process of "judicialization." Thus, the original notion that ordinary judges should not interpret the law but should instead ask the parliament to do so was abandoned in 1804, when the Napoleonic Code (Code civil des Français), was promulgated. The *référé législatif* was abolished, and from then on, judges would have to solve the interpretive problems on their own. As a result, the Court of Cassation became the institution in charge of interpreting statutes when they were ambiguous. It was thus transformed into a modern supreme court.[10] In the same vein, the Council of State and the administrative tribunals in charge of reviewing administrative decisions are now regarded as courts, albeit a special kind. Constitutional courts in Europe have undergone a similar process of judicialization in many countries: they are strongly linked to the regular courts and view themselves as part of the judiciary, broadly conceived. Whether this is a development to be celebrated or, on the contrary, criticized is a question to be considered in an instrumental spirit: we have to examine how well the institutions perform their functions in their new forms. Discussing the issue in light of the principle of separation of powers is not a fruitful strategy.

The principle of separation of powers is also unhelpful when it comes to more specific matters. For example, at what stage should constitutional review of a statute take place—before it is promulgated, or afterward? Both a priori and a posteriori review have their own advantages and disadvantages. It is hard to see, however, what help we can get from the notion of separation of powers to start answering this question. Gustavo Zagrebelsky, for instance, notes that a priori review by the French Constitutional Council is in keeping with the classic understanding of the principle of separation of powers that has prevailed in France, under which laws should be immune from judicial review. Since the constitutional court scrutinizes the laws *before* they are promulgated, that classic understanding can be maintained.[11] (Zagrebelsky's comment, of course, referred to the system that existed in France until the recent reform of July 2008, which has introduced a posteriori review.) This classic understanding, however, seems a bit too formalistic. Even if a statute has not yet been promulgated when the court ascertains its constitutionality, the parliamentary majority has already expressed its will, and this is the key fact. It is not at all obvious why, given the principles of separation of powers

and parliamentary sovereignty, constitutional review by a court should be fine if it takes place a priori but should be condemned if it occurs a posteriori.

Or consider the question whether courts in charge of constitutional review should formally repeal statutes or should instead merely disregard them for purposes of deciding a specific case. This is again a technical question, the answer to which should not depend on a particular understanding of separation of powers. In this connection, there has been too much discussion, of a fruitless kind, as to how to characterize the action of a constitutional court when it strikes down a statute. In part, this is because one of Hans Kelsen's more or less felicitous metaphors—the constitutional court as a "negative legislature"[12]—has been wrongly transformed into a touchstone of legitimacy (or illegitimacy). Let me explain.

As already noted, Kelsen used to say that what the court does when it invalidates a statute can be classified as part of the "legislative function."[13] The legislative function, he wrote, has two aspects: one is "positive," and the other is "negative." The positive function consists of enacting (or modifying) statutes, and it pertains to parliament exclusively. The negative function, instead, consists of repealing statutes. When the court examines a law and concludes that it offends the constitution, the court cancels that law with general effects. Since this outcome is similar to what parliament does when it repeals a law, Kelsen claimed that the "legislative power" (when it comes to repealing legal provisions) is now shared by two institutions: parliament and the court.

To a certain extent, this is a verbal pirouette, however. We should not take Kelsen's metaphor too seriously when defending or attacking the idea of setting up a constitutional court with the power to formally eliminate statutes. First, Kelsen himself was aware of the limited sense in which we can say that the constitutional court exercises a "legislative" function. We can analogize the court with the legislature only if we focus on the effects of the court's decisions: they are similar to the effects that the legislature produces when it repeals a statute. If we focus on the grounds of the court's decisions, however, there is a crucial difference between the two institutions. Whereas a parliament is free to act as it wills, within the limits prescribed by the constitution, the constitutional court is not. Whereas the parliament can freely repeal a statute, for any reason whatsoever, the court can invalidate a statute only if it concludes

that it is unconstitutional. Kelsen himself regarded the court's function as "jurisdictional" when seen from this perspective. He acknowledged that the court enjoys some degree of discretion when it interprets the constitution, but he believed that what the court does, basically, is enforce the constitution. From this perspective, it is not really a "legislature," he asserted, but a "jurisdictional" body.[23]

Second, the opposition between the European and the American models, though relevant in various aspects, is not as categorical as the metaphor of a "negative legislature" seems to imply. It is true that (normally) constitutional courts in Europe can formally repeal a given statute, whereas American courts simply disregard it for purposes of deciding a specific controversy. Yet the impact of the decisions of the courts in the United States is not confined to the particular cases: they establish binding precedents for the future. The enforcement of statutes gets blocked as a result of the body of precedents laid down by such courts. In this regard, the judiciary in the United States acts as a "negative legislature" too.

So to say that a constitutional court of the Kelsenian type is a "negative legislature" is simply to use a metaphor of limited value. This label tells us nothing interesting about the legitimacy of the institution. It may have been an excellent idea for European countries to create such a court and give it the power to formally strike down statutes. The fact that it can be conceived as a "negative legislature," however, adds no value, even if this image seems to better fit a particular conception of separation of powers inherited from the past—under which "judicial" review was to be excluded.

And the opposite is also true, of course: the fact that the constitutional court can be said to be a "negative legislature" in a metaphorical sense should attract no special objection in the name of separation of powers. If a constitutional court is the right institution to establish for purposes of checking the validity of parliamentary enactments, we should not be worried about the fact that it could be classified as a "negative legislature." At the beginning of the twentieth century, for example, there was an important scholarly debate in France about the introduction of an American, decentralized, model of judicial review. Some prominent academic figures, working against the historical currents in France, advocated that model and condemned the idea of a special constitutional court.[24] Again, the principle of separation of powers occupied center stage. Interestingly,

new implications were drawn from this principle, implications opposite to those that had been traditionally embraced in France. Some scholars, indeed, argued that constitutional review is perfectly acceptable when it is decentralized and concrete. It is legitimate, they claimed, for courts to be authorized to set aside statutes in particular cases (*refus d'application*), but it is not legitimate for a court to be empowered to formally repeal statutes (*annulation*). The former activity, they asserted, is of a judicial nature and thus acceptable under the principle of separation of powers, but the latter is not: it is a legislative function.

This thesis was clearly misguided, as Charles Eisenmann argued in the 1920s after visiting Vienna as a young student to write a doctoral dissertation (under Kelsen's supervision) on the new constitutional court in Austria. Eisenmann reasoned, quite rightly, that the choice between formal invalidation of a statute, on the one hand, and concrete nonapplication of a statute, on the other, is a technical question that cannot be decided on the basis of the principle of separation of powers. The difference has some relevance, but it does not amount to a categorical distinction between a "legislative" function and a "judicial" one.[25] We cannot automatically claim that if a given institution strikes down statutes, it is really a "legislative" body, whereas if it merely sets them aside for purposes of resolving disputes, it acts as a real "court." What matters is the sort of grounds—political or legal—on which the institution rests its decisions.

In sum, the principle of separation of powers and the metaphors it has sometimes generated are of no real value when it comes to justifying institutional choices of the kind we have examined. The historical understanding of this principle in Europe is certainly important in explaining the rise of special bodies like constitutional courts, but it gives us no justificatory reasons for their existence and for the particular details of their design. We should transcend historical inertia and judge institutional arrangements in a pragmatic spirit, in light of the ultimate goals that we seek and in light of other values that may operate as constraints.

In this pragmatic spirit, for example, Kelsen believed that, quite apart from any talk about separation of powers, there is an important consideration that speaks in favor of a centralized model of constitutional review: the need to protect legal certainty. As I explain in the next chapter, there is some truth to this argument, but it needs to be properly qualified.

CHAPTER THREE

A Traditional Justification

LEGAL CERTAINTY

ALL LEGAL SYSTEMS MUST try to satisfy the value of legal certainty to a sufficient extent. Both citizens and public officials need to be relatively sure what the law is. If a system of constitutional review of legislation is set up, it is important to design it in such a way that legal certainty is not impaired. Hans Kelsen, and others after him, have argued that the centralized model is much better in this respect. To what extent is this so? In the United States, for example, judicial review is decentralized, yet legal certainty seems to be sufficiently preserved. It is true that different lower courts reach opposite conclusions in many constitutional controversies, but as cases get litigated to the Supreme Court, precedents are established and uniformity is achieved. Is there any reason such an arrangement would not be feasible in continental Europe? Are there any features of the civil-law tradition that conspire against the introduction of an American-type decentralized system? Is centralization of legislative review really necessary to protect legal certainty?

THE CONSTRAINTS OF THE CIVIL-LAW TRADITION

It is often argued that it is not possible to adopt a decentralized system of judicial review in the European countries that belong to the civil-law family. Two main reasons are offered to support this claim.[1]

First, it is noted, quite rightly, that the judiciary in those countries

is organized differently than it is in common-law jurisdictions: courts are specialized in different areas of the law, and there is more than one supreme court sitting at the apex. Typically, there is a division of labor between two supreme courts, one dealing with ordinary law (private and criminal law, basically) and the other with administrative law.[2] Under these circumstances, it is contended, a decentralized system of judicial review would not work well: a statute could be held constitutional by the courts that are grouped under one supreme court and unconstitutional by the others. As Kelsen wrote, referring to the situation that existed in 1920, "It must be [taken into account] that in Austria as well as in many other countries of the European continent there were other courts besides the ordinary courts, especially administrative courts which occasionally had to apply the same statutes as the ordinary courts. Hence a contradiction between administrative courts and ordinary courts was not at all precluded."[3] A decentralized system can be implemented, it seems, only if the judiciary is unified.[4]

There is a problem here, no doubt, but it should not be too difficult to come up with a solution for it: a special body could be assigned the task of settling the disagreements between the supreme courts. In Greece, for example, the Special Highest Court is in charge of resolving conflicts that arise between the various supreme courts with respect to the constitutionality of statutes.[5] Of course, some institutional inertia has to be overcome to establish such a new body, but this is nothing compared with the creation of a constitutional court.

The second and more important reason that is often given against the introduction of the diffuse model of constitutional review refers to the absence of the doctrine of precedent in the civil-law tradition. The rulings of the highest courts interpreting and applying the law are not binding on lower courts. The latter are legally entitled to deviate from those rulings if they disagree with them. Consequently, as Mauro Cappelletti argues, "since the principle of stare decisis is foreign to civil law judges, a system which allowed each judge to decide on the constitutionality of statutes could result in a law being disregarded as unconstitutional by some judges, while being held constitutional and applied by others."[6] Even if the supreme court ruled on the matter, it would have no authority to bind lower courts. Kelsen wrote that this was "the most important fact" that explained the preference for a centralized model in Austria.[7]

Now, it is true that in many European countries, the official understanding is that lower-court judges are under no duty to follow the doctrines established by the supreme court. Every judge is "independent": judges are bound by the law, but not by the supreme court's interpretation of the law. To a large extent, this conception of judicial independence is a consequence of the legal philosophy that inspired the French Revolution. As I mentioned earlier, the French revolutionaries thought it possible to reduce the law to a body of coherent, complete, and specific legislation so that the task of judges would be utterly mechanical. In that scenario, precedents would not be needed. This conception, however, makes no sense. Experience and mature reflection soon made it clear that such aspirations are impossible to fulfill. Inevitably, the law exhibits ambiguities, gaps, and contradictions, and a supreme court has to unify the law's interpretation and application. Legal certainty would be destroyed if lower-court judges felt completely free to disregard the case law generated by the highest courts.

Actually, lower courts in civil-law countries tend to respect the existing case law in practice, even if they are not officially bound by it.[9] Judicial convergence is a universally felt need in any modern rational legal system—it is not idiosyncratic to the common-law world. But then why isn't the doctrine of precedent officially recognized in many civil-law countries? To a large extent, this is because judicial compliance with precedents can be achieved in other ways. In some countries, for example, the promotion of judges to the higher courts is decided, at least in part, by the supreme courts or by institutions that are close to them. As Mirjan Damaška explains, if judges want to be promoted, they had better be respectful of what their senior colleagues sitting on the highest courts have held in their past decisions.[9] In addition, the highest courts can regularly quash the decisions of lower courts that deviate from existing precedents. Civil-law countries tend to have a "hierarchical" system in which a substantial portion of lower-court judgments are reexamined by the supreme courts, which lack the power to select the cases they will hear, whereas common-law countries tend to have a "coordinate" system under which complaints that reach the top of the judicial pyramid are exceptional.[10] In such a hierarchical context, it has not been necessary in civil-law countries to insist on the binding character of precedents. In common-law countries, in contrast, it has been imperative to do so. As

Mirjan Damaška puts it, "A judicial organization composed of loosely hierarchical judges may require a doctrine of binding precedent as an internal ideological stabilizer."[11]

There is thus a certain tension between the official theory in the civil law and the actual practice of courts: precedents are not a "source of law," but judges tend to follow them. In some European countries, moreover, there is an increasing willingness to accept the idea that precedents established by the highest courts are indeed formally binding.[12] More and more scholars, lawyers, and judges believe that the role of precedents has to be officially acknowledged in a more transparent way if legal certainty is to be protected in highly complex legal systems. Even if precedents are not a genuine "source of law," their authority vis-à-vis lower courts should be officially recognized. The Portuguese Constitutional Court, for example, has held that although the Supreme Court of Justice does not create general rules for citizens to obey, it does furnish doctrines that other judges may be legally required to follow—judicial independence notwithstanding.[13]

The upshot of all of this is that it is not impossible for civil-law countries to adopt a decentralized (American) system of judicial review. Legal certainty will not collapse, for the highest courts will determine whether statutes are constitutional and lower courts will tend to comply with those rulings. Allan-Randolph Brewer-Carías, for instance, explains that the American model of judicial review has been successfully implemented in some civil-law countries, such as Argentina, Mexico, Greece, Japan, and Switzerland.[14]

A persuasive defense of the centralized model in the name of legal certainty, therefore, should acknowledge that we are dealing with a question of degree. The civil-law tradition is compatible with a diffuse system of judicial review—legal certainty will not be in ruins. Legal certainty can be more or less strongly cherished, however. In this regard, perhaps the civil-law tradition has given special weight to it.[15] If the protection of legal certainty is to be maximized, the centralized model may be preferable. By establishing a constitutional court that can be reached as soon as a statute raises constitutional problems, the centralized model safeguards legal certainty in a very straightforward manner. The sooner the constitutional court speaks, the more quickly any legal doubts will be dispelled.

The constitutional court's decisions striking down a statute, moreover,

have general effects. The procedure of review may be abstract or concrete, but the court will typically eliminate the statute from the legal system if it concludes that it is unconstitutional. The statute will be "written off the books."[9] The court, therefore, will not contradict itself in the future in connection with that particular law. Since the statute will have formally disappeared from the legal system, the court will not have the chance to review it again.[10]

Furthermore, the constitutional court, if properly designed, can devote all or an important part of its time and energy to the task of legislative review. Thus liberated from the burdens of ordinary adjudication, it is in a good position to construct a consistent jurisprudence in the field of constitutional review of statutes. The supreme courts in many European countries, in contrast, are often overwhelmed with cases and run the risk, consequently, of contradicting themselves.[11]

For these reasons, Kelsen was right in linking the centralized model to legal certainty. Although a diffuse system of judicial review could also work in civil-law countries, it would be less efficient than the centralized alternative.

IS LEGAL CERTAINTY THE OVERRIDING VALUE?

We should not accept all the particular techniques that Kelsen advocated in order to preserve legal certainty, however. Some of them have been embraced in several European countries, but others have been rejected, and rightly so, to accommodate other interests.

Kelsen, for example, was sympathetic to the possibility of setting a deadline for a statute to be brought to the constitutional court. Once the deadline had passed, the relevant statute could no longer be attacked. In this way, there would be a high level of certainty in the system.[12] The Czechoslovaks, for example, established such a deadline (of three years) when they created their constitutional court in 1920.[13] And the French followed a strategy that was even more radical until they changed the system in 2008: laws could be challenged only before they were promulgated (a priori review).

An important price is being paid under such an arrangement, however, for it usually takes some time for a law to reveal all its constitutional defects. If there is a deadline that must be complied with, a law will remain secure in the system if it is not initially challenged, despite the

constitutional shortcomings that are later discovered. For this reason, many European countries have rejected preventive (a priori) review, and others have embraced it but only in combination with a posteriori review.[14] Legal certainty is not the overriding value they seek to serve.

Similarly, Kelsen rejected giving retroactive effect to the decisions of the constitutional court striking down statutes. The cases that were decided in the past, in conformity with the relevant statute, should not be reopened, he argued, in the name of legal certainty. Only future cases should benefit from a declaration of unconstitutionality.[15]

Constitutional courts in Europe, however, have evolved toward a flexible jurisprudence on this issue. Apart from the fact that equality under the law is affected when the court's decision is not retroactive, the injustice of maintaining the past effects of an unconstitutional statute may sometimes clearly outweigh the costs associated with disrupting past legal expectations. It is necessary, moreover, to reward the plaintiff who brings a constitutional complaint and to encourage ordinary judges to make applications to the constitutional court.[16] Most constitutional courts in Europe, therefore, think that pragmatic balancing is inevitable.[17]

Kelsen, moreover, maintained that the constitutional court should have the authority to postpone the effects of its decisions declaring a law unconstitutional. This would give the parliament enough time to enact a revised statute and prevent a "gap" in the legal system, which might create legal uncertainty. This technique was introduced in Austria in 1920 and has been accepted in other countries as well.[18]

The disadvantage of this technique is that a statute can be maintained in the legal system for a certain period of time despite the fact that it has been declared unconstitutional. This result may be more or less acceptable depending on the seriousness of the constitutional vice that the court has found, on the one hand, and the seriousness of the consequences that would be caused if a legal gap emerged, on the other. Some amount of balancing and flexibility is advisable. Legal certainty is not the only consideration.

Finally, Kelsen went so far in his desire to protect legal certainty that he also favored introducing the following mechanism, which seems to be the legal equivalent of the resurrection of the dead in theological thought: if a law is invalidated by the constitutional court, the legal provisions that were rescinded by that law become effective again (unless the judgment

pronounces otherwise).[26] This technique guarantees that no legal gap will appear in the system after the court's decision. Such a gap would be "very undesirable," Kelsen wrote.[27]

The drawback of this solution (as Kelsen acknowledged) is that the resurrected statute may be an old statute that had been repealed a long time ago.[28] Some countries in Europe have introduced this mechanism, but with flexibility. The Portuguese Constitution, for example, explicitly provides that a declaration of unconstitutionality of a law shall cause the revalidation of the earlier laws. It empowers the court, however, to restrict this effect for "reasons of fairness or an exceptionally important public interest."[29] Other considerations, therefore, must be taken into account. Legal certainty is not the only value.

CONCLUSION

We find in Kelsen's work a plausible reason to favor the centralized model of constitutional review. There is indeed a relatively strong link between centralization and the protection of legal certainty. Though legal certainty would not collapse in a decentralized system, even if implemented in civil-law countries, there is no doubt that by concentrating review in a single court, we can secure legal certainty in a more efficient way. Some of the additional techniques that Kelsen advocated, however, have been rejected in various countries or have been accepted only in a qualified manner. In this way, the value of legal certainty has been partially sacrificed to other considerations, and rightly so.

The task, now, is to explore the advantages of the European model from a completely different normative angle. Let us go to the very foundations of constitutional review: Why do we want to subject parliamentary acts to some kind of judicial review, to begin with? What benefits do we expect? In particular, what entitles us to think that fundamental rights will be better safeguarded in this way? Are special constitutional tribunals more promising candidates than ordinary courts when it comes to legislative review? Legal certainty is simply a value that operates as a constraint. A political community establishes judicial review of legislation for other reasons. In light of these other reasons, what are the potential strengths of the European model?

PART TWO EXPLORING THE ADVANTAGES OF CONSTITUTIONAL COURTS