latter. Supreme Court Justices have a natural, and destructive, tendency to iron out the complexities in their role by conceiving of constitutional interpretation as a technical legal exercise. That is, after all, what lawyers do best, and people like to exaggerate the importance of the things they do well."[49]

It seems reasonable to predict that, other things being equal, if a constitutional tribunal were introduced in the United States with the explicit function of determining the constitutionality of federal legislation, the tendencies that these scholars have identified would be weaker. The positivist source of that court's legitimacy would be clear. The court would not feel a strong need to have jurisdiction over nonconstitutional cases (Posner); it would probably be less pressed by restrictive theories of interpretation, such as literalism and originalism (Neuborne); it would tend to discuss moral reasons more directly (Waldron); and it would not insist so much on legal technique (Eisgruber). It would not completely detach itself from ordinary legal discourse, of course, but the distance in style would be larger than it currently is. The increased relative autonomy of constitutional discourse would manifest itself in different ways than it does in continental Europe. After all, the common law is different from the civil law—it has generated a different, less formalistic style of judicial reasoning, and it has traditionally permitted the publication of dissenting opinions. Still, a more pronounced contrast of style might emerge between constitutional discourse and ordinary legal discourse in some respects, like those commented upon by the scholars just mentioned. Arguably, "this would improve the conditions for processes of democratic deliberation and debate about constitutional issues," as Christopher Zurn notes, for "there would be less confusion between constitutional issues and the technical legalisms they often come wrapped within in diffuse systems of constitutional review."[50]

CHAPTER SIX

The Structure of the Constitutional Conversation

SO FAR, I HAVE SUGGESTED some reasons why a constitutional court is better equipped than ordinary courts in civil-law countries to interpret the abstract principles of political morality that the constitution expresses. In this chapter I wish to examine the forms of the constitutional conversation. What is the court asked to focus on? Who can have access to it? Who defends the position of the government? What kind of review (concrete or abstract) can the court exercise? As I argue, various features of the European model help enhance the public visibility of constitutional courts, as well as their impact on political debates.

A CONSTITUTIONAL CONVERSATION THAT FOCUSES ON WHAT PARLIAMENT HAS DECIDED

Legislative review is a major task (sometimes the only task) that constitutional courts perform. It is this function that justifies their existence as special institutions. This is in keeping with one of the basic assumptions on which the European model rests: statutes have a special democratic dignity because of their parliamentary source.

In a parliamentary system, the legislative body is deemed to be the most representative political institution since its members are directly elected by the people, whereas the officials who occupy the other branches of government are not, as a general rule. In particular, the prime minister,

who is the head of the executive branch, is dependent on the support of the parliament. Most Western European countries follow this pattern, though in some countries there is also a popularly elected president. Except in France, however, the really important figure in the executive branch is the prime minister supported by the parliament, not the president (where this institution exists).[1]

The centrality of parliament is a qualified one, to be sure. First, in mass democracies that are structured around political parties, the prime minister enjoys a more direct democratic legitimacy than the system formally acknowledges. Formally, the prime minister governs because he or she is supported by the majority in the legislative assembly. As a matter of fact, however, the prime minister governs, to a large extent, because he or she "won the elections." When citizens cast their vote in favor of a particular member of parliament (or list of MPs), they have in mind the different candidates for the prime ministership.

Second, most statutes originate in legislative proposals made by the executive. The parliamentary majority will usually support those proposals, with minor changes. The opposition will hardly ever persuade a sufficient number of members of the majority to break party discipline and change their minds. The normal scenario is for the executive to enjoy stable parliamentary support, through a party or coalition of parties that is rather disciplined. This normal scenario is altered only when there is a crisis in the governing coalition or within the majority party. In such circumstances, some solution or other can overcome the impasse: typically, the prime minister can be removed by the parliament. In some countries, the parliament can also be dissolved by the prime minister with a call for new elections.

As Alec Stone Sweet explains, "Compared with presidential systems (like the American), the degree of centralized control in European parliamentary systems is generally quite high. The rise of prime ministerial (or cabinet) government—reinforced by relatively strict party discipline within parliament, and anchored by relatively stable party systems outside it—has come at the expense of the legislature."[2] Parliaments are thus "arena" legislatures rather than "transformative" legislatures: they tend to ratify the policy decisions made elsewhere. The situation, however, varies from country to country in terms of the number of effective veto players that can oblige the executive branch to reconsider its original projects.

Thus, the existence of a powerful second chamber in the parliament can have a moderating effect on governmental programs. In Germany and Italy, for example, the political process is less centralized than in Spain and France, since the senate is more powerful in the former countries than in the latter.[3]

But even if, as a matter of fact, the institutional centrality of the parliament is a rather qualified one in most European countries, the argument can still be made that statutes have a special dignity because of their source. The legislative process is more transparent than the processes through which other legal provisions, such as administrative regulations, are issued. The tension between the governing majority and the parliamentary opposition, which is an important factor to attract public debates, is more visible when legislative measures are discussed in the parliament than when other norms and acts are approved by the executive branch. Statutes enacted through a procedure of this sort deserve special consideration from a democratic perspective.

The European model of judicial review typically reacts to the higher democratic quality of statutes by establishing a special court as the only institution that can pass judgment on their constitutionality. The parliament is thus granted a "jurisdictional privilege": only the constitutional tribunal, not ordinary judges, can make the delicate decision to strike down one of the parliament's normative products. As Gustavo Zagrebelsky, a former president of the Italian Constitutional Court, explains, the current systems in Europe approach the foundational American idea that legislation is not the only source of rights: fundamental rights announced in the constitution preexist ordinary legislation. Still, he argues, the centrality of legislation in the European tradition is preserved to a certain extent. One of its manifestations is the jurisdictional privilege: the legislature is entitled to have its decisions scrutinized by a special court.[4]

European countries differ, however, as to whether this privilege must be extended to the statutes that were enacted *before* the constitution entered into force. As was mentioned in chapter 1, the constitutional courts in some countries have the sole power to check those statutes, whereas in other countries all courts share that responsibility. The democratic case for the privilege seems weaker when applied to the old laws. Legal certainty, however, argues in its favor.[5]

In any case, the fact that the constitutional court focuses on legislation,

especially if recently enacted, helps engage the interest of political parties and the general public. Statutes are relatively visible given the parliamentary procedure through which they are passed. Moreover, they tend to express key policy choices, for they usually prevail over other norms in the legal system (except for the constitution). A court that devotes an important part of its time and energy to checking the validity of statutes is thus likely to attract the attention of politicians and the citizenry.

In addition, the fact that the court can strike down laws—and not simply set them aside in a particular case—increases its public visibility. There is a deep sense of drama when someone challenges a law: everybody is aware of the enormous impact that the court's decision can potentially have. In common-law countries, of course, the presence of a strong doctrine of precedent can produce similar results. The U.S. Supreme Court, for instance, attracts lots of public attention given the force of its holdings, which transcend the disposition of the particular dispute. In civil-law countries, in contrast, only a decision by the constitutional court overturning a statute can produce legal consequences of similar import.

The European model has several shortcomings, however. First, the fact that only the constitutional court can judge the validity of parliamentary enactments makes it more difficult for constitutional issues to "percolate" in lower courts until they are finally settled. In the United States, for example, the public receives a plurality of points of view from different lower courts, all of them ruling on matters of constitutional law, until the Supreme Court finally speaks to the issue. The conversation thus develops over a longer period of time. Lawyers can refine and improve their arguments as new occasions to examine the same question present themselves. The discussion remains open until the Supreme Court intervenes. In contrast, the time for debate is shortened under the European model, for only the constitutional court has the authority to pass judgment on statutes. Ordinary judges have only a limited and preliminary role: they can certify questions to the court, thus preparing the argumentative terrain a little bit.[6]

From this perspective, there is a dialogic disadvantage to a priori review, especially if it is the only kind of review the court can engage in (as was the case in France until the 2008 reform). If the court has to speak at a relatively early stage, soon after the statute is enacted, no other judicial voice is heard before the court's decision is handed down. In France, this

shortcoming has traditionally been offset to a certain extent by the fact that the Council of State, in its capacity as an advisory body, issues reports on the legislation that the executive initiates.[7] The Council of State has very often voiced reservations about the constitutionality of certain bills, and participants in the debates in the National Assembly and the Senate have taken these reservations into account.[8] The Constitutional Council benefits from this previous discussion, of course. There is no doubt, however, that by permitting ordinary judges to certify questions to the Constitutional Council, the 2008 reform has facilitated the emergence of a richer constitutional conversation in France.

A second potential weakness of the European model is tied to the crisis of parliamentary legislation stemming from the rise of the "administrative state." There is an increasing tendency in many fields for statutes to delegate regulatory powers to executive and administrative bodies. Parliaments tend to legislate in more open-ended terms, for circumstances change very fast and it is increasingly difficult to generate consensus around clear statutory provisions. Important constitutional issues are likely to arise, therefore, at the executive regulatory level. If the legal provisions that the government issues are accorded the "force of statute" (as is normally the case with emergency decrees and so-called delegated legislation), the constitutional court is usually given jurisdiction to determine their validity. But if the government issues administrative regulations that are awarded a lower rank than statutes in the legal hierarchy, the constitutional courts in many countries have no say at all—or only a limited say. Ordinary courts are instead relied upon.[9]

This relates to a final problem: statutes may be unimpeachable from a constitutional standpoint if they are correctly interpreted and applied. Depending on the way statutes are enforced, a fundamental right may or may not be violated, for example. If the court has no jurisdiction to review administrative or judicial decisions, it is then unable to speak to interesting constitutional issues that may arise at the enforcement and adjudicatory levels. As Francisco Rubio Llorente, a former vice president of the Spanish Constitutional Court, contends, the court cannot fully guarantee constitutional values if its only target is legislation.[10] In this regard, those countries that allow individuals to file constitutional complaints (Germany, Spain, Austria) or to appeal judicial decisions on constitutional matters (Portugal) have an advantage over those that do not (France,

Italy, Belgium, Luxembourg).[11] The problem, as previously noted, is that constitutional courts may be overloaded with appeals and complaints of this sort unless they are granted ample liberty to select the cases that are truly important from a constitutional perspective.

Despite these limitations, the basic assumption upon which the European model rests seems plausible, at least given the traditions of parliamentary democracy. The constitutional conversation should be strongly linked to the controversial decisions that the parliament has expressed in the form of statutes. Accordingly, a major task of the court should be legislative review.

STARTING THE CONVERSATION: THE ROLE OF PUBLIC INSTITUTIONS AND PRIVATE INDIVIDUALS AS CHALLENGERS

Now, who has access to the court to attack the validity of statutes? One of the typical characteristics of the European model is that public institutions—usually of a political character—are granted access through the "constitutional challenges" mechanism. Within the group of Western European countries we are examining, only Luxembourg lacks this institutional device. In Central and Eastern Europe, all countries have included it.[12]

There are good reasons to permit public institutions to initiate constitutional litigation. As Hans Kelsen reasoned, the interest in protecting the constitution against the legislature is a public interest, not merely a private one. It seems reasonable, therefore, to give standing to such entities. Sometimes individuals are so lightly harmed in their own immediate interests that they have no incentive to launch a lawsuit—unless devices such as class actions are adopted. If the general rules on standing are rather strict, moreover, it may sometimes be difficult to find an individual that is in the right position to bring an action challenging a law. Public entities may be needed to fill in these gaps.[13] One could say that in the same way that there is a public interest in discovering those who are responsible for criminal activity and taking action against them, there is a similar interest in discovering and challenging unconstitutional statutes. For these purposes, Kelsen suggested creating the office of a special prosecutor whose job would be to initiate the process of legislative review.[14]

We can reinforce this Kelsenian idea from a different angle. We can

argue that the political community as a whole should be interested in discussing whether legislation is constitutional. If so, the process of judicial review should be opened not only to those individuals (or groups) who are personally affected in a more immediate manner but to other players as well.

One of the relatively familiar arrangements that we find in many European countries is that the parliamentary opposition is granted the power to challenge legislation in the abstract.[15] Thus, in Austria, France, Germany, Portugal, and Spain, a qualified minority of members of the parliament are entitled to attack statutes before the constitutional court.[16] In France, in particular, these actions by the opposition are central to the system: in practice, it is the opposition that brings abstract actions against parliamentary legislation.[17]

One of the likely consequences of conferring the power of referral to a qualified parliamentary minority is that more media attention is brought to the issues before the court. The political character of the plaintiffs draws the attention of the public. As Christopher Zurn puts it, an explicit signal is sent to the community "that what is at stake is a fundamental matter of constitutional law, and that there are reasonable disagreements about such fundamental matters that nevertheless need to be settled."[18] The visibility of the court is thus increased.

Another consequence that seems to derive from this procedure, according to many observers, is that the parliamentary debate becomes more constitutionalized. The different political groups in the legislative assembly use constitutional language more often and are sensitive to the court's case law. Alec Stone Sweet's comparative study of the French, Italian, Spanish, and German courts provides evidence to support this thesis.[19] In his view, "abstract review politics facilitate judicialization" of the legislative process.[20] The governmental majority is more willing to reconsider a proposal and negotiate with the opposition if the latter can credibly threaten a successful judicial challenge.

Apart from their impact on political negotiations, the availability of such challenges can improve the quality of legislative debates. Arguments concerning the validity of statutes will be made by the majority and the minority, and the fact that the minority can use its power to refer the issue to the court tends to increase the level of responsibility with which those arguments are made. As French scholars often observe, the existence

of the court helps ensure that the "axiom of André Laignel" is rejected. In 1982, Laignel addressed himself to the parliamentary minority and said, "Vous avez juridiquement tort parce que vous êtes politiquement minoritaire." (You are legally wrong because you are in the political minority.)[21] When it comes to constitutional questions, of course, the fact that one is in the minority does not mean that one is wrong. Conversely, the existence of the court prevents the opposition from being too frivolous when it raises objections. As Dominique Rousseau explains, referring to the French system, if the parliamentary opposition wants to be serious when it argues that a statute is unconstitutional, it is expected to bring an action to the constitutional court.[22]

If a challenge is filed, the majority and the minority will have a day in court, and the public will see who is right (according to the constitutional court). The minority will claim victory if the court rules that the statute is indeed unconstitutional. It can then argue that the majority should have been more attentive to the objections raised during the parliamentary debate. If, on the contrary, the court upholds the statute, the minority will suffer a defeat. In this regard, one of the advantages of the publication of dissenting opinions is that it gives the public some measure of the intellectual rigor of both the government and the challengers. If the court is unanimous in its decision to strike down a statute, the frivolity of the government will be obvious. Similarly, a court's unanimous decision to uphold the law will be taken as evidence that the plaintiffs were not sufficiently careful with their claims. A divided court, in contrast, makes the corresponding defeats less humiliating.

Moreover, if the parliamentary opposition chooses not to challenge the statute it has voted against and the court later declares it unconstitutional in a procedure triggered by others (by ordinary judges or by private individuals, for example), the opposition will have to share part of the blame: although it did vote against the statute, it will nevertheless be criticized for not having gone to the constitutional court to dispute its constitutionality.

Writing on the political impact of constitutional adjudication, Dieter Grimm, a former justice of the Federal Constitutional Court of Germany, asserts that one of its good consequences is that "political actors are forced to anticipate the opinion of the court in order to avoid a legal defeat. While arguments of political desirability or usefulness usually prevail in the

decision making process, they are now balanced by legal arguments."[23] Similarly, Erhard Blankenburg notes that in Germany, "governments as well as oppositions argue with what they suppose to be the interpretation of the Constitutional Court—governments sometimes anxiously, oppositions rather aggressively—both often in innovative ways."[24] Participants in the legislative debates are thus more careful when they define their positions and when they offer their justifications for them. What they decide to do, and what they say by way of justification at the legislative stage, will be subjected to public scrutiny once the constitutional court has spoken. There is reason to believe that this tendency is reinforced when a parliamentary minority has standing to bring actions against the laws passed by the majority.

Of course, for things to work this way, there must be a broad consensus among political actors and the general public that it is perfectly legitimate for the parliamentary opposition to initiate constitutional review. Sometimes such consensus is fragile, however. In Spain, for example, the governmental majority has sometimes resorted to democratic rhetoric to criticize the opposition for bringing a challenge. "The minority wants to get from the court what it has lost in the parliament" is not an uncommon remark aimed at discrediting the opposition. This, of course, is a misguided criticism. If the constitution places limits on ordinary legislation and entrusts the court with the power to interpret and enforce those limits, there is nothing particularly undemocratic about a parliamentary group having access to the court to review a law that raises constitutional doubts. In any case, if the public is critical of these types of actions, the parliamentary minority will tend to avoid them. This seems to be the situation in Portugal, for instance, where this type of procedure is rarely used, despite the fact that it only takes one tenth of the parliamentary deputies to initiate it.[25]

So far I have stressed the potential advantages in allowing public institutions to challenge statutes. Such institutions should not have a monopoly, however. Private individuals (as well as associations and groups) should also be accorded standing. There are two possible ways for individuals to trigger review within the European model. One is indirect: the "constitutional question" procedure that litigants can request ordinary judges to put in motion if they believe that the statute applicable to the particular

case violates the constitution. The other is direct: a constitutional complaint (used in Austria, Germany, and Spain) or a constitutional appeal (Portugal) or even an abstract challenge (Belgium and Hungary).

Until recently, France did not give individuals any kind of access to the Constitutional Council. As was already mentioned, the system was amended in July 2008 so that the ordinary judiciary can now certify questions to the court whenever fundamental rights and liberties seem to be transgressed by the applicable law. For these purposes, the relevant supreme court (the Court of Cassation or the Council of State, depending on the type of case) acts as a filter. This change is to be celebrated.[26] Under the earlier system, any agreement reached by the governmental majority and the parliamentary opposition that a particular statute would not be referred to the court meant that the statute was immune from future challenges—an objectionable result.[27]

There is a fairness argument that we should be sensitive to. A person who suffers the effects of a law should be entitled to call the government to account. The government should explain itself—it should put forth good enough reasons to justify its legislative choice given that harm. This fairness argument seems particularly powerful when a fundamental right is alleged to be violated. From an instrumental point of view, moreover, it is sensible to allow individuals and groups to challenge ordinary legislation: if they are harmed by a law, they have an incentive to look for the best arguments to mount an attack. More importantly, their intervention is necessary to compensate for the passivity of political institutions in some cases. It may happen, for example, that the latter do not realize the extent to which a law can negatively affect the rights and interests of certain minorities in society. It may also happen that it is unpopular to challenge particular types of statutes—those that protect national security, for example. For these and other reasons, the political players may fail to go to court. If individuals are not entitled to react in such cases, a possibly unconstitutional statute gets unduly immunized.[28]

Consider, for example, the 2004 French law banning conspicuous religious symbols from public schools.[29] That law, which seems to cover items such as head scarves for Muslim girls, yarmulkes for Jewish boys, turbans for Sikh boys, and large Christian crosses, is supposed to protect the principle of secularity (*laïcité*). It was enacted after an investigative committee established by the president in 2003—and headed by the ombudsman (Bernard Stasi)—issued a report recommending its passage. The Constitutional Council, however, had no chance to rule on its validity, since neither the majority nor the opposition in parliament filed an abstract challenge and the groups whose religious freedom was affected had no standing to bring an action. After the 2008 reform, fortunately, this law, as well as any other that is questioned by litigants on the grounds that it impinges upon fundamental rights and liberties, will be scrutinized by the Constitutional Council if the ordinary judge handling the case initiates the new "constitutional question" procedure introduced by the 2008 reform.

The experience in other countries suggests that individuals can enrich the court's agenda in desirable ways. As Gustavo Zagrebelsky observes, the "constitutional question" mechanism, through which ordinary judges can refer issues to the Italian Constitutional Court at the request of the individual litigants (as well as on the judges' own initiative), has created an attractive form of participation for cultural groups at the margins of mainstream political parties.[30] Similarly, the complaints procedure in Germany has been very popular and has helped attract the attention of citizens to fundamental rights. In 1983, for example, over one hundred people filed separate complaints against the Federal Census Act of 1983. These petitions resulted in one of the most important cases ever decided by the Federal Constitutional Court.[31] Similarly, the court in Spain struck down an important tax law on the grounds that it discriminated against married couples, at the initiative of a citizen who lodged a constitutional complaint. The political institutions that could have asked the court to review the law had been totally passive.[32]

DEFENDING STATUTES AGAINST CONSTITUTIONAL ATTACKS: THE RIGHT OF THE GOVERNMENTAL MAJORITY TO BE HEARD

Let us now examine the other side of the dispute: Who defends the statutes that are questioned before the constitutional court? One of the potential virtues of the European model is that it facilitates the right of the governmental majority to defend the constitutional legitimacy of the statute it has enacted. Whether it is the parliament or the executive (or both) that has the right to be heard by the court is of secondary importance in a parliamentary regime.[33] What is crucial is that before a decision

is finally made regarding the constitutionality of a statute, the court has heard the point of view of those who speak for the governmental majority. Their opinions are needed in order to get a balanced picture of the underlying problem. Their intervention, moreover, will help enhance the public visibility of the dispute. When a statute has been attacked on constitutional grounds, the public is eager to listen to the government's responses to the objections, especially if the parliamentary opposition is the challenger.

The government's intervention would not be easy to channel in civil-law countries if a decentralized system of judicial review were established. In many ordinary cases, the government is not a party to the proceedings. Ordinary courts would have to notify the parliament or the government every time a statute was questioned in a particular case. This would not be impossible, of course. In the United States, for example, courts must notify the U.S. attorney general (or the relevant state attorney general) if the constitutionality of an act of Congress (or a statute of that state) affecting the public interest becomes an issue in litigation involving private parties.[34] As was mentioned earlier, however, it is typical in civil-law countries for the courts of appeals and even the supreme courts to have an extremely heavy docket. The government would thus have to pay attention to too many cases. Centralizing constitutional review in a special court makes things easier: the government knows where it must concentrate its resources to justify its legislative choices.

The fact, moreover, that the court can strike down statutes enhances the quality of the legal arguments made by the government. Since the statute can be eliminated in a single procedure, there is an incentive for the government to turn to its most prestigious lawyers in order to come up with the best possible arguments to defend its position before the constitutional court. In the same way that centralization of judicial review can attract the best legal minds in the country to become members of the court, it can also attract the best lawyers when it comes to defending the claims of the governmental majority.

THE PRESENCE OF ABSTRACT REVIEW

Finally, we should inquire into the kind of review that the court is asked to exercise. As was already explained in chapter 1, constitutional courts typically have jurisdiction to review statutes in the abstract, that is, with no connection to a specific case. We find this feature in all the Western European countries under examination except Luxembourg, where only concrete review is available. Abstract review may be the only kind of review that is established (as in France, before the 2008 reform), or it may be combined with concrete review (as in Austria, Belgium, Germany, Italy, Portugal, Spain, and France after the 2008 reform). With respect to Central-Eastern Europe, all constitutional courts have been given abstract review powers, as was already mentioned.

Usually, abstract review is connected to procedures activated by public institutions, whereas concrete review is attached to procedures triggered by individuals (whether directly or indirectly). But the question of standing is different from the question whether review is abstract or concrete. Thus, individuals are allowed in some countries to file abstract challenges if they are personally affected by the pertinent law (as in Belgium) or, regardless of whether they are so affected, through an *actio popularis* (as in Hungary).[35]

There are some advantages, one can claim, to a system that includes abstract review. First, it makes it possible for the court to check statutes even when it is difficult to generate a specific case or controversy. Sometimes, when a case finally comes up to the court, it is too late: the statute has already produced most of its effects in an irreversible manner. Abstract review thus expands the scope of the court's intervention—and therefore its relevance in constitutional debates.[36]

Second, this type of review may enhance the court's impartiality. Different judges will decide constitutional issues differently, of course, depending on their moral and political conceptions. Abstract review, however, tends to place them away from the immediate interests of specific litigants—since abstract review is not attached to a particular case. In this sense, it provides a "veil of ignorance," to use the Rawlsian expression.[37] The risk of partiality is especially serious in those civil-law countries in which the doctrine of horizontal precedent has not been strongly developed.

Abstract review, however, is often criticized on several grounds. It is objected, for example, that relevant information about the practical impact of the statute at stake needs to be gathered before the court speaks. There is some merit to this criticism, but we should not exaggerate it. Abstract review does not mean that no knowledge about the world is considered. After all, the legislature discusses and enacts its statutes "in the abstract"

too, and there is no doubt that it can rely on an important body of empirical information to make decisions.[38] A constitutional court that examines a statute in the abstract can avail itself of a similar body of data.

Sometimes, moreover, nothing important is learned from the application of a statute in specific cases. Consider, for example, the question whether a criminal statute has a chilling effect on speech because it is too broad, or whether it is sufficiently precise to give fair warning to citizens about the conduct that is being prohibited, or whether it has been approved through the right constitutional procedures, or whether the matter regulated by it belongs to the sphere of competences of the governmental entity that has enacted it. Concrete review is not superior to abstract review in these sorts of cases in terms of the relevance of the information that can be obtained after enforcing the statute. That information can actually distract the courts. It is tempting to accept a criminal statute as valid, for example, when the person bringing the objection has committed what clearly counts as a horrible crime. That courts deciding concrete cases are often prepared to acquit on the basis of such constitutional grounds is to be applauded. But there is no doubt that things are easier when the problem is addressed in the abstract and at an early stage. In a procedure of a priori review, in which all these issues can be decided before the statute is promulgated, the constitutional court enjoys a privileged position in matters of this kind. Its being blind to the concrete cases is liberating.

It is true, however, that the rich variety of situations that arise in social life may have to be taken into account when a statute that covers them is to be measured against constitutional norms. A statute that criminalizes the consumption of illegal drugs, for example, may look constitutionally fine in the abstract, but its enforcement against those who use peyote in their religious ceremonies becomes troublesome. Similarly, a statute that criminalizes public nudity in front of children may be constitutionally acceptable as a general rule, but it runs into problems if it is to be applied to certain forms of artistic expression in the streets. Many examples can be given of statutes that need to be qualified when they are applied in specific situations. To the extent that this is so, it must be admitted that abstract review is epistemically inferior to more flexible concrete review. A court deciding in the abstract cannot anticipate the rich variety of cases a given statute will cover.

Another criticism that is often raised against abstract review is that the vivid circumstances of a specific case involving real people may be necessary to ensure that courts are properly sensitive to constitutional values. Judges may be more eager to recognize the fundamental rights of the accused, for example, when confronted with real-life situations. This is not a very powerful objection, however. There is some reason to doubt that courts will become more sensitive to rights through the concrete cases they decide. As Alec Stone Sweet and Martin Shapiro argue, for example, it is doubtful that the Supreme Court of the United States was moved to recognize the right of indigent criminal defendants to be provided with a lawyer when it learned about the situation of a particular defendant in *Gideon v. Wainwright*.[39] Rather, the Supreme Court chose that case precisely because it was already willing to announce the right.[40]

True, some cases are really extraordinary in terms of the dramatic circumstances in which individuals find themselves. Judges will be moved. It is not clear, however, that this is the ideal setting to interpret and elaborate constitutional principles. It may be difficult for the court to distance itself from those extraordinary cases and adopt a more systematic and nuanced view of the principles and interests at play. Certain aspects of a case may have an exaggerated impact on judges. Thus, speaking of the procedural protections that the U.S. Supreme Court granted welfare beneficiaries in *Goldberg v. Kelly*,[41] Owen Fiss insists that judges should not be carried away by their spontaneous and passionate reactions to the dramatic circumstances of a case. "Because it lays down a rule for a nation and invokes the authority of the Constitution, the Court necessarily must concern itself with the fate of millions of people, all of whom touch the welfare system in a myriad of ways: some on welfare, some wanting welfare, some being denied welfare, some dispensing welfare, some creating and administering welfare, some paying for it." Accordingly, Fiss argues, "the Court's perspective must be systematic, not anecdotal: The Court should focus not on the plight of four or five or even twenty families but should consider the welfare system as a whole—a complex network embracing millions of people and a host of bureaucratic and political institutions."[42]

Insofar as constitutional issues often require a systematic analysis of complex institutions and practices, it is not a bad idea to distance courts from specific and fragmentary stories when they have to determine the constitutionality of legislation.

Finally, abstract review can be criticized from another angle: the public is more likely to be interested in constitutional debates when there is a concrete, real case that sparks the controversy than when abstract questions are being considered. Concrete review is preferable from this perspective. In this regard, Alexis de Tocqueville's observation that judicial review in the United States tends to escape public notice is probably wrong as a description of current practices. He said that "when a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice." This is in contrast to what would have occurred, he wrote, if "the judge had been empowered to contest the law on the ground of theoretical generalities," which is what happens when a statute is challenged in the abstract.[43] On the contrary, the public will be more alert and engaged in the constitutional discussion if real-life stories illustrate the issues under examination. Judged from this standpoint, there is no doubt that abstract review has its limitations. It seems advisable, however, to use abstract review in connection with issues that deeply affect the private lives of individuals. The constitutional debates on abortion and euthanasia, for example, are already so complex, and give rise to such passionate reactions, that it may be better to discuss them in the abstract, without having to focus on the private drama of particular individuals.[44]

CHAPTER SEVEN

Overcoming Judicial Timidity

A CONSTITUTIONAL COURT, I contended in the previous chapter, performs its functions in a zone of high public visibility. I now want to claim that, despite this visibility, the court cannot be timid, in two senses. First, the court cannot shy away from constitutional issues; it has to confront them. Second, it is not easy for the court to be extremely deferential toward the legislature. A significant percentage of the laws that are challenged must be found to be totally or partially unconstitutional. Though many different factors can push judges in one direction or the other when it comes to how aggressively they exercise legislative review, some structural components of the European model operate as vectors of activism.

There are good reasons to celebrate this. A system of constitutional review is established to create a forum of principle where fundamental values are taken seriously. It would be unfortunate if the institutions in charge of review were so passive that their contribution to the protection of rights, and to ongoing public debates, were of marginal importance. We may want to subject those institutions to democratic checks (as I discuss in chapters 8 and 9), but we should encourage them to exercise their powers with some bite. The risk of timidity exists, however. Reviewing the validity of legislation means confronting the political branches, and this is always a delicate matter. The danger of passivism is especially serious in civil-law countries, which have inherited from the past a relatively narrow