ARTICLE

The European model of constitutional review of legislation: Toward decentralization?

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1. Introduction

Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is in contrast to the "American" model, whereby all courts have the authority to adjudicate constitutional issues in the course of deciding legal cases and controversies.[1]

The centralized model of constitutional review was born in Europe after World War I. Austria and Czechoslovakia in 1920, Liechtenstein in 1921, and Spain in 1931, were the first countries to adopt it. Hans Kelsen was the scholar who did the most to develop and popularize this model and defend it against the American alternative.[2] After World War II, the centralized model expanded to other countries; today it is the prevailing model in Europe, particularly among the member states of the European Union.

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[1] For a general view of this contrast, see Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., Columbia Univ. Press 1989). For a description of the systems of the different European countries, see DOMINIQUE ROUSSEAU, LA JUSTICE CONSTITUTIONNELLE EN EUROPE (Montchrestien 1998).

[2] On the historical origins of the European model of constitutional justice, see PEDRO CRUZ VILLALÓN, LA FORMACIÓN DEL SISTEMA EUROPEO DE CONTROL DE CONSTITUCIONALIDAD, 1918–1939 (Centro de Estudios Constitucionales 1987). Hans Kelsen's defense of the superiority of the centralized model can be found in Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942) [hereinafter *Comparative Study*].

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Of the fifteen countries that belonged to the European Union prior to its enlargement in 2004, eight have constitutional courts: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal, and Spain.

Of the remaining seven countries, only three follow the "American" model: Denmark, Sweden, and Finland. In practice, though, courts in these Nordic countries very rarely find a statute unconstitutional. In Denmark, it was not until 1999 that the Supreme Court rejected a politically important statute as being contrary to the Constitution. In Sweden and Finland, the constitutions establish the "clear mistake rule": only when the statute is unconstitutional beyond any reasonable doubt may a court set it aside for purposes of deciding the case.[3]

The other four countries follow neither the European nor the American model. Ireland and Greece have systems of constitutional review that cannot be easily classified. While Ireland has no constitutional court, the power of constitutional review is accorded only to certain courts within the ordinary judiciary (the High Court and the Supreme Court). The Supreme Court has the further authority to rule on the constitutionality of legislation before it is enacted, at the request of the president of the republic.[4] In Greece, all the courts have the authority to set aside legislation if they consider it unconstitutional.[5] But at the apex of the judicial system there is a Special Highest Court, a sort of constitutional court that resolves the conflicts that may arise among the ordinary supreme courts concerning the validity of a statute.[6]

The two remaining countries, the Netherlands and the United Kingdom, are exceptional in that they have no system of constitutional review of legislation. The Constitution of the Netherlands explicitly prohibits judges from setting aside legislation on constitutional grounds.[7] In the United Kingdom, judges also lack that capacity. The Human Rights Act, 1998, which came into force in October 2000, has empowered certain superior courts to declare a statute incompatible with a human right enumerated in the Act,[8] but such a judicial declaration does not mean that the statute is invalidated, or even set aside in the instant case. Parliament is expected to modify the statute that a court has found to be incompatible with a human right, but it may elect not to do so.[9]

[3] Swed. Const. chapter 11, art. 14; Fin. Const. § 106. On the system of constitutional review in the Nordic countries, see Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 Am. J. Comp. L. 345 (2000).

[4] Art. 34, Constitution of Ireland, 1937.

[5] GR.Const. art. 93, § 4.

[6] *Id.* art. 100, § 1.

[7] Neth. Const. art. 120.

[8] Human Rights Act, 1998, c. 42 (Eng.).

[9] *See* K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 Mod. L. Rev. 79, 92 (1999) (stating that the intention was that "Parliament should still hold the key").

The 2004 enlargement brings ten new countries into the European Union: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. All but Estonia have constitutional courts;[10] thus, seventeen out of twenty-five member states subscribe to the centralized model at present.[11]

However, there are forces that are propelling the European model toward decentralization. Ordinary courts are gaining new powers to check the validity of legislation. The decentralizing forces at work are both internal and external to the system, and while it may seem that they are at odds with the foundational values that led so many European countries to adopt a centralized model of constitutional review, I will argue that this is not so. Provided certain conditions are met, those values need not be undermined.

Inevitably, I will have to generalize to make my points. There are important variations within the "European" model, and many details will have to be condensed for purposes of argument. I will confine my general points, however, to the constitutional courts of Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal and Spain (the countries that belonged to the EU prior to the 2004 enlargement). In so doing, I hope to capture the structural features of the centralized model that are common to these countries, their primary reasons for having embraced the model, and the changes that are affecting them.

2. The structural features of the European model and their justification

The structural features I wish to highlight are *centralization* and *abstract review*.

First of all, centralization: only the constitutional court is empowered to hold that a statute is unconstitutional. We find this feature in the group of eight countries we are considering, with one exception: Portugal. The Portuguese Constitution has created a Constitutional Court to review legislation, but it has also allowed ordinary judges to set aside legislation on their own authority.[12]

The second feature is abstract review. The court may examine a statute in the abstract, and invalidate it with general effects (effects *erga omnes*) if it

[10] *See* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 253 n.7 (Univ. of Chicago Press 2000) (stating that "Estonians anticipated too few constitutional cases to justify the trouble and expense of establishing a separate tribunal"). In Estonia, the National Court is both the supreme court and the court in charge of constitutional review. ESTONIA CONST. art. 149, § 3.

[11] In the postcommunist European countries that are not part of the European Union, the centralized model is also absolutely dominant. *See* SCHWARTZ, *supra* note 10, at 22–48.

[12] PORT. CONST. art. 204.

contravenes the constitution. This possibility is established in all the countries of the group, with the exception of Luxembourg.[13]

There are basically two avenues by which the court can be reached in order to trigger constitutional review of legislation: "constitutional challenges" and "constitutional questions."

Constitutional challenges are typically brought by public institutions, such as the government, the ombudsman, the general prosecutor, a parliament, a qualified minority of the parliament, etc. Those challenges entail an abstract attack against the statute: there is no concrete case that triggers the procedure. Normally the challenge must be filed within a deadline after the official publication of the statute. In some countries, however, the statute may be attacked before its publication.[14]

[13] In Luxembourg, the Constitutional Court reviews statutes only in the context of constitutional questions raised by the ordinary judges. The decision of the Court binds the judge that raised the question, as well as the judges that may have to decide the concrete case on appeal, but the statute is not invalidated with general effects. *See* Loi portant organisation de la Cour Constitutionnelle, July 27, art. 15. It should also be mentioned that in Belgium, the Court can strike down a statute with general effects when it decides an abstract challenge. But, as in Luxembourg, when the Court reviews a statute in the context of a question raised by an ordinary judge, the statute is not expelled from the system. *See* Loi Speciale sur la Cour d'Arbitrage, Jan. 6, 1989, arts. 9, 10, 28. Finally, in Portugal there is abstract review, but the Constitutional Court can also declare that a statute is unconstitutional in a particular case. When that happens, the statute is not invalidated with general effects. However, if in three cases the Court has ruled that a particular statute is invalid, a procedure of abstract review will be initiated, normally at the request of the Attorney General, and the statute will finally be expelled from the system. Port. Const. art. 281, § 3.

[14] In Austria, abstract challenges may be filed by the federal government (against state statutes), a state government (against federal statutes), one-third of the House of Representatives or the Senate (against federal statutes), and one-third of a state parliament (against state statutes, if the state constitution so provides). *See* B-VG art. 140, § 1 (Austria). In Belgium, they can be filed by the federal, regional or communal governments, and by the presidents of the legislative assemblies at the request of two-thirds of their members. *See* Loi Speciale sur la Cour d'Arbitrage, art. 2. In France, the challenges can only be brought before the promulgation of the statute, by the president of the republic, the prime minister, the president of the National Assembly, the president of the Senate, sixty deputies or sixty senators. Fr. Const. art. 61. In Germany, they can be filed by the federal government, the state government, or one-third of the members of the house of representatives. GG art. 93, § 2 (F.R.G.). In Italy, challenges may be filed, on federalism grounds, by the state government (against a regional statute), and a regional government against a state statute or a statute of another region. Cost. art. 127 (Italy). In Portugal, challenges can be brought, both before and after promulgation of the statute. Preventive challenges may be filed (depending on the type of norm) by the president of the republic, the ministers of the republic (who are the representatives of the republic in the regions), the prime minister, and one-fifth of the members of the assembly of the republic. *See* Port. Const. art. 278. After promulgation of the statute, challenges can be filed by the president of the republic, the president of the assembly, the prime minister, the ombudsman, the attorney general, one-tenth of the members of the assembly, and (in connection to regional controversies), by the ministers of the republic, the regional legislative assemblies, the presidents of the latter, the presidents of the regional governments, or one-tenth of the members of a regional legislative assembly. *See id.* art. 281. In Spain, statutes may be challenged by the prime minister, the ombudsman, fifty deputies, fifty senators, the regional governments, and the

Constitutional questions, on the other hand, are raised by ordinary judges. When an ordinary judge has to decide a particular case, if she believes that the applicable statute is unconstitutional, or doubts its validity, she can refer the question to the constitutional court. The court will not decide the case, confining itself to a determination of the relevant statute's constitutionality.[15]

It should be noted that in some countries (Spain, Germany, and Austria) there is a third type of procedure, that of "constitutional complaint," which allows individuals to go before the constitutional court if they consider that their fundamental rights have been violated.[16] In most cases in which the complaint is justified, the violation rests on an incorrect interpretation of the relevant statute. However, if the statute itself is found to be at fault, the court will review the statute and pass on its constitutionality in the abstract (either in the same procedure or in a separate one).

Regardless of these variations, all but Portugal embrace this common feature: only the constitutional court can invalidate a statute on the grounds that it contradicts the constitution. If ordinary courts are given any responsibility, it is through the constitutional question procedure that allows them to refer statutes to the constitutional court. They act as "policemen" in that regard, but not as judges.[17] The reasons for this institutional design are examined below.

2.1. Legal certainty

An important reason traditionally given to justify the European model relates to the principle of legal certainty, which is highly valued in countries adhering to the civil law tradition.[18] (It would not be an exaggeration to say that Kelsen was virtually obsessed with this value—which figures so prominently in his writings—when he offered a justification for the model of constitutional review

regional parliaments. C.E. art. 162, § 1 (Spain). The only country that does not have this mechanism is Luxembourg. Additionally, it should be mentioned that in Austria, Belgium, and Germany, it is possible in some exceptional cases for an individual that is immediately and directly affected by a statute to attack it directly to the constitutional court, without having to wait for a concrete case to be brought before an ordinary judge.

[15] Constitutional questions exist in Austria (see B-VG art 89, § 2; 140, § 1 (Austria), Belgium (Belg. Const. art. 142, § 3), Germany (GG art. 100 (F.R.G.)), Italy (Legge Cost. 1/1948, Feb. 9, 1948, art. 1), Luxembourg (Lux. Const. art. 95ter), and Spain (C.E. art. 163 (Spain)). This mechanism does not exist in Portugal (where the judge can set aside the statute on his own authority) and in France (where statutes can only be reviewed before their promulgation).

[16] In Germany and Spain, litigants must (as a general rule) first exhaust all the remedies that are available within the judiciary; only then is their complaint admissible. In Austria, in contrast, the complaint is directly brought against administrative decisions.

[17] In France, they cannot act as policemen either: the mechanism of the constitutional question does not exist.

[18] On the weight of this principle in the civil law tradition, and some of its consequences, see John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America; ch. 5–9, 13 (Stanford Univ. Press 1985).

that Austria adopted in 1920). If all courts were authorized to review the constitutionality of legislation, a divergence of judgment would emerge among them as to the constitutionality of a particular statute. In the United States, this potential for interpretive plurality is neutralized by the doctrine of precedent, which makes the decisions that are rendered by the highest courts binding on the lower courts. But in many European countries of the civil law tradition this solution is not possible, both for structural and cultural reasons.[19]

The structural reasons stem from the organization of the judiciary. In most European countries, courts are classified by subject matter. For each major area of law, there are specialized courts headed by a supreme court. There are thus several supreme courts, but no single court to unify them. Each of the supreme courts, moreover, is composed of many judges who apportion its caseload among several panels. These supreme courts are not well placed to generate a consistent case law that resolves the interpretive conflicts that lower courts create.

The cultural reason militating against the American solution is attributable to the absence of a doctrine of precedent in the civil law tradition. Because precedents play no official role, or at most a very minor one, judges enjoy broad discretion not to follow the standards proffered by the highest courts. Dating from the process of codification that followed the French Revolution, the traditional assumption has been that legislation is sufficiently clear, coherent, and complete to make it unnecessary for courts to create precedents. The idea that the judge should confine himself to applying the relevant statute has been so dominant in the civil law tradition (in spite of all the evidence that suggests that legislation is not always so clear, coherent and complete) that there is little room for precedents to play a role.

Against this structural and cultural background, it makes sense to create a special court in charge of constitutional review of legislation in order to foster legal certainty. If review is centralized in a single court, the problem of the contradictions among courts is solved.[20]

The other feature of the European model—the abstract character of constitutional review—can also be linked to the value of legal certainty. If the constitutional court reviewed statutes as it decided concrete cases, and the consequence of finding a statute unconstitutional were simply its non-application to the instant case, the court might contradict itself. In the absence

[19] *See* Hans Kelsen, *Comparative Study, supra* note 2, at 186; Mauro Cappelletti, Judicial Review in the Contemporary World 55–60 (Bobbs-Merrill Co. Inc. 1971).

[20] However, ordinary judges may have different opinions about whether a statute needs to be referred to the constitutional court. The most efficient way to deal with this problem of divergence is the French one: establishing preventive review and requiring ordinary judges to enforce the statutes that have passed that constitutional filter, no matter what the ordinary judges may think about the statute. The Belgian solution is more moderate, and goes in the opposite direction: the highest courts are always required to send the questions when the issue of unconstitutionality arises. *See* Loi Speciale sur la Cour d'Arbitrage, art. 26.

of a strong doctrine of precedent, the court could give one opinion about the validity of a statute in one case and a different one in the next case. If constitutional review of legislation is not linked to a particular controversy, however, the risk of contradictions is drastically reduced.

This is clearly so when the court holds that a statute is unconstitutional. The effect of its decision is the formal expunction of the statute from the legal system: the statute is actually "written off the books" and may not be reviewed again. That is why Kelsen said that the court acts as a "negative legislature."[21] While a parliament's function is to introduce statutes into the legal system (as a positive legislature), the court's role is to expunge those that run counter to the constitution (as a negative legislature).[22]

It is true that in some countries, when the court declares a statute constitutional, it is still possible for that statute to be challenged by a new procedure. The constitutional court could reject a challenge to a statute in one instance, but an ordinary judge could raise another question concerning the same statute at a later date. However, even where it is possible to reopen the issue of a statute's constitutionality, the incidence of multiple review is very low. Generally, judges are not expected to raise a question when they know that the court has already held, in a decision with general effect, that the statute in question is valid.

Even in those countries that allow individuals to file constitutional complaints, the risk of contradictions is reduced. In some countries (Austria and Spain, for example), if the Court finds that the statute applied in the case that triggered the complaint is unconstitutional, it will initiate a special procedure to declare the invalidity of the statute. (In Austria, this procedure takes place before, while in Spain it takes place after, the Court has decided the complaint). In other countries, such as Germany, no such procedure is initiated, but the Court declares whether the statute is constitutional or not in the abstract and with general effect, even if its pronouncement figures in a decision that resolves the complaint.[23]

Belgium and Portugal are interesting in this regard. When the Belgian Court decides a question raised by an ordinary judge, its decision has no general effect. If it holds that the statute is unconstitutional, the statute is merely held inapplicable to the instant case. However, the ruling opens the possibility for an abstract challenge to be filed. Similarly, in Portugal, when the

[21] Kelsen, *Comparative Study, supra* note 2, at 187.

[22] Of course, if constitutional review takes place a priori, as in the paradigmatic case of France, the Court's declaration of unconstitutionality means that the statute cannot be promulgated.

[23] Different institutional and procedural arrangements can be established to respond to the problem of what should the constitutional court do when, in a particular case it is deciding, the incidental question arises as to whether the applicable statute is constitutional. See the comparative study of Luis Javier Mieres Mieres, El incidente de constitucionalidad en los procesos constitucionales (Civitas-IVAP 1998).

Court rules on the constitutionality of statutes with respect to concrete cases that are brought before it, its conclusions have no general effect. However, once the Court has ruled that a particular statute is unconstitutional in three cases, a procedure of abstract review can be initiated in order to invalidate the statute. In these two countries, the drastic measure of expunging a statute can sometimes be postponed, even when the court has already found the statute to be unconstitutional. In the meantime, there is the risk that the court will contradict itself.

Thus, while the absence of a strong doctrine of precedent along the vertical axis explains the need to centralize constitutional review in a special court, the absence of a strong doctrine of precedent along the horizontal axis accounts for the need to articulate abstract review procedures. The European model is thus doubly centralized in that constitutional review is centralized in a special court, and the constitutional issues that could arise repeatedly, in many different cases, are consolidated into a single, abstract question. In both instances, centralization is meant to promote legal certainty.

2.2. Democracy

Besides legal certainty, other values associated with the idea of democracy also help to account for the structural features of the European model.

Judicial review of legislation may give rise to a "democratic objection," inasmuch as the legislation in question is the product of a democratic legislature. This objection may be minimized if the members of the court are selected in ways that are relatively democratic. The centralized model tries to accommodate this intuition by offering a "dualist" structure. It creates two bodies to perform two different functions: constitutional review of legislation is in the hands of a constitutional court, while the "ordinary function" of applying legislation to particular cases is carried out by the ordinary judiciary. The advantage of this structure is that a country may establish special norms for the selection and tenure of judges on the constitutional court.

For example, a country may use political procedures to appoint judges to the constitutional court, while resorting to more bureaucratic procedures to select ordinary judges. Or it may opt to use different political procedures in each case. Or it may limit the term of judges of the constitutional court to reduce the risk of a serious gap between the constitutional jurisprudence of the court and the basic moral and political beliefs of the people and their elected representatives. At the same time, ordinary judges may be given tenure for life (or until the age of retirement).

Even if a country adopted the same political procedure to select all judges, there might still be an advantage in having a dualist structure: the debate about the candidates would focus on the particular type of legal issues (constitutional/ordinary) that they would confront. Thus, when selecting judges for the constitutional court, the debate regarding the interpretation of the constitution would predominate. Also, a country might want to relegate the delicate

and politically sensitive task of constitutional interpretation to a special court in order to free the remaining judges, who perform the ordinary judicial function, from undue political pressure.[24]

Thus, for various reasons having to do with democracy, it may be necessary to create a special constitutional court. In Europe the selection processes for judges of constitutional courts are typically different from, and more political than, those used to choose ordinary judges.[25] And it is often the case that the judges of the constitutional court have tenure for a limited period, in contrast to what is true of ordinary judges.[26]

Moreover, in countries that have made a peaceful transition from dictatorship to democracy, there is an additional argument in favor of the centralized model. If the new democratic forces were not able to replace the judges who were appointed under the previous regime, it made sense to refuse to grant those judges the power to decide the validity of the legislation enacted by the new democratic parliament. The constitution typically speaks, especially in the sensitive area of rights, at a level of generality that is not present in ordinary legislation. It is thus very important who interprets that text, and it is not reasonable to entrust the task to judges whose commitment to democracy may be in doubt. In these circumstances there is an additional reason for adopting

[24] Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 Int'l J. Const. L. (I·CON) 446, 465 (2003) (stating, rightly, that "[t]he option of creating such exceptional courts may help preserve the independence of the rest of the judiciary").

[25] Thus, in Austria, eight judges of the Constitutional Court (including the president and vice president) are appointed by the president of the republic on the recommendation of the federal government, and six others on the recommendation of the house of representatives and the senate. *See* B-VG art. 147 (Austria). In Belgium, the twelve judges are appointed by the king from a list of two candidates proposed alternately by the house of representatives and the senate. *See* Loi speciale sur la Cour d'Arbitrage, arts. 31, 32. In France, three judges are appointed by the president of the republic, three by the president of the National Assembly, and three by the president of the Senate. Fr. Const. art. 56. In Germany, half of the judges are elected by the house or representatives and the other half by the senate. GG art. 94 (F.R.G.). In Italy, five judges are appointed by the president, five by parliament in joint session, and five by ordinary and administrative supreme courts. Cost. art. 135, § 1 (Italy). In Portugal, ten judges are appointed by the assembly of the republic, and three are co-opted. Port. Const. art. 222, § 1. In Spain, four judges are selected by the house of representatives, four by the senate, two by the government, and two by the general council of the judiciary. C.E. art. 159, § 1 (Spain). Luxembourg is a special case, though: the Court is composed of the president of the superior court of justice, the president of the administrative court, two counselors of the cour de cassation and five magistrates nominated by the grand duke, upon the joint opinion of the superior court of justice and the administrative court. Lux. Const. art. 95ter.

[26] Thus, the term is nine years in France (Fr. Const. art. 56), twelve years in Germany (GG art. 4 (F.R.G.)), nine years in Italy (Cost. art. 135., § 3 (Italy)), nine years in Portugal (Port. Const. art. 222., § 3), and nine years in Spain (C.E. art. 159, § 3 (Spain)). The exceptions are Austria, where the judges are appointed until the age of retirement at seventy years (B-VG art. 147., § 6 (Austria)); Belgium, where the same rule applies (Loi relative aux traitements et pensions des juges, des référendaires et des greffiers de la Cour d'arbitrage, Jan. 6, 1989); and Luxembourg, where they are appointed until retirement age (Lux. Const. art. 95ter).

the centralized model: the members of the new constitutional court can be appointed by the new democratic branches.

Further, the democratic argument in favor of this model is important in order to reinforce and qualify the argument from legal certainty. What happens when a seemingly unconstitutional statute was enacted *before* the constitution came into force?

The argument in favor of legal certainty seems to pull in the direction of centralization: the risk of a divergence of opinion among ordinary courts remains the same. The democratic argument, however, may pull in the opposite direction. First of all, a statute enacted in an authoritarian period would have no democratic pedigree that would justify placing it under the exclusive jurisdiction of a special democratic court. And even when a statute has been passed by a democratic parliament, it may be argued that deference is due such a statute on the presumption that the representatives of the people want to respect the constitution when they enact new laws. But this presumption cannot hold if the constitution against which the statute is evaluated did not yet exist when the legislation in question was discussed and passed. There is therefore no democratic reason to deny ordinary judges the authority to decide that the constitution has tacitly repealed an earlier statute, if they perceive a conflict of norms. Therefore, the relative weight accorded to the democratic argument versus the legal certainty argument would dictate whether the constitutional court should be the only one empowered to declare unconstitutional a statute that pre-dates adoption of the constitution. European countries have come up with various solutions to this problem.[27]

3. Internal pressures to decentralize constitutional review

For the reasons mentioned thus far, it makes sense for many European countries to prefer a centralized model of constitutional review of legislation. But this model has its own operational problems, and there are underlying tendencies at work that are pressing toward decentralization.

3.1. The present situation

First of all, the problem of delays exerts a significant influence. The constitutional court needs time to resolve a question referred by an ordinary judge, and during this time the parties to the case that has prompted the judge to raise the question must wait for resolution of their claims. The longer the delays entailed by resort to the constitutional court, the less likely judges will be to refer questions to it. A judge who is concerned about avoiding delay will

[27] In Italy, for example, the Constitutional Court centralizes the review of statutes, no matter their date. In Germany, in contrast, the Court can (as a general rule) only review statutes that were enacted after the Constitution. In Spain, a mixed solution was adopted: the jurisdiction is shared between the Constitutional Court and ordinary courts.

tend to err on the side of assuming the constitutional validity of a statute. Some say that ordinary judges in some European countries do not raise many constitutional questions due to a lack of constitutional consciousness. This may sometimes be a factor, but even if they are highly sensitive to constitutional values, they still face the dilemma of having to defer resolution of a case for a considerable period of time if they want the constitutional court to review a particular statute. As a consequence, statutes may sometimes be unduly shielded from constitutional objections.

The extent to which this concern is a factor depends on how long it takes the constitutional court to render a decision. This varies greatly from country to country, and from case to case. It can take a few months in Luxembourg, up to one year in Austria and Belgium, between one and two years in Italy, longer in Germany, and even longer in Spain (sometimes up to eight years!). It should be mentioned in this connection that the European Court of Human Rights condemned Germany in 1997 for a violation of article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, because the German Constitutional Court had taken seven years and four months in one case and five years and three months in another to decide a constitutional question.[28]

The problem of delays is compounded by another problem: the idea that a statute can be held to be constitutional once and for all (in relation to a particular constitutional clause, at least) makes sense in the case of statutes that are specific and categorical, but that is not true of many modern statutes. The more precise legislation is, the more easily we can imagine the kind of situations to which it applies. We can then compare the statute's provisions with the prescriptions that we ascribe to the constitution. What the constitution requires may be controversial and difficult to determine in many cases, but once we accept a particular construction, it should be relatively easy to decide whether a statute is valid or not, based on its clear legal consequences.

The problem is that modern legislation tends not to be categorical and specific. We live in a world where circumstances change very quickly in many areas of the law. Moreover, it is increasingly difficult in a pluralist society to generate consensus around specific rules. It is not surprising, therefore, that parliaments tend to legislate in more open-ended terms. Even when they use specific terms to define the situation to which a certain legal consequence attaches, they often include more general clauses that allow judges to expand the set of cases to which the rule applies or to restrict that set by introducing exceptions to the rule. This is not new in the life of the law, but the degree to which legislation has ceased to be specific and categorical is especially worrisome within the civil law tradition, since some of the most fundamental

[28] *See* Probstmeier v. Germany, App. No. 20950/92, Eur. H.R. Rep. 100 (1998). Pammel v. Germany, App. No. 17820/91, 26 Eur. H.R. Rep. 100 (1998). *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

principles of that tradition (including rejection of the doctrine of precedent) rest on the assumption that the laws the judge must apply are so precise that there is no room left for "judicial lawmaking." If this is no longer the kind of legislation we have, it becomes increasingly difficult to determine, a priori, whether a particular statute is constitutional or not, since the range of cases to which it may apply is more difficult to define in advance. Abstract constitutional review then becomes a difficult task, and must be complemented by another kind of review that takes place after the statute has been interpreted and applied in various types of cases. It may seem paradoxical, but "abstract" review is only appropriate when legislation is "specific," whereas "concrete" review (that is, case-by-case review) is imperative when faced with "abstract" legislation.

When compared to the public institutions empowered to initiate constitutional challenges, ordinary judges are in a much better position to explore the legal consequences of a particular statute in a range of different cases. This means that if they take their responsibility as indirect guardians of the constitution seriously, they will have to refer constitutional questions in an increasing number of cases; the same statute may have to be examined repeatedly, as dictated by the variety of situations to which it may be interpreted to apply. Similarly, the constitutional court will not be able to be categorical in its determination of the constitutionality of a statute, but may have to draw distinctions among the different types of cases to which the statute could plausibly apply.

Accordingly, in the context of modern legislation the number of constitutional questions referred to constitutional courts by ordinary judges is bound to increase, thus exacerbating the problem of delays. And, because of this, centralization of review of legislation in a constitutional court seems inconsistent with the pragmatic needs of modern societies.

The centralization characteristic of the European model is already being undermined, moreover, through *interpretation*. Before referring a question to the constitutional court, the ordinary judge is expected in many countries to look for an interpretation of the statute that will preserve its constitutional validity.[29] This power of interpretation allows ordinary judges to have a share in the task of safeguarding the constitution against offensive legislation. Although they do not have the power to disregard statutes on constitutional grounds, they have the power to interpret them so as to make them cohere with the constitution.

It bears emphasizing that ordinary judges are not avoiding a constitutional issue when they ascribe a particular meaning to a statute in order to save its validity. They do grapple with the issue by declaring that the constitution

[29] There is an explicit legal provision in Spain, for example, that tells judges not to refer a question to the constitutional court if it is possible to interpret the statute in such a way that it no longer infringes the Constitution. Ley Orgánica del Poder Judicial, art. 5.3 (1985).

should be understood in a certain way and, based on that, holding that the statute must be read accordingly. They may avoid concluding that the statute is invalid (thereby avoiding a decision to impugn the statute by referring a question to the constitutional court), but they do not shy away from the interpretive controversy concerning the constitution.

Now, if ordinary judges must "interpret" statutes in harmony with the constitution, while only the constitutional court can "set aside" a statute, it is then necessary to distinguish between those readings of a statute that count as legitimate "interpretations" and those that do not. Obviously, if the division of labor that underlies the centralized model is to be respected, an ordinary judge cannot make a statute say whatever it would need to say in order to be constitutional. She may not "save" the statute by making it say what nobody could reasonably understand it to say. That would be equivalent to setting aside the statute and replacing it with a different one.

The problem is that it is not easy to identify the conditions that a reading of the statute must satisfy for the reading to qualify as an "interpretation." Some European constitutional scholars have tried to isolate those conditions, but their conclusions are rather vague.[30] The reading, they say, must be one that the text permits; one should not manipulate the text. But what about implicit exceptions, for example, which may have to be read into a statute in order to protect a fundamental liberty? If the text says "whoever does X will face penalty Y" and the judge reads the statute to provide that "whoever does X, except in circumstances C1 and C2, will face penalty Y," to what extent is she respecting the literal tenor of the statute? And what about extending a statutory provision to an uncovered case, through analogical reasoning? The constitutional principle of equality may sometimes require this sort of extension. Is this still within the domain of statutory interpretation? It is also said that the intention of the legislature should be honored. But the problem in the constitutional context is that the legislature might in fact have intended for judges to give the statute a rather strained interpretation (to restrict or expand its scope), if that were the only way to save it from the constitutional fire.

Actually, it would be strange to insist on too literal an interpretation of a statute within the civil law tradition. In contrast to the traditional image of a judge who mechanically applies legislation to decide concrete cases, judges in the civil law tradition have tended toward the so-called teleological interpretation of statutes. It is common for judges to interpret statutes in light of their goals and underlying principles and to restrict or expand the scope of a particular provision accordingly, when faced with a tension between the literal meaning of the statute and those goals or principles.[31] So it would be strange to insist

[30] *See, e.g.*, Konrad Hesse, Escritos de Derecho Constitucional 33–54 (Centro de Estudios Constitucionales 1992).

[31] *See* Konrad Zweigert & Hein Kötz, Introduction to Comparative Law (Tony Weir trans., Clarendon Press, 3d ed. 1998, pp. 265–268).

that when judges look at a statute in light of the constitution, they should be more literalist than they traditionally have been allowed to be.

The European model is thus based on an unstable distinction between the "power to interpret" (for the ordinary judge) and the "power to set aside" (for the constitutional court). This is in contrast to the American model, where the distinction between the two powers may be theoretically important and may have some pragmatic consequences, but those consequences do not go so far as to determine the institutional division of labor between a constitutional court and other courts. Because in the United States all courts have both powers—the power of interpretation and the power to set aside statutes—the institutional consequences of the distinction are minimal.[32]

3.2. A proposal

The European model needs to reconsider the division of labor upon which it is based. The fundamental distinction should not be between interpreting and setting aside statutes under the constitution. Rather, the critical question should be this: has the constitutional court determined the meaning of the relevant constitutional clauses under which a statute is to be examined?

If the constitutional court has not yet had occasion to interpret the constitution in relation to a particular problem, it may be risky for an ordinary judge to depart from the literal meaning of the statute in order to make it conform to what she thinks the constitution requires. The ordinary judge is working with her own interpretation of the constitution, and she may be wrong (or, more precisely, the constitutional court may disagree). The ordinary judge may be pushing the statute in a "constitutional direction" that is not actually the right constitutional direction. It may be the case, for example, that the plain meaning of the statute is perfectly constitutional, and there is no reason to deviate from it.[33]

If, on the other hand, the constitutional court has provided sufficient guidance on the meaning of the constitution as it applies to a particular problem, then the ordinary judge should be allowed to offer a strained reading of the statute, if this is the only way to make the statute cohere with the constitution. The judge should not worry whether that reading qualifies as "interpretation." The reason for that is simple: *ordinary judges should also be authorized actually to set aside a statute when the constitutional precedents set by the court make it relatively clear that this statute is invalid.*

[32] The existence of both federal and state courts in the United States complicates this picture, since when federal judges review the validity of state legislation under the federal Constitution they are expected to defer to the interpretation that state courts have given to that legislation.

[33] I leave aside the exceptional case in which there is no controversy at all about what the constitution means and entails, and there is a clear contradiction between the statute and the constitution if the statute is interpreted literally. The ordinary judge can then depart from the literal interpretation of the statute in order to harmonize it with the constitution, even if the constitutional court has not had occasion to declare what the meaning of the relevant constitutional clause is, a meaning that is clear enough and is not subject to any interpretive disagreement.

To justify this proposal, which suggests an internal correction to the centralized system, it is first necessary to specify what may be called the "circumstances of the problem of legitimacy" that constitutional review poses. Constitutional review of legislation is a delicate task because *(a)* the constitutional text to be interpreted uses morally controversial concepts in many instances and *(b)* the legislative text under review derives a special dignity from its source—a popularly elected parliament.[34] The combination of these circumstances makes constitutional review a problematic institution within a democracy. As we saw, the European model typically reacts to this problem by granting the power of review to a special court whose members are appointed by the popular branches for a limited period of time, instead of placing that power in the hands of career judges.

Because of this, ordinary judges should interpret the constitution in accordance with the precedents laid down by the constitutional court—the court with sufficient democratic legitimacy to interpret a constitution that is superior to the legislation enacted by a parliament.[35] Furthermore, legal certainty requires that the diversity of statutory interpretations—when it results from a more fundamental disagreement about the meaning of the constitution—be neutralized through recourse to those precedents.[36] But coherence with the precedents of the constitutional court should also prove a sufficient condition to justify giving ordinary judges the power to set aside statutes. The constitutional court should not, therefore, retain an unqualified monopoly.

Imagine this extreme case: the constitutional court declares a statute unconstitutional. Some time later, an ordinary judge has to decide a case where a statute with the same or extremely similar content must be applied. There is no doubt that if the constitutional court has invalidated the first statute, it will likewise strike down the second. And yet, under the current model, in many countries the ordinary judge is not allowed to set aside the second statute on his own authority.[37] The result is that litigants must bear the cost of waiting for the constitutional court to decide the question, even when the answer is obvious. This is not sensible.

[34] In fact, I think that a third circumstance must be considered: the difficulty of amending the constitutional text. But we can ignore this feature for purposes of this discussion. For further discussion of the relevance of this factor, see Victor Ferreres Comella, *A defense of constitutional rigidity, in* Analisi e diritto 2000: Ricerche di giurisprudenza analitica 45–68 (2001).

[35] In Spain, for example, a law explicitly requires judges to interpret legislation in light of the Constitution, and to interpret the Constitution in light of the doctrines generated by the Constitutional Court in all types of procedures. Ley Orgánica del Poder Judicial, art. 5.1.

[36] Although the doctrine of precedent is not officially accepted in many civil law countries, the fact of the matter is that some version of it operates in practice. For an interesting discussion of this topic, *see* Interpreting Precedents: A comparative study 534–42 (D. Neil MacCormick & Robert S. Summers eds., Ashgate/Dartmouth 1997).

[37] The Spanish Constitutional Court, for example, has clearly held that the judge must refer the second statute to the Court for its review. *See* SSTC 23/1988, 158/1993, 18/2003.

There is an enormous proliferation of legislation nowadays, and it is not uncommon for two statutory provisions to be very similar. Moreover, in federal (or quasi-federal) systems, it is possible for a statutory provision enacted by one of the states to be very similar (or identical) to that of another state. In those circumstances, the centralized model is too rigid, in that it does not allow ordinary judges to complement the work of the constitutional court.

Apart from efficiency considerations, another advantage would accrue from permitting ordinary judges to set aside statutes: the constitutional court would have a strong incentive to take care in the articulation of its reasons for striking down a particular statute. If the court knew that the justification it offered would be used by ordinary judges in future cases to assess the validity of other statutes, it would have to evaluate carefully its rationale for invalidating a law, and would have to render its opinion with great clarity in order to define properly the scope of its future application.

A reasonable design, therefore, would be one in which the constitutional court centralized the function of constitutional interpretation (for purposes of checking the validity of legislation), while ordinary judges were allowed to assess the validity of legislation by themselves when the court had already supplied sufficiently specific standards. Only in instances where the court has articulated no such standards should the ordinary judge have to refer a question to it. This system would still be different from the American model, where the power of judicial review can be exercised by all courts even if the Supreme Court has not yet spoken in a specific way about the issue that a particular statute poses. In the United States, "hard cases" are first decided by lower courts. Under this proposal, in contrast, the ordinary courts would only be authorized to set aside statutes when the cases were relatively "easy" in light of the constitutional court's precedents. If no such precedents existed, the ordinary judges would certify a question to that court, thus ensuring that the system remained centralized for the hard cases.

It must be acknowledged that the distinction between easy and hard cases is not easily drawn, since it depends on the degree to which the case law of the constitutional court has fixed the interpretation of the relevant constitutional clauses. Nonetheless, it would be more efficient, and more conducive to intellectual rigor and clarity on the part of the constitutional court, if this distinction were used as the basis for a division of labor between ordinary courts and the constitutional court. Such a basis would be far superior to the current reliance on a distinction between readings of a statute that qualify as "interpretation" and those that are more properly characterized as "readjustment" of the statute.

One could object, on democratic grounds, to the consequences of my proposal for some extraordinary cases in which, for example, a parliament decided to enact a statute that clearly contradicted the court's interpretation of the constitution in order to express the legislature's disagreement with the court and to provoke a second round of debate. Under my proposal, the

ordinary judge would be authorized to set aside that statute directly, thus presumably depriving the legislature of its institutional right to a hearing and a decision by the constitutional court. That being a fair criticism, I suggest that in such extraordinary cases, the following technique be introduced: parliament should be authorized in those circumstances to add a "jurisdictional clause" to the statute that would explicitly reserve to the constitutional court the power to review its validity. The jurisdictional clause would signal to the political community that an important constitutional discussion was forthcoming. The legislature would be expressing its awareness that the statute gave rise to constitutional problems, given the court's precedents. This technique would be similar in spirit to the Canadian "notwithstanding" clause, which allows the legislature to immunize a statute against judicial review of its conformity with the Canadian Bill of Rights.[38] But, whereas in Canada the statute is protected against any type of judicial review, under this proposal the statute would only be shielded from constitutional review by ordinary judges. If this mechanism were introduced, it would be possible to accommodate a parliament's interest in having a second round of debate before the constitutional court, even in the face of a more decentralized system.

4. External pressures

Independent of these internal tensions in the centralized model, there are external forces that promote decentralization. These forces have been unleashed by the process of supranational integration in the context of the European Union and the Council of Europe. Membership in these organizations entails many economic, social and political consequences. It also alters the role of ordinary judges in the application of national legislation.

4.1. The European Union

The European Community was granted legislative power by the foundational treaties. There is a complex distribution of legislative powers between Community institutions and national authorities. The European Court of Justice (ECJ), which sits in Luxembourg, was established to safeguard the treaties and the norms enacted by Community institutions. It soon proclaimed that European Community law (EC law) had primacy over national law.[39] But for a while it did not indicate how that primacy should be enforced.

The Italian Constitutional Court, for example, understood that if an Italian statute contradicted EC law, the statute was not only "directly" contrary to EC law, but also "indirectly" contrary to the Italian Constitution. This conclusion

[38] *See* article 33 of the Canadian Bill of Rights of 1982.

[39] Case 6/64, *Costa v. Enel* [1964], E.C.R. 585, CMLR 425.

served to reinforce the primacy of EC law. Its institutional consequence, however, was that within Italy only the Constitutional Court could rule that an Italian statute infringed upon EC law, for only that Court had the power to invalidate legislation on constitutional grounds. The ECJ reacted against this. In an important decision, it held that every national judge was empowered and required to set aside national legislation if it contradicted EC law, without having to refer the question to the national constitutional court.[40] The ECJ thus imposed a decentralized system of judicial review of legislation for conformity with EC law. It freed ordinary judges by removing the review function from the exclusive domain of the constitutional court.

This led to the following remarkable situation: in the vast majority of European Union countries, ordinary judges have no power to disregard a domestic statute that contradicts the national constitution, but they can disregard that statute if it runs counter to EC law.[41] This suggests that merely setting aside a statute enacted by a democratic parliament is not a sufficient reason to justify a "democratic objection." Indeed, in the context of EC law, we allow ordinary judges to review statutes without raising concerns about the betrayal of the democratic principles traditionally invoked to justify the centralized model of constitutional review of legislation. Moreover, such review by ordinary judges has not raised serious questions regarding legal certainty. Why is this so?

One may venture that the key difference here is that a nation's constitution is a very special text, often expressing broad and morally charged principles that make for controversial interpretations and a plurality of readings. As I suggested, it is the combination of an abstract constitutional text and a popularly enacted statute that renders constitutional review of statutes a delicate task. To the extent that EC law consists mainly of detailed provisions that regulate complex, technical issues of economic and social policy, one of the principal reasons for the problem of legitimacy disappears.

However, this characterization of the contrast between national constitutions and EC law has its limits. First of all, there are controversial, open-ended principles of EC law that ordinary judges are nonetheless allowed to use as grounds for refusing to apply national legislation. For example, the principle of proportionality must be applied to determine what kinds of restrictions may be imposed on the economic liberties that EC law guarantees, in order to protect countervailing public interests. The validity of national legislation will depend in turn on the outcomes of the proportionality inquiry.[42]

[40] Case 106/77, Simmenthal II, [1978] E.C.R. 629.

[41] On the different and complex ways in which domestic legal systems have incorporated this basic principle of EC law, see Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler, The European Court and National Courts: Doctrine and Jurisprudence (Hart Publishing 1998).

[42] Balancing is prominent in the jurisprudence of the ECJ. On the reasoning of the court, *see* Joxerramon Bengoetxea et al., *Integration and Integrity in the Legal Reasoning of the European Court*

Second, EC law is increasingly full of principles that protect abstract fundamental rights. Because the member states have been transferring more and more powers to the European Community, there has been an increasing perception of a need to check the latter by means of a bill of rights. In the 1970s, the court began to recognize these rights as "general principles" of EC law. These rights, however, do not bind the Community institutions exclusively; they also bind the states themselves, when they act and legislate in the area of EC law. This domain includes the member states' enforcement of EC law, their legislation to implement EC law, and even their derogation from EC law to protect certain public interests. Moreover, member states must respect EC legislation that directly protects fundamental rights. There is legislation, for example, that protects the right not to be discriminated against on grounds of gender in the workplace. Any national statute that contradicts this law must be set aside.[43]

The Charter of Fundamental Rights of the European Union, adopted at the Nice summit of December 2000, has been included (as part II) in the new draft Treaty to establish a Constitution for Europe.[44] Once the treaty comes into force, fundamental rights will acquire much greater visibility at the EC level. Accordingly, national judges will increasingly realize that the fundamental right upon which a national statute infringes is not only part of the national constitution but also part of EC law, and therefore directly enforceable by such judges against the statute under review.

There will still be an important space where EC law will not be applicable, and, hence, where state legislation will only be measured against the standards of the national constitution. But the more the EC expands its sphere of influence, the more that space will shrink. As we move in that direction, it will seem increasingly paradoxical that the same judges who are authorized to set aside national legislation that contravenes EC law are prohibited from doing so when the same legislation infringes the national constitution. As the decentralizing logic of the EC legal system penetrates the judicial systems of the member states, the centralized system of constitutional review will find itself in an increasingly awkward position.

of Justice, in The European Court of Justice 43 (Gráinne de Búrca & J.H.H. Weiler eds., Oxford Univ. Press 2001).

[43] On the scope of application of fundamental rights, see Paul P. Craig & Gráinne de Búrca, EU Law: Text, Cases, And Materials 337–49 (Oxford Univ. Press, 3d. ed. 2003). Recently, in the *Booker* case the ECJ has made explicit what was probably implicit in its jurisprudence, but is nevertheless a big step: that the member states are also bound by the EC fundamental rights when they adapt the national legislation to a directive. That is, the new legislation enacted by the state will be measured, not only against the directive, in order to verify that it respects the goals and the restrictions that the directive mentions, but also against the fundamental rights that are part of EC law. Cases C-20/00, C-64/00, Booker Aquaculture ltd. V. Scottish Ministers (2003).

[44] *See* Charter of Fundamental Rights of the European Union, 2001 O.J. (C 364) 1; Draft Treaty Establishing a Constitution for Europe, 2003 O.J. (C 169) 1.

It may be objected that, as a matter of fact, the system for reviewing the conformity of national legislation with EC law is not decentralized, since there exists the mechanism of the "preliminary reference," which provides, among other things, for national judges to reach the ECJ if they have a question about the interpretation of a provision of EC law by which they must assess the validity of a national statute.[45] It may be argued that these preliminary references are the functional equivalent of the "constitutional questions" that national judges must refer to the national constitutional courts. The only difference concerns the particular court to which the relevant question must be referred: the ECJ instead of the national constitutional court.

This objection, however, underestimates the differences between the two mechanisms. First of all, the purposes of the two questions are different. When an ordinary judge raises a question before the constitutional court, she is asking the latter to rule on the constitutional validity of the statute. While the constitutional court will have to interpret the relevant provisions of the constitution, the final conclusion it must reach concerns the validity of the inferior norm (the statute). Preliminary references work differently: the national judge does not ask the ECJ whether a particular national statute is in conformity with EC law. Instead, she asks the ECJ to clarify the meaning of the relevant provisions of EC law, so that she may decide, in turn, whether the national statute is acceptable, in light of that interpretation of EC law. The ECJ's conclusion refers to the higher norm (the EC provision), not to the national norm that has to be checked under it. It is true that the answers that the ECJ gives are often very specific and narrowly tailored to the problem that the national law poses, and there is then not much room left for the national judge to exercise her judgment. But even in these cases, the ECJ does not actually pass upon the validity of the national law.

Second, while ordinary judges must always bring a question to the constitutional court if they conclude that the applicable statute violates the constitution, they are under no similar duty to reach the ECJ through a preliminary question if they think that the national statute violates a provision of EC law. National judges are free to raise the preliminary question or not. They are perfectly entitled to decide the issue themselves, with no help from the ECJ.

The one exception to this discretion of the national judge is this: if the case reaches a national court against whose decisions there is no judicial remedy under national law, then that court is under a duty to refer the question to the ECJ.[46]

But even this exception is limited. The court of last resort need not send a preliminary reference when there is no reasonable doubt about the meaning of the relevant EC provision, or, more importantly, when the ECJ has already

[45] Treaty Establishing the European Community, Nov. 0, 1997, O.J. (C 340) 3 (1997) [hereinafter EC Treaty], art. 234.

[46] *Id.* art. 234, § 3. Actually, it is under such an obligation, even if it considers that the national statute is in conformity with EC law.

pronounced itself on the issue. If the question is identical to another one that has already been decided, there is no need to raise it again before the ECJ. Even when the question is different, if the answer can be derived from precedents set by the ECJ, there is also no need to refer any question.[47] As the ECJ is increasingly overloaded with preliminary questions, moreover, the precedential effects of its decisions will have to be interpreted broadly. Otherwise, it would have to resolve too many questions.[48]

Notice that this way of understanding the preliminary reference procedure is similar to the system that I proposed earlier as an internal correction to the centralized model of constitutional review of legislation at the domestic level: ordinary judges should be allowed to set aside legislation on their own authority, provided they interpret the national constitution in light of the set of precedents established by the constitutional court, and provided those precedents have sufficiently clarified the underlying issue.

There is another possible objection to the thesis that the EC system is pressing the domestic systems of constitutional review in a decentralizing direction. It may be argued that, although it is true that the conformity of a national statute with EC law is checked by national courts in a decentralized way, there remains nevertheless a purely centralized system, namely, when a piece of EC legislation must be measured against the higher norms of the EC system itself. This is the case when an EC regulation or directive must be examined to determine whether it complies with the foundational treaties, which function as a sort of constitution. The ECJ made clear in *Foto-Frost* that national judges are not authorized to set aside any EC norm or act themselves: they must first refer the matter to the ECJ, which has the sole power to declare EC norms and acts invalid.[49] The system seems very Kelsenian: it grants a monopoly over rejection (of acts and norms) to a central court. If this were true, then countries with constitutional courts would not have to worry about their centralized systems since the EC system would itself be internally centralized.

[47] These exceptions were clearly defined by the ECJ in the *CILFIT* case. Case 283/81, CILFIT, Case 283/81, CILFIT v. Minister of Health, 1982 E.C.R. 3415, [1983] C.M.L.R. 472 (1982).

[48] Various proposals have been made to deal with the problem of the excessive workload of the ECJ, which is a consequence of the increasing number of preliminary references that are brought to it. *See* Henry Schermers, *Problems and Prospects*, in THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION 33–34 (Alan Dashwood & Angus Johnston eds., Hart Publishing 2001); *id.* A5 123–125 (the Court's paper); Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, *in* THE EUROPEAN COURT OF JUSTICE 177–214 (JUSTICE, *supra* note 42, at 177–214. There seems to be a general agreement that, in the near future, national judges will have to share more responsibility in the interpretation of EC law. In favor of stronger decentralization, so that the ECJ can have time to deal with the most important and controversial questions, see Thomas de la Mare, *Article 177 in Social and Political Context*, *in* THE EVOLUTION OF EU LAW 215, 228–33 (Paul Craig & Gráinne de Búrca eds., Oxford Univ. Press 1999).

[49] Case 314/85, Foto-Frost v. Hauptzollant Lübeck-Ost, [1987] E.C.R. 4199.

This objection, however, is not well taken. The fact that national judges cannot set aside EC norms or acts by themselves is not an expression of Kelsenian centralization but a function of the idea that it is necessary to distribute judicial competences between EC courts and national courts in a way that maintains the independence of the EC legal sphere. While national courts enforce EC law against offending national legislation, only EC courts can invalidate EC law or acts. As Gerhard Bebr suggested in an early comment to the *Foto-Frost* decision, the principle at stake is the autonomy of the Community's legal order. The power of national courts "to review the validity of a Community act, which is a higher source of law enjoying supremacy in the national legal order, is indeed incompatible with and clearly contrary to the autonomous, independent nature of the Community legal order."[50] So only the EC courts can review the validity of EC acts. Currently, the ECJ together with the Court of First Instance are the only Courts within the EC system. But if regional courts were created within that system of EC courts, and different layers were thus established, a decentralized system of judicial review could be instituted: Lower EC courts would be authorized to set aside EC legislation by themselves, on the grounds that it violates the treaty, without having to refer an internal question to the highest court within the system.[51]

In sum, if ordinary courts are required to set aside legislation that contradicts EC law, it seems difficult to justify why they cannot do the same when that legislation violates the national constitution.

4.2. The Council of Europe

The countries that are members of the Council of Europe have signed a convention that protects fundamental rights (the 1950 European Convention on Human Rights), as well as additional protocols.[52] The European Court of Human Rights, which sits in Strasbourg, is in charge of enforcing this convention against the states that violate its provisions.

It is up to every member state to decide what kind of domestic legal arrangements must be established in order to foster compliance with the convention. The convention does not require a particular procedure but an outcome: that there be no violation of rights within the member state.[53] Judicial review of legislation, in particular, is not imposed. As the European Court of Human Rights states, the convention "does not go so far as to require a remedy

[50] Gerhard Bebr, *The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (Cases 314/85 and 133 to 136/85)*, 25 Common Market L. Rev. 667, 678 (1988).

[51] I am indebted to Luis María Díez-Picazo for this point.

[52] ECHR and Protocols. (ETS Nos. 5 and 9, 46, 114, 117, 140, 146 155.

[53] For an overview of the Strasbourg system for the protection of fundamental rights, see D. J. Harris, et al., Law of the European Convention on Human Rights 1–36 (Butterworths 1995); P. van Dijk & J. H. van Hoof, Theory and Practice of the European Convention on Human Rights 1–69 (Kluwer Law International 1998).

whereby the laws of a Contracting State may be impugned before a national authority as being in themselves contrary to the Convention."[54]

In some countries, however, international treaties are considered by the domestic legal system to trump national legislation, and judges are authorized to disregard the latter if it contradicts a treaty. Since the convention is an international treaty, the same rule applies.[55]

The interesting issue here is that some of these countries do not authorize judges to set aside legislation if it contradicts the fundamental rights recognized in the national constitutions. In the Netherlands, for instance, there is no system of constitutional review of legislation (the Constitution forbids judges to refuse to apply legislation on constitutional grounds).[56] But judges are required to ignore national legislation if it contradicts international treaties.[57] Similarly, in France ordinary judges have no role to play when it comes to constitutional review. But they are allowed to set aside legislation if it runs counter to a treaty. Article 55 of the French Constitution gives treaties a superior rank over statutes, and the Constitutional Council has made it clear that it is not part of its task, but that of ordinary judges, to control the conformity of legislation with the international treaties.[58] In Belgium, ordinary judges must refer a question to the Constitutional Court if they deem a statute to contradict the Constitution, but they can refuse to apply the statute on their own authority if they find that it contravenes an international instrument. The same is true in Luxembourg. The case of Spain is interesting in this regard. Article 10.2 of the Constitution provides that the Bill of Rights of the Constitution will be interpreted in light of the human rights treaties to which Spain is a party. The European Convention is one of them. But beyond this interpretive prescription, the convention is a treaty that benefits from the protection that article 96 of the Constitution implicitly extends to treaties in general: they prevail over contrary legislation. The Spanish Constitutional

[54] Holy Monasteries v. Greece, App. Nos. 13092/87 & 13984/88, 20 Eur. H.R. Rep. 1, 5 (1995).

[55] For an overview of the different ways in which the domestic legal systems have dealt with the European Convention, see Jörg Polakiewicz, *The Status of the Convention in National Law, in* Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000, at 31 (Robert Blackburn & Jörg Polakiewicz eds., Oxford Univ. Press. 2001) [hereinafter Fundamental Rights in Europe]. This book contains useful reports on the impact of the European Convention on the national legal systems.

[56] Neth. Const. art. 120.

[57] *Id.* art. 94.

[58] Decision number 74–54 DC, January 15, 1975, of the Constitutional Council. A fascinating description of the context in which this decision was made can be found in Noëlle Lenoir, *The Constitutional Council and the European Convention of Human Rights: The French Paradox, in* 2 Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in International Perspective 145 (Mads Andenas & Duncan Fairgrieve eds., Kluwer Law International 2000) [hereinafter Liber Amicorum].

Court has declared that its functions do not include reviewing domestic legislation for consistency with international instruments.[59] Accordingly, an ordinary judge can set aside a statute on the grounds that it violates a convention right, without having to resort to the Constitutional Court.

It should be noted that in recent years the European Court of Human Rights has interpreted the convention in a more activist way. At the beginning, it granted states a "wide margin of appreciation" to decide the extent to which a restriction of a fundamental right was necessary in a democratic society in order to protect other rights or interests. The standards that the court imposed were minimal, and it was therefore difficult for a statute to violate the convention. Recently, however, the margin of appreciation has been reduced in many areas, the standards have been more stringent, and the likelihood that a statute will not satisfy them has consequently increased. There is now a rich body of case law that the national judge can use to evaluate national legislation.[60]

To the extent that the convention is taken in some countries to prevail over national statutes, the consequent erosion of the centralized system of constitutional review can be very substantial. For example: only the constitutional court can hold that a statute violates the freedom-of-speech right protected by the national constitution, but the ordinary judge will be perfectly able to set aside the same statute on his own authority, on the grounds that it violates the right to freedom of speech enshrined in the European Convention.

The only way in which a domestic system of judicial review of legislation could "recentralize" itself would be to incorporate the European Convention as part of the national constitution. (Austria did so in 1964, for example.) Then, of course, a statute that violated the convention would automatically be deemed to contravene the constitution, and only the constitutional court would be authorized to set it aside. Some voices have been raised in France and Belgium in favor of this solution, or something close to it. They fear that, otherwise, the constitutional court will lose much of its relevance in the area of fundamental rights.[61]

This move to "constitutionalize" the convention would be similar in spirit to the strategy employed in the past by the Italian Constitutional Court in an effort to assert its monopoly over the review of the conformity of Italian legislation with EC law. The Italian Court argued that an Italian statute that infringed EC law was, for that reason alone, invalid under the Constitution.

[59] STC 28/1991.

[60] On the court's use of the margin of appreciation standard, see Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Martinus Nijhoff 1996).

[61] *See, e.g.*, Guy Carcassonne, *Faut-il maintenir la jurisprudence issue de la décision n° 74-54 DC du 15 janvier 1975?* 7 Les Cahiers du Conseil Constitutionnelle (1999); Francis Delpérée, *Présentation de la Cour d'arbitrage de Belgique*, 12 Les Cahiers du Conseil Constitutionnelle 63 (2002).

As will be recalled, the ECJ—in the *Simmenthal* decision—declared that monopoly unacceptable, and granted all ordinary judges the power of review. A similar domestic move with respect to the European Convention, however, would not be rejected by the European Court of Human Rights. The latter must ensure that human rights are respected by the states, but leaves them discretion to choose the best means of achieving that result.

In any case, recentralization could not be completely successful. Even if the constitutional court alone had the power to invalidate a statute on grounds of non-conformity with the European Convention, ordinary judges would still have the power to ensure, through interpretation, that statutes were in harmony with the convention. Actually, in countries where the convention has the same status as an ordinary statute, this interpretive rule applies. In Germany, for example, the Constitutional Court held in a landmark decision in 1987 that the legislature must be presumed not to have wished to deviate from the Convention, "insofar as it has not clearly declared otherwise."[62] But if ordinary judges are empowered to ensure, through interpretation, that national statutes comply with the European Convention, we face once more the institutional division of labor that we criticized, one that relies on an unstable distinction between an "interpretation" and a "manipulation" of statutes to make them cohere with higher standards.

5. A theoretical shift

The existence of a supranational system of European norms, interpreted by two supranational courts, should contribute to an important shift in the theoretical discussion regarding the problem of the legitimacy of constitutional review of legislation.

For many years the literature on constitutional interpretation in some European countries has been too obsessed with the problem of how to distinguish between a genuine interpretation of a statute and the undue manipulation of its content. One reason for this theoretical emphasis has already been examined above: since ordinary judges are granted the power to interpret statutes so as to save their constitutional validity, but not to set them aside on constitutional grounds, it is very important to define the boundaries of "interpretation" versus "manipulation" of statutes.

Another factor in this situation has to do with the political impact of the decisions rendered by the constitutional court when it reviews legislation. It is one thing for the court to say that a statute is invalid and quite another to say that it should be interpreted in a certain way (or not be interpreted in a certain way). In the first case the majority that enacted the statute suffers a political defeat, especially if the parliamentary opposition is the one that challenged the

[62] 74 BVerfGE 358. The decision is referred to in Andreas Zimmermann, *Germany, in* FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 55, at 335, 339.

statute. In the latter case, in contrast, the majority can claim that the constitutionality of its political choice has been vindicated by the court, even though the statute must be interpreted in a certain way. The "interpretive judgment" articulated by the court may even be submerged in the reasoning that the decision contains, and not appear as an unequivocal ruling at the end of the decision. The press, for example, may not notice that the declaration of constitutionality is a qualified one and that the political victory that the majority has obtained is, therefore, not complete. Of course, for this distinction to make sense, there must be some delineation as to what constitutes an "interpretation" of a statute. When the interpretive possibilities have run out, the court must make a more formal and explicit declaration that the statute requires readjustment to correct its constitutional shortcomings.

It is understandable, seen in this light, that the problem has been under discussion for a long time, and that a sophisticated literature has been generated to address it.[63] Unfortunately, this literature has contributed to a distortion of the issues. The view has emerged in many quarters that the major problem regarding the legitimacy of constitutional review hinges on the question of what the constitutional court should do with a particular statute once it appears to contravene the constitution, and not on the question of what should be the correct interpretation of the constitution, or who should have the authority to render that interpretation. That a court should have the power to impose its interpretation of the constitution on the popular branches does not seem to some European scholars to pose an issue of democratic legitimacy at all.[64] It is sometimes said that if things are different in America, this is because the United States Constitution does not explicitly provide for judicial review, whereas European constitutions that have created constitutional courts clearly do, and because the American Constitution is so old that the problem of adherence to an "originalist" interpretation is at issue. For many European scholars, then, the important issue is the extent to which the constitutional court can allegedly distort the text of the statute in order to save its constitutionality.

But clearly, the more important issue is what does the constitution say, and who should be empowered to settle its meaning in the name of the political community to which the text belongs. Does democracy require that the majoritarian branches decide? May a system of judicial review be established? What sort of system? How should judges be appointed? Are there ways to understand the relationship between the courts and the legislature that make

[63] For a comparative view of this problem, see Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual (Eliseo Aja ed., Ariel 1998).

[64] Swimming against the current, Michel Troper has rightly insisted on the weakness of the various arguments that are usually proferred in Europe to justify the institution of constitutional review in a democracy. *See* Michel Troper, *The Logic of Justification of Judicial Review*, 1 Int'l J. Const. L. (I·CON) 99 (2003).

the arrangement more democratic than others? And then the difficult question: What are the standards that should guide the judge when she tries to ascribe concrete meaning to the broad and morally loaded clauses of the constitution? It is a pity that this debate is neglected in favor of a discussion about what should happen with a statute once it is found to be in tension with the constitution.

To make matters worse, there is a theme in Kelsen that has often been inaccurately used to buttress this incorrect understanding of the problem of legitimacy. As already mentioned, Kelsen repeatedly said that one can understand the constitutional court to be a negative legislature, in the sense that it has the power to invalidate legislation that is enacted by a parliament.[65] But Kelsen never intended this more or less felicitous phrase to express the standard for measuring the legitimacy of the constitutional court. That is, he never thought that the answer to the problem of the conditions under which constitutional review is legitimate was to say: "the Constitutional Court acts legitimately if and only if it acts as a negative legislature." To begin with, Kelsen argued that sometimes the court should act as a positive legislature. For example, it might have to restore the applicability of an earlier statute that had been repealed by the statute that the court has decided to invalidate, if this is necessary to fill a gap in the system. Kelsen applauded this technique and thought it was a pity that the United States courts could not use it.[66] Second, Kelsen was worried about the legitimacy of review even when the court acted as a negative legislature. Thus, he insisted that constitutional review should only take place with respect to rather specific clauses of the constitution, for he thought that the final authority to interpret the more abstract clauses that protect, for example, "justice," "liberty," or "equality" should rest with the parliament.[67] So it is a mistake, I think, to use Kelsen to justify the idea that the problem of legitimacy arises when the constitutional court, instead of simply declaring a statute unconstitutional, partially readjusts it in order to save its validity, acting, as it were, as a "positive legislature."

The interesting point about the European supranational courts is that they help us see matters in the right way once again. Both the ECJ, when it answers preliminary references, and the European Court of Human Rights, when it decides whether a state has violated a fundamental right enumerated in the convention, do not address the question of what to do with a national statute that seems to contradict the higher norm. The ECJ will simply fix the meaning of the relevant provision of EC law, leaving it to the national judge to decide whether the national statute should be disregarded or whether it is possible to reinterpret it in such a way to make it consistent with EC law. This is rightly

[65] Kelsen, *Comparative Study*, *supra* note 2, at 187.

[66] *Id.* at 198–200.

[67] Hans Kelsen, *La garantie jurisdictionnelle de la Constitution*, 44 Revue du Droit Public 221–41 (1928).

thought to be a secondary problem, when compared to the larger question to which the ECJ has given an answer: What is the concrete meaning of the EC provision? Similarly, the ECHR does not declare whether a national statute that has been applied to a case is or is not contrary to the convention. It simply says whether there has been a violation of a fundamental right; it is then up to the state to decide what to do with the statute. In particular, the national judges will decide whether it is possible to make it consistent with the convention through a new interpretation or whether it must be invalidated.

The increasing importance of these two supranational courts in Europe should, therefore, have a healthy impact on the discussion of the legitimacy problem. The emphasis should be placed on how to arrive at the correct interpretation of the higher norms that protect rights, who should make that interpretation, and by means of what procedure. In that context, the manner of selecting judges to sit on the supranational courts, the interaction between those courts and the relevant political branches, and the process for amending the fundamental texts that those courts must enforce, should all be subject to scrutiny. For example: Is the amendment process unduly burdensome, so that the political branches encounter too many obstacles if they endeavor to respond to the court's jurisprudence, or are there good reasons for protecting that jurisprudence by attaching a rigidity to those texts? How are these supranational courts to accommodate universal norms and local traditions and sensibilities? Is there a sufficient consensus in Europe to which these courts may resort in order to support their interpretations of the fundamental texts? In comparison to these questions, the issue of whether a statute that seemingly contradicts the higher norms can be reinterpreted in order to save its validity, and who should be authorized to do so, should be regarded as being of lesser importance. We should not let this problem overshadow the more fundamental and interesting set of questions that are part of the intellectual horizon of contemporary Europe.[68]

6. Some features of the European model that are worth preserving

The main thesis that I defend in this article is that the European model of judicial review of legislation should transform itself into a more decentralized one. It should give ordinary judges a limited power to set aside statutes that are contrary to their nation's constitution, thus bringing it closer to the American model.

[68] Some of these questions are explored in J. H. H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration 102–29 (Cambridge Univ. Press 1999) (Chapter 3: "Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of human rights in the European legal space").

There are, however, some distinctive features of the European model that are worth retaining. In particular, the mechanism of "constitutional challenges," by which certain public institutions can challenge the validity of a statute, is a procedure that merits preservation. I will now briefly list some of the potential advantages of this procedure. Each deserves a fuller exploration than is possible here.

6.1

When the constitutional validity of a statute is questioned on the grounds that it does not respect the distribution of legislative powers between the federation and the states (or between the state and the regions), it is advisable to have a procedure that allows the governmental organs involved to trigger the process of review. In particular, it makes sense to allow the federal government to challenge a state statute, and a state government to challenge a federal statute, on federalism grounds. (This is the case in Austria, Belgium, Italy, Germany, Portugal and Spain.) Even if the question can be raised later by private individuals in a concrete case, it should also be possible for the organs that are directly involved to make their claims against each other. There is an epistemic advantage in granting these organs standing to challenge and defend the relevant statutes: since they have enacted the statutes or suffer their impact within their own sphere of competences, it is quite likely that they will have easy access to the information that is relevant to decide the controversy.

6.2

In several European countries (Austria, France, Germany, Portugal, and Spain), the parliamentary opposition is granted the power to challenge legislation in the abstract. This possibility is worth preserving, as it forces parliamentary debate to become more constitutionalized.[69] Arguments concerning the constitutional validity of a statute will be made by the majority and the minority, and the fact that the minority can use its power to challenge the statute will tend to increase the likelihood of responsible arguments being made. Both the majority and the minority will have their day in court, and the public, guided by the court, will see who is right. It is important that the political class be sensitive to constitutional issues. Politicians have considerable influence on the way public debates are structured, and it is important that their legislative debates include a constitutional layer.

[69] This consequence has been explored in Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe 61–91 (Oxford Univ. Press 2000); Dieter Grimm, *Constitutional Adjudication and Democracy, in* Liber Amicorum, *supra* note 58, at 103, 111 (stating, rightly, that it is a desirable consequence of constitutional review 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").

6.3

The fact that constitutional review can take place in the abstract may also have some advantages. I have emphasized the need for a more "case-by-case" type of constitutional review, given the tendency for modern statutes to be open-ended and imprecise. Sometimes, however, the possibility of abstract review allows the court to protect certain rights, or certain aspects of them, that might be more difficult to protect if review were taking place in the context of a concrete case.

For example, it is sometimes said that there is no a priori reason why some social rights should not be understood to be fundamental. In fact, the case can be made that majoritarian legislatures will sometimes prefer to maximize the trivial interests of a majority that is relatively well-off to the detriment of the fundamental social rights of the poor, who are under-represented. And yet, the problem is that courts may not be in a good institutional position to protect those rights against the legislature. It is rightly said, for example, that social rights can only be satisfied with economic resources, and that only the legislature (when it enacts the annual budget, for example) is in a position to have a systematic view of the needs that must be met with the resources that are available, which are inevitably scarce. But the fact that a constitutional court can review statutes in the abstract alters this argument. It may still be true that the court should defer to the legislative branch when it comes to social rights, but the reason is no longer an institutional reason that has to do with the need for systematicity; the budget could be challenged in the abstract and the court could review it in its generality.

Or take the "overbreadth doctrine" that the Supreme Court of the United States has articulated to protect freedom of speech. This doctrine makes it possible for a court to declare a statute unconstitutional on its face, if it covers conduct that is protected under the First Amendment, even when it also covers conduct that is not protected. The idea is that the existence of such a statute may generate a "chilling effect," since it will unduly discourage constitutionally protected speech. The interesting point about this doctrine is that he whose speech is not privileged can still make the claim that the statute is unconstitutional. That is why this doctrine is viewed by some American judges as a strange element in the system of constitutional adjudication.[70] The idea that constitutional review is linked to the resolution of cases makes it difficult to accept that the person whose act is not protected should be able to claim successfully that the statute is unconstitutional on the grounds that it prohibits other individuals, who are not parties to the lawsuit, from engaging in constitutionally protected speech. There seems to be a mismatch between the substantive doctrine and the procedural context of constitutional adjudication. The fact that this doctrine originated in America, and that it is still at work there, shows that substantive doctrines can grow and develop in hostile

[70] *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (Black, J.).

procedural environments. Still, the tension continues to be felt.[71] In contrast, no such problem arises under a system that allows certain public institutions to challenge statutes in the abstract. In that system there is no mismatch between substance and procedure. The public interest in not having a law that chills speech can be protected through a public institution that claims that the statute, because it is overbroad, will negatively affect the speech interests of the community as a whole.

These are some of the advantages that could accrue from a procedure of abstract review of norms triggered by public institutions. This kind of procedure should be maintained even if the European model moves in the decentralizing direction advocated in this article. In a way, Europeans have had a small advantage over Americans in that they have constructed a system of constitutional review from scratch in modern times. When framing their new constitutions, they have been in a position to choose whatever institutional arrangements seemed best suited to protect those constitutions. Most have chosen constitutional courts and have allowed public institutions to challenge statutes in the abstract. The European framers have not been concerned over whether the constitutional court would "look like a court" or not. The fact that, in many respects, the European model is moving in the American direction attests to the importance of "traditional courts" as the right institutional structures to perform certain basic functions. Still, there is room for maneuvering and for institutional imagination, and the fact that many European countries have been able to transcend the "trinitarian conception" of the separation of powers, as Bruce Ackerman has put it in another context, is a positive development from which Europeans should benefit.[72]

[71] For an overview of the overbreadth doctrine, with references to the mismatch problem, *see* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1021–39 (Foundation Press, 3d ed. 1988).

[72] Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 724–27 (2000).