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THE CONSEQUENCES OF CENTRALIZING CONSTITUTIONAL REVIEW IN A SPECIAL COURT. SOME THOUGHTS ON JUDICIAL ACTIVISM.

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1. INTRODUCTION

If one examines the legal landscape of contemporary Europe, one will be struck by the institutional salience of Constitutional Courts. In a long evolution that started after the First World War and that reached its climax after the fall of Communism, most European countries have established these special courts in order to protect their national Constitutions against offensive legislation. Europe is now clearly associated with a "centralized model" of constitutional review, where only one court has authority to strike down a statute as unconstitutional, while the United States exemplifies the "decentralized model", where all courts are empowered to set aside legislation if it violates the Constitution[1].

Historically, the European option in favor of a centralized model is basically linked to the value of legal certainty. If all courts were given the power to review the constitutional validity of legislation, disagreement would arise among them. This would make the law more uncertain for both citizens and governmental authorities. In contrast, if only a Constitutional Court has the power to check legislation, there is no risk of disagreement among courts. Centralization is thought to be an efficient solution to the problem of judicial divergence[2].

[1] So, for example, 17 out of 25 countries within the European Union (after the 2004 enlargement) have Constitutional Courts: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal, Spain, Cyprus, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. For a very complete description of the different ways in which constitutional review has been articulated in Europe, see Marco Olivetti and Tania Groppi (editors), *La giustizia costituzionale in Europa* (Milano, Giuffrè Editore, 2003).

[2] To a certain extent, this justification of the centralized model is nowadays in crisis. In contemporary Europe there are pressures, both internal and external, that are pressing in a decentralizing direction. I have examined this issue elsewhere. See, Victor Ferreres Comella, "The European model of constitutional review of legislation: Toward decentralization?", *I.CON. International Journal of Constitutional Law*, Volume 2, number 3, July 2004, pp. 461-191 (forthcoming).

But quite apart from this foundational rationale of the centralized model, the decision to centralize review in a special court may have had other effects (whether intended or not). In this article, I will offer some thoughts about the consequences of this choice in connection with two questions: first, the degree to which Constitutional Courts can avoid constitutional issues; and second, the extent to which they can engage in a deferential type of review when they check legislation. My main thesis is that, other things being equal, Constitutional Courts are less likely than the courts in a decentralized model to engage in these two forms of passivism. Some features of constitutional courts press them in the direction of activism.

I want to be clear at the outset, however, that many other factors are relevant to account for the degree of passivism or activism of courts in a given country. So, for example, in order to have a complete picture, one would need to examine the political process that a country has; what are the dominant cultural assumptions about the role of courts; what are the possible connections between the domestic courts and supranational institutions and practices; as well as many others. These other factors may reinforce or, on the contrary, work against the potential consequences of establishing a special constitutional court. My point is simply that if a country sets up a constitutional court, it introduces a vector of activism. That is, *other things being equal*, the country with a constitutional court will tend to have a more activist type of judicial review.

Before arguing my case, however, it is important to isolate some features of the centralized model that are relevant to the discussion.

2. A "DUALIST STRUCTURE"

I propose that we say that the centralized model is based on a *dualist structure*, for it divides the judiciary (understood in a broad sense) into two parts: "ordinary courts", on the

one hand, and the "Constitutional Court", on the other. It assigns different tasks to each of them. To simplify, it assigns ordinary courts the "ordinary judicial function", which consists of applying legislation to decide concrete cases, while it entrusts the Constitutional Court with the "constitutional function", which consists of reviewing the validity of legislation under the Constitution. In contrast, we can say, the decentralized, American model, is based on a *monist structure*: there is a single judicial branch, which exercises the two functions at the same time.

One of the potential advantages of the dualist structure is that it is possible (although not necessary) to design the Constitutional Court in a different way than ordinary courts. Thus, a more "political" procedure may be chosen to select the members of the Constitutional Court, while a more "bureaucratic" or strictly "professional" procedure may be followed to appoint ordinary judges. Or limited tenure may be granted to the members of the Constitutional Court, while tenure for life, or until retirement age, may be awarded to the ordinary judges. These and other combinations are possible, and the extent to which the final design of Constitutional Courts will differ in this regard from that of ordinary courts may vary from country to country. The basic point, however, is that a dualist structure makes room for more institutional variation than a monist structure.

The dualist structure that characterizes the centralized model can be more or less rigid. In this regard, two factors should be taken into account. We can call them the *purity* of the Constitutional Court, and its *autonomy*.

a) *Purity* refers to whether or not constitutional review of legislation is the only function that the Constitutional Court performs. As I said, it is a defining feature of the centralized model that the Constitutional Court is the only court that can strike down legislation. But this does not necessarily mean that constitutional review of legislation is the

only function of that Court. It may have other tasks too, and these tasks will require the Court to apply ordinary legislation to particular cases. So, for instance, it may have jurisdiction to supervise the regularity of the elections, to enforce the criminal law against high governmental authorities, to check the validity of administrative decisions and regulations on federalism grounds, to protect fundamental rights against administrative and judicial decisions, etc. To the extent that a Constitutional Court does some of these things, it shares with ordinary courts the power to apply legislation to ordinary cases[3]. The distinction between the Constitutional Court and ordinary courts is not then a perfect mirror of the foundational distinction between the constitutional function and the ordinary judicial function. We can say that a Constitutional Court is not *pure* if, apart from reviewing legislation, it has other functions. It is the less pure the more important those other functions are, and the larger the amount of workload they generate.

In Western Europe, for example, we can locate Constitutional Courts at different points within a spectrum of purity. On one extreme, we find absolutely pure Constitutional Courts, whose only function is to review legislation for its constitutionality (Belgium and Luxembourg). Next we find Courts that perform some additional tasks, although their main function is still constitutional review of legislation (France, Italy). At the other end of the spectrum, some Courts have jurisdiction over so many different and relevant matters that it would be wrong to say that, in practice, their most important function is to check legislation (Germany, Austria, Spain and Portugal).

[3] The main difference is that in the rare case where the relevant statutory provision is unconstitutional, the Constitutional Court can disregard it, whereas ordinary courts cannot do so on their own authority. On the way the Constitutional Court is required to act when confronted with such a statute in a concrete case, see the comparative study of Luis Javier Mieres, *El incidente de constitucionalidad en los procesos constitucionales. (Especial referencia al incidente en el recurso de amparo)* (Madrid: Civitas-IVAP, 1998).

b) The second factor to consider is *autonomy*, that is, the extent to which the Constitutional Court is detached from the ordinary judiciary, with no links connecting the two. This depends, in large part, on the procedures that are established to reach the Constitutional Court.

Consider two possible ways in which a statute can be brought to the Court. The first is through a "constitutional challenge": Certain public institutions can go to the Court and attack a statute in the abstract[4]. There is no concrete case that triggers their action. Nor are they required to go to the ordinary courts first: they must file their challenge directly to the Constitutional Court. The second avenue to reach the Court is through a "constitutional question". If an ordinary judge that is deciding a concrete case thinks that the applicable statute is (or may be) unconstitutional, she is required to suspend the proceedings and raise a question to the Constitutional Court. The latter will decide whether the statute is valid or not. It will then be for the ordinary judge to decide the particular case accordingly.

Obviously, there is an important difference between these two procedures. In the context of an abstract challenge, the Constitutional Court is not linked to the ordinary judiciary, while there is such a link when it decides a question sent by an ordinary judge. If we take this into account, we can say that the dualist structure is more rigid in France, where there are abstract challenges, but no constitutional questions, than it is in Austria, Belgium, Germany, Italy, Luxembourg, and Spain, where ordinary courts can react to an unconstitutional statute by sending questions to the Constitutional Court. The French Constitutional Court is thus more detached from the rest of the judiciary than the Courts of these other countries.

Some Constitutional Courts, moreover, have the authority to review judicial decisions. Thus, in Spain and Germany, individuals are granted the right to file a "constitutional

[4] In some countries, individuals who are particularly affected by a statute may bring a challenge too.

complaint" if they think that one of their fundamental rights has been violated. Normally, before filing such a complaint, it is first necessary to seek remedies in the ordinary courts. The violation of the fundamental right may derive from a governmental decision that the ordinary courts have later failed to invalidate, or from the judicial decision itself. Through this complaint procedure, a strong link is established between ordinary judges and the Constitutional Court. The latter becomes in practice the highest supreme court of the judicial system, although its jurisdiction is restricted to the issue whether a fundamental right has been infringed. From this perspective, the dualist structure is less rigid in Spain and Germany, for example, than it is in Austria, Belgium, France, Italy, and Luxembourg, where there is no complaint procedure of this sort[5].

In sum, the dualist structure may be more or less rigid, depending on how pure the Constitutional Court is, and how autonomous it is vis-à-vis the rest of the judiciary. The more functions the Court must carry out (besides constitutional review of legislation), and the stronger its links with the ordinary courts, the less rigid that structure is. The less rigid the dualism of that structure is, the more it resembles the monist structure that characterizes the American, decentralized, model of constitutional review. And, to this extent, the more nuanced will be the differences between the "European model" and the "American model" that I will try to highlight throughout my argument.

With this background in mind, I will now offer some thoughts about what consequences are more likely to follow if a country chooses a Constitutional Court as guardian of the Constitution.

3. THE "CONSCIOUSNESS" OF CONSTITUTIONAL COURTS

[5] In Austria there is a complaint procedure against administrative decisions, but the cases are directly brought to the Constitutional Court.

Although it is not crucial to support my argument, it should first of all be noted that a country may resort to a dualist structure for an "expressive" purpose. A political community may decide to express its full commitment to the Constitution as the supreme law of the land (or to interpret that there is such an underlying commitment) through the establishment of an institution that is created with the *specific purpose* of protecting the Constitution against the legislature. If the superior rank of the Constitution has to be made visible, a court is erected that stands out as a special institution in charge of protecting it. In the same way that a country may realize that the protection of the environment is an important goal and may decide to create a new institution to deal with the matter, some European countries that suffered dictatorships have expressed their commitment to the new, democratic Constitutions through the establishment of Constitutional Courts. A closer analogy is the European Court of Human Rights. After the moral disaster of Nazism and Fascism, European countries decided to build a new institution that would guard human rights against violations by the States. Apart from the technical functions that the European Court exercises, it performs an expressive function: it symbolizes the culture of rights that European countries tried to generate after the Second World War.

But even if there is no expressive rationale behind the decision to establish a Constitutional Court, such a Court is nevertheless expected to be particularly sensitive to constitutional issues. It cannot be oblivious to the very reasons that led the framers to establish it as a specialized institution: to protect the Constitution against offensive legislation.

In particular, other things being equal, the Court will find it difficult to avoid the constitutional issues that are brought to it. It will also find it difficult to resort to very deferential standards of review when checking statutes. The more rigid the dualist structure

(the more the Court is "pure" and "autonomous"), the harder it will be for that Court to engage in any of these two forms of passivism.

4. CONSTITUTIONAL COURTS AND AVOIDANCE

In the American context, Alexander Bickel wrote extensively about what he called the "passive virtues". He argued that, because constitutional matters are highly controversial, the Supreme Court should not decide them unless the time is ripe for the Court to do so. He celebrated the fact that the Supreme Court, because it has discretionary jurisdiction (through the *writ of certiorary*, basically), can select its cases and "decide not to decide". He also suggested that the Court should review a statute as it applies to a particular type of case, without going further than that. He argued, moreover, that constitutional considerations should only come into play when the case cannot be disposed of on ordinary legal grounds. And he advocated the avoidance canon, which requires judges to choose an interpretation of a statute that prevents a constitutional issue from emerging[6].

Constitutional Courts, however, find it difficult to cultivate these passive virtues. They cannot easily avoid the constitutional issues that are brought to it, and they cannot, therefore, easily create a buffer zone around themselves so as not to tread into dangerous terrain. The centralized model is structurally "anti-Bickellian". Several features of the model account for this result.

4.1. NO DISCRETIONARY JURISDICTION

[6] See, generally, Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962). For a more recent defence of this thesis, see Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999). These different forms of avoidance were enumerated by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S 288 (1936), 346.

Because the Constitutional Court is the only institution that is authorized to declare a statute unconstitutional, it would make no practical sense to give that Court the power to select its cases. No constitutional review of legislation by the Court would mean no constitutional review at all. Thus, if a public institution brings an abstract challenge against a statute, or an ordinary judge raises a question, the Constitutional Court must give an answer to it (provided all the procedural requirements are met). If the Court declined to give an answer, the statute would escape constitutional review[7].

Things are different, however, when the Constitutional Court shares jurisdiction with ordinary courts over certain matters. If the Constitutional Court has jurisdiction to decide "complaints" in the area of fundamental rights, for example, there is a potential space for something like a *writ of certiorary*.[8] Here the Court is basically the court of last resort concerning particular legal issues. In this context it is possible to argue that the fact that the Court refuses to hear a complaint does not mean that there has been no judicial decision on the matter. The case has been fully examined by lower courts[9].

The situation in the United States is different. Because the system is decentralized, the Supreme Court can be allowed to have discretionary jurisdiction (basically through the *writ*

[7] This is not to deny that constitutional courts sometimes decline to decide upon the validity of a statute. In Italy, for example, the Constitutional Court sometimes refuses to answer a question raised by an ordinary judge with the argument that the problem whether the statute is constitutional is one concerning which the legislature should be granted a wide area of discretion. These decisions are not interpreted by the legal community to mean that the statute is actually constitutional, but rather that it is not for the Court to decide whether it is constitutional or not. For a description of this practice, see Paolo Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi* (Torino: G. Giappichelli editore, 2000), pp. 238-262. So, after all, it is possible for a Constitutional Court to find ways to decline to pass upon the validity of a statute. But the point is that Court will have to work its way towards avoidance. For structural reasons, the system is biased in the other direction.

[8] Actually, given the excessive workload of the Constitutional Court, there is a tendency in Germany and Spain to favor a system that would allow the Court to dismiss the complaints that are relatively unimportant from a constitutional point of view. For a general view of these proposals, see Pablo López Pietsch, "Objetivar el recurso de amparo: las recomendaciones de la Comisión Benda y el debate español", *Revista Española de Derecho Constitucional*, number 53 (1998), pp. 115-151.

[9] The exception to this discretionary or more flexible jurisdiction should occur in the relatively rare case when the complaint rests on the proposition that the applicable statute is unconstitutional. The Constitutional Court cannot refuse to decide the complaint in such a case, for here its refusal would mean that the party has not obtained an answer by the only institution that is authorized to reject a statute on constitutional grounds.

of certiorary). If the Court declines to decide a case where the validity of a statute is at stake, this does not mean that there has been no judicial review. Lower courts have dealt with the issue fully, since they share with the Supreme Court the power to set side a statute on constitutional grounds.

4.2. NO CASE-BY-CASE MINIMALISM

As stated previously, one of the typical avenues to reach the Constitutional Court is through an abstract challenge. When such a challenge is filed, the Court cannot limit the extent of the attack that the statute suffers. Because there is no concrete case that triggers the abstract challenge, the institution that files it can select the provisions of the statute that it finds unconstitutional and can impugn as many of them as it wants to.

Moreover, because there is no concrete case that frames the constitutional inquiry, the challenger can oblige the Court to review the full consequences of the relevant provision. That is, although it is possible to distinguish different types of cases that a statute can be understood to deal with, the Court cannot decide that, for the moment, the question of the validity of the statute will only refer to its applicability to one type, leaving undecided whether the statute should be considered to be valid when applied to the other types. Since there is no concrete case, there is no justification for leaving undecided whether the statute is constitutional in its several aspects and consequences[10].

[10] Incidentally, it should be mentioned that, precisely because the scope of the attack is unlimited when abstract challenges are filed, in most countries these challenges can only be brought by a limited set of institutions. This is so in order to "protect" statutes. Given the democratic dignity of statutes, only some agents should be authorized to challenge them in the abstract, when there is no

This is in contrast to what happens in the American system, where a court may refuse to deal with the question whether a provision is valid, if that provision is not applicable to the case at hand. And the court can also confine itself to the question whether the statute is constitutional to the extent that it applies to a certain type of case, of which the actual case is an illustration, while leaving undecided whether that statute should be deemed to be valid if it had to be applied to a different type of situation.

What the Supreme Court did in the *Bowers v. Hardwick* case, for example, can serve as an illustration[11]. The relevant statute criminalized sodomy, and it covered both homosexual and heterosexual intercourse. The Supreme Court held that the statute was valid, but it made clear that it was only ruling on the problem whether the statute was constitutional as applied to homosexual sodomy, because that was the specific kind of conduct that was present in that case. It left undecided whether that statute could be validly applied to heterosexual sodomy[12]. This strategy of partial avoidance would not be possible for a Constitutional Court to follow when it has to decide an abstract challenge. The challenger has the privilege to require the Court to address the constitutional issues fully.

The contrast between the two models should not be exaggerated in this regard, however. On the one hand, most Constitutional Courts have jurisdiction to decide, not only abstract challenges, but constitutional questions sent by ordinary judges too. In the context of these questions, there is a concrete case that triggers the process of review, and the Constitutional Court may decide to play the minimalist game. It need not examine all the aspects and consequences of the statute; only those that are relevant to decide that particular

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case that justifies the process of review. It bears emphasizing that this protection takes place only in the context of abstract challenges, where the attack can extend to any provision, for any constitutional reasons, and where the full extent of the provision will have to be examined by the Court. For a similar thesis, see Luis Javier Mieres, *El incidente de constitucionalidad en los procesos constitucionales. (Especial referencia al incidente en el recurso de amparo)*, op. cit., pp. 191-192.

[11] 478 U.S. 186 (1986). This precedent has been recently overruled by the Supreme Court in *Lawrence v Texas*, June 26, 2003.

[12] It said: "The only claim properly before the Court… is Hardwick´s challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy", 478 U.S 186, 196, footnote 2.

case need be dealt with. On the other hand, in the United States there is some room for abstract review. Although judicial review normally takes place in connection to a concrete case, it is sometimes possible for individuals and groups to challenge a statute on its face, even before it is actually applied[13]. Still, whereas abstract review is typical of the European model, it is rarer in the American model.

4.3. THE DIFFICULTY OF AVOIDING CONSTITUTIONAL GROUNDS BY RESORTING TO ORDINARY LEGAL GROUNDS

For structural reasons, Constitutional Courts find it difficult to decide cases on "ordinary legal grounds". Normally, they have to invoke the Constitution.

In the context of abstract challenges, it is obvious that the Constitutional Court cannot resort to "ordinary legal grounds". The whole point of the procedure is to measure the validity of the statute under the Constitution, and the Court cannot therefore escape the constitutional issue.

When constitutional questions are raised by ordinary judges, the situation is similar. In general, it is difficult for the Constitutional Court to decline to pass judgment on the constitutional validity of the statute. A division of labor underlies the dualist structure. Roughly, it is for the ordinary judge to select the statutory provision that is applicable to the case, while it is for the Constitutional Court to declare whether that provision is valid, should that judge entertain doubts about its validity. The dualist structure obliges the Court to be rather deferent towards the ordinary judge when it comes to the selection of the applicable legislation. It is not often the case that the Court tells the ordinary judge that, actually, the applicable statutory norm is not the one that the judge has selected, but a different one, so as

[13] See Alec Stone Sweet and Martin Shapiro, "Abstract and Concrete Review in the United States", in Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford University Press, 2002), pp. 347-375.

not to have to pass constitutional judgment on the former[14]. (If there is someone who can more easily "avoid" the constitutional issue, it is the ordinary judge, but not the Constitutional Court, once the former raises a question to the latter).

Finally, in the "complaints" procedure the Constitutional Court has more room for manoeuvre, since it does not have to review a statute under the Constitution, but has instead to decide a concrete case in light of fundamental rights. But even here there is a structural tendency to constitutionalize the legal problems. For the Court to be authorized to quash the decision of an ordinary judge, it must bring a *constitutional* objection against the way in which that judge has applied the law to the particular case. If the Constitutional Court wants to increase its power to review judicial decisions, it has to constitutionalize the legal problems, sometimes leading to "overconstitutionalization"[15].

In the United States, in contrast, all the courts have the two functions I distinguished earlier on, the "ordinary judicial function" and the "constitutional function". Each court is in charge of selecting and applying the relevant legislation to cases, and examining whether that legislation comports with the Constitution. A court can therefore try to find ways to dispose of the case that make it unnecessary to reach the constitutional issue. The Supreme Court is authorized to do that as well: it is an "ordinary court", after all.

4.4. NO AVOIDANCE OF CONSTITUTIONAL ISSUES THROUGH STATUTORY INTERPRETATION

[14] On the level of deference exhibited by the Spanish Constitutional Court in this connection, see Javier Jiménez Campo, "Cuestiones irrelevantes", *Anuario de Derecho Constitucional y Parlamentario*, number 7 (1995), pp. 79-101.

[15] This impacts in a rather complicated way on the debate about whether or not constitutional rights bind private individuals, and whether they do so directly, or indirectly (by forcing the ordinary judges to interpret the relevant legislation in a way that protects fundamental rights in the private sphere). This is not the place to enter this discussion. For a sharp analysis, see Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law", *I.CON. International Journal of Constitutional Law*, Volume 1, Number 1, January 2003, p. 79, especially pp. 84-88.

It is common practice for Constitutional Courts to preserve the validity of statutes through a saving construction, when such construction is possible. Thus, the Court may hold that the examined statute is *constitutional* to the extent that it is interpreted in a certain way, or to the extent that it is not interpreted in a certain way. Alternatively, the Court can use a negative formula: it can hold that the statute is *unconstitutional* if interpreted in a certain way, or unless it is interpreted in a certain way. (Since, from a theoretical point of view, nothing important depends on the formula that is used, I will always refer to the first formula, and assume that it is equivalent to the second)[16].

It is crucial to notice that when a Constitutional Court renders such an "interpretive decision", which identifies the interpretive conditions under which a statute can remain in the system, *it does not avoid the constitutional question at all*. It fully deals with it, and gives an answer to it. It reads the Constitution in a particular way, gives a concrete meaning to it, and then decides what the statute must be interpreted to say in order for it to be in harmony with the Constitution. In doing this, the Court avoids *striking down the statute*, but it does not avoid *examining and answering the constitutional question itself.*

To illustrate this point, here is an example: In its decision 74/1987, the Spanish Constitutional Court had to review a provision of the code of criminal procedure that grants detained individuals the right to be assisted by a translator if they are foreigners who do not understand or speak Castilian. A constitutional challenge was brought against this provision, on the grounds that it does not cover the case of Spanish citizens who are unable to understand or speak Castilian. Although Castilian is the official language in Spain, and

[16] Sometimes there is a practical difference, though. In Italy, for example, only the decisions by the Constitutional Court that declare a statute unconstitutional are formally recognized by the legal system to have *erga omnes* effects. So ordinary judges feel bound by the Constitutional Court´s interpretation of the statute only if the decision it has rendered is technically one of unconstitutionality. For the Court to prevail it has to say that the statute is *unconstitutional* if it is interpreted in a certain way, or unless it is interpreted in a certain way. This requirement does not exist in Spain, however. On this difference, see Francisco Javier Díaz Revorio, *Las sentencias interpretativas del Tribunal Constitucional* (Editorial Lex Nova, Valladolid, 2001), pp. 80-81, 99-112.

citizens have the duty to learn it, other languages are also official in particular regions, and it is not impossible for a Spanish citizen to have difficulty in understanding or speaking Castilian. The Court held that it would be against the constitutional rights of due process and equality to deny arrested individuals who are Spanish citizens the right to have a translator in those circumstances. It then concluded that the statutory provision "is not unconstitutional if it is interpreted in the sense that it does not exclude Spanish citizens from the right to be assisted by a translator if they do not understand or speak Castilian". It is obvious that the Court did not avoid the constitutional issue. On the contrary: it fully answered it. It held that the Constitution requires the legislature to grant Spanish citizens who are unable to understand or speak Castilian the right to be assisted by a translator. It then sought a remedy: it imposed a particular reading of the statute in order to save its validity.

Could the Constitutional Court, however, engage in statutory interpretation in order to avoid the constitutional question itself? Given the structural reasons we have already examined, this is difficult. The Constitutional Court has no authority to impose a particular interpretation of the statute on the ordinary judges, *unless that interpretation is grounded in the Constitution*. That is, for the Constitutional Court to be authorized to impose its interpretation of the statute, it must hold that the statute *would be unconstitutional* if it were interpreted in a different way from the way the Court indicates.

In the United States, in contrast, it is possible for courts (including the Supreme Court) to avoid constitutional issues through statutory interpretation. As the Supreme Court has held, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions can be avoided [a court´s] duty is to adopt the latter"[17]. When courts do that, they do not answer the question what the Constitution requires in connection to a particular problem. They leave

[17] *Delaware & Hudson* case, 213 US 366, 408 (1909), quoted in *Jones v. United States*, 526 US 227, 239 (1999).

undecided whether or not a statute that clearly expressed the disfavoured meaning would be constitutional. They set no precedent to this effect.

If the Supreme Court can resort to this strategy of avoidance, this is due to the fact that, as an ordinary court, it can decide what meaning to ascribe to a statute as an ordinary legal matter. Because it has this authority, it can try to find an interpretation of the statute that will make it unnecessary to deal with a constitutional problem. Moreover, because it is both the supreme interpreter of federal statutes and the supreme interpreter of the federal Constitution, the authority of its statutory interpretations vis-à-vis lower courts is always the same, whether the foundation of those interpretations lies in the Constitution or in mere ordinary law[18].

So, while Constitutional Courts in Europe cannot, for structural reasons, avoid constitutional issues through statutory interpretations, there is room for that in the American system.

5. THE VISIBILITY OF CONSTITUTIONAL COURTS

[18] It is true, as some American commentators have emphasized, that the Constitution is not completely irrelevant when courts resort to the avoidance canon. Although courts do not hold that the interpretation they leave aside is actually unconstitutional, they do say that it would give rise to constitutional doubts. This implies that, to a certain extent, they have taken the Constitution into account. Otherwise, they could not have been able to see any constitutional problem in the horizon. As Frederick Schauer says, when courts resort to the avoidance canon they bring the Constitution "in a whisper, rather than with a shout". Frederick Schauer, "Ashwander Revisited", *The Supreme Court Review* 1995 (University of Chicago Press), p. 88. The legislature, moreover, is unlikely to insist on a reading of the statute that raises constitutional doubts among courts. Still, there is a difference between rejecting an interpretation of the statute on the grounds that a constitutional problem would arise, on the one hand, and rejecting that interpretation on the grounds that it would make the statute unconstitutional, on the other hand. Technically speaking, there is no constitutional precedent yet when the court does the former -or, at least, the precedent does not have the same force it would have if the constitutional issue had been frankly decided. Indeed, there have been instances where the Supreme Court has later upheld an interpretation of the statute that had initially been avoided for constitutional reasons. See, generally, William Kelley, "Avoiding Constitutional Questions as a Three-Branch Problem", 86 *Cornell Law Review*, 831 (2001), especially pp. 857-858, 864. Kelley explains that in the United States there has been an important historical shift in the way the avoidance canon has been applied. Until early XXth century, the avoidance canon was about preferring a reading of the statute that met constitutional scrutiny to another reading *that was actually unconstitutional*. Later, however, it was about avoiding an interpretation *that merely raises constitutional doubts* (pp. 839-840). Note that the earlier understanding of the doctrine is the only one that, for structural reasons, Constitutional Courts are authorized to engage in.

So far I have argued that, for structural reasons, Constitutional Courts cannot easily avoid constitutional issues. I will now refer to another characteristic feature of Constitutional Courts: they tend to operate in a context of high public visibility. Several institutional factors work in this direction:

a) First, because there is only one Court that can hold that a statute is invalid, the attention of political parties and of public opinion will focus on that Court. It is only there that the judicial fate of the democratic decision of Parliament will be decided. The drama unfolds on that stage only, and everybody is aware of it. In the United States, in contrast, people have to follow the decisions of all the courts, since all of them have the power of constitutional review, and all of them contribute to the decision whether or not to set aside a particular statute (until the Supreme Court settles the issue, if it does). As Alexis de Tocqueville noted a long time ago, in America a statute is attacked gradually: "its final destruction can be accomplished only be the reiterated attacks of judicial functionaries"[19].

b) Second, because the Constitutional Court is specialized in Constitutional matters, commentators do not have to make an effort to isolate the constitutional cases and place them apart from ordinary cases. Specialization simplifies public debate. Moreover, to the extent that the Constitutional Court decides in the abstract, it abstracts away from the particular circumstances of cases where the statute could be applied. It isolates the question concerning the validity of the statute and detaches it from other legal questions. In the United States, in contrast, constitutional cases are ordinary cases too. The constitutional questions are thus submerged in a wider set of ordinary legal questions. Again, as Tocqueville observed, "when

[19] Alexis de Tocqueville, *Democracy in America* (1835), Volume I, Chapter VI (Vintage Books Edition, 1990), p. 102.

a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice". This is in contrast to what would have happened if "the judge had been empowered to contest the law on the ground of theoretical generalities", which is what happens when a statute is challenged in the abstract[20].

This contrast, of course, should not be exaggerated. On the one hand, some Constitutional Courts depart from the "pure model", since they have jurisdiction over matters that are different from constitutional review of legislation. To the extent that this is so, ordinary legal questions and constitutional questions merge. On the other hand, thanks to the *writ of certiorary*, the United States Supreme Court has been able to focus on cases that raise constitutional issues, which nowadays make up a large percentage of its total workload. Moreover, when it pronounces on the constitutionality of a statute, the Supreme Court´s decision can acquire as much publicity as an abstract decision by a Constitutional Court.

c) Third, to the extent that public officials or institutions are allowed to bring abstract challenges to the Constitutional Court, they tend to bring more media light. Their role in setting the agenda for the Court is very important, moreover. It would be rather improper to let the Court have discretionary jurisdiction when confronted with an abstract challenge that is brought by an important public institution. If the democratic legislature is "privileged", in that its normative product can only be reviewed by the Constitutional Court, the institutional challengers are "privileged" too: they can require the Court to answer the objections they have articulated against the legislature. Public institutions have thus a crucial role in setting the agenda for the Constitutional Court, in contrast to what happens in America, where the Supreme Court creates its own agenda through the *writ of certiorary*.

[20] Alexis de Tocqueville, op. cit., p. 102.

All these features push Constitutional Courts towards visibility. But visibility means "danger". To the extent that the Court´s decisions are highly visible, they are more likely to generate controversy and resistance. The political science literature tells us that there is a correlation between low salience of courts and the diffuse support they get from the public at large[21].

Now, if several factors move Constitutional Courts into a danger zone of high visibility, one would imagine that, in contrast to the courts in the United States, those Courts have a stronger structure or nature that allows them to tread into that dangerous terrain. The paradox is that things are rather the other way around: in comparison to ordinary courts, and other things being equal, Constitutional Courts are rather *fragile* from a structural point of view.

6. THE FRAGILITY OF CONSTITUTIONAL COURTS

The relative fragility of Constitutional Courts derives from the dualist structure of which they are a part. While ordinary courts, which carry out the function that consists in applying legislation to decide concrete cases, are absolutely indispensable, Constitutional Courts are not. If they did not exist, and if no court had the power of constitutional review of legislation, negative consequences may result, but the situation would no be so serious than if ordinary courts did not exist. For many decades, few countries in the world accepted the institution of judicial review, and even now there are states that reject it.

Ordinary courts, moreover, are often strongly linked to rule of law values. They appear as impartial third parties that decide the controversies among individuals, or among individuals and the public institutions. To the extent that people view ordinary courts as

[21] See references in Barry Friedman, "Mediated Popular Constitutionalism", 101*Michigan Law Review* 2595 (2003).

independent organs, they will support them and will be critical of efforts to undermine their independence. Constitutional Courts, in contrast, are relatively new institutions, and they are not purely "judicial": they are specialized in politically sensitive issues; their members are usually selected in a more political manner; sometimes they decide challenges brought by political institutions, etc….. To the extent that Constitutional Courts appear to be more "political", they cannot easily draw from the moral capital that ordinary courts may have accumulated as impartial interpreters and enforcers of the law[22].

In a monist structure things tend to be different. Because the courts that are empowered to exercise the constitutional function are the same ones that perform the ordinary judicial function, they are better protected against external attacks. When they exercise constitutional review of legislation, they can build on the legitimacy they have obtained in the system as courts of law. Quite probably, Franklin D. Roosevelt found resistance against his plan to restructure the Supreme Court, in part because the latter is an ordinary court of justice that people believe should be independent from political pressures. If Roosevelt had instead been struggling with a Constitutional Court, he would probably have found it easier to convince the public that his plan was a reasonable effort to curb the jurisprudence of a court that was too activist in the particular area of constitutional law. Ordinary courts would not have been affected by his plan.

Precisely because Constitutional Courts are structurally more fragile, it is necessary to establish formal rules to better protect them. So, for example, Constitutional Courts are explicitly founded in the Constitution, so that they cannot be abolished, or their powers restricted, through ordinary legislation. In some countries, it is even impossible to abolish

[22] In countries that have made a recent transition to democracy, however, the situation is normally different. The newly established Constitutional Court represents the values of the democratic system, while the ordinary courts are associated with the authoritarian past, if not with corruption.

constitutional review through a constitutional amendment[23]. Similarly, the number of judges of the Court is normally established in the Constitution. Parliament cannot, by enacting an ordinary statute, play with the numbers in order to allow the political majority to have a Court of its liking.

Additional measures can be taken to protect the Constitutional Court. For example, it may be thought advisable not to allow judges to write dissenting and concurring opinions (however desirable they may be on other grounds). If the opinions and votes of the individual judges remain secret, the political branches cannot press them with implicit or explicit promises about future jobs once they leave the Court[24]. Moreover, if the Court speaks publicly with one voice, it will be in a better position to resist criticisms. Actually, if it is not possible for judges to write dissents for the public to read, they have an incentive to try to reach an accommodation with the other judges on the Court. (As John Ferejohn and Pasquale Pasquino argue, a Court will tend to be "internally deliberative" if dissents are not authorized, while it will be "externally deliberative" if they are[25]). The decision the Court finally reaches may then be more moderate, and the political branches will be more willing to accept it.

Also, it may be advisable not to design *pure* Constitutional Courts that are strongly *autonomous* from the ordinary judiciary. Thus, if a Constitutional Court is empowered to exercise some "judicial functions", and if it is strongly connected with the ordinary judiciary (through constitutional "questions" or "complaints", for example), then the Constitutional Court is more likely to be able to protect itself against governmental pressures or attacks. It

[23] The Constitution of Portugal, for example, declares in its article 288, letter l) that it is not possible to amend the Constitution to eliminate "the scrutiny of legal provisions for active unconstitutionality and unconstitutionality by omission". And in Austria, it is usually understood that only a total revision of the Constitution, which requires a referendum, and not an ordinary constitutional amendment, can abolish constitutional review.

[24] For a defense of this thesis, in connection with the Italian case, see Mary Volcansek, *Constitutional Politics in Italy. The Constitutional Court* (New York: St. Marttin´s Press, Inc., 2000), pp. 8, 24.

[25] John Ferejohn and Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice", in Wojciech Sadurski (editor), *Constitutional Justice, East and West* (Kluwer Law International, The Hague-London-New York, 2003), pp 21-36.

will appear as a "court", the independence of which is as important as that of the rest of courts, rather than as a "political institution" that should be more sensitive to the external pressures that the political branches may exert. The other side of the coin, though, is that ordinary courts may then offer some resistance against a Constitutional Court that tries to penetrate the judiciary and become the real "supreme" court (over the ordinary Supreme Court). In those circumstances, the Constitutional Court has less reason to fear the attacks of the political branches than those that may come from the ordinary courts[26].

7. CONSTITUTIONAL COURTS AND DEFERENCE

Given what I have said so far, one would be tempted to argue in the following way: if it is true that, other things being equal, a relatively pure Constitutional Court (a) cannot easily avoid constitutional issues, and (b) is relatively fragile in comparison to ordinary courts, then (c), other things being equal, the Court will tend to be deferent towards the legislature. I want to argue, however, that this is not so. Other things being equal, we should expect a Constitutional Court to be *activist*, not deferent.

The reason is this: the Constitutional Court is not likely to earn its own space in the institutional system if it regularly upholds the statutes that are challenged before it. What would be the point of establishing an institution the main function of which is to control the

[26] Thus, a certain tension between the Supreme Court and the Constitutional Court is more or less inevitable in those systems where the latter is authorized to review the former´s decisions. Although it is not easy to define the boundaries between the two courts, the underlying tension can be accommodated if the two Courts act in good faith. Sometimes, however, the tension explodes. For a pathological instance of such tension, see a recent decision of the Spanish Supreme Court (First Chamber), of January 23, 2004, which condemns the judges of the Constitutional Court to pay damages to a citizen whose complaint had been declared inadmissible by the Constitutional Court. The Supreme Court considers that the reasons for the Constitutional Court´s decision to declare the complaint inadmissible were insufficient, and that the plaintiff´s faith in the rule of law had thereby been harmed. According to the Supreme Court, the economic value of the harm that each judge caused to the plaintiff amounts to 500 euros. So each judge is obliged to pay 500 euros to the plaintiff. The Constitutional Court is outraged by this decision, of course, which seems to belong to a surrealist world. The decision, by the way, has been challenged before the Constitutional Court! The case is pending.

validity of legislation, if it turned out that it rarely invalidated a statute? Even if the Court had been created with the purpose not to "check" the legislature, but to "legitimate" it against constitutional objections, it would still have to be quite activist. As Charles Black explained in the American context, for a Court to be in the position to legitimate statutes, it is necessary for it to exercise the power of invalidation[27]. Who would be impressed by a Constitutional Court´s decision to uphold a particular statute, if that Court were always accepting their validity?

An interesting case to consider in this regard is that of France. Because the French Constitutional Council is quite "pure" (apart from electoral matters, its basic function is to review legislation), it should not be surprising that its jurisprudence exhibits a high rate of declarations of unconstitutionality. It would be difficult for this Court to acquire institutional relevance if it rarely invalidated a statute. Moreover, given that it is normally the parliamentary opposition that challenges the statutes, the space that the Court has created for itself is that of distributing political power between the governing majority and the opposition[28]. (It is said that under the Presidency of Robert Badinter, there was the implicit rule that the Court should declare a statute unconstitutional in 50% of the cases). In this way, constitutional review makes up for the fact that there is no federal system in France, which is the strategy that is normally resorted to in order to divide power between the majority and the minority.

In contrast, in a decentralized system of constitutional review, it is possible (but not necessary) for the courts to be very deferent towards the legislature. Since their space in the system as ordinary courts is absolutely protected, they have more flexibility as to how actively they want to exercise their constitutional function, which is "additional". They can

[27] Charles Black, *The People and the Court* (New York: Macmillan, 1960), pp. 34 *et seq.*

[28] For an examination of the role of the Constitutional Council within the French legislative process, see Alec Stone, *The Birth of Judicial Politics in France* (Oxford University Press, 1992). On the high rate of declarations of unconstitutionality in France, see Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press, 2000), p. 63.

certainly be activist, but they can also choose to be extremely deferential without being institutionally embarrassed for it.

Therefore, if one held the view that the statutes that the democratic Parliament enacts should benefit from a strong presumption of constitutional validity, and that only those statutes that are "clearly mistaken" should be invalidated, then it would be wrong to establish a Constitutional Court, since such a Court has an activist bias built in it. It would be less risky to rely on ordinary judges. The latter would perform their ordinary function of deciding concrete cases according to the law. In the rare event that the applicable statute was clearly unconstitutional, they would set it aside. Even if this happened very rarely, nobody would question the institutional relevance of those courts. Moreover, it seems advisable to rely on ordinary judges, who are not "experts" in constitutional law, to apply the "clear mistake" rule. One would imagine that when a statute is clearly unconstitutional, it exhibits a kind of defect that any judge will be able to identify, and that there is thus no need to establish a specialized court to this effect.

From this perspective, it makes sense that Denmark, Sweden, and Finland, for example, have decided not to establish Constitutional Courts. In these countries only a very deferential conception of constitutional review is thought legitimate. 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 Constitution explicitly announces the "clear mistake rule": only when the statute is unconstitutional beyond any reasonable doubt may a court set it aside for purposes of deciding a case (article 14, Chapter 11, of the Swedish "Instrument of Government", and section 106 of the Finnish Constitution)[29]. It would have been pragmatically inconsistent to lay down the clear mistake rule and then erect a Constitutional Court.

[29] On the practice of constitutional review in these countries, see Jaakko Husa, Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective, 48 *American Journal of Comparative Law*, 345 (2000).

To put it in American terms, a Constitutional Court has not only an "anti-Bickellian" bias (in that it is difficult for the Court to implement the avoidance rule); it has also an "anti-Thayerian" bias (in that it is difficult for it to follow the clear mistake rule)[30].

If, however, a Constitutional Court is not "pure", but has additional functions (apart from reviewing legislation), its position is different. The more important these other functions are, the more easily the Court will be able to play the game of deference towards Parliament, if other factors push in that direction. Even if it turns out that only rarely does the Court strike down a statute, its role in the system will nevertheless be secure, since other functions will justify its existence. The German and the Spanish Constitutional Courts, for example, play an important role when they decide controversies between the central government and the state or regional governments, and when they decide complaints brought by individuals against administrative and judicial decisions. These Courts, for institutional reasons, enjoy more latitude to decide how deferential they wish to be when they review statutes in the abstract procedures. Even if constitutional review ceased to be "relevant", because a very deferential standard of review was chosen, the position of those Courts would still be safe: the other tasks would be sufficient to ensure their institutional prominence.

Apart from these structural features (centralization, and the degree of purity of the Court), other factors may also contribute to encourage a Constitutional Court to be activist:

a) A first factor refers to the selection and tenure of the judges of that Court. To the extent that judges may believe that some degree of deference towards the legislature is justified on democratic grounds, they will be less worried about deference is they are appointed through procedures that are relatively democratic. The same is true if they serve for a limited period of time, as is the case in many European countries.

[30] James Bradley Thayer defended the clear mistake rule in his famous article "The Origin and Scope of the American Doctrine of Constitutional Law", 7 *Harvard Law Review*, 129 (1893).

b) A second factor is related to the level of rigidity of the Constitution. If the Constitution is not too difficult to amend, judges of the Constitutional Court may feel less restrained when they check legislation. They know that their rulings can be neutralized through a constitutional amendment. The easier it is to amend the Constitution, the less reason there is for a judge to be worried about the "counter-majoritarian" objection, and the more willing the political community will be to accept an activist Court. In general, European Constitutions are easier to amend than the United States Constitution, and this should be a contributing factor to judicial activism.

c) A third factor refers to the strength of the doctrine of precedent. When the Constitutional Court (in a *civil law* system) interprets the Constitution in order to decide the validity of a statute, its interpretation of the Constitution has relevance, of course, within the legal system. The Court is expected to be coherent when it reviews other statutes in the future, and ordinary judges are expected to take that interpretation into account when they read statutes. But the precedential effects of the Court´s decision are not so strong than in a *common law* system. The Court has more room for flexibility and for future revisions. This compensates for its structural obligation to confront constitutional issues: although the Court cannot easily avoid the question what the Constitution requires in connection to a particular problem, its answer is not as conclusive as it would be in a *common law* system. It is more easily revisable in future cases. To the extent that this is so, the Court feels encouraged to engage in an activist reading of the Constitution.

d) A fourth factor refers to the type of Constitution that the Court is in charge of enforcing. The more expansive the domain that is covered by the Constitution, the more

likely it is that the Court will be able to find in it a principle or set of principles that may be used to invalidate a statute.

Thus, in comparison to the United States Constitution, modern Constitutions in Europe tend to be very rich in rights and principles. Moreover, the idea that fundamental rights bind, not only the government, but private individuals too (either directly or indirectly), expands the relevance of the Constitution as well: it imposes limits on individuals when they deal with others in the private sphere. As a result, the domain of "political justice" and the domain of "constitutional justice" (what the Constitution says about issues of political justice) tend to coincide in Europe[31]. It is not surprising, for example, that Robert Alexy, a leading German legal philosopher, has insisted that one of the big problems that a theory of fundamental rights has to solve is how to carve out an institutional space for the democratic legislature under such an expansive Constitution. For, if the Constitution covers so much terrain, and the Court is the supreme interpreter of the Constitution, what is left for the democratic branches to decide?[32] The American Constitution, in contrast, imposes fewer constraints on the political branches. Even Dworkin, for example, who defends a moral reading of the Constitution that emphasizes the central place of the abstract principles of equality and basic liberty, has to acknowledge that the social and economic rights that he believes are part and parcel of a liberal theory of justice cannot be interpreted to be included in the American Constitution[33]. And his definition of a constitutional right is one that imposes restrictions on the government, not private individuals.

[31] I am here borrowing the concepts and terminology of Larry Sager, "The Domain of Constitutional Justice", in Larry Alexander (editor), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), pp. 235-270.

[32] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), pp….. For a comment on this book, with references to this problem, see Mattias Kumm, "Constitutional rights as principles: On the structure and domain of constitutional justice", *I.CON, International Journal of Constitutional Law* (forthcoming).

[33] Ronald Dworkin, *Freedom´s Law* (..), pp….

This contrast has historical origins. The American Revolution did not have to radically transform society in the way that the liberal revolutions in Europe had to. These European revolutions had to dismantle the feudal structures that the absolute monarchies had not been able to destroy completely. Thus, whereas the American Constitution tried to establish a few negative limits on the government, the European Constitutions contained an ambitious program of social transformation.

Moreover, while in America it was originally expected that the Constitution would be enforced by courts, the European Constitutions were written under the assumption that the political branches, not courts, would take care of their protection and implementation. This contributed to their ambitious tone[34].

When more modern European Constitutions were adopted, and some form of constitutional review was in the background, they had to be were written more carefully[35]. But the fact that it was Constitutional Courts, and not ordinary courts, that were asked to enforce the Constitution against the legislature, made it possible for the Constitution to be drafted in more "philosophical" terms than if ordinary courts had been the ones in charge. The Constitution can resist full legalization if the institution entrusted with guarding it is not fully judicial. The Constitutional Court has a clear authority to use the Constitution to strike down legislation, no matter how peculiar the Constitution may be as a legal norm, no matter how much it differs from ordinary law. In contrast to what is true in the American system, a Constitutional Court does not need to rest its power of constitutional review on the fact that "it is emphatically the province of courts to say what the *law* is" (*Marbury v. Madison*).

[34] It should be noted, however, that the general understanding in America was that courts would review legislation very deferentially. They would only set aside a concededly unconstitutional act. That is, they would apply the "clear mistake rule". See, Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), pp. 34-38.

[35] Thus, Hans Kelsen, who took the Constitution seriously as a norm that had to be enforced by a Constitutional Court, insisted in not including too abstract terms in the Constitution, such as "justice", "liberty", and "equality", but more precise and specific concepts instead. See Hans Kelsen, "La garantie jurisdictionnelle de la Constitution", 44 *Revue du Droit Public*, 221-41 (1928).

The consequence of having a Constitution that covers so much, and that does so through abstract and "philosophical" clauses, is that it is difficult for a Court to argue that the Constitution is silent about a moral problem. When someone challenges a statute on the grounds that it violates a certain principle of justice, it is easy for him to connect that principle to some clause or set of clauses of the Constitution. The Court cannot react "passively" by saying that the Constitution is silent about the problem that the challenger has brought to the surface. The Constitution may be indeterminate (vague), but not silent. The only alternative strategy that a passive Court could resort to would be to use deferential standards when reviewing legislation under the rights and principles that the Constitution includes. But, as I have argued before, a Constitutional Court cannot go very far in this direction either. To the extent that its basic role in the system is to check legislation, it cannot say all too often that the statutes it reviews are coherent with the requirements that flow from the Constitution.

8. CODA: A TENTATIVE ARGUMENT

I am tempted to conclude my remarks with the following idea, which is concededly very speculative. If we accept that, other things being equal, and under certain assumptions about the degree of purity and autonomy of the Constitutional Court, such a Court (a) cannot easily avoid the constitutional issues that are presented to it, (b) is highly visible and relatively fragile, (c) cannot be too deferent towards the legislature, and (d) cannot easily deny that the Constitution speaks to the problems that are brought to its attention, then, shouldn´t we conclude that (e) such a Constitutional Court has a strong incentive to be good at the function it is expected to perform? Whether it upholds a statute or invalidates it, it has to do so on the basis of good reasons. Even if it does not persuade all the parties that its

decisions are right, it must convince as many people as possible that it is seriously doing its job, and that it was indeed a good idea to establish a Constitutional Court. After all, Constitutional Courts are not strictly necessary.