2 Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain
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As European systems of constitutional justice have matured, the interdependence of lawmaking and constitutional interpretation has tightened, blurring boundaries allegedly separating judging and legislating, often to the point of irrelevance. This interdependence became increasingly obvious once scholars began focusing attention on the impact of constitutional jurisprudence on public policy (Shapiro and Stone 1994). This line of research documents the capacity of constitutional courts to shape, pre-empt and even dominate legislative processes. In its most extreme formulation (my own), European constitutional courts are explicitly conceptualized as adjunct — or 'specialized' — legislative chambers, engaged in continuous, highly-structured dialogues with governments and parliamentarians in the making of public policy (Stone 1992, 1994).

This chapter examines the reverse side of the same coin. As the coin turns over, the relative importance of constitutional politics conceived as legislative process gives way to the relative importance of constitutional politics as judicial process. The construction of constitutional law is driven by ongoing interactions — constitutional dialogues — between constitutional courts, the legislature, and the judiciary. Mainstream European legal scholarship, which rarely moves beyond the textual analysis of constitutional provisions and case law, misses much of what is most important about the new constitutionalism in Europe: namely, its profoundly participatory nature. The chapter is divided into four parts. I begin with a brief introduction to systems of constitutional justice in France, Germany, Italy and Spain. Of crucial importance are mechanisms for the protection of human rights. I then turn to two sets of constitutional dialogues, between constitutional courts and parliamentarians, and between constitutional courts and judicial authorities,
about the nature, content, and application of rights. As constitutional courts have consolidated their positions as the supreme interpreters of the constitution, the role and function of parliamentarians and of ordinary (that is, non-constitutional) judges have been transformed. Most important, legislators and judges behave as constitutional adjudicators, and therefore as adjunct builders of the constitutional law.

THE EUROPEAN MODEL OF CONSTITUTIONAL REVIEW

European constitutional courts (what will be called the Kelsenian Court below) make up an institutional ‘family’ to the extent that they share common attributes distinguishing them from institutions that exercise constitutional review elsewhere. By constitutional review, I mean the authority of an institution to invalidate laws, administrative decisions and judicial rulings on the grounds that these acts violate constitutional norms. The contrast between European and American ‘models’ of review is the standard reference point. In American judicial review, ‘any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional’ (Shapiro and Stone 1994). Although formulated broadly, the power is in practice conditioned by a number of doctrines designed to distinguish ‘the judicial function’ (the settlement of legal disputes) from ‘the political function’ (legislating). Most important, judicial review powers are said to be exercised only to the extent that they are necessary to settle a concrete ‘case or controversy’. It can then be further said that the power of judicial review is not wished for, in and of itself, but at times must be exercised in order to resolve a pending legal conflict. Advisory opinions on constitutionality are necessarily precluded as a judicial usurpation of the legislative function. American separation of powers notions – which rest on the formal equality of the executive, legislative, and judicial branches of government – both enable and restrict judicial review.

In Europe, constitutional review of legislation by the judiciary is formally prohibited, and this prohibition is the very core of separation of powers doctrines. According to these doctrines, American-style judicial review is attacked as a confusion of powers enabling the judiciary to participate in the political function. Thus whereas the American judiciary is responsible for defending the integrity of a hierarchy of legal norms, the apex of which is the constitution, the European judiciary, according to the traditional orthodoxy, is