1

Democratic Transitions and Constitutional Courts

Le développement de la justice constitutionnelle
est certainement l'événement le plus marquant du droit constitutionnel européen
de la seconde moitié du XXe siècle.

Louis Favoreu[1]

1 DEMOCRATIC TRANSITIONS

"The interval between one political regime and another": this is the definition of transition provided by Guillermo O'Donnell and Philippe C. Schmitter in their seminal book *Transitions from Authoritarian Rule*.[2] This is clearly a wide-ranging notion, encompassing all changes in political regimes. Indeed, although with the "third wave of democratization"[3] transitions have almost by definition become transitions *to democracy*, in actual fact a transition can also be from a democratic form of government to an authoritarian regime (*authoritarian* transitions),[4] or from

[1] Louis Favoreu, *Les Cours Constitutionnelles* (Presses Universitaires de France 1986), 3 ("The development of constitutional justice is undoubtedly the most memorable event of European constitutional law in the second half of the twentieth century").

[2] Guillermo O'Donnell and Philippe C. Schmitter, "Tentative Conclusions about Uncertain Democracies" in Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (eds.), *Transitions from Authoritarian Rule* (The Johns Hopkins University Press 1986), 6.

[3] Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).

[4] Suffice it to consider the "first and second reverse wave" identified by Huntington 1991, note 3, at 17–21. Although it would be inaccurate to speak of an authoritarian transition, a country that is at present characterized by a serious democratic deficit is Hungary. Indeed, the new 2012 Constitution, with subsequent amendments, has attracted strong criticism from numerous scholars, who have interpreted a number of constitutional provisions as evidence of an antidemocratic tendency that has characterized the country since the electoral victory of the Fidesz Party in 2010. See Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012); Michel Rosenfeld,

https://doi.org/10.1017/9781108776783.003 Published online by Cambridge University Press

an illiberal regime to another illiberal regime (of the same or different kind).[5] The transition may also lead to a "political gray zone"[6] where *hybrid* regimes are to be found.[7] These regimes are characterized by the fact that democratic procedures (such as free and fair elections) coexist alongside elements of authoritarian rule (such as violations of fundamental rights and freedoms, and a weak separation of powers).

The study of democratic transition processes developed particularly after the fall of the Berlin Wall in November 1989, when a number of countries in Central and Eastern Europe, after breaking free from the previous Socialist regime, began a transition toward democracy. In this period the analysis of these processes was so highly developed as to justify claims about the emergence of a new discipline called *transitology*.[8]

A variety of factors can lead to a process of democratization: it can be the result of historical events (as in the case of the fall of the Berlin Wall), or the outcome of a gradual evolution of the political system (as was the case in the United States and in some European countries during the "first wave of democratization" [1828–1926]).[9] In other cases it may follow on from the military defeat of an authoritarian regime (as happened after World War II in Germany, Italy, Austria, and Japan), or it may be the consequence of the death of a dictator (as in the case of Spain after Franco's death).

"Editorial. Constitutionalism, Moderation and Compromise: Confronting Threats within and beyond the Constitution" (2011) 9 *International Journal of Constitutional Law* 3–4, 552. It is significant that in the view of Kim Lane Scheppele the 2012 Hungarian Constitution is an "unconstitutional Constitution" (Kim Lane Scheppele, "The Unconstitutional Constitution" [January 2, 2012] *The New York Times*, https://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/ [accessed August 2, 2019]). Another country characterized by serious democratic backsliding in recent years is Poland. See Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-constitutional Populist Backsliding" (2018) *Sydney Law School Research Paper* 18/01; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

5 As in the case, for example, of some Asian and African countries. See Thomas Carothers, "The End of the Transition Paradigm" (2002) 13 *Journal of Democracy* 1, 9.

6 Carothers 2002, note 5, at 9.

7 Leonardo Morlino, "The Two 'Rules of Law' between Transition to and Quality of Democracy" in Leonardo Morlino and Gianluigi Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010), 41 ff.; Valerie Bunce and Sharon L. Wolchik, "Mixed Regimes in Postcommunist Eurasia: Tipping Democratic and Tipping Authoritarian" (2008) *Società per lo studio della diffusione della democrazia Working Paper* 1/2008, 4. An analysis from a legal point of view of this type of regimes is put forward by Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 *Cornell Law Review* 2, 391 ff.

8 See Philippe C. Schmitter, "Transitology: The Science or Art of Democratization?" in Joseph S. Tulchin and Bernice Romero (eds.), *The Consolidation of Democracy in Latin America* (Lynne Rienner 1995), 11–41; Valerie Bunce, "Should Transitologists Be Grounded?" (1995) 54 *Slavic Review* 1, 111–125.

9 See Huntington 1991, note 3, at 16–17.

The processes of democratic transition and democratic consolidation are neither straightforward nor rational. Rather, they are extremely complex, and characterized by numerous variables, consisting of *actors* and *factors*.[10]

The actors can be classified into two groups. The first group includes the *institutional* actors, such as the military, the government, Parliament, the judicial authorities, the Head of State, the electoral bodies, the constitutional courts (the focus of the present study), Truth Commissions, and supranational and international bodies. The second group, by contrast, consists of *noninstitutional* actors, such as the civil society, interest groups, and elites. In a hybrid position we find the political parties, which serve as liaison between the institutions and the civil society.

In the same way as the actors, also the factors contributing to the success or failure of the transitions are many and varied. The first group includes *endogenous* factors, such as unexpected events, the nature of the previous nondemocratic regime, the electoral systems, the party systems, religious and philosophical beliefs, the existence of a democratic tradition and culture, the level of economic and social development, the constitutional structure, and the "stateness."[11] The second group, by contrast, consists of *exogenous* factors, such as the international context and influences, as well as the *Zeitgeist*.[12]

Due to the previously mentioned variables, the outcome of every transition process is characterized by a high level of *uncertainty*. The case of the recent transitions in the Arab world is emblematic in this respect. It is well known that since December 2010 a series of revolts and protests against the existing autocratic or

[10] For an analysis of the actors and factors influencing the processes of democratic transition and consolidation in Africa, Latin America, Central and Eastern Europe, and Asia see Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (The Johns Hopkins University Press 1996); Luca Mezzetti, *Le democrazie incerte. Transizioni costituzionali e consolidamento della democrazia in Europa orientale, Africa, America Latina, Asia* (Giappichelli 2000); Luca Mezzetti, *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico* (Cedam 2003); Justin O. Frosini and Francesco Biagi (eds.), *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge 2015).

[11] "In many countries the crisis of the non-democratic regime is also intermixed with profound differences about what should actually constitute the polity (or political community) and which *demos* or *demoi* (population or populations) should be members of that political community. When there are profound differences about the territorial boundaries of the political community's state and profound differences as to who has the right of citizenship in that state, there is what we call a 'stateness' problem" (Linz and Stepan 1996, note 10, at 16). Serious "stateness" problems arose both in Spain and the Czech Republic (to be discussed, respectively, in Chapters 3 and 4). It should be noted that a "stateness" problem arose also in Italy, with specific reference to Sicilian separatism. However, this issue was resolved by means of the adoption of the Statute of Sicily on May 16, 1946.

[12] The *Zeitgeist*, or spirit of the times, derives from the history of ideas in the German tradition. According to Linz and Stepan 1996, note 10, at 74, "When a country is part of an international ideological community where democracy is only one of many contested ideologies, the chances of transiting to and consolidating democracy are substantially less than if the spirit of the time is one where democratic ideologies have no powerful contenders."

semi-autocratic regimes have been taking place in several North African and Middle Eastern countries, in some cases resulting in the fall of the respective dictators. The widespread nature of these movements gave rise to expressions such as "Arab Spring" or "fourth wave of democratization," reflecting the assumption that these transitions would be successful. On the contrary, in a number of countries, such as Egypt and Libya, the processes of democratization ran into enormous difficulties, making their outcome extremely uncertain.

Another important characteristic of transitions is given by their *provisional nature*. Indeed, the transition is placed in a kind of limbo between one regime and the next. It is a period that is not destined to last forever, but that will lead (or rather, *should* lead) to a new political regime, different from the one that existed before. As a result, a transition may be either long or short depending on the circumstances, but it always has a beginning and an end.

It should be noted that democratic transitions are increasingly linked to the adoption of new constitutions, thus giving rise to *constitutional transitions*.[13] It is evident, however, that not all constitutions mark a real break with the authoritarian past. In the first place, one should consider the *procedure* adopted for drafting the constitution because the nature of a constitution is strictly linked to the way it is drafted. Thus, "[I]t would appear to be unimaginable, for example, for a despot to 'impose' a liberal-democratic Constitution: for it to be genuinely liberal and democratic, it would need to be *decided* (not simply 'accepted', and this is the reason for the weakness of all forms of plebiscite) by the people and/or their representatives."[14] In this connection, the process that led to the adoption of the 2014 Constitution of Tunisia, where a Constituent Assembly was directly elected by popular vote, was far more democratic than the constitution-making process that took place in Morocco, where the 2011 Constitution was drafted by a committee of experts all appointed by the king. The impression, therefore, is that the new Moroccan Constitution represents a modern example of an *octroyée* Constitution.[15]

Secondly, it is evident that also the *content* of the constitution matters. Illiberal regimes often rely on socialist and authoritarian constitutions, or constitutions based on religious fundamentalism. In order to make a clean break with the illiberal past, the new constitution needs to be based on values and principles of liberal-democratic constitutionalism, such as the principle of separation of powers (both horizontal and vertical), the separation between state and religion, the civilian

[13] Giuseppe de Vergottini, *Le transizioni costituzionali* (Il Mulino 1998).

[14] Antonino Spadaro, "La transizione costituzionale. Ambiguità e polivalenza di un'importante nozione di teoria generale" in Antonino Spadaro (ed.), *Le "trasformazioni" costituzionali nell'età della transizione* (Giappichelli 2000), 64.

[15] Francesco Biagi, "The Pilot of *Limited* Change: Mohammed VI and the Transition in Morocco" in Frosini and Biagi 2015 (eds.), note 10, at 56 ff.; Francesco Biagi, "The 2011 Constitution-Making Process in Morocco: A Limited and Controlled Public Participation" in Tania Abbiate, Markus Böckenförde, and Veronica Federico (eds.), *Public Participation in African Constitutionalism* (Routledge 2018), 55 ff.

control of the military, the principle of equality, the safeguarding of fundamental rights, the protection of minorities, the independence of the judiciary, and an effective system of constitutional justice.[16]

However, it is not always the case that a democratic transition requires the adoption of a new constitution. Indeed, as pointed out by Giuseppe de Vergottini, it is also possible for transitions to take place by means of a *reform* of the existing constitution, or even *without amending the constitution at all*.[17] Mexico is an example of a democratic transition that took place by means of constitutional reforms. Indeed, from 1977 onward, a series of constitutional amendments introduced major electoral reforms, which played a prominent role in the democratization process of the country. These reforms made a multiparty system possible, leading in the year 2000 to the alternation of power in a country that for 71 years had been dominated by a hegemonic force, the Institutional Revolutionary Party (*Partido Revolucionario Institucional*).[18]

Another case of particular interest is Portugal, where the constitutional reforms of 1982 and 1989 were crucial to guarantee an effective transition to democracy. Indeed, the Constitution of 1976 made numerous references to a transition toward a society and economy of a Socialist type, but with the amendments of 1982 and 1989, the Council of the Revolution was abolished, a Constitutional Court was established, the powers of the president were reduced in certain respects, and for the most part the ideological references to Socialist-economic principles were eliminated. The amendments to the Portuguese Constitution were so radical as to "give the impression that the body drafting the amendments was in actual fact endowed with constituent powers."[19]

Examples of transitions that, at least initially, took place without any formal constitutional amendments are to be found in the Western Balkans, most notably Serbia and Montenegro, where, until the adoption of the new constitutions (respectively, in 2006 and 2007), the transition was based on the constitutions adopted in the 1990s, and was largely directed by the existing elites.[20]

[16] See de Vergottini 1998, note 13, at 51; Larry Diamond, *Developing Democracy: Towards Consolidation* (The Johns Hopkins University Press 1999), 11 ff.

[17] Giuseppe de Vergottini, *Diritto costituzionale comparato* (Cedam 2013), 269.

[18] On the role of the electoral reforms in the process of democratization in Mexico, see Ricardo Becerra, Pedro Salazar, and José Woldenberg, *La mecánica del cambio político en México. Elecciones, partidos y reformas* (Cal y Arena 2000); Lorenzo Córdova Vianello, "La reforma electoral y el cambio político en México" in Daniel Zovatto and J. Jesús Orozco Henríquez (eds.), *Reforma política y electoral en América Latina 1978–2007* (Editorial UNAM 2008), 653 ff.

[19] de Vergottini 1998, note 13, at 161. See also Giuseppe de Vergottini, "Principio di legalità e revisione della Costituzione portoghese del 1982" in Alessandro Pizzorusso and Vincenzo Varano (eds.), *L'influenza dei valori costituzionali sui sistemi giuridici contemporanei* (Giuffrè 1985), 1154.

[20] See Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina* (Cedam 2008), 25.

2 FORMAL TRANSITION AND SUBSTANTIVE TRANSITION

Identifying the "temporal coordinates" of democratic transitions is extremely complicated. Whereas political scientists pay considerable attention to identifying the end of the transition and the beginning of the period of consolidation, as well as to the characteristics distinguishing these two processes,[21] legal scholars often tend to identify the entry into force of the new democratic constitution as the watershed between transition and consolidation. In their view, the adoption of a new constitution represents "the legal expression of a successful transition."[22] However, this formulation seems to be slightly simplistic because it fails to take account of the complexity and the dynamism of these processes. An analysis of the transitions that took place in Europe in the twentieth century shows that the entry into force of a new democratic constitution, while representing the most significant element of change and discontinuity between the old and the new legal system,[23] is not in itself sufficient to give rise to an *effective* transition from autocratic to democratic rule.[24] The constitution serves to formalize the change, but is not in itself sufficient to ensure the effective transformation of the state.

In a more traditional perspective, what distinguishes the transition from the consolidation (from a more specifically legal perspective) is the fact that the transition consists of a period in which the fundamental values and principles underlying the new order are formally laid down in the constitution, whereas the consolidation is the period in which these principles and values become firmly rooted. The question arises, however, as to whether this distinction is more theoretical than substantive: How is it possible to consolidate something that in many respects exists only on paper, and that has not yet been implemented? In this connection reference may be made to the recognition and protection of fundamental rights, that clearly constitute an essential feature of any democracy: at the time they are laid down in the constitution, fundamental rights still have to be implemented, and as a result it makes little sense to claim that they need to be "consolidated." They could be consolidated only if they had already been applied in practice, at least partially. One need only consider the case of Italy, particularly the period following the adoption of

[21] On these debates see Richard Gunther, Hans-Jürgen Puhle and P. Nikiforos Diamandouros, "Introduction" in Richard Gunther, P. Nikiforos Diamandouros, and Hans-Jürgen Puhle (eds.), *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective* (The Johns Hopkins University Press 1995), 3 ff.

[22] See Ruth Rubio-Marín, "Women and the Cost of Transition to Democratic Constitutionalism in Spain" (2003) 18 *International Sociology*, 253. The author, however, rejects this position.

[23] The fundamental importance of the adoption of a new democratic constitution to mark the break between the old and the new regime is underlined by Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992), 46 ff., 60 ff., and 69. See also de Vergottini 1998, note 13, at 169.

[24] See Giuseppe de Vergottini, "Costituzionalismo europeo e transizioni democratiche" in Marina Calamo Specchia, Maddalena Carli, Giampiero Di Plinio, and Roberto Toniatti (eds.), *I Balcani occidentali. Le Costituzioni della transizione* (Giappichelli 2008), 4.

the 1948 Constitution: for a long time, and above all until the Constitutional Court started its activity in 1956, many constitutional provisions on fundamental rights were not effectively enforced, while a number of laws dating back to the Fascist regime continued to be applied, although they were clearly inconsistent with the new Constitution.[25]

Therefore, a transition, in the sense of replacement of an authoritarian regime with a completely different one based on new principles and values, cannot be deemed to be complete with the mere entry into force of a new constitution. The risk is to deal with a "façade democracy,"[26] characterized by the paradoxical situation that the new democratic constitution operates within a legal order that in many respects is still de facto authoritarian.[27] In these cases it is possible to speak of *constitutions without constitutionalism*.[28]

It is evident, then, that the traditional (*formal*) meaning of transition does not appear to be capable of encapsulating the process in its entirety. For this reason, it seems necessary to opt for a *substantive* interpretation of transition, which refers to the period in which the fundamental principles characterizing the new system are enforced. On the basis of this interpretation, the conclusion of the constituent process strictly speaking does not mark the end of the transition and the beginning of the consolidation, but, on the contrary, marks the beginning of the *second phase of the transition*, in which the principles laid down in the constitution are effectively implemented. The substantive transition thus goes hand in hand with the enforcement of the constitution, and as a result, to paraphrase a well-known distinction,[29] it

[25] As discussed in Chapter 2, Sections 3 and 4.

[26] de Vergottini 1998, note 13, at 26; Giovanni Sartori, *Elementi di teoria politica* (Il Mulino 1995), 24 ff.

[27] As in the case of Italy in the period 1948–1956 (see Chapter 2, Section 3). A sharp contrast between the provisions of the new constitution and the real conditions of the country could also be seen in various Balkan countries (de Vergottini 2008, note 24, at 7), in Latin America (Atilio A. Borón, "Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism" in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley [eds.], *Constitutionalism and Democracy: Transitions in the Contemporary World* [Oxford University Press 1993], 339 ff.) and Africa (H. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in Greenberg, Katz, Oliviero, and Wheatley [eds.] 1993, in this note, at 65 ff.).

[28] On the distinction between constitutions and constitutionalism see Stephen Holmes, "Constitutions and Constitutionalism" in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 189 ff.; Augusto Barbera, "Le basi filosofiche del costituzionalismo" in Augusto Barbera (ed.), *Le basi filosofiche del costituzionalismo* (Laterza 2005), 3 ff.

[29] With regard to the distinction between "law in the books" and "law in action" see Harold C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press 1946); Tullio Ascarelli, "Interpretazione del diritto e studio del diritto comparato" in *Saggi di diritto commerciale* (Giuffrè 1955), 508; Karl H. Neumayer, "Law in the Books, Law in Action et les méthodes du droit comparé" in Mario Rotondi (ed.), *Buts et méthodes du droit comparé* (Cedam 1973), 505 ff.

seems possible to distinguish between a *transition in the constitution* and a *transition in action*.[30]

This second phase tends to be much longer than the first one. Moreover, whereas the formal transition comes to an end at a particular point in time (i.e., the entry into force of the new constitution) the same cannot be said for the substantive transition. Indeed, if the transition process is successful, over time the substantive transition will *fade* into consolidation, without a clear demarcation between these two phases. For this reason, though the transition and the consolidation are conceptually distinct, they may even temporally overlap. Thus, the traditional bipartition between transition and consolidation is insufficient to explain the complexity and the dynamism of the process. The latter, on the contrary, consists of three parts: *formal* transition, *substantive* transition, and *consolidation*. The final outcome is given by the *consolidated democracy*.

In other cases, however, when the substantive transition encounters resistance, the process moves into a "political gray zone" (mentioned previously), where *hybrid* regimes are to be found. Finally, it may be the case that the difficulties prevail, with the consequence that the transition fails and a new autocratic regime takes over.

Every transition, then, is characterized by *uncertainty*, not only because the "rules of the game" are unclear and because it is extremely difficult to predict how long this process will last but also because (as noted) its *final outcome* is uncertain. In particular, *the outcome largely depends on the second phase of the transition, that is the substantive transition*. Indeed, during this phase it becomes clear whether the principles and values laid down in the new constitution are effectively implemented in practice (thus paving the way for consolidation), or whether they remain a dead letter (meaning that the country drifts into a "grey area," with the risk of a restoration of an authoritarian regime). In this second phase, as shown in this book, the role played by the constitutional courts is of the utmost importance.

Before arguing that the establishment of these courts, particularly in the period after World War II, is closely linked to the processes of democratic transition, it seems necessary to provide a brief overview of the origins of constitutional justice.

3 FROM THE *STAATSGERICHTSBARKEIT* TO THE *VERFASSUNGSGERICHTSBARKEIT*

The first experiences of constitutional justice were closely linked to decentralized states. Indeed, in these countries there was a need to create a body to safeguard and preserve the "federative contract," and to bring harmony to the institutional

[30] On the distinction between "formal" transition and "substantive" transition see also Francesco Biagi, "Three Generations of European Constitutional Courts in Transition to Democracy" (2014) 2 *Diritto pubblico comparato ed europeo*, 986–988.

https://doi.org/10.1017/9781108776783.003 Published online by Cambridge University Press

pluralism underlying the original *pactum foederis*.[31] In the United States, it is the Supreme Court that is the body that has acted since 1787 as the arbiter between the federal government and the member states, whereas in Europe the origins of constitutional justice, in terms of regulation of competences between the member states by a confederal body, can be traced back to the 1815 German Confederation. Afterward, reference may be made to the Austrian Constitution of 1867, where the *Reichsgericht* was vested with the task of resolving the conflicts between the *Reich* and the *Länder*, and the Swiss Constitution of 1874, in which the Federal Court was granted the power to strike down cantonal laws in conflict with federal law.[32] Moreover, the 1919 Weimar Constitution set up a Constitutional Tribunal (*Staatsgerichtshof*) to resolve not only the conflicts between constitutional bodies within the *Reich* and the *Länder* but also the disputes between the *Reich* and the *Länder*, and between the *Länder*. In the same vein the Austrian Constitution of 1920 provided that the Constitutional Court should rule on conflicts of powers between the *Bund* and the *Länder*.

As a result, nineteenth-century Europe saw the emergence of a particular "type" of constitutional justice, known as *Staatsgerichtsbarkeit*, that was intended to preserve the coexistence between the various levels of political power within the state. On the contrary, what could not be established in Europe until the beginning of the twentieth century (with only a few exceptions) was the type of constitutional justice aimed at safeguarding the fundamental rights laid down in the constitution, namely the *Verfassungsgerichtsbarkeit*.[33] Indeed, in nineteenth-century Europe, a key element for the emergence of this type of constitutional justice was lacking, that is social and political pluralism. It should be noted that the distinction between these two types of constitutional justice was established only after World War II, whereas in the period between the two world wars the *Verfassungsgerichtsbarkeit* was considered to be the continuation and completion of the *Staatsgerichtsbarkeit*.[34]

It is well known that the "European" model of constitutional review, inspired by the theories of Hans Kelsen, was born between the two world wars. This model is characterized by the fact that constitutional review can only be carried out by an *ad hoc* body, the constitutional court (centralized model), thus clearly departing from the "US" system, where all the courts are empowered to exercise a constitutional control of legislation (decentralized model). The first experiences of the European system were given by the Constitutional Courts of Czechoslovakia, Austria, and

[31] See Elena D'Orlando, *La funzione arbitrale della Corte costituzionale tra Stato centrale e governi periferici* (Libreria Bonomo Editrice 2005), 40.

[32] On constitutional justice in nineteenth-century Europe, see Jörg Luther, *Idee e storie di giustizia costituzionale nell'Ottocento* (Giappichelli 1990).

[33] On the distinction between *Staatsgerichtsbarkeit* and *Verfassungsgerichtsbarkeit*, see Alessandro Pizzorusso, "Garanzie costituzionali. Art. 134" in Giuseppe Branca (ed.), *Commentario della Costituzione* (Zanichelli-Il Foro italiano 1981), 21 ff.

[34] See Gustavo Zagrebelsky, *La giustizia costituzionale* (Il Mulino 1988), 22.

Spain. The first was provided by the Constitution of Czechoslovakia of February 29, 1920, followed a few months later by the Austrian Constitutional Court, envisaged by the Constitution of October 1, 1920 (the *Oktoberverfassung*). Then the Spanish Constitution of December 9, 1931 made provision for the Court of Constitutional Guarantees (*Tribunal de garantías constitucionales*).

According to Kelsen, the constitutional court was not a court strictly speaking because it was not responsible for adjudicating on specific situations or events, but exercised an "abstract" control of legislation, striking down laws that were deemed to be incompatible with the constitution, with *ex nunc* effects, or in certain cases, with *pro futuro* effects. In Kelsen's scheme, a court that is entrusted with the power of ascertaining whether a law is compatible with the constitution is not a judicial but a legislative body. In particular, the constitutional court is considered a *negative legislator*: whereas the positive legislator enacts new laws, the negative legislator is responsible for striking down laws that are in contrast with the constitution.[35] This interpretation was intended to head off the risk of a "government of judges" because in that historical period Europe was witnessing the rise of the Free Law Movement (*Freirechtsbewegung*)[36] and the People's Community (*Volksgemeinschaft*)[37] that aimed to free judges from what they considered to be the strict application of the law.[38]

The model outlined by Kelsen was intended precisely to avoid the risk of a government of judges, by requiring them to be subject to the laws and granting the constitutional court the exclusive right to strike down laws in contrast with the constitution. The willingness to prevent a system of constitutional review based on

[35] Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit" (1929) 5 *Veröffentlichtung der Vereinigung der Deutschen Staatrechtslehrer* 2/"La garantie jurisdictionnelle de la Constitution – La justice constitutionnelle" (1929) 5 *Revue de Droit Public et de la Science Politique en France et à l'étranger*. The English translation can be found in "Kelsen on the Nature and Development of Constitutional Adjudication" in Lars Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015), 22 ff.

[36] In contrast with legal positivism, the members of the Free Law Movement argued that judges should fill in the gaps and uncertainties in the law, as well as promoting creative jurisprudence. Moreover, jurists were expected to work toward an extension of positive sources, promoting normative sources other than the law. Hence the recourse to custom, administrative and judicial practice, case law, the adoption of comparative method and the findings of other social sciences, in particular sociology, and so on. See Giuseppe Volpe, *L'ingiustizia delle leggi. Studi sui modelli di giustizia costituzionale* (Giuffrè 1977), 29 ff.

[37] In the *Volksgemeinschaft* perspective, when considering a specific case, the judge "is not required to evaluate it on the basis of positive norms, that might not be capable of foreseeing it, but to draw on the more widely established law of the people's community, not only in cases in which a positive norm is lacking, but also where it is deemed that in the specific case the provisions of the applicable positive law are in contrast with the values and goals of the community" (Volpe 1977, note 36, at 98).

[38] See Eduardo García de Enterría, "La posición juridica del Tribunal constitucional en el sistema español: posibilidades y perspectivas" (1981) 1 *Revista española de derecho constitucional* 1, 44.

the US model clearly emerged from Article 89 of the 1920 Austrian Constitution, which explicitly prohibited ordinary judges from exercising a constitutional review of legislation.

Whereas Kelsen's model may be seen as symptomatic of a lack of trust in the judiciary, the origins of the US system of constitutional review reflect the aim of establishing the judiciary above the other branches of government, in particular the legislature. More specifically, the historical and ideological motivations for this approach are rooted in the intention of wealthy American bourgeois families to obtain protection from the courts for their constitutional and, above all, property rights against the risk of abuses and expropriation by the legislative assemblies.[39] From this point of view, nineteenth-century European liberal ideology was markedly different from US liberalism. In Europe, the guiding principle was the reorganization and stabilization of legal systems, for example through the introduction of codes, to reduce the margin of discretion of the judges, and to limit as much as possible the activities of the courts (and in fact, as noted in the preceding text, constitutional review of legislation was entrusted to an *ad hoc* body, a *negative legislator*).[40] In the United States, on the contrary, while carrying out judicial review of legislation, the courts were required to interpret constitutional provisions that were often extremely vague and elastic, with the consequence that they had to incorporate into their reasoning elements of evaluation that were by their very nature discretional and (in the most noble sense of the word) "political."[41] As a result, the trust placed in the judiciary was much greater than in Europe.[42]

4 THE DIFFICULTIES OF THE FIRST EUROPEAN CONSTITUTIONAL COURTS

The first experiences of the European model of constitutional review, especially if one considers the cases of the Czechoslovak and Spanish Constitutional Courts, encountered major difficulties. The reasons for the limited success of these bodies are many and various.

[39] See Volpe 1977, note 36, at 157.

[40] See Giovanni Bognetti, *Lo spirito del costituzionalismo americano. Breve profilo del diritto costituzionale degli Stati Uniti. La Costituzione liberale* (Giappichelli 1998), 67.

[41] Ibid.

[42] It should be noted, however, that the judiciary in the United States was not initially a strong branch of government. The Constitution made provision solely for the Supreme Court as the necessary judicial body, delegating to Congress the question of whether and to what extent the lower federal courts should be established. In addition, the Constitution did not specify the number of justices to be appointed to the Supreme Court, with the result that Congress had to determine this number by means of legislation, thus potentially interfering in the composition of the Court and indirectly in its judicial decisions (in this connection, mention should be made of the court-packing plan of Franklin D. Roosevelt).

With regard to the Czechoslovak Constitutional Court, on many occasions the political parties expressed their skepticism, if not their outright hostility, in relation to an institution that was authorized to overrule their decisions, as this constituted a threat to the principle of parliamentary supremacy. In addition, there was a certain tension between the apex courts and the Constitutional Court because the former saw the latter as a potential rival. The "stranglehold" on access is another reason that explains the difficulties encountered by the Constitutional Court. In fact, the bodies entitled to challenge the constitutionality of a law before the Court were only the two Houses of Parliament, the Supreme Court, the Supreme Administrative Court, and the Election Court, and each of them had to act *en banc*. This means that the parliamentary opposition was not granted standing to apply to the Court. Even the ordinary courts were denied the power to suspend a case and refer a question of constitutionality to the Court, as they could only challenge the constitutionality of a law *in abstracto* in the *en banc* session.[43] Furthermore, the constitutional challenge could be raised only within three years of the date when the contested law was enacted. Also the lack of a "federal rationale" appears to have weakened the role of the Constitutional Court: indeed, as discussed previously, at that time constitutional justice was strictly linked to decentralized countries. Czechoslovakia, on the contrary, was a unitary state, and therefore there was no need to resolve disputes between the central government and the substate entities.[44] In light of this situation, it is hardly surprising that in 1931, when the term of office of the judges appointed in 1921 expired, the president and the apex courts delayed appointing new judges for seven years.[45] In fact, between 1931 and 1938, the Court was "*de facto* abolished, or at the very least, suspended."[46] At that point, however, Czechoslovakia was in its final months before the Nazi invasion, and as a result the Court managed to operate for just a few months, until it was suspended in 1939 by Hitler's regime. For all these

[43] See the decision of the Supreme Administrative Court of Czechoslovakia, Boh. Adm. 1097/22, 1757/22.

[44] On the factors explaining the difficulties encountered by the Czechoslovak Constitutional Court see Zdeněk Kühn and Jan Kysela, "Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic" (2006) 2 *European Constitutional Law Review* 2, 189; David Kosař and Ladislav Vyhnánek, "The Constitutional Court of Czechia" in Armin von Bogdandy et al. (eds.), *Constitutional Judicial Review* (Oxford University Press, forthcoming); see also the website of the Czech Constitutional Court: www.usoud.cz/en/constitutional-court-of-the-czechoslovak-republic-and-its-fortunes-in-years-1920-1948/ (accessed July 15, 2019). A similar degree of hostility was also encountered when the Constitutional Court of the Czech Republic started its activity (see Chapter 4, Section 3).

[45] The Constitutional Court was composed of seven members: three appointed by the President of the Republic (from a list submitted by Parliament or government), two by the Supreme Court, and two by the Supreme Administrative Court. The appointment made by the president had to be countersigned by the prime minister.

[46] Pedro Cruz Villalón, *La formación del sistema europeo de control de constitucionalidad (1918–1939)* (Centro de estudios constitucionales 1987), 290. Also the Constitutional Court of the Czech Republic was forced to suspend its activities for reasons relating to the appointment of the constitutional judges (see Chapter 4, Section 3).

reasons, the Court handed down an extremely limited number of judgments, having little impact on Czechoslovak society.

Also the Spanish Court of Constitutional Guarantees encountered enormous difficulties. During its short-lived existence it never enjoyed a position of prestige. Rather, in the view of a number of legal scholars, the experience of the Court represented "one of the least glorious pages"[47] as far as the constitutional order of the Second Republic was concerned. The first ruling of the Court was handed down on June 8, 1934, but the decree issued on May 4, 1937 abolished this body as it was deemed to be in conflict with the principles on which Franco's regime was based. Among the difficulties encountered by the Court, mention should be made of the lack of a *real* support from the political forces for setting it up. The then-president of the Court, Alvaro de Albornoz, claimed in a speech before Parliament that nobody had wanted to establish the Court, no significant political force had supported it and that, on the contrary, it had encountered hostility from the right and the left in equal measure. In 1935 the right-wing forces had tabled a motion for constitutional reform envisaging the abolition of the Court. The following year, the left-wing parties had tabled a motion advocating the removal from office of the constitutional judges in the case of manifest hostility to the Republican institutions, to be determined by a simple majority of the Court.[48] Furthermore, some constitutional framers were supporters of the US system of constitutional review, whereas others, as advocates of the principle of parliamentary sovereignty, were against granting the courts the power to verify the constitutionality of legislative acts, and more in favor of review mechanisms of a political nature.[49] In light of the manifest hostility toward the Court, it is not entirely clear why this body was established. The attempt to provide an arbiter to settle conflicts between the state and the regions, and the influence the prestigious Austrian Constitutional Court exerted over the Spanish constitutional drafters, are two of the reasons put forward by legal scholars to justify the establishment of the Court.[50]

Another aspect that explains the difficulties encountered by the Court of Constitutional Guarantees is that its members were too overtly politicized.[51] The president was not elected by the judges, but by Parliament, and its members included, among the others, a representative of each region of the country, both "autonomous" and "nonautonomous." Even the "technical" members (such as those nominated by the

[47] Eduardo García de Enterría and Tomás-Ramón Fernandez, *Curso de derecho administrativo* (Civitas 1980), 94.

[48] See Cruz Villalón 1987, note 46, at 339.

[49] See Francisco Tomás y Valiente, *Escritos sobre y desde el Tribunal constitucional* (Centro de estudios políticos y constitucionales 1993), 26–27.

[50] See Francisco Rubio Llorente, "Del Tribunal de garantías constitucionales al Tribunal constitucional" (1982–1983) 16 *Revista de derecho político*, 33.

[51] In the view of Pedro J. González-Trevijano Sánchez, *El Tribunal constitucional* (Aranzadi 2000), 49, it was precisely the composition of the Court that was "mainly responsible for its lack of success."

bar association, and the faculties of law) were chosen mainly on the basis of political criteria. As a result, the Court was considered to be equivalent to a "political Chamber."[52]

Moreover, it is important to consider the extremely difficult historical phase in which the Court started its activity. Indeed, the judges had the misfortune to find themselves engulfed in the political conflicts of the time, having to deal with a very complex social and political climate. The result was that the rulings of the Court, influenced by this historical context, "were judged according to parameters of a political nature [and] became the subject of struggle and controversy between the various parties."[53] The case of the law on agrarian contracts approved by the Parliament of Catalonia in 1934 is emblematic. Although the Court declared the law unconstitutional, the Catalan Parliament ignored the ruling and approved another law with the same content. All this took place in a climate of such tension between the central government and the regional government of Catalonia that the president of the Court, Alvaro de Albornoz, was forced to resign.

The tension between the central government and Catalonia, as pointed out in the following text,[54] appears to be a constant in Spanish history: it was to resurface during the process of transition to democracy, with the adoption of a new Statute of Autonomy for Catalonia in 2006, and more recently with the events surrounding the popular consultation for the self-government of Catalonia in November 2014 and with the referendum on secession of October 1, 2017.

As argued by Pedro Cruz Villalón, neither Czechoslovakia nor Spain were sufficiently "*mature*"[55] for the constitutional review of legislation. On the contrary, the political and institutional conditions were much more favorable to the setting up of a Constitutional Court in Austria, and this helps to explain why this Court was far more effective than those in Czechoslovakia and Spain.[56] It should be noted that the Austrian constitution-making process took place with the collaboration of legal scholars of the caliber of Karl Renner, Michael Mayr, and Hans Kelsen, and that the Constitution, that was the outcome of significant compromises between the main political parties, adopted a federal structure based on a balance of powers between the *Länder* and the *Bund*. This "moderate federalism"[57] represented an

[52] Rubio Llorente 1982–1983, note 50, at 31; see also Rosa María Ruiz Lapeña, *El Tribunal de garantías constitucionales en la II República española* (Bosch 1982), xxi ff.

[53] Giancarlo Rolla, *Indirizzo politico e Tribunale costituzionale in Spagna* (Jovene 1986), 77. On the case law of the Court of Constitutional Guarantees see Martín Bassols Coma, *La jurisprudencia del Tribunal de garantías constitucionales de la II República española* (Centro de estudios constitucionales 1981).

[54] See Chapter 3, Sections 1.B and 3.D.

[55] Cruz Villalón 1987, note 46, at 417.

[56] On the Austrian Constitutional Court, see Charles Eisenmann, *La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche* (Economica-Presses Universitaires d'Aix-Marseille 1986) (reproduction of the 1928 edition).

[57] I.M.ª de Lojendio Irure, "Prólogo" in Cruz Villalón 1987, note 46, at 15.

important feature of the Constitution, in which the Constitutional Court was intended to play a key role. Indeed, constitutional review of legislation served to safeguard the federal structure and the proper demarcation of competences between the *Bund* and the *Länder*. This approach undoubtedly contributes to explaining the effectiveness of the Constitutional Court's action.[58]

It must be stressed, however, that even the Austrian Court encountered serious difficulties. Above all, the constitutional reform of 1929 not only vested the Supreme Court and the Administrative Court with the power to refer questions of constitutionality to the Constitutional Court[59] but also modified the procedure for the appointment of the members of the Court, strengthening the role of the federal government (the Government of the Christian-Social Party, in power at the time), thus upsetting the balance in the composition of the Court. A few years later, by means of a government order of May 23, 1933, the Law on the Constitutional Court was reformed to reduce by half (for an indefinite period) the number of members of the Court, that as a result was unable to perform most of its functions.[60] On April 24, 1934, the adoption of an authoritarian-corporatist Constitution resulted in the demise of democracy in Austria. Indeed, although this new Constitution envisaged a constitutional chamber within the Federal Court to take over the functions of the Constitutional Court, the political conditions prevented any effective constitutional review of legislation.

It should be noted that, in spite of their limited success, the precedents of constitutional justice in Spain and Czechoslovakia played a role that was by no means secondary in the decision to set up a constitutional court after the collapse of the respective authoritarian regimes.[61] In Spain, for example, although references to the Court of Constitutional Guarantees were few and far between, and it was nearly always cited as a negative example, this experience was useful during the constitution-making process to avoid the same mistakes. In the Czech Republic the reference to the 1920 Constitutional Court of Czechoslovakia was important especially from a symbolic point of view: indeed, as recalled in the preceding text, it was the first Constitutional Court in Europe (set up even before the Austrian Court) responsible for constitutional review of legislation. Therefore, for the Czech constitutional framers it would have been hard to justify the interruption of a tradition of constitutional justice of such historical significance.

[58] Cruz Villalón 1987, note 46, at 419.

[59] On this procedural gateway to the Constitutional Court see Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution" (1942) 4 *The Journal of Politics* 2, 183 ff.

[60] Cruz Villalón 1987, note 46, at 266 ff. According to Cruz Villalón, in actual fact the Court could have continued to carry out its functions, but the government order achieved its aim thanks to the complicity, or at least the weakness, of the Court or some of its members (at 273).

[61] As discussed, respectively, in Chapter 3, Section 2, and Chapter 4, Section 3.

5 THE CLOSE LINK BETWEEN THE PROCESSES OF DEMOCRATIC TRANSITION AND THE SETTING UP OF CONSTITUTIONAL COURTS AFTER WORLD WAR II

The extraordinary spread of constitutional courts in Europe (and beyond) after World War II should not be taken to mean that it was inevitable that these bodies would be established. *Au contraire*. It is important to bear in mind that the criticisms of the setting up of constitutional courts inspired by Jacobin ideals – based on the principle of the "law as the expression of the general will"[62] and the myth of the representative assembly – continued to be particularly strong. It was precisely these ideas that were cited to undermine the legitimacy of a body entrusted with the power of striking down legislative acts adopted by Parliament, the representative institution *par excellence*. These arguments had a certain resonance within the constituent assemblies in Italy, France, and Spain whenever the issue of constitutional justice was discussed. Whereas in the constituent assemblies of Central and Eastern European countries the setting up of a constitutional court was not seriously contested, the legitimacy of these bodies began to be questioned in Parliament as soon as the courts started their activity. Thus, defeating the dogma of parliamentary supremacy was by no means an easy task.

Interestingly enough, in certain countries the power to review the constitutionality of legislation was granted to bodies *other than* the constitutional court (or the ordinary courts). A particular case is that of Portugal, where a Constitutional Court was established only after the constitutional reform of 1982. Indeed, the 1976 Constitution, adopted after the fall of Salazar regime, had entrusted the power of constitutional review not only to the ordinary courts and the Constitutional Commission but also to the Council of the Revolution, a constitutional body representing the military.[63]

It has to be pointed out that the constituent assemblies do not seem to have been influenced by the limits and difficulties of previous experiences of constitutional justice. In this connection, suffice it to mention the fact that in designing the system of constitutional review, the German constitutional drafters not only refused to be discouraged but even drew inspiration from the *Staatsgerichtshof* of the Weimar Republic,[64] although it was a body that not always performed the role assigned to it

[62] See the seminal book by Raymond Carré de Malberg, *La loi, expression de la volonté générale* (Sirey 1931).

[63] See António Araújo, "A construção da justiça constitucional portuguesa: o nascimento do Tribunal Constitucional" (1995) 30 *Análise Social* 134, 897 ff.; Gonçalo de Almeida Ribeiro, "Judicial Review of Legislation in Portugal: A Brief Genealogy" in Francesco Biagi, Justin O. Frosini, and Jason Mazzone (eds.), *Constitutional History: Comparative Perspectives* (Brill, forthcoming); Giuseppe de Vergottini, *Le origini della seconda Repubblica portoghese* (Giuffrè 1977), 234–235.

[64] See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1989), 8–11.

by the Constitution of 1919. In fact, "completely betraying its institutional role and functions,"[65] the Court contributed to the collapse of the constitutional order by means of the well-known ruling of October 25, 1932 on the "coup d'état" in Prussia on July 20 the same year, which de facto paved the way for National Socialism.

What, then, are the reasons leading European constitutional framers to set up a constitutional court in their respective countries? As noted in the following text, there are undoubtedly a number of different reasons, in large part relating to the idea that constitutional courts represented a necessary instrument to mark a clean break with the previous autocratic regime.

A *The "Terrible Lessons" Learned from Autocratic Regimes*

The setting up of the Constitutional Courts in Germany and Italy, as well as the re-establishment of the Austrian Constitutional Court, are undoubtedly based on the "terrible lessons"[66] of the Nazi and Fascist regimes. In a similar way, it was the intention of establishing a true democracy after many years of authoritarian rule that explains the creation of Constitutional Courts in Spain and Portugal,[67] and a decade later in Central and Eastern Europe. As argued by Luis López Guerra,

> the establishment of constitutional jurisdiction is linked with the desire to guarantee democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution. The objective of constitutional jurisdiction is to defend the Constitution from possible situations which might threaten its integrity.[68]

In some countries the reaction to the autocratic past gave rise to systems of constitutional review characterized by elements of the American model. Greece, for example, following the fall of the Regime of the Colonels (1967–1974), revived its tradition of constitutional justice by adopting a decentralized system, with a Supreme Court responsible for guaranteeing a uniform interpretation of constitutional provisions.[69] Along similar lines, in Portugal the 1982 constitutional reform envisaged a system characterized by elements of both the centralized model (with the setting up of a Constitutional Court) and the decentralized one (in which the

[65] Volpe 1977, note 36, at 203.
[66] Favoreu 1986, note 1, at 11.
[67] Portugal, as discussed in the following text, is also characterized by elements of the decentralized system of constitutional review.
[68] Luis López Guerra, "The Role and Competences of the Constitutional Court" in European Commission for Democracy through Law, *The Role of the Constitutional Court in the Consolidation of the Rule of Law* (Council of Europe Press 1994), 17.
[69] On the Greek system see Allan R. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge University Press 1989), 168 ff.

ordinary courts are not allowed to apply laws in conflict with the Constitution).[70] Also in Estonia, in contrast with the choices made in the other Central and Eastern European countries,[71] the framers decided to set up a mixed system, in which constitutional review is exercised by the Constitutional Chamber of the Supreme Court, but at the same time the ordinary courts are required to set aside laws inconsistent with the Constitution.[72]

Similarly, outside Europe, a number of Latin American countries opted for a decentralized system of constitutional review, or decided to create a Constitutional Chamber (*Sala constitucional*) within the Supreme Court.[73] The case of Japan is a particular one: indeed, the adoption of a decentralized model is to be explained largely by the decisive influence of the United States during the constitution-drafting process.[74]

The fact that the setting up of constitutional courts goes hand in hand with the establishment of democratic regimes is confirmed by the *a contrariis* argument that, almost without exception, "no dictatorial and oppressive regime has ever accepted an effective, and not merely nominal, system of constitutional justice."[75] Numerous examples could be mentioned, starting from the collapse of constitutional control of legislation in Hitler's Germany,[76] or in Austria after the *Anschluss* of 1938.[77] Another example is Spain, where, as noted previously, the decree of May 4, 1937 resulted in the abolition of the Court of Constitutional Guarantees. The Socialist regimes are also of interest in this connection, considering that with the exception of Yugoslavia and Poland,[78] constitutional review was never envisaged because it was deemed to

[70] See Araújo 1995, note 63, at 918 ff.; de Almeida Ribeiro forthcoming, note 63.

[71] Where a centralized model of constitutional review was adopted. See Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014), 3 ff.; Čarna Pištan, *Tra democrazia e autoritarismo. Esperienze di giustizia costituzionale nell'Europa centro-orientale e nell'area post-sovietica* (Bononia University Press 2015), 162 ff.

[72] See Čarna Pištan, "I sistemi di giustizia costituzionale nei paesi dell'Europa centro-orientale e dell'area post-sovietica" in Luca Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale* (Cedam 2011, vol. II), 191–192 and 233–234.

[73] See Justin O. Frosini and Lucio Pegoraro, "Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?" (2008) 3 *Journal of Comparative Law* 2, 39 ff.

[74] See Norikazu Kawagishi, "The Birth of Judicial Review in Japan" (2007) 5 *International Journal of Constitutional Law* 2, 308 ff.

[75] Mauro Cappelletti, "Dimensioni della giustizia nelle società contemporanee" in *Studi di diritto giudiziario comparato* (Il Mulino 1994), 69.

[76] The last judgment of the Constitutional Court, in which it found that it was not competent to adjudicate the case, was handed down on June 30, 1933.

[77] However, as noted previously, already from 1934 onward, the political conditions prevented any effective constitutional review of legislation.

[78] Constitutional review of legislation was introduced in Yugoslavia in 1963 and in Poland in 1982. In Yugoslavia it was justified by the federal structure of the State, but above all by the system of self-management, whereas in Poland the setting up of the Constitutional Court was intended to be evidence of the democratization process taking place in the country. In Czechoslovakia, as discussed in Chapter 4, Sections 1 and 3, Constitutional Law no. 143 of 1968 envisaged a

be in contrast with the principle of supremacy of the representative assembly. Another example is South Africa during the apartheid era, when the country was characterized by a long struggle between the High Court, that intended to strike down certain racist laws, and the political forces that over the course of many years managed to abolish the courts' power of constitutional review.[79] By way of confirmation of this tendency, one need only consider the case of Hungary, where following the recent democratic deterioration, the powers of the Constitutional Court – which had been considered for a long time one of the most powerful and activist constitutional courts in the world[80] – have been severely curtailed.[81]

The very few constitutional courts that have managed to carry out their functions effectively in spite of the fact that they were operating under authoritarian regimes (as in the case of Egypt under Mubarak[82] and Chile under Pinochet)[83] may be seen as exceptions that confirm the rule.[84]

The "lessons" learned from the experience of authoritarian regimes not only resulted in the setting up and the spread of constitutional courts but also served as an important stimulus for the adoption of other instruments aimed at the protection of fundamental rights and freedoms, such as the European Convention on Human Rights (ECHR), the (old) European Commission of Human Rights, and the

Federal Constitutional Court and a Constitutional Court for each of the two republics that had been established, i.e., the Czech Republic and the Slovak Republic. However, these Courts were never set up.

79 Cappelletti 1994, note 75, at 70.

80 See Alec Stone Sweet, "Constitutional Courts" in Rosenfeld and Sajó (eds.) 2012, note 28, at 826.

81 See Oliver W. Lembcke and Christian Boulanger, "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court" in Attila Tóth (ed.) 2012, note 4, at 269 ff.; Kriszta Kovács and Gábor Attila Tóth, "Hungary's Constitutional Transformation" (2011) 7 *European Constitutional Law Review* 2, 183 ff.; András Jakab and Pál Sonnevend, "Continuity with Deficiencies: The New Basic Law of Hungary" (2013) 9 *European Constitutional Law Review* 1, 102 ff.

82 In particular, from mid-1980s to the end of the 1990s, a period in which the Supreme Constitutional Court struck down numerous important laws enacted by the regime. See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge University Press 2007); Clark B. Lombardi, "Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State" (2008) 3 *Journal of Comparative Law* 2, 234 ff.

83 See Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge University Press 2002), 255 ff., who shows that, although it was envisaged by the Constitution adopted under Pinochet in 1980, the Constitutional Court played a decisive role in keeping the actions of the regime in check and in promoting the transition to democracy.

84 On the role of judicial bodies in autocratic regimes see Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).

European Court of Human Rights. Indeed, it is significant that most member states ratified the ECHR after a period of military conflict and/or authoritarian rule.[85]

B *Distrust toward the Legislature and Fear of the Judiciary*

Another reason that explains the setting up of constitutional courts refers to the distrust toward the legislative branch. The experiences of authoritarian rule in various European countries show that in many cases the legislature represented the greatest threat to people's rights and freedoms,[86] due to its power to commit grave injustices in a systematic manner. Bearing these experiences in mind, constitutional drafters decided to establish constitutional courts so as to provide an effective protection from arbitrary (legislative) power.[87] Indeed, these courts were intended to act as a counterweight to majoritarian institutions, which had often failed to defend people's rights under the previous autocratic regimes.

Furthermore, in a number of cases the decision to adopt a centralized system of constitutional review rather than a decentralized system seems to be linked to a lack of trust in the ordinary courts. However, this was not a lack of trust in judges as such, but a reflection of the fact that they were part of the previous authoritarian regime and/or due to their hesitant stance in the past when called on to rule on constitutional matters.[88]

> How could an American system function – asked Louis Favoreu – in the Federal Republic of Germany, Italy, Spain, or Portugal, with judges from the preceding period of dictatorship named to the courts? Adopting [the US] judicial review in these countries would require "purification" on a massive scale of the corps of magistrates, while one could immediately find a dozen or so constitutional judges

[85] See Tom Allen and Benedict Douglas, "Closing the Door on Restitution: The European Court of Human Rights" in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the European Convention on Human Rights. Justice, Politics and Rights* (Cambridge University Press 2011), 213.

[86] García de Enterría 1981, note 38, at 45.

[87] With specific reference to Italy see Giovanni Bognetti, *The American Constitution and Italian Constitutionalism: An Essay in Comparative Constitutional History* (CLUEB 2008), 58, who argues that "the main reason why the Italian constituents gave their assent to [the setting up of a system of constitutional review of legislation] probably had to do … with the experience of Fascism. Most of constituents wished it to be adopted because they believed it could be a useful guarantee against possible future encroachment by the Legislature on civil and political rights of the people."

[88] See Andrew Harding, Peter Leyland, and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective" (2008) 3 *Journal of Comparative Law* 2, 10. For example, with regard to Germany, Ackerman 1992, note 23, at 105, argues that at the beginning the legitimacy of the *Bundesverfassungsgericht* depended largely on the fact that, unlike other courts, none of its judges were associated with the previous authoritarian regime. On the complex task of denazification of the German judiciary after the defeat of Hitler regime, see Ingo Muller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press 1991), 201 ff.

> with no prior culpability during those periods, capable of carrying out their duties without mental reservations.[89]

However, the refusal to vest the ordinary courts with the power of constitutional review was not always due to the previously mentioned reasons. In the case of Italy, for example, several members of the Constituent Assembly feared that the judiciary would not make a limited but rather an "extensive – or perhaps … excessive or uncontrollable"[90] use of constitutional review,[91] and that granting judges such a power would mean allowing them too much discretion and creativity in interpreting the laws: indeed, "if they had wanted to, they could have struck down any law, simply by interpreting the constitutional norm in the sense that they preferred from time to time."[92] In addition to that, many members of the Constituent Assembly had been strongly influenced by the work of the French legal scholar, Eduard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*,[93] in which he argued that in the United States the decentralized system of judicial review, along with other factors, had given rise to a judicial supremacy, where the legislature and the executive were subordinate to the judicial branch, thus determining a serious imbalance in institutional power.[94]

In short, either due to a distrust stemming from the authoritarian past, or for the purposes of avoiding a "government of judges," the fact is that entrusting the power of constitutional review to the judiciary was often seen as risky, and this evidently favored the setting up of constitutional courts.

In the constituent assemblies of various European countries the decision to adopt a centralized system of constitutional review rather than a decentralized system was justified also with reference to matters of a technical nature. Indeed, the introduction of the US model in civil law countries (as in the case of continental Europe) would have given rise to inconsistent rulings because the same law might have been set aside by certain judges who deemed it to be unconstitutional but enforced by other judges who found it to comply with the constitutional provisions.[95] Moreover,

[89] Louis Favoreu, "American and European Models of Constitutional Justice" in David S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot 1990), 110.

[90] Elisabetta Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana* (Laterza 2012), 9.

[91] A short time before, e.g., the Court of Cassation had handed down a ruling giving rise to considerable controversy because it had struck down the Legislative Decree of the President of the Council as it was found to be in conflict with the "second provisional Constitution" (as discussed in Chapter 2, Section 1).

[92] Lamarque 2012, note 90, at 19.

[93] Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Marcel Giard & Cie 1921).

[94] On the influence of this book in Europe, see Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter" (2003) 101 *Michigan Law Review* 8, 2758 ff.

[95] On the contrary, it is well known that in common law systems courts' rulings declaring laws unconstitutional, on the basis of the principle of binding precedent often have de facto an *erga*

there was a risk of giving rise to contrasts among courts of different types and levels.[96] In actual fact, these factors, albeit important, were never really decisive in the choice between the two models. Interestingly enough, a number of European and Latin American countries characterized by a decentralized or partially decentralized system of constitutional review have shown that it is possible, by means of suitable measures, to ensure a uniform interpretation of the constitution even in the absence of the principle of binding precedent, which is a distinguishing feature of common law countries.[97] In this sense, there does not appear to be a necessary connection between how constitutional review is exercised (i.e., through a centralized or a decentralized system) and the common law or civil law tradition of a specific country.[98]

C *Constitutional Courts in the Constitution-Making Processes*

Starting from the 1990s, the constitutional drafters of certain countries – probably aware of the role that constitutional courts could play in the processes of democratization – decided to set up these courts even *before* the adoption of the new constitution, thus giving rise to the "paradox of a constituted body co-participating in the constituent process."[99]

omnes effect: indeed, the judgments of the higher courts (and in particular of the Supreme Court) are binding on the lower courts.

[96] See Cappelletti 1994, note 75, at 63–64.

[97] In some Latin American countries (Bolivia, Colombia, Peru, Guatemala, Mexico) the system of constitutional justice is set up so that the ordinary courts can strike down laws with *inter partes* effects, whereas only the Constitutional Court (or the Supreme Court) can annul a law with *erga omnes* effects. A different solution is adopted in Argentina and Brazil, where Supreme Court rulings formally have *inter partes* effects, but because they are handed down by the judicial body at the highest level, the lower courts are obliged to comply with them, and as a result these rulings de facto have *erga omnes* effects. The situation is different in Venezuela, where Article 321 of the Code of Civil Procedure requires the courts to comply with the case law of the Court of Cassation in analogous cases, to safeguard the integrity of legislation and the uniformity of case law: as a result, in this case the binding effect of the decisions of the Supreme Court has been codified (Frosini and Pegoraro 2008, note 73, at 48–50). In Europe reference may be made to the case of Greece, where the Special Supreme Court is responsible for guaranteeing a uniform interpretation of constitutional provisions. In particular, the Constitution stipulates that the Court has the power to resolve the "controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution" and interpret the "provisions of such statute when conflicting judgments have been pronounced by the Council of State, the Court of Cassation or the Court of Audit.") (Article 100(1)(e)). In Estonia the lack of the principle of binding precedent is dealt with by obliging judges setting aside a law in contrast with the Constitution to refer the matter to the Supreme Court (Article 9 of the Constitutional Review Court Procedure Act of 2002; see Pištan 2011, note 72, at 233–234).

[98] As argued by Frosini and Pegoraro 2008, note 73, at 50.

[99] Andrea Lollini, *Constitutionalism and Transitional Justice in South Africa* (Berghahn Books 2011), 63.

In Albania, for example, in 1991 a provisional Constitution entered into force,[100] providing for political pluralism, the separation of powers, and the protection of fundamental rights; the following year, for the first time in the country's history, a Constitutional Court was established.[101] In the period from 1992 to 1998 (the year of the adoption of the new Constitution), the Court handed down some important judgments relating to fair trial, and on a number of occasions dealt with transitional justice, ruling in particular on the constitutional legitimacy of the "lustration laws" adopted by the country.[102]

In post-apartheid South Africa, the role played by the Constitutional Court (envisaged by the Provisional Constitution of 1993) was even more decisive. The Court was required to adjudicate on whether the final draft of the Constitution was in contrast with the 34 fundamental constitutional principles that were intended to guide the Constituent Assembly. This control was carried out "scrupulously":[103] indeed, the constitutional judges refused to certify the first draft of the Constitution and obliged the Constituent Assembly to implement numerous changes to ensure compliance of the final version with the 34 principles. Moreover, the Court marked a break with the segregationist past by delivering judgments abolishing the death penalty and prison sentences for debtors, in addition to prohibiting inhuman and degrading treatments, as well as corporal punishments.[104]

Also the Polish Constitutional Court, although set up under the previous Socialist regime,[105] ended up playing a prominent role in the process that led to the adoption of the new Constitution. Indeed, during this long process that lasted eight years (1989–1997), the Court declared some fundamental principles, such as the independence of judicial review, and the separation of powers.[106]

[100] Officially known as "Law on the Major Constitutional Provisions."

[101] The Court was established by Constitutional Act 7561/1992.

[102] Act 7666/1993; Act 8001/1995; Act 8043/1995. With regard to these Acts see Kathleen Imholz, "A Landmark Constitutional Court Decision in Albania" in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Volume II. Country Studies* (United States Institute of Peace Press 1995), 729 ff.; Kathleen Imholz, "States of Emergency as Pretexts for Gagging the Press: Word Play at Albania's Constitutional Court" (1997) 6 *East European Constitutional Review* 4. A new lustration law entered into force in Albania in 2009 (Act 10034/2008), but it was struck down by the Court in March 2010.

[103] Andrea Lollini and Francesco Palermo, "Comparative Law and the 'Proceduralization' of Constitution-Building Processes" in Julia Raue and Patrick Sutter (eds.), *Facets and Practices of State-Building* (Martinus Nijhoff 2009), 310.

[104] See Lollini 2011, note 99, at 68; Heinz Klug, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid" (2008) 3 *Journal of Comparative Law* 2, 174 ff.

[105] The constitutional reform envisaging the Constitutional Court was approved on March 26, 1982, and the Law on the organization and functioning of the Court was adopted on April 29, 1985. The Court finally was established on January 1, 1986.

[106] See Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (Macmillan 2000).

D *The Role of the Council of Europe and the European Union*

Finally, it is necessary to examine the role played by supranational organizations – and more specifically by the Council of Europe and the European Union – in setting up constitutional courts in Central and Eastern European countries following the collapse of the Socialist regime. The Council of Europe, aware of the extremely important functions that these bodies were to carry out in the processes of democratization, strongly recommended their establishment:

> In the admission process [to the Council of Europe], the existence of a constitutional court has been a particularly important point and the Council scrutinized the conditions of the constitutional review. The more the democratic functioning of a given State was uncertain, the more the Council of Europe prescribed measures for strengthening the powers of the constitutional court.[107]

This approach is confirmed by the European Commission for Democracy through Law (better known as the Venice Commission), a consultative body of the Council of Europe on constitutional matters,[108] that repeatedly pointed out that the setting up of a constitutional court was a decisive step in the transition from an authoritarian regime to democracy. One need only consider the opinion of Antonio La Pergola, the founder and then-president of the Venice Commission, who argued that "a good constitutional court is the foundation stone of a sound democracy."[109]

It is decidedly more problematic to ascertain whether the establishment of constitutional courts in Central and Eastern European countries was also linked to the process of European integration. Legal opinion is divided on this point. According to some scholars, the prospect of joining the European Union may have acted as an incentive for the constitutional drafters of these countries to set up constitutional courts. Bruce Ackerman, for example, supports the view that the new political elites in Central and Eastern Europe simply could not ignore the effect their choices would have on the immediate future of their countries, above all with regard to accession to the European Union.[110]

[107] László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary" (2003) 18 *International Sociology*, 153.

[108] Further discussed in Chapter 5, Section 4.E.

[109] See European Commission for Democracy through Law, *Constitution Making as an Instrument of Democratic Transition* (Council of Europe Press 1993), 8; European Commission for Democracy through Law, *Meeting with the Presidents of Constitutional Courts and Other Equivalent Bodies* (Council of Europe Press 1993), 15–16; European Commission for Democracy through Law, *The Role of the Constitutional Court in the Consolidation of the Rule of Law* (Council of Europe Press 1994).

[110] Bruce Ackerman, "The Rise of World Constitutionalism" (1997) 83 *Virginia Law Review* 4, 776–777. See also Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002), 17–20; Samuel Issacharoff, "Constitutional Courts and Democratic Hedging" (2010) *Public Law and Legal Theory Research Paper Series*, New York University School of Law, 7.

According to other scholars, this appears to be implausible. Wojciech Sadurski, for example, rightly points out that at the time of the fall of Communism, the prospect of joining the European Union "was still beyond the wildest dreams of the political elites from the region. Most of the constitutional courts were set up at the beginning of the 1990s, that is, well before serious talks about possible membership had begun."[111] In addition to that, Sadurski notes that the official documentation of the European Union, in the sections dealing with the reforms to be adopted in the legal domain, did not include any recommendations about the adoption of Kelsenian-style constitutional review.[112] In any case, this does not detract from the fact that the setting up of constitutional courts in post-Communist Europe was indeed welcomed by the institutions of the European Union because their establishment constituted an important step on the road to democratization.[113]

[111] Wojciech Sadurski, "Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?" (2009) 42 *Israel Law Review* 3, 509.
[112] Ibid.
[113] Daniela Piana, "Bureaucratic and Managerial Cultures in Central Eastern European Courts" in Alberto Febbrajo and Wojciech Sadurski (eds.), *Central and Eastern Europe after Transition: Towards a New Socio-Legal Semantics* (Ashgate 2010), 209.